No. 20-957

In the Supreme Court of the United States

ALIREZA VAZIRABADI,
PETITIONER

v.

DENVER PUBLIC SCHOOLS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to limit, segregate, or classify his . . . applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . .national origin." 42 U.S.C. § 2000e-2(a)(2). (87a-88a) For "[r]elationship between use of selection procedures and discrimination", under 29 CFR § 1607.3 (91a), it considers a "[p]rocedure having adverse impact constitutes discrimination unless justified." And selection procedure defined under 29 CFR § 1607.16 (*Id.*), in pertinent part includes "[a]ny... unscored application forms". The EEOC, under 29 C.F.R. § 1606.1 (90a), "defines national origin discrimination broadly as including...the denial of equal employment opportunity because of an individual's . . . linguistic characteristics of a national origin group." The question presented is:

Whether an employer can be liable under Title VII, when the employer requires its *bilingual*[1] job applicants, without job requirement, disclose their bilingual language; and the refused-for-hiring bilingual applicant demonstrated that the use of bilingual questioning and language disclosure causes a disparate impact on the basis of national origin, and the employer failed to demonstrate such language questioning hiring practice is job related for the position applied and consistent with the employer's business necessity.

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[1] The bilinguals "include people ranging from the professional interpreter who is fluent in two languages all the way to the established immigrant who speaks the host country's language but who may not be able to read or write it. In between we find the bilingual child who interacts with her parents in one language and with her friends in another". Francois Grosjean Ph.D., *Who is Bilingual?*, Psychology Today (Oct. 21, 2010), https://www.psychologytoday.com/us/blog/life-bilingual/201010/who-is-bilingual (last visited: December 22, 2020)

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Petitioner, Alireza Vazirabadi ("Petitioner", "Plaintiff" or "Vazirabadi"), having firsthand knowledge of the events in this case, respectfully petitions this Court for review of the judgment of the Tenth Circuit Court of Appeals ("Tenth Circuit") and grant of writ of certiorari.

OPINIONS BELOW

The unpublished Order and Judgement of the Tenth Circuit affirming the district court order reproduced as App. A (1a-10a). The unpublished Order On Pending Recommendations And Motions issued by the district court for the District of Colorado, reproduced as App. B (11a-57a), and the denied petition for Rehearing and/or Rehearing en banc reproduced as App. C (58a).

JURISDICTION

The Tenth Circuit Court of Appeals entered its Order and Judgement on July 23, 2020 and denied the timely petition for Rehearing and/or Rehearing en banc on August 24, 2020. By order of March 19, 2020, this Court extended the deadline for all petitions for writ of certiorari due on or

after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. (App. I, 87a-91a)

STATEMENT

1. Under Title VII of the Civil Rights Act of 1964, it is "unlawful... for an employer . . . refuse to hire . . . any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . national origin"; 42 U.S.C. § 2000e-2(a)(1) (88a) or

"to limit, segregate, or classify his . . . applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities... because of such individual's...national origin." §2000e-2(a)(2). (*Id.*)

Under 29 C.F.R. § 1606.1 (90a), discrimination based on national origin "define[d]...broadly" for "denial of equal employment opportunity because of an individual's... linguistic characteristics of a national origin group." For example, when an applicant discloses as a "Farsi/ Persian bilingual" [2], with great accuracy, it identifies applicant's relation with Iranian "national origin group", or when an applicant discloses as "Somali bilingual"[3], with great probability, it identifies applicant's relation with Somalian "national origin group", or as "Amharic bilingual"[4], identifies applicant's relation with Ethiopian "national origin group".

This refusal to hire presents employer's hiring practice for requiring job applicants disclose, beside English, in

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[2] https://en.wikipedia.org/wiki/Persian_language
[3] https://en.wikipedia.org/wiki/Somali_language
[4] https://en.wikipedia.org/wiki/Amharic

what other languages applicants are bilingual, when applied positions need no bilingual requirement.

Identifying national origin by "an individual's... linguistic characteristics of a national origin group" that causes "denial of equal employment opportunity", under 29 C.F.R. § 1606.1; "broadly", it is "define[d]" as "national origin discrimination". And under 42 U.S.C. § 2000e-2(k)(1)(A)(i) (88a), when the employer (Respondent) "uses a particular employment practice [of bilingual questioning] that causes a disparate impact on the basis of . . . national origin and the [R]espondent fail[ed] to demonstrate that the challenged practice [of bilingual questioning] is job related for the [Petitioner's] position in question and consistent with [DPS] business necessity"; it therefore establishes that Respondent's bilingual questioning hiring practice causes disparate impact, in violation of Title VII Act.

