UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Appellate Case: No. 19-1245
(D.C. No. 1:17-CV-01194-WJM-SKC)(D. Colo.)

Filed: July 23, 2020

ALIREZA VAZIRABADI,

Plaintiff - Appellant,

v.

DENVER PUBLIC SCHOOLS; JOHN AND JANE DOES 1 THROUGH 10; JOHN AND JANE DOE CORPORATIONS 1 THROUGH 10; OTHER JOHN AND JANE DOE ENTITIES 1 THROUGH 10, all whose true names are unknown,

Defendants - Appellees.

ORDER AND JUDGMENT *

Before TYMKOVICH, Chief Judge, EBEL, and HARTZ, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Alireza Vazirabadi, appearing pro se,[1] brought this employment discrimination action against Denver Public Schools ("DPS"), alleging that he was not hired for a position as a Process Improvement Engineer ("PIE") because of his national origin and age. Vazirabadi appeals the district court's order granting DPS's Motion for Summary Judgment. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Vazirabadi is an Iranian American man in his mid-fifties. In 2015, Vazirabadi saw a job posting online—DPS was seeking applicants for two Process Improvement Engineer ("PIE") positions. A qualified candidate needed an engineering degree and at least five years of relevant experience. DPS also sought candidates with strong collaborative leadership skills. Vazirabadi has a bachelor's degree in Industrial Engineering and, as of 2015, he had over 20 years of relevant experience. He applied for the position through DPS's online job application system. In 2015, the application asked candidates if they were bilingual and, if so, in what languages (the "bilingual question"). Vazirabadi indicated that he is bilingual in Farsi/Persian. Vazirabadi did not report his bilingualism on any other materials or at any other stage in the interview process, nor was he asked about this at any time. Vazirabadi did not report his age or national origin at any point in the interview process.

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[1] Because Vazirabadi appears pro se, we construe his filings liberally, but we do not "assume the role of advocate" for Vazirabadi. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)).

Vazirabadi was selected for a phone interview. He and four other candidates were then invited to undergo in-person interviews. The first component of the in-person interview process was a panel interview with the hiring manager and three incumbent PIEs. The panel asked each applicant to facilitate a group discussion about team-building activities in Denver. Vazirabadi's account of his performance differs from his interviewers' account. Vazirabadi asserts that he facilitated a collaborative discussion and that he maintained "excellent interactions and chemistry with all the panel members, for the entire 60 minute interview." (Doc. 117 at 13) At the end of the interview, one of the interviewers asked Vazirabadi if he prefers to be called "Alireza" or "Ali." (*Id.*) Vazirabadi took this a sign that he would certainly be offered the position. In contrast, DPS maintains that Vazirabadi dominated the conversation and failed to engage all members of the panel in the conversation.

After DPS had interviewed all five candidates, the interviewers met to compare notes and rank the candidates on a scale of one through five, one being the most desirable. The ranking order was unanimous; each interviewer agreed that Vazirabadi was the least desirable candidate and he was therefore ranked fifth. The hiring manager created a spreadsheet to reflect that ranking and included a comment about Vazirabadi: "Good experience, not a good team fit. Not sure if he would work well on a team." (Doc. 116-1 at 30) DPS extended offers to the candidates ranked first and second, and both candidates accepted. The hiring manager then emailed Vazirabadi to inform him that DPS had decided to hire other candidates.

Vazirabadi alleged that the email left him feeling "emotionally and physically sick, numb, humiliated and rejected" because he was "100% sure" he had "perfect" qualifications and had "performed great" in his interview.

(Doc. 67 at 8, ¶ 27)

Vazirabadi filed a charge of discrimination with the EEOC and subsequently received a Notice of Right to Sue. Vazirabadi filed a complaint against DPS in May 2017. Vazirabadi amended his complaint once as a matter of course, and he later received leave from the court to file a second amended complaint. In his operative Second Amended Complaint, Vazirabadi asserts that DPS engaged in national origin discrimination in violation of Title VII of the Civil Rights of 1964 ("Title VII"), 42 U.S.C. §§ 2000e et seq., and age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. In May 2018, the magistrate judge held a scheduling conference and set deadlines to guide the proceedings. The magistrate judge set a deadline of June 30, 2018 as the last day to add parties or amend pleadings.

In September 2018, Vazirabadi served a subpoena to produce on non-party Infor Global Solutions ("Infor"). Infor is a software company that licenses online job application software to DPS. Vazirabadi sought information from Infor about its development of the bilingual question for DPS's job application software. Infor refused to produce the requested information, and Vazirabadi filed a motion to compel. The magistrate judge denied the motion, concluding that Vazirabadi had failed to demonstrate how the information he sought from Infor was relevant to his claims against DPS. Vazirabadi filed an objection to the magistrate judge's ruling.

On November 30, 2018—five months after the June 30, 2018 deadline for amending pleadings—Vazirabadi filed a motion to amend his Second Amended Complaint. On February 8, 2019, while the November 30, 2018 motion was still pending before the court, Vazirabadi filed another motion to amend his Second Amended Complaint. Through

those motions, Vazirabadi sought to add claims for conspiracy between DPS and Infor. The magistrate judge recommended denying those motions, and Vazirabadi filed an objection to that recommendation.

On January 14, 2019, DPS moved for summary judgment, and the magistrate judge recommended granting that motion. Vazirabadi filed an objection to that recommendation.

On June 25, 2019, the district court issued its Order on Pending Recommendations and Motions. First, the court adopted the magistrate judge's recommendation regarding Vazirabadi's motions to amend, overruled Vazirabadi's objection to that recommendation, and denied Vazirabadi's November 30, 2018 Motion to Amend and his February 8, 2019 Motion to Amend. Second, the court adopted the magistrate judge's recommendation regarding DPS's Motion for Summary Judgment, overruled Vazirabadi's objection to that recommendation, and granted DPS's Motion for Summary Judgment. Third, the court overruled as moot Vazirabadi's objection to the magistrate judge's denial of Vazirabadi's motion to compel. Vazirabadi appeals each of those rulings.

II. DISCUSSION

A. The district court did not err in denying Vazirabadi's motions to amend.

We review the district court's ruling on a motion for leave to file an amended complaint for an abuse of discretion. *Zisumbo v. Ogden Reg'l Med. Ctr.*, 801 F.3d 1185, 1195 (10th Cir. 2015). Rule 15(a)(2) provides that after the initial deadline for amendment has passed, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.* However, "[a]fter a scheduling order

deadline, a party seeking leave to amend must demonstrate (1) good cause for seeking modification under Fed. R. Civ. P. 16(b)(4) and (2) satisfaction of the Rule 15(a) standard." *Gorsuch, Ltd., B.C. v. Wells Fargo Nat'l Bank Assoc.*, 771 F.3d 1230, 1240 (10th Cir. 2014). Rule 16(b)(4) provides that "[a] schedule may be modified only for good cause and with the judge's consent." "In practice, this standard requires the movant to show the 'scheduling deadlines cannot be met despite [the movant's] diligent efforts.'" *Gorsuch*, 771 F.3d at 1240 (quoting *Pumpco, Inc. v. Schenker Int'l, Inc.*, 204 F.R.D. 667, 668 (D. Colo. 2001)). "Rule 16's good cause requirement may be satisfied, for example, if a plaintiff learns new information through discovery or if the underlying law has changed." *Id.* "If the plaintiff knew of the underlying conduct but simply failed to raise [applicable] claims, however, the claims are barred." *Id.* Courts are "afforded wide discretion" in their application of the good cause standard under Rule 16. *Bylin v. Billings*, 568 F.3d 1224, 1231 (10th Cir. 2009).

Vazirabadi failed to show that the June 30, 2018 deadline could not have been met despite his diligent efforts. *See Gorsuch*, 771 F.3d at 1240. In his November 30, 2018 Motion to Amend, Vazirabadi sought to add Infor and Infor's CEO as parties to this action. Vazirabadi learned about Infor through discovery on August 16, 2018—106 days before he filed his first motion to amend. Vazirabadi does not offer any explanation for that delay. Vazirabadi knew of Infor's involvement but failed to raise claims against them for more than 100 days. Similarly, in his February 8, 2019 Motion to Amend, Vazirabadi sought to add as parties two DPS employees who were involved in interviewing and making hiring decisions for the two PIE positions. Vazirabadi knew of those employees and their involvement in interviewing and making hiring decisions from the outset of the case. Yet, after filing his initial

complaint, he waited 233 days—more than eight months—before attempting to add those employees as parties to this action. Again, Vazirabadi offers no justification for that delay. Vazirabadi did not satisfy Rule 16's good cause standard. Therefore, the district court acted within its discretion in denying Vazirabadi's motions to amend, both of which were filed long after the June 30, 2018 scheduling deadline.