2. Respondent, within the meaning of 42 U.S.C. 2000e-(b), is the Denver Public Schools ("DPS") system in the City and County of Denver, Colorado, which employs over ten thousand full-time employees. (Doc. 1, at 1)

3. Position applied online

On or about August 2015, Petitioner responded to DPS advertisement for the position of Process Improvement Engineer ("PIE")[5], which required five years of experience. His online response included submission of his industrial engineering resume with a two-page cover letter, itemizing the job requirements against his ten-plus years of direct experience. (20a, ¶H) The advertised position did not require or prefer any bilingual applicants; however, the online application presented Petitioner a list of specific languages, such as Arabic, Somali, Amharic and Swahili, etc., and

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[5] The PIE "guides DPS departments in collaborative process improvement and reengineering projects... lead[s] or mentor[s] process owners through transformational business process definition and re-engineering projects...[with] improved services, increased efficiencies, and cost savings or revenue enhancements." (ROA, Vol. II (Doc. 116-1) at 41)

asked him to disclose in which language he is bilingual; and if his language not listed, to enter it manually. He entered Farsi/ Persian. (59a, ¶I)

4. Panel interview[6]

About September of 2015, Petitioner had his panel interview, consisted of the hiring manager and three incumbent PIEs. All panel members "had 2-page interview questionnaire[s]"on which they "continuously made hand-written notes". (17a)

Petitioner noted great interaction and chemistry with all the panel members. In the last ten minutes of interview, he was asked to facilitate the panel, for an outside group activity. He performed great, as he has done meeting facilitations in years of project management meetings. (See Complaint, Doc.1, at 4, ¶23) (ROA, Vol. I (Doc. 26) ¶24, (Doc. 67) ¶24)

At the end of interview, while everyone standing to leave the interview room, one positive and "validating" feedback occurred, when Petitioner was asked "do you like to be called Alireza or Ali?", as he "[n]oticed that the other panel members were awaiting [for] his response, [he] responded 'Ali'." (19a, 60a)

5. Hired candidates and filing complaint

From the five final candidates, Respondent hired two applicants with about 5 years of experience. (86a) Petitioner filed his EEOC complaint on October 20, 2015; and upon exhausting that process unsuccessfully, in May of 2017, filed his complaint in the U.S. District Court for

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[6] Against Respondent's motion for summary judgement, under Federal Rules of Civil Procedure 56, the district court waived consideration of Petitioner's affidavit (ROA, Vol. II (Doc. 117) at 120-122, 133-34). Because the court of appeals ordered summary judgment in favor of Respondent, all factual disputes must be resolved in favor of Petitioner. See *EEOC v. Abercrombie & Fitch Stores*, 135 S. Ct. 2028, 2031, 575 U.S. 768, 192 L. Ed. 2d 35 (2015).

District of Colorado. (Complaint, Doc. 1). Magistrate Judge Michael E. Hegarty assigned to the case. (Doc. 4)

6. Litigants' bilingual questioning arguments

For national origin discrimination, on the basis of bilingual questioning, under Title VII Act, Petitioner claimed Respondent's hiring practice of requiring disclosure of job applicant's bilingual language, as discriminatory, when the applied job required no such qualification. Petitioner invoked 29 C.F.R. § 1607.3 (91a), 29 C.F.R. § 1606.1 (90a) and 42 U.S.C. § 2000e-2(a)(2) (87a). (Doc. 1, at 7, ¶31, at 8-9 ¶¶34-39) The district court, in its final order (11a-56a), confirmed examining by citing from Petitioner's original complaint (Doc. 1), as "ECF No. 1" (19a, 33a, n. 5), as well as referring to his First Amended Complaint ("FAC"), as "ECF No. 26 at 35, 38". (*Id.*)

Regarding bilingual questioning, in FAC, Petitioner described Respondent's "online job application has elaborate customized computer program ... questioning 100% of job applicants, regardless of job requirement". (ROA, Vol. I, (Doc. 26) at 27, ¶38) He asked why Respondent does not "explain the rationale behind identifying specific bilinguals...[and w]hat makes ...[Respondent] spend...resources to design and customize [its] ... online job application to specifically ask for ... bilingual languages that make up less than 2% [(1.8%)] of [its] entire ... student population, per 2014 reports?" (*Id.*, at 30, ¶43)

Petitioner argued, per "one Linguistics expert (Prof. Li Wei)...in majority of cases a bilingual is not fluent (reading, writing and speaking) in another language...Far from it, majority of bilinguals have low language fluency". (ROA, Vol. 1 (Doc. 67) at 240) As example, Petitioner referred to his:

"American-born, raised and college educated nieces, [that] when asked [whether]...they are bilingual in English and Farsi... [they]...claim to be bilingual. Yet objectively, none of them [have Farsi 'language proficiency' or

'fluency']...at all, [and] cannot read or write any Farsi text". Petitioner concluded that in other words, "being bilingual has deeper identity connection...in form of parental national origin, familial blood relationship... ethnicity, culture, history and religion."(*Id.*)

i. Bilingual, language proficiency/fluency arguments

As one of the litigants arguments, below are examples of Respondent's substitutions from its "bilingual" questioning practice to "language proficiency" or "language fluency":

a. "The online application asked three questions about language proficiency" (*Id.*, (Doc. 29) at 64)

b. "asking applicants whether they speak other languages does not plausibly establish that responses were used negatively" (*Id.*, 67)

c. "seemingly simple language proficiency questions in online job applications..." (*Id.*, 68)

d. "Classifying applicants based on their proficiency in other languages is not unconstitutional." (*Id.*, 71)

e. "The online application asked three questions about language proficiency: (1) if Vazirabadi is bilingual in Spanish; (2) if he is bilingual in one of several other listed languages; and (3) if he is bilingual in another of these listed languages or in some other language." (*Id.*, (Doc. 49) at 198)

f. Respondent "values bilingual candidates for all positions in the [School] District and accordingly asks each applicant if he or she speaks a language other than English." (*Id.*, (Doc. 53) at 229)

g. Respondent "values candidates who are fluent in languages other than English and therefore asks all candidates for any position whether they speak a second language." (*Id.*, 232)

h. "To apply, a candidate first had to complete an online candidate talent profile, which asked questions about language proficiency." (*Id.*, Vol. II, (Doc. 116) at 12)

ii. **Language questioning justification**

For justifying why its bilingual applicants require to disclose their bilingual language, Respondent stated:

"DPS poses this question [bilingual] due to the diverse population of parent and students it serves" (ROA, Vol. I (Doc. 26) at 21, ¶22); and in the Appeals Court it was reasserted:

"DPS has maintained since submitting its position statement that it *'seeks out individuals who are bilingual'* and properly asks candidates about language proficiency 'due to the diverse population of parents and students it serves.' " (Answer Brief, at 26, n. 2)(emphasis added)

Petitioner articulated Respondent's justification appears as "not cognizable reasoning", by explaining:

"For 2014, DPS reported 87,389 students enrolled. Only 1.84% of them (1605 students) were classified as English Language Learners [("ELL")]. The top five languages (1088 students or 1.25%) broken into: Arabic 345 students (0.39%), Vietnamese 336 (0.38%), Somali 207 (0.24%), Nepali 101 (0.12%), Amharic (Ethiopia) 99 (0.11 %)." (ROA, Vol. I (Doc. 26) at 21, ¶22) From these languages, the magistrate judge noted that "Amharic" language is associated with a "population [that] is not Muslim". (77a)

7. Litigants' candidates' interview ranking arguments

For the final candidates' panel interview rankings, Respondent "recorded these rankings onto a spreadsheet (titled 'Ranking Matrix')". (22a, 86a)

i. **The top ranking numbers for hiring: Petitioner claims 5, Respondent claims 1 and 2**

With ranking of 5 (*Id.*), Petitioner explained he received the highest ranking for hiring versus hired candidates, with 1 and 2 rankings. Petitioner described, by examining 3rd and 4th rank candidates' rankings rational and the "statements made for each candidate (in Comments section)" and "years of experience", that leads to 4th rank candidate as "more qualified for hiring than 3rd rank candidate"; thus, because of the ranking number "trajectory", Petitioner with "ranking of 5 [was]... highest qualified candidate" for hiring. He also raised the "missing

information" and "lack of any attributes" for the hired candidates, with only "after-the-fact" ranking statements of "Accepted: start" dates. (*Id.*)(ROA, Vol. I (Doc. 26) at 23-24, ¶29; (Doc. 67) at 244, ¶30A)(Doc. 1, at 6, ¶28)

ii. For ranking applicants, Respondent stated: "[a]fter the last panel interview concluded...the panel met to rank the five candidates from one to five, with one being the most desirable candidate, and five being the least desirable. (21a)

iii. **Court's Recommendation: factual dispute exist.**

In the first court Recommendation, which the district court "adopted in its entirety" (ROA, Vol. I (Doc. 50) at 206, 224), the magistrate judge described Respondent stated that Ranking Matrix "document confirms that the two highest ranking individuals were selected for the PIE positions;...[and Petitioner] counters that the document reflects he is the highest ranked candidate." (81a) Also:

"[T]he Court finds that it lacks sufficient information concerning when, by whom, and for what purpose the Ranking Matrix was created. The Court finds that whether DPS's reason is pretext, considering the limited facts at this stage of the litigation, is a *factual dispute* which cannot be resolved under Rule 12(b)(6)." (*Id.*)(emphasis added)

iv. Correct ranking record and argument waived; Respondent's new Appeals Court position

In the Appeals Court, Petitioner explained in his opposition to summary judgement motion, the district court final order "incorrectly described and analyzed [Petitioner's] two separate [records of "Ranking Matrix" and "Overall Ranking" with]...different ranking arguments". (Reply Brief, at 20-23). Also argued Respondent in support of district court favorable summary judgement ruling, in its Answer Brief, made new "consequential" statement, concerning DPS-produced Ranking Matrix document (*Id.*, at 18-19) that:

"Indeed, the spreadsheet [('Ranking Matrix')] did not factor into the court's summary judgement analysis at all." (Answer Brief, at 24). And again asserted "[t]he district court, however, did not rely on the spreadsheet ['Ranking

Matrix'] in its summary judgment analysis". (Reply Brief, at 18-19)

Petitioner presented six Ranking Matrix manifestation of candidates' rankings—the alleged document that "not factor[ed] into the court's summary judgement"—in the two affidavits supporting summary judgement motion. Because of such manifestation, Petitioner argued, the affidavits should "not [have] factor[ed] into the court's summary judgement", either. (*Id.*, at 19)

8. Realleged and incorporated into cause of action...; invoking rule 38(b)—trial by jury

In the filed complaints, "[p]ursuant to Federal Rules of Civil Procedure 38(b)", Petitioner "[d]emand[ed] trial by jury". (Complaint, Doc. 1 at 14)(ROA, Vol. I (Doc. 26) at 24, (Doc. 67) at 14). For all cause of actions, Petitioner "re-allege[d] and incorporate[d] into [his] cause of action each and every allegation [he] set forth in each and every paragraph of [his] [c]omplaint[s]." (*Id.*, (Doc. 26) at 38, ¶70, (Doc. 67) at 246, ¶¶ 31-32, (Doc. 108-1) at 477, ¶¶ 62-63) (*Id.*, Vol. II (Doc. 118) at 254, ¶¶ 69-70)(Doc. 1, ¶¶ 34-39).