B. The district court did not err in granting DPS's Motion for Summary Judgment.

"We review the district court's summary-judgment order de novo, applying the same standard that the district court is to apply." *Singh v. Cordle*, 936 F.3d 1022, 1037 (10th Cir. 2019). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and one party is entitled to judgment as a matter of law." *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004) (citing Fed. R. Civ. P. 56(c)). "Although we construe the evidence in the light most favorable to the non-movant, to avoid summary judgment, a nonmovant must provide significantly probative evidence that would support a verdict in [his or her] favor." *Jaramillo v. Adams Cty. Sch. Dist. 14*, 680 F.3d 1267, 1268–69 (10th Cir. 2012).

Vazirabadi claims that DPS discriminated against him based on his national origin and age, in violation of Title VII and the ADEA. Because Vazirabadi offers no direct evidence of discrimination, we apply the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under the *McDonell Douglas* framework, "the plaintiff has the initial burden of establishing a prima facie case of discrimination." *Singh*, 936 F.3d at 1037. "In general, '[t]he critical prima facie inquiry . . . is whether the plaintiff has demonstrated that

the adverse employment action . . . occurred under circumstances which give rise to an inference of unlawful discrimination.'" *Id.* (quoting *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1227 (10th Cir. 2000)). "If the plaintiff makes this showing, the burden shifts to the employer to assert 'a legitimate nondiscriminatory reason for its actions.'" *Id.* (quoting *Daniels v. United Parcel Serv., Inc.*, 701 F.3d 620, 627 (10th Cir. 2012)). If the employer meets that burden, "the burden shifts back to the plaintiff to introduce evidence that the stated nondiscriminatory reason is merely a pretext." *Id.* (quoting *Daniels*, 701 F.3d at 627).

To establish a genuine issue of material fact as to pretext, a plaintiff must demonstrate that the "proffered non-discriminatory reason is unworthy of belief." *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1134 (10th Cir. 2010) (quoting *Pinkerton v. Colo Dep't of Transp.*, 563 F.3d 1052, 1065 (10th Cir. 2009)). A plaintiff "can meet this standard by producing evidence of 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Id.* (quoting *Pinkerton*, 563 F.3d at 1065).

The district court concluded that even if Vazirabadi had made a prima facie case of national origin or age discrimination, DPS satisfied its burden of providing legitimate, non-discriminatory reasons for not hiring Vazirabadi, and Vazirabadi failed to make a showing of pretext. We agree.

DPS argues that it chose not to hire Vazirabadi because he performed poorly in his interviews. The evidence in the record supports DPS's position. Regarding Vazirabadi's performance in his panel interview, the hiring manager stated that Vazirabadi "performed poorly" because, rather than facilitating a group discussion, "he dictated it." (Doc. 116-1 at 2–3) The hiring manager also observed that Vazirabadi "was unable to make all the Process Improvement team members feel he was listening to their ideas." (*Id.*) One of the incumbent PIEs offered a similar account, stating that Vazirabadi "dominated the discussion rather than facilitate it." (Doc. 116-5 at 1) A supervisor described her impression that Vazirabadi "would not be able to work collaboratively and consultatively in a team role." (Doc. 116-2 at 2) In contrast, interviewers described the two candidates who were ultimately hired for the positions as demonstrating strong collaborative and listening skills. Based on his performance, all interviewers ranked Vazirabadi fifth out of five candidates. In documenting Vazirabadi's rank, the hiring manager commented: "Good experience, not a good team fit. Not sure if he would work well on a team." (Doc. 116-1 at 30)

Moreover, the hiring manager stated in an affidavit that, at the time she made her hiring decision, she was not aware that applicants were required to complete an online job application, and she was therefore not aware of any applicant's response to the bilingual question. She further stated that the age, national origin, and language proficiency of the candidates had no bearing on her hiring decisions.

Vazirabadi does not offer any evidence to show that DPS's proffered non-discriminatory reasons for choosing not to hire him are unworthy of belief. *See Reinhardt*, 595 F.3d at 1134. He offers only his own impression that he

maintained "excellent interactions and chemistry with all the panel members, for the entire 60 minute interview." (Doc. 117 at 13) Vazirabadi does not present any evidence of "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" that would cast doubt on DPS's assertion that it chose not hire Vazirabadi because he performed poorly in his interviews and had gaps in his employment history. *Reinhardt*, 595 F.3d at 1134 (quoting *Pinkerton*, 563 F.3d at 1065). Vazirabadi has therefore failed to meet his burden under the *McDonell Douglas* framework, and DPS is entitled to summary judgment.[2]

III. CONCLUSION

We AFFIRM the district court's rulings in its Order on Pending Recommendations and Motions.

Entered for the Court

David M. Ebel
Circuit Judge

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[2] 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.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martinez

Civil Action No. 1:17-CV-01194-WJM-SKC
Document: 143
Filed: June 25, 2019

ALIREZA VAZIRABADI,

Plaintiff,

v.

DENVER PUBLIC SCHOOLS; JOHN AND JANE DOES 1 THROUGH 10; JOHN AND JANE DOE CORPORATIONS 1 THROUGH 10; OTHER JOHN AND JANE DOE ENTITIES 1 THROUGH 10, all whose true names are unknown,

Defendants.

ORDER ON PENDING RECOMMENDATIONS AND MOTIONS

This matter is before the Court on two recommendations by United States Magistrate Judge S. Kato Crews. (ECF Nos. 125 & 135.) In the first recommendation, filed on March 6, 2019, Judge Crews recommended that this Court (1) deny Plaintiff Alireza Vazirabadi's ("Plaintiff" or "Vazirabadi") Motion to Amend Second Amended Complaint ("November 30, 2018 Motion to Amend"; ECF No. 108); and (2) deny Plaintiff's Second Motion to Amend Second Amended Complaint ("February 8, 2019 Motion to Amend"; ECF No. 118) (collectively, "Motions to Amend"). ("March 6, 2019 Recommendation"; ECF No. 125.)

In the second recommendation, filed on March 28, 2019, Judge Crews recommended that this Court (1) grant Defendant Denver Public Schools' ("DPS") Motion for

Summary Judgment ("Motion for Summary Judgment"; ECF No. 116); (2) dismiss with prejudice Plaintiff's Second Amended Complaint ("Second Amended Complaint"; ECF No. 67); (3) enter judgment in favor of DPS and against Plaintiff; (4) dismiss without prejudice the John and Jane Doe Corporations 1 through 10 ("Doe Corporations"); and (5) dismiss without prejudice the Other John Doe Entities 1 through 10 ("Doe Entities"). ("March 28, 2019 Recommendation"; ECF No. 135.)

The March 6, 2019 Recommendation and March 28, 2019 Recommendation are incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). Plaintiff filed timely objections to the March 6, 2019 Recommendation ("March 12, 2019 Objection"; ECF No. 129) and the March 28, 2019 Recommendation ("April 11, 2019 Objection"; ECF No. 136).

Also pending before the Court are Plaintiff's (1) objection to Judge Crews's denial of his motion to compel ("Objection to Denial of Motion to Compel"; ECF No. 107); and (2) motion seeking leave to file a surreply ("Motion for Leave to File Surreply"; ECF No. 113).

For the reasons set forth below, the March 6, 2019 Recommendation is adopted in its entirety, Plaintiff's March 12, 2019 Objection is overruled, Plaintiff's November 30, 2018 Motion to Amend is denied, Plaintiff's February 8, 2019 Motion to Amend is denied, the March 28, 2019 Recommendation is adopted as modified, Plaintiff's April 11, 2019 Objection is overruled, DPS's Motion for Summary Judgment is granted, Plaintiff's Objection to Denial of Motion to Compel is overruled as moot, and Plaintiff's Motion for Leave to File Surreply is denied as moot.

I. LEGAL STANDARD

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3)

requires that the district judge "determine de novo any part of the magistrate judge's [recommendation] that has been properly objected to." An objection to a recommendation is properly made if it is both timely and specific. *United States v. 2121 East 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996). An objection is sufficiently specific if it "enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Id.* In conducting its review, "[t]he district court judge may accept, reject, or modify the recommendation; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). Here, Plaintiff filed a timely objection to the March 6, 2019 Recommendation and to the March 28, 2019 Recommendation. (*See* ECF Nos. 129 & 136.) Therefore, the Court reviews the issues before it *de novo*, except where otherwise noted.