9. October 2017: Magistrate judge Recommendation

Based on "factual allegations... made by... [Petitioner] in the operative FAC, which are taken as true for analysis under Fed. R. Civ. P. 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)", the magistrate judge made his Recommendation. (58a-82a)

a. Bilingual questioning liability determination

Because Petitioner alleged Respondent required him to disclose his bilingual language, and raised the "existence of a municipal policy", the magistrate judge "must determine whether his allegations are plausible for a municipal liability claim." (66a)

Before discovery, Petitioner was the only known applicant that required to disclose his bilingual language; and per the Recommendation, "[w]hen a policy is not unconstitutional in itself, the county cannot be held liable solely on a showing of a single incident of unconstitutional

activity. *Meade v. Grubbs*, 841 F.2d 1512, 1529 (10th Cir. 1988)". (66a-67a) When a Petitioner "seeks to impose municipal liability on the basis of a single incident, [he] must show the particular illegal course of action was taken pursuant to a decision made by a person with authority to make policy decisions on behalf of the entity being sued. *Moss v. Kopp*, 559 F.3d 1155, 1169 (10th Cir. 2009) (citation omitted)". (67a)

b. No other applicants identified

The magistrate judge stated "DPS asserts that Vazirabadi fails to establish the online system constitutes a 'custom' or 'widespread practice' because he 'identifies no other specific job applicants. . .due to the questions seeking bilingual proficiency.'" (*Id.*)

c. "Single incident" of discrimination

"[D]ue to the questions seeking bilingual proficiency", the magistrate judge "agree[d] that Vazirabadi's allegations identify only a single incident of discrimination" (67a.), and at "this early stage of the litigation during which no discovery has occurred...the Court recommends finding... [Petitioner] plausibly alleges the existence of a municipal policy sufficient to meet the first requirement." (*Id.*)

Respondent in refuting this Recommendation finding of "due to the questions seeking bilingual proficiency", in the Appeals Court stated this Recommendation:

> "merely held Vazirabadi 'plausibly alleged the existence of an illegal municipal policy,' based on the purported 'profiling [of] applicants for special investigation.'" (Answer Brief, at 26)

10. March 2018: Court adopts the Recommendation.

The district court ruled "Judge Hegarty's Recommendation is adopted in its entirety" (ROA, Vol. I (Doc. 50) at 206, 224); and "[t]he Court agrees... that [Petitioner] has plausibly alleged the existence of an illegal municipal policy." (*Id.* at 215) The court stated:

"[T]he Recommendation found that Plaintiff had stated the elements of a Title VII failure-to-hire claim by showing that DPS had allegedly selected T rather than Plaintiff based on Plaintiff's national origin." (*Id.* at 223)

11. July 30, 2018: magistrate judge ordered discovery.

In a discovery dispute hearing, Respondent was ordered:

"Within two weeks... shall disclose the numerical comparison from a three year period comparing the number of overall applicants with the number of applicants who identified as bilingual. If possible, applicants who identified as Hispanic should be excluded. Counsel shall prepare an estimate of cost for production for this information." (83a)

12. August 6, 2018: The magistrate judge reassigned.

Per district court order, "[t]his action is reassigned to Magistrate Judge S. Kato Crews, upon his appointment." (84a)

13. August 13, 2018: Respondent submitted records.

Respondent produced 64-page data spreadsheet that included a summary table page (85a), supported with an affidavit. This document displayed 45,304 of Respondent's job applicants required to disclose, other than English, whether they are bilingual in other languages, and if so, in what language. From the 12 specific listed languages of: Amharic, Arabic, Burmese, Chines-Mandarin, French, Karen, Khmer, Nepalese, Russian, Somali, Tigrigna and Vietnamese, total of 1929 (4.3%) bilingual job applicants identified. With this evidence, in a court filing, Petitioner explained this document should nullifies the pre-discovery finding that his bilingual questioning was a "single incident" of "discrimination". (ROA, Vol. I (Doc. 108) at 406, ¶11)

14. Jan. 2019: Motion for summary judgement filed.

Respondent filed this motion that stated Petitioner's national origin cause of action, under "42 U.S.C. § 2000e-2(a)(1)". (*Id.*, Vol. II (Doc. 116) at 10)

15. Opposition to summary judgement motion

In opposition to this motion, Petitioner asked the magistrate judge "to consider his Second Amended Complaint (*Id.*, Vol. I (Doc. 67) at 237-261)...as the 'factual background and procedural history of this case'". (*Id.*, Vol. II (Doc. 117) at 109, ¶2)

16. Magistrate judge Recommendation

The U.S. Magistrate Judge, S. Kato Crews "recommend[ed] granting the Motion" of Respondent for "Summary Judgment pursuant to Fed. R. Civ. P. 56." (*Id.*, (Doc. 135) at 449-464)

Concerning Petitioner's claim of national origin discrimination, the magistrate judge stated it is "governed by the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973)." (*Id.*, 455, ¶1) And the judge affirmed "it is undisputed that Vazirabadi exceeded the minimum qualifications for the PIE position of a bachelor's degree and at least five years of relevant work experience." (*Id.*, at 456) From the four "elements of [Petitioner's] *prima facie*", the magistrate judge "concluded that Vazirabadi has established only the first three elements" that were:

"(1) he belongs to a protected...class...; (2) he applied and was qualified...had a bachelor's degree and 20 years of relevant work experience; and, (3) he was not hired for the job." (*Id.*) The magistrate judge stated Petitioner's "*prima facie* case fails on the fourth element, however, because the undisputed material facts demonstrate that DPS filled the PIE positions after rejecting Vazirabadi, and there is no competent evidence from which to infer discrimination." (*Id.*)

Petitioner responded that the "fourth prong of a plaintiff's prima facie test in a discharge case should be the same as for a failure to hire claim." *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220, 1229 (10th Cir. 2000)." (*Id.*, (Doc. 136) at 465, ¶A)

17. Objection to Recommendation

Petitioner made timely objection "to parts of ... [the] Recommendation...in favor of granting [Respondent's] Motion for Summary Judgement." (*Id.* (Doc. 136) at 465-508).

A. Bilingual questioning disparate impact

i. Petitioner argued "[u]nder 42 U. S. C. § 2000e-2(a)(2), it is 'unlawful employment practice... to limit, segregate ... classify... [job] applicants... in any way... because of ...national origin'. DPS admits job applicants subjected to bilingual questioning", where Petitioner's national origin identified, by confirming his bilingual language for discrimination. (*Id.*, at 466, ¶D)

ii. Petitioner asserted, "for disparate impact", the Recommendation did not consider:

"'whether...[DPS] practice of ... [bilingual questioning] has led to [Vazirabadi's] illegal [job] discrimination.' *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 982 (1988). This is despite the fact that '[o]ther Courts of Appeals have held that disparate impact analysis may be applied to hiring...that involve the use of 'discretionary' or 'subjective criteria...' *Watson*, 487 U.S. at 984" (*Id.* at 475, ¶6)

iii. "To support disparate impact, under Title VII cause of action", Petitioner presented, as exhibit, Respondent's employee affidavit that:

"[F]rom...December 2013 to December 2015 for non-teacher positions...[Respondent] identified as bilingual ... over 2,800 unique responses to an additional question ... asking ... "If your language was not listed...please indicate the language(s) here." (*Id.*, at 496)

B. "Trigger" date for duty to preserve records

i. In the Recommendation and the final ruling, "October 20, 2015"—the day Petitioner filed his EEOC complaint, weeks after the interviews and hiring—was determined as the "trigger" date for Respondent's "duty to preserve" candidates' hand-written interview notes, while Respondent claimed those notes were "discarded"

before October 20, 2015 "trigger" date. (43a)

Under Title VII and 29 C.F.R. § 1602.40 (89a), Petitioner argued "regardless of any... notification [DPS]... required to preserve hiring records for two years" and:

"in the end, it does not matter when the documents were destroyed...[Respondent]... still required by federal regulations implementing Title VII... to retain all records pertaining to employment decisions for a period of two years. See 29 C.F.R. § 1602.40. *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F. 3d 93, 108 (2nd Cir. 2001)" (Brief, at 43, ¶10)(ROA, Vol. II (Doc. 136) at 468, ¶4)

ii. Petitioner argued:

"Several courts have held that destruction of evidence in violation of a regulation that requires its retention can give rise to an inference of spoliation. See *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 716 (7th Cir.1998) ('The violation of a record[-]retention regulation creates a presumption that the missing record contained evidence adverse to the violator.'); *Hazen v. Fisher*, 13 F.3d 1235, 1239 (8th Cir.1994) (because employer violated record retention regulation, plaintiff 'was entitled to the benefit of a presumption that the destroyed documents would have bolstered her case'); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1419 (10th Cir.1987)". (*Id.*, at 470-471)

iii. For "evaluating [records] preservation efforts" by Respondent, in context of Federal Rules of Civil Procedure 37(e), 2015 Advisory Note, that the "court should be sensitive to the party's *sophistication* with regard to [records]... *preservation efforts*", Petitioner for demonstrating Respondent's sophistication in litigation, submitted an exhibit that listed Respondent's 114 previous federal cases, from 1987 to 2014; Petitioner argued, Respondent "with decades of experience in litigation...'had the duty to preserve evidence because it knew, or should have known.' *Burlington" Northern and Santa Fe Ry. Co.* [(*"BNSF"*)] *v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007). (ROA, Vol. II (Doc. 136) at 469-470)(emphasis added)

iv. By comparing Respondent's interview records spoliation with *BNSF* case, Petitioner argued the Appeals Court rejected sanctioning BNSF for records spoliation because BNSF as a substitute, "generated extensive documentation of the condition of the land before and during remediation." (*Id.*) In other words, "BNSF by substituting ...tar-like material...with its 'extensive documentation' got BNSF absolved of spoliation sanction." Petitioner concluded:

"Comparing BNSF to [Respondent] spoliation case, in essence, [Respondent] destroyed the very 'extensive [hiring] documentation' [and] ... has not offer[ed] any equivalent substitute for candidates' hiring records." (*Id.*, at 470, ¶4.2)

Similarly argued, in *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1401, 1407 (10th Cir. 1997), Boeing was not sanctioned for loss of "Mr. Aramburu's 1991 attendance records" because "any inference of bad faith [was]... undermined by the other attendance records [for 1991] produced by Boeing... However... [Respondent] failed to present any equal substitute records, as BNSF or Boeing did." (*Id.*, at 471, ¶4.3)