In considering the recommendations, the Court is also mindful of Plaintiff's *pro se* status, and accordingly, reads his pleadings and filings liberally. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007). The Court, however, cannot act as advocate for Plaintiff, who must still comply with the fundamental requirements of the Federal Rules of Civil Procedure. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991); *see also Ledbetter v. City of Topeka*, 318 F.3d 1183, 1188 (10th Cir. 2003).

II. BACKGROUND

The following factual summary is primarily drawn from the various motions pending before the Court and documents submitted in support, as well as Plaintiff's Second Amended Complaint. These facts are undisputed unless attributed to a party.

A. Introduction

Plaintiff is a 55-year-old Iranian-American citizen residing in Aurora, Colorado. (ECF No. 67 at 1, ¶ 1.)

In 2015, DPS was recruiting two Process Improvement Engineers ("PIE") for its Risk Management Department. (ECF No. 116-1 at 1, ¶ 4.) On August 3, 2015, Plaintiff applied for one of the positions after seeing DPS's job posting on a job listing website ("Job Posting"; *id.* at 11–12). (ECF No. 67 at 4, ¶ 19; *see also* ECF No. 116-1 at 13–16.) Plaintiff was invited to several rounds of interviews, but DPS chose to hire other candidates. (ECF No. 116-1 at 1–3.) This lawsuit followed. (ECF No. 1.)

B. PIE Position Requirements

The Job Posting described "the purpose of the [PIE] position, expected outcomes and results, and overview of areas of accountability," as follows:

> The Process Improvement Engineer (PIE) guides DPS departments in collaborative process improvement and re-engineering projects . . . . The PIE will lead or mentor process owners through transformational business process definition and re-engineering projects . . . .
>
> In addition, the PIE will increase awareness of the value of business process improvement throughout DPS, will train and mentor DPS employees in the use of process improvement tools, and will share business process improvement best practices with other DPS initiatives.
>
> (ECF No. 116-1 at 11.)

In describing "specific knowledge and qualifications required for the job," the Job Posting listed in pertinent part the following requirements:

- Strong interpersonal and teamwork skills with the ability to negotiate and influence others.
- Excellent [ ]verbal communication and presentation skills.
- Able to work collaboratively with cross functional teams and with DPS employees at all levels of the organization from executive leadership to line staff.

(*Id.* at 12.)

In detailing the "minimum education and experience required for the [PIE position]", the Job Posting provided that the applicant must have:

- [A] Bachelor's degree in Industrial Engineering.
- At least 5 years of work experience in continuous improvement or a related field, with a focus on process design/re-engineering and Lean Six Sigma.
- At least 5 years of work experience in cross-functional project management.

(*Id.*)

C. PIE Recruitment Process

When there is a vacancy for a PIE position, the job is posted by DPS, and candidates submit an application and other materials, including resumes and cover letters, through DPS's online application system. (*Id.* at 2, ¶ 5; *see also* ECF No. 67 at 4, ¶ 19.)

During the relevant time period, Karen Johnson served as DPS's Senior Manager of Process Improvement and the hiring manager for PIEs. (ECF No. 116-1 at 1, ¶¶ 2, 4.) Johnson's standard practice is to gather resumes and cover letters from the online applications and select candidates for phone interviews. (*Id.* at 2, ¶ 5.) After conducting phone interviews, Johnson chooses candidates to advance to the following in-person interviews: (1) one panel interview with Johnson and the PIEs on her team; and (2) one interview with DPS's Director of Risk Management, Terri Sahli, who was Johnson's supervisor at the time. (*Id.*)

D. Plaintiff's Application for the PIE Position

Twenty-six individuals, including Plaintiff, applied for one or both of the two vacant PIE positions using DPS's online application system. (*Id.* at 2, ¶ 5; *see also* ECF No. 117 at 27.) To apply, applicants had to complete a DPS online job application ("Job Application"; ECF No. 116-3). (ECF No. 116-1 at 2–3, ¶¶ 5, 13.) The Job Application asked

applicants a set of 13 questions, such as:

- Are you eligible for employment in the United States?
- Are you presently employed? If so, where?
- Are you 18 years or older?

(*See* ECF No. 116-3.) In pertinent part, the Job Application asked applicants to indicate whether they were "bilingual," and if so, to identify the language. (*Id.* at 2.) In his Job Application, Plaintiff answered that he was bilingual in "Farsi/Persian." (*Id.*) Plaintiff claims that this answer "identified his Iranian heritage/national origin." (ECF No. 140 at 2, ¶ 3.) However, the Job Application did not ask for, and Plaintiff did not provide, his age or national origin. (*See* ECF No. 116-3.)

After completing the Job Application, applicants were then asked to submit their cover letters and resumes to DPS's online application system. (ECF No. 116-1 at 2–3, ¶¶ 5, 13.) Plaintiff submitted both documents, but did not state his age, national origin, or language proficiency in either document. (*Id.* at 13–16.) Johnson gathered the applicants' resumes and cover letters, and selected nine candidates, including Plaintiff, for phone interviews. (*Id.* at 2, ¶¶ 5, 7.)

E. Phone Interviews

The phone interviews were conducted by Johnson and lasted from 45 to 60 minutes. (*Id.* at 32.) Johnson interviewed all nine candidates by phone between August 28 and September 2, 2015. (*Id.* at 27, 32.) During the phone interviews, Johnson asked each of the nine candidates the same set of questions, none of which concerned the candidate's age, national origin, or language proficiency. (*See id.* at 21–26.)

Plaintiff's phone interview took place on August 31, 2015. (*Id.* at 27, 31.) During the interview, Johnson informed Plaintiff that there were two open PIE positions and that he would "be considered for both." (ECF No. 136 at 12, ¶ 7.1.)

Plaintiff took this comment as "positive feedback." (*Id.*) In the interview, Plaintiff did not discuss his age, national origin, or language proficiency with Johnson. (ECF No. 116-1 at 3, ¶ 13; *see also id.* at 21–22; ECF No. 116-4 at 2; ECF No. 116-6 at 4, 10.)

F. Panel Interviews

After conducting the phone interviews, Johnson chose six candidates, including Plaintiff, for the in-person interviews. (ECF No. 116-1 at 2, ¶ 8.) The candidate pool narrowed to five after one applicant declined to interview. (*Id.*)

The purpose of the panel interview was to test a candidate's facilitation skills and the essential functions of the PIE position, including: (1) the ability to achieve project results working closely and collaboratively with executive sponsors, process owners, and project teams; (2) strong interpersonal and teamwork skills with the ability to negotiate and influence others; and (3) the ability to work collaboratively with cross functional teams and with School District employees at all levels of the organization from executive leadership to line staff. (*Id.* at 2, ¶¶ 4, 8; *see also id.* at 11–12.) To test these skills, the panel asked each candidate "to facilitate a group discussion on the topic of 'things to do for a team building event in Denver [the "Facilitation Question"].'" (*Id.* at 2, ¶ 8.; *see also* ECF No. 67 at 7, ¶ 24; ECF No. 117 at 25–26.)

Plaintiff's panel interview took place on September 10, 2015. (ECF No. 67 at 7, ¶ 24; ECF No. 116-1 at 29.) Plaintiff's interviewers consisted of Johnson and the three incumbent PIEs—Andra Manczur, Katie Wolters, and Jeffrey Gwaltney. (ECF No. 116-1 at 2, ¶ 8.) According to Plaintiff, all of the panel members "had 2-page interview questionnaire[s]," on which they "continuously made hand-written notes" for the duration of his panel interview. (ECF No. 117 at 13, ¶ 5; *see also id.* at 17–18.) In his panel

interview, Plaintiff did not discuss his age or national origin. (ECF No. 116-1 at 3, ¶ 13; *see also* ECF No. 116-4 at 2; ECF No. 116-5 at 2, ¶ 7; ECF No. 116-6 at 7, 10.)

In her affidavit, Johnson described Plaintiff's performance at his panel interview, particularly in regard to how Plaintiff answered the Facilitation Question, as follows:

> [Mr. Vazirabadi] performed poorly. Instead of facilitating a group discussion, he dictated it. He was unable to make all the Process Improvement team members feel he was listening to their ideas, and rather than engaging us and drawing out ideas about potential team building events in Denver, he told us what we should do. Mr. Vazirabadi also focused mostly on me instead of giving everyone on the team equal attention. Although Mr. Vazirabadi had many years of engineering experience, it was clear after the panel interview that he was unlikely to meet the School District's needs and be successful in the PIE position.