18. June 2019: District court final order

Based on the magistrate judge Recommendation (*Id.*, (Doc. 135) at 449-464), the district court granted Respondent's Motion (*Id.* (Doc. 116) at 10-108) for Summary Judgment, and with prejudice dismissed Petitioner's Second Amended Complaint. (11a-56a)

I. Court's bilingual questioning disparate impact

A. District court: Petitioner "forfeited" disparate impact claim.

In opposing Respondent's summary judgement motion, earlier in his filing, Petitioner asked the magistrate judge "to consider his Second Amended Complaint...as the 'factual background and procedural history of this case,'" that included his national origin discrimination under Title VII (*Id.*, (Doc. 117) at 109, ¶2); however, the district court found disparate impact claim was forfeited because Petitioner "did not raise his disparate impact claim in his Response to the

Motion for Summary Judgment or in his Surreply." (48a) The court stated Petitioner "claims that he has 'continuously, [and] in many filings, made arguments that DPS subjects 100% of its job applicants to bilingual questioning,' though he fails to cite or reference those filings." (*Id.*) Given:

"the issue of disparate impact was not before the Magistrate Judge on summary judgment, and is deemed forfeited. *United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001) ('In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived'); *see also Pevehouse v. Scibana*, 229 F. App'x 795, 796 (10th Cir. 2007)." (49a)

B. District court addressed disparate impact.

"Nevertheless, the Court...briefly address[ed] the arguments Plaintiff raised in the Objection regarding his disparate impact claim." And to "survive summary judgment on an individual claim for disparate impact requires three steps" (49a), which are:

"First, [Plaintiff] must establish a *prima facie* case that (a) an employment practice (b) causes a disparate impact on a protected group. Second, if [Plaintiff] presents a prima facie case, the burden will shift to [DPS] to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. Third, assuming [DPS] shows business necessity, [Plaintiff] may still prevail by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1220–21 (10th Cir. 2013)" (49a)

C. Petitioner failed disparate impact *prima facie*

For Petitioner challenging his bilingual questioning, the court stated "[i]t is abundantly clear that [Petitioner] has failed to establish a *prima facie* case that DPS's bilingual questioning causes a disparate impact on a protected group." (*Id.*) Also:

i. Petitioner "appears to allege that DPS's employment practice of asking applicants whether they are bilingual

in a language causes a disparate impact on various protected groups." (*Id.*)

ii. Regarding court ordered (83a) record production that Respondent produced (85a), the district court stated Petitioner "cites statistics about the number of DPS applicants who identified themselves as being bilingual in either 'Amharic', 'Arabic', 'Somali', or an unlisted language...That is the extent of Plaintiff's support for his disparate impact claim." (*Id.*)

iii. "Notably, Plaintiff does present any evidence to support his claim that DPS's question about whether an applicant is bilingual in a language causes a disparate impact on any group. Thus, Plaintiff has failed to establish even a prima facie case of disparate impact discrimination. *See Tabor*, 703 F.3d at 1220. Therefore, for this additional reason, Plaintiff's disparate impact claim cannot survive summary judgment." (50a)

iv. For Petitioner "discussing DPS's bilingual question to show that DPS's reasons for not hiring him were pretextual, the Court finds such an argument to be wholly without merit." (*Id.*)

v. "To establish a genuine issue of material fact as to pretext, Plaintiff 'must demonstrate that [DPS's] proffered non-discriminatory reason is unworthy of belief. ' *Reinhardt[v. Albuquerque Pub. Sch. Bd. of Educ.]*, 595 F.3d [1126,] 1134 [(10th Cir. 2010)]." (*Id.*)

vi. The court stated Petitioner, "clearly has not made such a demonstration as Plaintiff does not attempt to explain how DPS's bilingual question illustrates 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [DPS's] proffered legitimate reasons' for not hiring him." (*Id.*)

vii. In conclusion, "[t]o the extent Plaintiff is discussing DPS's bilingual question to show that DPS's reasons for not hiring him were pretextual, the Court finds such an argument to be wholly without merit." (*Id.*)

II. District court records spoliation finding

A. Spoliation within weeks of interviews and hiring

Concerning spoliation of the interview notes, within weeks of interviews and hiring, the district court described Magistrate Judge Crews finding:

i. Based on Petitioner's panel interview of September 10, 2015, and his EEOC filing of October 20, 2015, Judge Crews determined that "the earliest date DPS's duty to preserve [interview records] could have been triggered was October 20, 2015." (43a)

ii. "Judge Crews observed that to 'obtain sanctions for spoilation of evidence, a party must first show that (1) a party ha[d] a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence. '" (*Id.* (quoting *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007).) (41a.)

iii. The district court determined "DPS's destruction of the interview notes does not raise any triable issue of material fact affecting summary judgment." (42a)

B. District court adverse inference finding

i. "Since it is undisputed that DPS discarded the interview notes before it knew, or should have known, litigation was imminent, spoliation sanctions are not appropriate." (43a)

ii. "Spoliation sanctions are proper when '(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence' *Turner*[7](quoting *Grant*[8])" (43a) However, "if the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith" and "[m]ere

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[7] *Turner v. Public Service Co. of Colorado*, 563 F.3d 1136, 1149 (10th Cir. 2009).