(ECF No. 116-1 at 2–3, ¶ 9.)

Gwaltney's account of how Plaintiff performed in his panel interview is similar to Johnson's description:

> Mr. Vazirabadi did not do well in his interview. He dominated the discussion rather than facilitate it, telling [the interviewers] what we should do in Denver rather than elicit our own ideas. It was more like a lecture than a shared discussion, with little collaboration. Mr. Vazirabadi also seemed to focus most of his attention on Ms. Johnson, neglecting me and my colleagues Andra Manczur and Katie Wolters. As someone who was working as a PIE, it was apparent to me that Mr. Vazirabadi did not show the facilitation skills needed for the job. To be successful, a PIE must have strong interpersonal skills, be an excellent listener, and have the ability to work collaboratively with employees at every level of the School District.

(ECF No. 116-5 at 1, ¶ 4.)

Plaintiff disputes these accounts, asserting that Johnson and Gwaltney's "characterization of [his] facilitation

performance is categorically false, untrue, defamatory and extremely hurtful." (ECF No. 117 at 13–14, ¶ 5.) In particular, Plaintiff alleges that he "had excellent interactions and chemistry with all the panel members, for the entire 60 minute interview." (*Id.* at 13, ¶ 5.)

From his fillings, it is evident that one event in particular is of great importance to Plaintiff. (*See, e.g.*, ECF No. 1 at 4–5, ¶¶ 23, 25; ECF No. 67 at 7–8, ¶¶ 24, 29; ECF No. 117 at 5, 13, ¶¶ 5, 9; ECF No. 118 at 86–87, 117–118; ECF No. 129 at 5, ¶ 10; ECF No. 136 at 14, ¶ 7.7; ECF No. 140 at 2, ¶ 5.) This "memorable and validating moment" occurred right before Plaintiff left the panel interview room, when Gwaltney asked Plaintiff: "do you like to be called Alireza or Ali?" (ECF No. 67 at 7, ¶ 24.) Noticing that the other panel members were awaiting his response, Plaintiff responded "Ali." (*Id.*) Plaintiff asserts that Gwaltney's question "proves the interview panel was looking forward to [Plaintiff's] immediate hiring" and that a "picture fails to capture" these "last few exchanged words saying over 1000 words." (*Id.*; ECF No. 136 at 18.)

In his response to the Motion for Summary Judgment, Plaintiff attached as an exhibit a "Team Facilitation Narrative," wherein Plaintiff describes in detail his version of how his panel interview transpired when he was asked the Facilitation Question. (ECF No. 117 at 25–26.) From his narrative, Plaintiff appears to be arguing that, contrary to Johnson and Gwaltney's assertions, his interview went well as the panel members showed "sincere excitement," laughed at his "funny joke[s]," and smiled approvingly. (*Id.* (emphasis omitted).) In addition, Plaintiff appears to describe a more collaborative environment, one where he did not dominate the discussion. (*Id.*)

In Johnson and Gwaltney's affidavits, they discuss how two of the candidates, Thach Nguyen and Ashley Schroeder (who were ultimately hired), significantly outperformed Plaintiff in their panel interviews. (*See* ECF

No. 116-1 at 3, ¶ 10; ECF No. 116-5 at 2, ¶ 5.) In particular, they discuss how Nguyen and Schroeder "demonstrated strong collaborative skills," superior listening skills, and were able to successfully facilitate a group discussion in a collaborative manner that involved the entire group. (ECF No. 116-1 at 3, ¶ 10; ECF No. 116-5 at 2, ¶ 5.)

G. Plaintiff's Interview with Sahli

Plaintiff and each of the other candidates who participated in the panel interviews also interviewed with Sahli. (ECF No. 116-1 at 2, ¶ 5; ECF No. 116-2 at 2, ¶¶ 7, 9.) Sahli's "only role in the hiring process was to conduct a short one-on-one interview with each finalist Ms. Johnson identified and then provide feedback to Ms. Johnson," but ultimately the "hiring decisions were made by Ms. Johnson." (ECF No. 116-2 at 2, ¶ 7.)

Plaintiff's one-on-one interview with Sahli took place on September 15, 2015. (ECF No. 116-1 at 29.) The following is Sahli's account of the interview:

> Mr. Vazirabadi came across as very sale-and-entrepreneurial-oriented. PIEs do not work in isolation, and their role is not to solicit business within the School District. My impression was that Mr. Vazirabadi would not be able to work collaboratively and consultatively in a team role. I also did not feel that Mr. Vazirabadi would be able to work within the standardized service model Ms. Johnson implements.

(ECF No. 116-2 at 2, ¶ 9.) During the interview, Sahli did not ask and Plaintiff did not disclose his age, national origin, or proficiency in "Farsi/Persian." (*Id.* at 2, ¶ 10; *see also* ECF No. 116-4 at 2; ECF No. 116-6 at 7, 10.)

H. Resumes of the Relevant Applicants

The resumes of the applicants also played an important role in Johnson's hiring decision. (*See* ECF No. 116 at 5, 15; ECF No. 116-1 at 2–3, ¶¶ 7, 12.) In regard to Plaintiff, Johnson noted that he has a Bachelor of Science in Industrial Engineering from the University of Wisconsin– Stout, and that he had over 20 years of

engineering experience in California and Colorado. (ECF No. 116-1 at 2, ¶ 7; *see also id.* at 15–16.) However, Johnson also noted that since October 2013, Plaintiff's only occupation had been as an UberX Driver and that he had a "previous four-year gap in professional employment while he served as a caregiver." (*Id.* at 2, ¶ 7; *see also id.* at 15.) Plaintiff was 52 years-old when he interviewed with DPS for the PIE positions. (ECF No. 140 at 3–4, ¶ 11.)

Nguyen has a Bachelor of Science in Materials Science and Engineering from Cornell University's College of Engineering. (ECF No. 116-1 at 18; *see also* ECF No.116 at 5, ¶ 14.) At the time of his interviews, Nguyen had over six years of relevant engineering experience with no gaps in his professional employment. (ECF No. 116-1at 18; *see also* ECF No. 116 at 5, ¶ 14.) Nguyen was 28 years-old when DPS offered him the PIE position. (ECF No. 67 at 3, ¶ 17.)

Schroeder has a Bachelor in Science in Industrial Engineering from the University of Michigan's College of Engineering. (ECF No. 116-1 at 19–20; *see also* ECF No. 116 at 5, ¶ 14.) At the time of her interviews, Schroeder had over five years of relevant engineering experience with no gaps in her professional employment. (ECF No. 116-1 at 19–20; *see also* ECF No. 116 at 5, ¶ 14.) Schroeder was "in her thirties" when DPS offered her the PIE position. (ECF No. 67 at 3, ¶ 17.)

I. Hiring Decision

After the last panel interview concluded on September 21, 2015, 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. (ECF No. 116-1 at 3, ¶ 11; *see also id.* at 29–30.) Each panelist individually ranked the candidates in the exact same order: Schroeder was the highest ranked candidate (with a ranking of one), Nguyen was the second highest ranked candidate (with a ranking of two), and Plaintiff was the lowest ranked candidate

(with a ranking of five).[1] (ECF No. 116-1 at 3, ¶ 11; ECF No. 116-5 at 2, ¶ 6; ECF No. 121-1 at 4–5.) Johnson recorded these rankings onto a spreadsheet (titled "Ranking Matrix") and included the following comment about Plaintiff: "Good experience, not a good team fit. Not sure if he would work well on a team."[2] (ECF No. 116-1 at 30; *see also* ECF No. 121-1 at 5.)

After this discussion, Johnson decided to offer the open PIE positions to Nguyen and Schroeder. She determined that "[t]hey both had the requisite engineering experience and displayed the best collaboration, leadership, interpersonal, and teamwork skills." (ECF No. 116-1 at 3, ¶ 12.) Schroeder and Nguyen accepted the offers of employment and advanced to background screening with DPS's Human Resources Department. (*Id.*; *see also id.* at 40–43.) On September 23, 2015, Johnson informed Plaintiff that DPS had decided to hire other candidates. (*Id.* at 39.)

Johnson asserts that at the time she made her hiring decision for the PIE positions, she was not aware that applicants were required to complete the online Job Application questions before submitting their resumes and

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[1] Plaintiff argues that the "Ranking Matrix analysis proves Vazirabadi is [the] highest ranked candidate" since he had the highest numerical ranking. (ECF No. 136 at 14, ¶ 7.8; *see also* ECF No. 122 at 8–9, ¶ 5.) Plaintiff supports this assertion by pointing to the interview questionnaires the panel members allegedly took notes on during his interview. (ECF No. 122 at 12–13.) On the questionnaires, there is an "Overall Ranking" index, in which a higher score correlates with a higher ranking, and vice versa. (*Id.* at 13.) Thus, Plaintiff appears to argue that since he had the highest numerical ranking of five, he was actually the highest ranked candidate when compared to the other candidates who had lower numerical rankings—namely, one through four. (*See* ECF No. 116-1 at 30.)

[2] Plaintiff was not the only candidate the panel determined would not work well on their team. (*See* ECF 116-1 at 30.) Similarly, the panel found that the third ranked candidate—who had "[e]xcellent experience" as opposed to Plaintiff's "[g]ood experience"—was "not a good team fit." (*Id.*)

cover letters, and therefore she was not aware of any applicant's responses on these questions, including responses to the bilingual question. (*Id.* at 3, ¶ 13.) Further, it is undisputed that Plaintiff did not report or identify his age or national origin in his Job Application, in his cover letter, on his resume, or otherwise at any stage of his interviews. (*Id.*; *see also id.* at 13–16; ECF No. 116-3; ECF No. 116-4 at 2; ECF No. 116-6 at 7, 10.) Other than identifying that he was bilingual in Farsi/Persian on the Job Application, Plaintiff did not further indicate his bilingualism on any materials or at any other stage in the process. (ECF No. 116-1 at 3, ¶ 13; *see also id.* at 13–16; ECF No. 116-3; ECF No. 116-4 at 2; ECF No. 116-6 at 7, 10.) Thus, Johnson asserts that the "age, national origin, and language proficiency of Mr. Vazirabadi, Mr. Nguyen, and Ms. Schroeder had no bearing whatsoever on [her] hiring decisions for the PIE positions." (ECF No. 116-1 at 3, ¶ 13.)

In sum, the only evidence to suggest that DPS knew of Plaintiff's national origin is that he reported being bilingual in "Farsi/Persian" on his Job Application. (ECF No. 67 at 10–11; *see also* ECF No. 116-3 at 2; ECF No. 116-4 at 2; ECF No. 116-6 at 10.) Meanwhile, Plaintiff's only allegation concerning his age is that Johnson and the other interviewers inferred his age from his physical appearance. (*See* ECF No. 116-4 at 2; ECF No. 116-6 at 7.)

III. PROCEDURAL HISTORY

Plaintiff initiated this action on May 15, 2017. (ECF No. 1.) After DPS filed a motion to dismiss Plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Plaintiff filed his First Amended Complaint as a matter of course on July 14, 2017. (ECF Nos. 22 & 26.) In his First Amended Complaint, Plaintiff brought six claims against DPS and several others. (ECF No. 26.)

On July 28, 2017, DPS filed a motion to dismiss Plaintiff's First Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 29.)

On March 30, 2018, this Court granted the motion in part and dismissed all of Plaintiff's claims except for his claim against DPS for national origin discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e et seq. (ECF No. 50.) On May 7, 2018, Plaintiff filed a motion to amend his First Amended Complaint. (ECF No. 60.)

On May 11, 2018, United States Magistrate Judge Michael E. Hegarty held a scheduling conference and set case deadlines to guide these proceedings. (ECF No. 62.) Specifically, Judge Hegarty set a deadline of June 30, 2018, as the last day to add parties or amend the pleadings ("June 30, 2018 Deadline"; ECF No. 63 at 11). *Id.* During the Scheduling Conference, Judge Hegarty granted Plaintiff's motion to file a Second Amended Complaint, which was docketed on May 15, 2018.[3] (ECF Nos. 62 & 67.) In the Second Amended Complaint, Plaintiff brings action against DPS, the Doe Corporations, the Doe Entities, and John and Jane Doe 1 through 10 (the "Doe Individuals") for national origin discrimination in violation of Title VII and for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. (ECF No. 67.)

During discovery, Plaintiff served a subpoena to produce on a non-party, Infor, Inc. ("Infor"). (ECF No. 94.) Infor is a software company that licenses online job Application software to DPS. (ECF No. 99 at 2.) DPS used Infor's software for the online Job Application, which included the question of whether the applicant is bilingual. (ECF No. 97 at 2, ¶ 4.) With his subpoena to Infor, Plaintiff sought, among other information, production of various data related to Infor's development of the "bilingual question" used by DPS. (*Id.*; *see also* ECF No. 94.) Infor refused to produce the requested information, leading Plaintiff to file a

[3] On August 6, 2018, this case was reassigned to Judge Crews. (ECF No. 85.)

motion to compel. (ECF No. 97 at 1, ¶ 1.) On November 6, 2018, Judge Crews held a hearing on the motion to compel. (ECF No. 106.) After discussion and argument regarding the motion, Judge Crews denied Plaintiff's motion to compel. (*Id.*; *see also* ECF No. 109 at 24.)

As a result, Plaintiff filed his Objection to Denial of Motion to Compel, which is currently pending before the Court. (ECF No. 107.) Infor subsequently responded to Plaintiff's objection. (ECF No. 111.) On December 5, 2018, Plaintiff filed a surreply (ECF No. 112) to Infor's response and a Motion for Leave to File Surreply (ECF No. 113), which is currently pending before the Court. (*Id.*)

Five months after the June 30, 2018 Deadline for amending pleadings and adding parties, Plaintiff filed the November 30, 2018 Motion to Amend. (ECF No. 108.) While that motion was still pending before the Court, Plaintiff filed the February 8, 2019 Motion to Amend. (ECF No. 118.) Through these Motions to Amend, Plaintiff seeks to add four new parties: (1) Infor; (2) Charles Philips (Infor's CEO), in his individual capacity; (3) Johnson, in her individual capacity; and (4) Gwaltney, in his individual capacity. (ECF Nos. 108 & 118.) In addition, Plaintiff seeks to add various claims against DPS and these four parties for conspiracy, invasion of privacy, and conspiracy to violate Title VII. (*See* ECF Nos. 108 & 118.) Judge Crews reviewed the November 30, 2018 Motion to Amend and the February 8, 2019 Motion to Amend, and issued his March 6, 2019 Recommendation. (ECF No. 125.)

On January 14, 2019, DPS moved for summary judgment, arguing that the record clearly establishes that Plaintiff's age and national original did not play a role in DPS's hiring decision. (ECF No. 116.) Judge Crews reviewed DPS's Motion for Summary Judgment and issued his March 28, 2019 Recommendation. (ECF No. 135.)

IV. MOTIONS TO AMEND SECOND AMENDED COMPLAINT

In the March 6, 2019 Recommendation (referred to as the "Recommendation" for the remainder of this Section IV), Judge Crews recommended that Plaintiff's November 30, 2018 Motion to Amend (ECF No. 108) and February 8, 2019 Motion to Amend (ECF No. 118) be denied. (ECF No. 125.) Plaintiff's March 12, 2019 Objection (referred to as the "Objection" for the remainder of this Section IV) disputes various portions of the Recommendation. (ECF No. 129.) After discussing the controlling law, the Court will address Judge Crews's findings and Plaintiff's objections in turn.

A. Standard for Modifying the Scheduling Order After the Deadline

"After a scheduling order deadline, a party seeking leave to amend must demonstrate (1) good cause for seeking modification under Fed. R. Civ. P. 16(b)(4) and (2) satisfaction of the Rule 15(a) standard." *Gorsuch, Ltd., B.C. v. Wells Fargo Nat. Bank Ass'n*, 771 F.3d 1230, 1240 (10th Cir. 2014). If a plaintiff fails to satisfy either factor—(1) good cause or (2) Rule 15(a)—then the plaintiff is not entitled to have the scheduling order modified. *Id.* at 1241.

Rule 16 of the Federal Rules of Civil Procedure provides that a scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). "Good cause" under this rule "is much different than the more lenient standard contained in Rule 15(a). Rule 16(b) does not focus on the bad faith of the [plaintiff], or the prejudice to the opposing party." *Colo. Visionary Acad. v. Medtronic, Inc.*, 194 F.R.D. 684, 687 (D. Colo. 2000). Rather, Rule 16(b) focuses on the "diligence of the party seeking leave to modify the scheduling order to permit the proposed amendment." *Id.*

In practice, this standard requires the plaintiff "to show the scheduling deadlines cannot be met despite [the plaintiff's] diligent efforts." *Gorsuch*, 711 F.3d at 1240

(internal quotation marks omitted). "Rule 16's good cause requirement may be satisfied, for example, if a plaintiff learns new information through discovery or if the underlying law has changed." *Id.* "If the plaintiff knew of the underlying conduct but simply failed to raise [the] claims, however, the claims are barred." *Id.* Moreover, district courts are "afforded wide discretion" in their application of the good cause standard under Rule 16(b). *Bylin v. Billings*, 568 F.3d 1224, 1231 (10th Cir. 2009).