[8] *Burlington Northern and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007).

negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case. (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997))." (*Id.*)

iii. "[T]he record does not support the finding that [Petitioner] was prejudiced by the destruction of the interview notes." (44a)

iv. "At the most, the record supports the finding that they were negligent in their conduct, but '[m]ere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.' *Turner*, 563 F.3d at 1149." (*Id.*)

v. "As a result of the foregoing, the Court denies Plaintiff's request for spoliation sanctions, including an adverse inference." (44a)

19. September 2019: Appeal to the Tenth Circuit

A. Bilingual questioning and disparate impact

i. Petitioner argued the district court erred waiving its earlier ruling, where the magistrate judge "Recommendation [was] ... adopted in its entirety" and "[t]he Court agree[d]... that [Petitioner] has plausibly alleged the existence of an illegal municipal policy", as the Recommendation referred to "the questions seeking [applicants] bilingual proficiency". (67a) And the magistrate judge "agree[d] that Vazirabadi's allegations identif[ied] only...[his] single incident of discrimination", yet, Respondent could not be held "liable" for a "single incident" of "discrimination". (See Brief, at 5, 8-9, 15, 32-33, 35)

ii. To nullify his language questioning as a "single incident", Petitioner resubmitted DPS-produced bilingual questioning report (85a) that substantiated thousands of other bilinguals required such involuntary disclosure. (Brief, at 9)

B. Records spoliation and adverse inference

Petitioner reiterated his district court argument that under 29 C.F.R. § 1602.40 of Title VII Act "[a]ny... employment *record made*... having to do with hiring... shall be preserved... for a period of 2 years *from the date of the making of the record*", with citing stare decisis cases. He argued, therefore, the court erred determining "October 20, 2015", the day Petitioner filed his EEOC complaint, weeks after the interviews and hiring, as Respondent's "trigger" date for its "duty to preserve" the interview notes. (*Id.*, at 39-40, 43-47)(emphasis added)

C. *Hicks* presumption rebuttal by interested parties

Petitioner argued: (a) *Hicks*[9]...supports Respondent's sanction for records spoliation "because [DPS]...violated § 1602.[40] by destroying the [hand-written interview] ...records, [Vazirabadi]... is entitled to the benefit of a presumption that the destroyed documents would have bolstered [his]...case." (b) Petitioner argued, it does not "appear legal" for Respondent to rebut *Hicks* presumption, with two affiants that as "interested parties" acknowledged discarding all the hand-written interview records. (See Reply Brief, at 15, ¶B; 16)

D. Handwritten notes not electronically stored

For records spoliation, Petitioner argued Respondent incorrectly equated the handwritten interview notes spoliation to "failure to preserve electronically stored information", under Federal Rules of Civil Procedure 37(e)(2) Advisory Committee Notes. (Reply Brief, at 16, ¶D)

E. Respondent's *Hicks* presumption argument

Respondent presented three reasons that:

"*Hicks* presumption does not apply [to Respondent] ...First, Federal Rules of Civil Procedure 37(e)(2)... only allows an adverse inference or presumption 'upon [a] finding that the party acted with the intent to deprive another party of the information's use in the litigation...

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[9] *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1419 (10thCir. 1987).

the revised rule 'is designed... addressing failure to preserve electronically stored information. Second, like the plaintiff in *JetStream*[10]..., Vazirabadi plainly requested an '[a]dverse-inference sanction'... which goes beyond the rebuttable presumption applied in *Hicks*. Third...as in *JetStream*, the [School] District presented evidence that rebutted any presumption the interview notes would have bolstered Vazirabadi's case." (Answer Brief, at 37-38)

20. July 2020: The 10th Circuit Order and Judgement

As it pertains to this petition and Question Presented, the Appeals Court Order and Judgement stated:

> "In his brief, Vazirabadi raises four specific arguments to challenge the summary judgment ruling: (1) DPS discarded the panel interview notes and thus an adverse inference should be applied against DPS to remedy the spoliation; (2) DPS interviewers submitted false affidavits, and the court failed to weigh the evidence in favor of Vazirabadi; (3) DPS's bilingual question had a disparate impact on members of a protected class; and (4) Vazirabadi, as the fifth ranked candidate, was actually the most desirable candidate. We have carefully considered each of these arguments and find them to be unpersuasive. Accordingly, we do not discuss them further." (10a, n. 2)

21. REASONS FOR GRANTING THE PETITION

The Appeals Court ruled Petitioner's "four specific arguments to challenge the summary judgment ruling" as "unpersuasive" and did "not discuss them further". Petitioner for presenting reasons in granting the petition, he refers to the district court opinion, ruling, discussion and articulation of the "four specific arguments" that the Appeals Court did "not discuss", nevertheless, it "[a]ffirm[ed] the district court's rulings". (10a)

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[10] *EEOC v. Jetstream Ground Services, Inc.*, 878 F. 3d 960, 966 (10th Cir. 2017).

A. Early in the case, applicant's bilingual questioning ruled as "an illegal municipal policy"

In the first court's Recommendation, before discovery, the magistrate judge "due to the questions seeking bilingual proficiency", he "agree[d] that [Petitioner's] ... allegations identify only [himself as] a single incident of discrimination", therefore "the Court recommend[ed] finding ... [Petitioner] plausibly allege[d] the existence of a municipal policy". (67a.) And later, the district court "agree[d]... that [Petitioner] has plausibly alleged the existence of an illegal municipal policy." (ROA, Vol. I (Doc. 50) at 215)

Therefore, in its final order, the district court erred waiving this early crucial finding.