B. The November 30, 2018 Motion to Amend

1. The Recommendation

In the Recommendation, Judge Crews found that Plaintiff had not sustained his burden under Rule 16(b)(4) as he had failed to establish that good cause supports modifying the Scheduling Order. (ECF No. 125 at 6–9.) As a result, Judge Crews recommended that Plaintiff's November 30, 2018 Motion to Amend be denied. (*Id.* at 13.)

At the outset, the Recommendation noted that the November 30, 2018 Motion to Amend—wherein Plaintiff seeks to add Infor and its CEO—was filed 153 days after the June 30, 2018 Deadline for amending pleadings and adding parties. (*Id.* at 6.) Plaintiff argued that he had only learned of Infor's involvement in this case after obtaining certain discovery. (*Id.*; *see also* ECF No. 108 at 2, ¶ 4.) The Recommendation found that Plaintiff's argument was not persuasive because Plaintiff had acquired this information on August 16, 2018—106 days before Plaintiff filed his November 30, 2018 Motion to Amend. (ECF No. 125 at 6.)

The Recommendation noted that after learning of Infor's alleged involvement in the case on August 16, 2018, Plaintiff chose to undertake the following actions concerning the software company:

> Vazirabadi's subpoena to Infor [was served on] August 20, 2018 [ECF No. 94 at 2]; he filed a motion to compel Infor to comply with the subpoena on

> September 24, 2018 [ECF No. 97]; the [c]ourt held a hearing on the motion to compel, and denied it, on November 6, 2018 [ECF No. 106]; and, Vazirabadi filed an objection to this [c]ourt's denial of the motion to compel on November 19, 2018 [ECF No. 107].

(ECF No. 125 at 6–7.) Judge Crews emphasized that "[d]espite all of this activity regarding Infor from August 16 to November 19, 2018, Vazirabadi did not seek to add Infor (or its CEO) as a defendant to this case until November 30, 2018." (*Id.* at 7.)

Judge Crews noted that instead of seeking to amend his complaint "as soon as he became aware of the underlying facts described in his motion[ ], Vazirabadi waited several months to make his request." (*Id.* at 8.) Indeed, Judge Crews found that the "timing, facts, and course of this litigation suggest that Vazirabadi knew the circumstances giving rise to his purported amendments far earlier than when he chose to file the [November 30, 2018 Motion to Amend]." (*Id.*) For these reasons, Judge Crews determined that Plaintiff had not sustained his burden under Rule 16(b)(4) and thus recommended that Plaintiff's November 30, 2018 Motion to Amend be denied. (*Id.* at 9, 13.)

2. Plaintiff's Objections

In the Objection, Plaintiff concedes that he had learned of Infor's existence on August 16, 2018, but nonetheless argues that he exercised "**100% Due Diligence**" in filing his November 30, 2018 Motion to Amend since he sought discovery "11 days" after learning of Infor's alleged involvement in the case. (ECF No. 129 at 3, ¶ 5 (emphasis in original).)

In support, Plaintiff highlights how he promptly served a subpoena on Infor, and followed with a motion to compel disclosure on September 24, 2018. (*Id.*) Plaintiff also discusses how his motion to compel was subsequently denied by Judge Crews, and how his objection to that ruling is still pending before this Court. (*Id.* at 3, ¶¶ 5–6.)

3. Analysis

The Court finds Plaintiff's arguments to be wholly unconvincing. Rule 16(b)'s "good cause" standard "requires the [plaintiff] to show the scheduling deadlines cannot be met despite [the plaintiff's] diligent efforts." *Gorsuch*, 711 F.3d at 1240 (internal quotation marks omitted). Here, Plaintiff does not attempt to satisfy that standard. Instead, he argues that he should be allowed to add Infor and its CEO as parties to this action, even though the deadline for adding parties has long elapsed, because he diligently sought discovery from Infor. This clearly does not make the requisite showing that the scheduling deadline could not have been met despite Plaintiff's diligent efforts.

Indeed, Plaintiff's actions in seeking discovery from Infor supports the finding that Plaintiff has failed to demonstrate good cause since Plaintiff strategically chose to seek non-party discovery from Infor for over three months, but did not attempt to add it as a party. (*See* ECF No. 125 at 7 ("Despite all of this activity regarding Infor from August 16 to November 19, 2018, [Plaintiff] did not seek to add Infor (or its CEO) as a defendant to this case until November 30, 2018").) Plaintiff made the tactical choice to seek discovery from Infor and not add them as a party. It was only when Plaintiff had exhausted his discovery avenues in regard to Infor that he attempted to add it as a party. *See Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 865 (5th Cir. 2003) (where plaintiffs "deliberately chose to delay amending their complaint, ...a busy court need not allow itself to be imposed upon by the presentation of theories seriatim") (internal quotations marks omitted).

The Court recognizes that the good cause requirement may be satisfied "if a plaintiff learns new information through discovery." *Gorsuch*, 711 F.3d at 1240. At first glance, it would appear that Plaintiff's November 30, 2018 Motion to Amend could potentially fall within this category as he learned about Infor through discovery on August 16,

2018, after the June 30, 2018 Deadline for amending pleadings. However, Plaintiff did not file his motion to amend right away or in a timely fashion—nor did Plaintiff exercise diligence in his efforts to amend his complaint. Instead, he waited 106 days before filing his November 30, 2018 Motion to Amend. When a "plaintiff knew of the underlying conduct but simply failed to raise [the] claims, . . . the claims are barred." *Id.* Here, Plaintiff knew of the underlying conduct concerning his claims against Infor and its CEO on August 16, 2018, but he failed to raise those claims until November 30, 2018. As a result, Plaintiff is not entitled to leave in order to bring those claims.

The Court also acknowledges that Plaintiff is proceeding *pro se,* but even then, he is held to the same rules of procedure that govern other litigants. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) ("[t]his court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants"). Moreover, the Court frankly finds the record to be entirely devoid of anything that could lend credence to the notion that good cause exists for allowing Plaintiff to amend his complaint.

In sum, Plaintiff has failed to show that the June 30, 2018 Deadline could not have been met despite his diligent efforts. *See Gorsuch*, 711 F.3d at 1240. Rather, the record clearly shows that Plaintiff knew of the information underlying his November 30, 2018 Motion to Amend over 100 days before he attempted to amend his complaint. As a result, Plaintiff has failed to satisfy Rule 16(b)'s good cause inquiry and therefore he is not entitled to leave to amend.[4]

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[4] In the Recommendation, Judge Crews found that Plaintiff's November 30, 2018 Motion to Amend should also be denied because Plaintiff had failed to satisfy Rule 15(a). (ECF No. 125 at 9–12.) Because the Court finds that no good cause exists for amending the Scheduling Order, it need not consider the Recommendation's findings, nor Plaintiff's objections, concerning whether Plaintiff has satisfied Rule 15(a). *See Gorsuch*, 771 F.3d at 1240–41.

See id. at 1240–41. Accordingly, the Court adopts the Recommendation to the extent it denies Plaintiff's November 30, 2018 Motion to Amend.

C. February 8, 2019 Motion to Amend

1. The Recommendation

In the Recommendation, Judge Crews found that Plaintiff had not sustained his burden under Rule 16(b)(4) as he had failed to demonstrate that good cause supports modifying the Scheduling Order. (ECF No. 125 at 6–9.) As a result, Judge Crews recommended that Plaintiff's February 8, 2019 Motion to Amend be denied. (*Id.* at 13.)

Judge Crews highlighted how Plaintiff's February 8, 2019 Motion to Amend—wherein Plaintiff seeks to add Johnson and Gwaltney—was filed 223 days after the June 30, 2018 Deadline for amending pleadings and adding parties. (*Id.* at 6.) Judge Crews then discussed how Plaintiff seeks to add Johnson and Gwaltney based on their affidavits submitted in support of DPS's Motion for Summary Judgment on January 14, 2019, wherein they averred that Plaintiff performed poorly in his panel interview. (*Id.* at 7.) Judge Crews noted, however, that the "information contained in Johnson and Gwaltney's affidavits is not new" as "it has always been DPS's position that Plaintiff performed poorly during his [panel] interview." (*Id.* at 7 (citing ECF No. 53 at 4–5, ¶ 24).)