B. The courts erred in holding that it is not in violation of Title VII (42 U.S.C. § 2000e-2(a)(2), § 2000e-2(k)(1)(A)(i), 29 C.F.R. § 1606.1, § 1607.3) for an employer to require its bilingual job applicants disclose their bilingual language, without a job requirement.

i. Disparate treatment and disparate impact

The "two proscriptions... as the 'disparate treatment' (or 'intentional discrimination') ... and the 'disparate impact' ...under Title VII... prohibits two categories of employment practices":

> '(1) to fail or refuse to hire... any individual, or otherwise to discriminate against any individual with respect to his ... privileges of employment, because of such individual's ... national origin; (87a-88a) or
>
> (2) to limit, *segregate*, or *classify* his ... applicants for employment *in any way* which would deprive or *tend to deprive* any individual of employment opportunities ... because of such individual's ... national origin.'" 42 U.S.C. § 2000e-2(a), *EEOC v. Abercrombie & Fitch Stores*, 135 S. Ct. 2028, 2031-2032, 575 U.S. 768, 192 L. Ed. 2d 35 (2015). (emphasis added)

ii. National origin discrimination definition

Under 29 C.F.R. § 1606.1 (90a), the EEOC "defines national origin discrimination broadly" for "the denial of equal employment opportunity because of an individual's ... linguistic characteristics of a national origin group." (*Id.*) Petitioner's applied job required no bilingual qualification, yet with no justification, he required to disclose his bilingual language, either selecting from Respondent's listed specific languages, or to enter it manually; he entered it manually. Based on Respondent identifying "linguistic characteristics of [Petitioner's]... national origin group", despite his highest interview ranking and three times more years of experience than hired applicants, Respondent refused to hire him.

iii. Respondent's disparate treatment in form of applicants bilingual questioning

The courts erred not finding Respondent's disparate treatment of its job applicants, as unlawful employment practice, in form of requiring bilingual applicants, without a job requirement, to disclose their bilingual language. Respondent by requiring its bilingual applicants, as a small percentage (85a) of its total applicants to disclose their bilingual language appears as a form of:

> "'[d]isparate treatment'...[that] is the most easily understood type of discrimination. [Respondent]... simply treats [bilingual applicants]... less favorably than [not bilinguals] ... because of their ['linguistic characteristics of a national origin group'] ...Proof of [Respondent's] discriminatory motive... inferred from the mere fact of [requiring bilinguals language disclosure as the] differences in [Respondent's applicants] treatment" *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993), quoting *Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977).

iv. Under 29 C.F.R. § 1607.3, without a job justification, collection and storage of bilingual applicants' name, positions applied and the disclosed languages appear as manifestation of disparate impact on less than 5% of Respondent's total applicants (85a).

> "[C]laims that stress 'disparate impact' [by contrast] involve employment practices [such as collection and storage of bilingual applicants' name, positions applied and disclosed languages] that are facially neutral...and cannot be justified by [DPS] business necessity [, under 42 U.S.C. § 2000e-2(k)(1)(A)(i) (88a) and 29 C.F.R. § 1607.3 (91a)]. Proof of discriminatory motive . . . is not required under a disparate-impact theory." *Hazen,* 507 U.S. at 609.

v. Disparate impact proof

Under 42 U.S.C. § 2000e-2(k)(1)(A)(i) (88a), for "[b]urden of proof in [Respondent's collection and storage of bilingual applicants' names, positions applied and the disclosed languages, as] disparate impact" , and as an "unlawful employment practice", when Petitioner, as the "complaining party demonstrate[d][11] that... [R]espondent use ... [of bilingual questioning as] a particular employment practice that causes a disparate impact on the basis of... national origin and the [R]espondent fail[ed] to demonstrate that [collection and storage of bilingual applicants' names, positions applied and disclosed languages are]...job related for the [Petitioner's] position in question and consistent with [DPS] business necessity"

Therefore, under § 2000e-2(k)(1)(A)(i), where Petitioner "demonstrate[d][11] that... [R]espondent use ... [of bilingual questioning as]... a particular employment practice that causes a disparate impact on the basis of... national origin"; the district court erred waiving its analysis, as to whether Respondent's hiring practice

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[11] (Doc. 1, at 3-4, ¶21, 8, ¶¶34-37), (ROA, Vol. I (Doc. 26) at 21, ¶¶22, at 25, ¶¶32-33, at 26-29, ¶¶37-41) (*Id.*, (Doc. 67) at 240-242, ¶¶20-22, at 246, ¶¶ 31-32, 34, 36)

"demonstrate[d] that [bilingual questioning]... is job related for the [Petitioner's] position in question and consistent with [DPS] business necessity". Earlier, it was noted, the courts concluded Petitioner "has plausibly alleged the existence of an illegal municipal policy", which was identified "due to the questions seeking bilingual proficiency". (67a)(ROA, Vol. I (Doc. 50) at 215)

C. Thousands of bilingual applicants impacted

As the record shows (85a), thousands of bilingual applicants required language disclosure, without the applied positions needed such qualification. The lower courts' rulings weakens Title VII's framework. Other employers may find bilingual questioning a powerful proxy to identify targeted applicants' "linguistic characteristics of [a]... national origin group" for hiring exclusion.

22. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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