Judge Crews noted that Plaintiff's Second Amended Complaint, which was docketed on May 15, 2018, "refers to both Johnson and Gwaltney," discusses how "they were part of a team of interviewers who interviewed Vazirabadi, and that he 'did poorly' during a part of his interview." (ECF No. 125 at 7 (quoting ECF No. 67 at 4, 17 ¶ 18).) Judge Crews further observed that Plaintiff's Second Amended Complaint "even alleges that DPS 'falsified [Vazirabadi's] panel interview performance' by stating that he 'did poorly' during a part of his interview." (ECF No. 125 at 7 (quoting

ECF No. 67 at 4¶ 18).) The Recommendation found that "[d]espite his knowledge of Johnson and Gwaltney since at least May 15, 2018, including their role in his interview and DPS's position that he 'did poorly' during a part of the interview in which Johnson and Gwaltney participated, Vazirabadi waited over eight months before seeking to add these individuals as named defendants to this case." (ECF No. 125 at 7–8.)

Judge Crews noted that instead of seeking to amend his complaint "as soon as he became aware of the underlying facts described in his motion[ ], Vazirabadi waited several months to make his request." (*Id.* at 8.) Indeed, Judge Crews found that the "timing, facts, and course of this litigation suggest that Vazirabadi knew the circumstances giving rise to his purported amendments far earlier than when he chose to file the [February 8, 2019 Motion to Amend]." (*Id.*) For all these reasons, Judge Crews found that Plaintiff failed to show good cause to modify the Scheduling Order and therefore recommended Plaintiff's February 8, 2019 Motion to Amend be denied. (*Id.* at 9, 13.)

2. Plaintiff's Objections

In the Objection, Plaintiff acknowledges that his February 8, 2019 Motion to Amend was filed 223 days after the deadline set forth in the Scheduling Order, but argues that there is good cause to amend the Scheduling Order because Johnson and Gwaltney did not file their affidavits until January 14, 2019. (ECF No. 129 at 4, ¶ 10.) Plaintiff alleges that Johnson and Gwaltney's affidavits are "totally false, factually contradictory, **solidly incriminating** that **domino-like, factually substantiates *all*** of Vazirabadi's claims that indeed: (a) Vazirabadi was highest ranked hiring candidate,(b) defendants [*sic*] did not hire him despite his highest ranking," and so on. (*Id.* at 4–6 (emphasis in original).)

Plaintiff also asserts that Judge Crews erroneously "did not consider Vazirabadi's most important, substantive

and consequential reply (DOC # 126) against [DPS's Response to his February 8, 2019 Motion to Amend]." (ECF No. 129 at 1, ¶ 3 (emphasis in original); *see also id.* at 2, 6 ¶¶ 4, 11.) Lastly, Plaintiff claims that he "presented many good causes [in] previous filed documents, such as DOCS#s 108, 117, 118, 122 and most importantly: DOC# 126." (*Id.* at 6, ¶ 11 (emphasis in original).)

3. Analysis

The Court finds Plaintiff's arguments again to be wholly without merit. While the Court recognizes that the good cause requirement may be satisfied "if a plaintiff learns new information through discovery," *Gorsuch*, 711 F.3d at 1240, it is abundantly clear that Plaintiff's February 8, 2019 Motion to Amend is not based on new information as Plaintiff appears to contend. Rather, Plaintiff seeks to amend his complaint based on information that Plaintiff knew about long before he initiated this action on May 15, 2017—namely, Johnson and Gwaltney's statements that Plaintiff performed poorly in his panel interview.

Indeed, Plaintiff attached as an exhibit to his February 8, 2019 Motion to Amend the Position Statement DPS submitted to the Equal Employment Opportunity Commission on February 26, 2017.[5] (*See* ECF No. 118 at 144–49.) In the Position Statement, DPS discusses much of the information included in Johnson and Gwaltney's affidavits. (*Compare id.*, with ECF No. 116-1 at 1–4, and ECF No.116-5.) In pertinent part, the Position Statement discusses how Plaintiff was interviewed by Johnson and Gwaltney and details how Plaintiff "performed poorly" in his panel interview. (ECF No. 118 at 144–46.) Notably, the section discussing Plaintiff's poor performance in his panel

[5] Plaintiff has included DPS's Position Statement in numerous filings. (*See, e.g.*, ECF No. 26 at 35, 38; ECF No. 108-1 at 66–71; ECF No. 117 at 27–32.) Indeed, excerpts of the Position Statement were even included in his original complaint. (ECF No. 1 at 26, 28.)

interview is quite similar to the corresponding sections in Johnson and Gwaltney's affidavits. (*Compare id.* at 145–46, *with* ECF No. 116-1 at 2–3, ¶ 9, *and* ECF No. 116-5 at 1, ¶ 4.) Thus, it is beyond dispute that Plaintiff's February 8, 2019 Motion to Amend is not based on new information.

Moreover, the Court notes that during Gwaltney's deposition on August 16, 2018, Plaintiff discussed how he was considering bringing claims against Gwaltney in this action. (*See* ECF No. 122 at 15.) Yet, Plaintiff waited another 176 days after that date, even though the deadline for adding parties had elapsed, to seek leave to add Gwaltney to this lawsuit. (ECF No. 118.)

Plaintiff appears to acknowledge to a certain extent that the information contained in Johnson and Gwaltney's affidavits is not new information, arguing instead that "neither [Johnson or Gwaltney's] depositions, nor [DPS's] previous filings[,] ever made such ***direct*** and ***brazen*** false statements against Vazirabadi's 9/10/2015 panel interview performance." (*Id.* at 4, n.1 (emphasis in original).) The Court finds this argument to be unpersuasive. It is immaterial whether the description of Plaintiff's performance at the panel interview was more direct in the affidavits than in DPS's previous filings. What matters is that Plaintiff knew of the underlying conduct surrounding his belated claims against Johnson and Gwaltney, and simply failed to raise them until it was too late. *See Gorsuch*, 711 F.3d at 1240.

In regard to Plaintiff's allegation that Johnson and Gwaltney's affidavits substantiate all of his claims, the Court finds such an assertion to be completely without support. Rather, after reviewing the affidavits and the relevant pleadings, the Court finds the opposite to be true. Indeed, Plaintiff himself previously noted in his Response to DPS's Motion for Summary Judgment the "devastating effect" that these affidavits have on his claims. (ECF No. 117 at 4, ¶ 6.)

As to Plaintiff's contention that Judge Crews erroneously failed to consider his Reply to DPS's Response to his February 8, 2019 Motion to Amend, the Court finds such an argument to be unpersuasive. (*See* ECF No. 129 at 1, ¶ 3; *see also id.* at 2, 6 ¶¶ 4, 11.) At the March 15, 2019 status conference, Judge Crews explained to Plaintiff that he did not have Plaintiff's Reply when the Recommendation was issued. (*See* ECF No. 133 at 12–13.) Judge Crews also explained that he did not need to wait for the Reply before issuing his order. (*Id.*) This explanation was reiterated in Judge Crews's Recommendation. (*See* ECF No. 125 at 1, n.1 (citing D.C.Colo.LCivR. 7.1 (nothing "precludes a judicial officer from ruling on a motion at any time after it is filed")).)

Nonetheless, the Court has decided to consider Plaintiff's Reply to determine whether it would have any bearing on the disposition of his February 8, 2019 Motion to Amend. In the Reply, Plaintiff discusses how he believes the Court is awaiting the outcome of his appeal in a very similar case, *Vazirabadi v. Denver Health & Hosp. Auth.*, No. 17-CV-01737-RBJ (the "*Denver Health lawsuit*"). (ECF No. 126 at 1, ¶ 2; *see also id.* at 2, 4.) In the *Denver Health* lawsuit, Plaintiff brought claims pursuant to Title VII and the ADEA against Denver Health and Hospital Authority and others for age and national origin discrimination after the hospital did not hire him. (*Denver Health, see* ECF No. 112.)

On October 11, 2018, United States District Judge R. Brooke Jackson denied Plaintiff's motion for leave to file an amended complaint and granted the defendants' motion for summary judgment. (*Id.*) The next day, Plaintiff appealed Judge Jackson's order, and that appeal is currently before the Tenth Circuit. (*Denver Health*, ECF No. 115.) Plaintiff appears to argue that since Johnson and Gwaltney's affidavits were filed after he appealed, the Court should allow him to amend his complaint. (ECF No. 126 at 2.)

The rest of the Reply addresses Plaintiff's perceived inconsistencies regarding when the panelist used their interview notes, when these notes were discarded, and whether a candidate ranked with the highest numerical number is actually the top-ranked candidate. (*Id.* at 2–4.) The Court finds the arguments contained in Plaintiff's Reply to be meritless and concludes that they have no bearing on the disposition of Plaintiff's February 8, 2019 Motion to Amend. As for the other documents that Plaintiff cites to demonstrate good cause—namely, ECF Nos. 108, 117, 118, & 122—the Court has reviewed these filings de novo and has likewise found that they do not demonstrate the requisite showing of good cause needed for this Court to modify the Scheduling Order pursuant to Rule 16(b).

In sum, Plaintiff has failed to show that the June 30, 2018 Deadline could not have been met despite his diligent efforts. *See Gorsuch*, 711 F.3d at 1240. Rather, it is evident from the record that Plaintiff knew of the information underlying his February 8, 2019 Motion to Amend before he initiated this action on May 15, 2017. (*See* ECF No. 118 at 144–49.) As a result, Plaintiff has failed to satisfy Rule 16(b)'s good cause inquiry and therefore Plaintiff is not entitled to leave to amend.[6] *See Gorsuch*, 711 F.3d at 1240–41. Accordingly, the Court adopts the Recommendation to the extent is denies Plaintiff's February 8, 2019 Motion to Amend.

D. Rule 11 Sanctions

In its Response to Plaintiff's February 8, 2019 Motion to Amend, DPS requested that the Court impose Rule 11

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[6] In the Recommendation, Judge Crews found that Plaintiff's February 8, 2019 Motion to Amend should also be denied because Plaintiff had failed to satisfy Rule 15(a). (ECF No. 125 at 9–12.) Because the Court has found that no good cause exists for amending the Scheduling Order, it need not consider the Recommendation's findings, nor Plaintiff's objections, concerning whether Plaintiff has satisfied Rule 15(a). *See Gorsuch*, 771 F.3d at 1240–41.

sanctions against Plaintiff and grant DPS its costs, including reasonable attorney fees, incurred in responding to the motion. (ECF No. 124 at 10–11.) In support, DPS noted the following: "Vazirabadi already has one motion to amend the second amended complaint before this Court, and summary judgment is fully briefed. Yet, Vazirabadi has filed another motion nearly identical to the one pending before this Court that largely responds to [DPS's Motion for Summary Judgment]." (*Id.* at 11.) DPS also discussed how Plaintiff "clearly understands" that his Motions to Amend were untimely, and that the information included in his February 8, 2019 Motion to Amend was "not new at all." (*Id.*)

Judge Crews entertained DPS's request and determined that, although Plaintiff's Motions to Amend were "without merit," he would not impose Rule 11 sanctions against Plaintiff. (ECF No. 125 at 12.) Judge Crews, however, informed Plaintiff that he could be sanctioned in the future if he continues to file motions in this case that lack proper legal support. (*Id.*)

The Court notes that Judge Crews's decision regarding Rule 11 sanctions was non-dispositive and therefore it most likely raises a Rule 72(a) issue. However, neither party has objected to Judge Crews's decision to not impose sanctions against Plaintiff. (*See* ECF Nos. 129 & 134.) Thus, even if Judge Crews's decision regarding sanctions raises a Rule 72(b) issue, the Court would review Judge Crews's Rule 11 analysis for clear error. *See 2121 East 30th St.*, 73 F.3d at 1060 ("[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court") (emphasis added).

The Court finds that Judge Crews's analysis concerning Rule 11 sanctions was thorough and sound, and that there is no clear error on the face of the record. *See Bertolo v. Benezee*, 2013 WL 1189508, at *1 (D. Colo. Mar. 22, 2013) ("In the absence of a timely and specific objection,

'the district court may review a magistrate . . .[judge's] report under any standard it deems appropriate'") (quoting *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991), *aff'd*, 601 F. App'x 636 (10th Cir. 2015).

Moreover, the Court would not grant DPS's request in the first place because a request for Rule 11 sanctions "must be made separately from any other motion"—which DPS has not done. Fed. R. Civ. P. 11(c)(2). Rule 11 also requires proof that DPS first gave Plaintiff warning of its intent to seek such sanctions and twenty-one days to withdraw the offending filing. *See* Fed. R. Civ. P. 11(c)(2). DPS has not offered such proof. (*See* ECF No. 124 at 10–12.) Thus, even if the Court were to find that Judge Crews's decision regarding sanctions implicates Rule 72(b), the Court would still adopt the Recommendation and not impose Rule 11 sanctions upon Plaintiff.

V. MOTION FOR SUMMARY JUDGMENT

In the March 28, 2019 Recommendation (referred to as the "Recommendation" for the remainder of this Section V), Judge Crews recommended that DPS's Motion for Summary Judgment (ECF No. 116) be granted and Plaintiff's Second Amended Complaint (ECF No. 67) be dismissed with prejudice. (ECF No. 135.) In his April 11, 2019 Objection (referred to as the "Objection" for the remainder of this Section V), Plaintiff disputes various portions of the Recommendation. (ECF No. 136.) After discussing the controlling law, this Court will address Judge Crews's findings and Plaintiff's objections in turn.

A. National Origin and Age Discrimination

1. Legal Standard

Plaintiff claims he was not hired because of his national origin and age, and brings claims under Title VII and the ADEA. (ECF No. 67 at 10–12.) Since Plaintiff offers no direct evidence of impermissible discrimination, the burden-shifting framework of *McDonnell Douglas Corp. v.*

Green, 411 U.S. 792 (1973), governs his claims.

The *McDonnell Douglas* framework involves a three-step analysis. *See Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1216 (10th Cir. 2002). "First, the plaintiff must prove a prima facie case of discrimination. If the plaintiff satisfies the prima facie requirements, the defendant bears the burden of producing a legitimate, nondiscriminatory reason for its action." *Id.* "If the defendant makes this showing, the plaintiff must then show that the defendant's justification is pretextual." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1226 (10th Cir. 2000).

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) (quoting *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1065 (10th Cir. 2009)). Plaintiff "can meet this standard by producing evidence of 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [DPS's] proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that [DPS] did not act for the asserted non-discriminatory reasons." *Reinhardt*, 595 F.3d at 1134 (quoting *Pinkerton*, 563 F.3d at 1065); *see* also *Johnson v. Weld Cty., Colo.*, 594 F.3d 1202, 1211 (10th Cir. 2010). If Plaintiff "advances evidence upon which a factfinder could conclude that [DPS's] allegedly nondiscriminatory reasons for the employment decisions are pretextual, the court should deny summary judgment." *Reinhardt*, 595 F.3d at 1134.

2. *Prima Facie* Case of Discrimination

Judge Crews determined that Plaintiff failed to prove even a prima facie case of age or national origin discrimination. (*See* ECF No. 135 at 7–11.) Plaintiff objects to this finding. (*See* ECF No. 136 at 3–4.) However, because

the Court concludes that Plaintiff has not made a showing of pretext, the Court need not resolve Plaintiff's objections regarding his *prima facie* case.

3. DPS's Legitimate, Non-Discriminatory Reasons for Not Hiring Plaintiff

In the Recommendation, Judge Crews determined that DPS had satisfied its burden in providing legitimate, non-discriminatory reasons for not hiring Plaintiff. (ECF No. 135 at 11.) In particular, the Recommendation noted that DPS claims it did not hire Plaintiff because: "(1) he demonstrated in his panel interview that he did not possess the requisite facilitation skills for the PIE position; (2) he had gaps in his professional employment history; [and] (3) [DPS] determined that the candidates who were selected were more qualified." (*Id.*)

It is unclear whether Plaintiff objects to Judge Crews's finding that DPS had satisfied its burden in providing legitimate, non-discriminatory reasons for not hiring Plaintiff. (*See* ECF No. 136.) The Court notes, however, that at this stage, DPS need only "explain its actions against the plaintiff in terms that are not facially prohibited by Title VII." *Jones v. Denver Post Corp.*, 203 F.3d 748, 753 (10th Cir. 2000) (internal citations omitted). Having proffered these justifications, the Court finds that DPS has met its burden. As a result, the burden returns to Plaintiff to demonstrate that DPS's justifications are pretextual.

4. Pretext

In the Recommendation, Judge Crews concluded that even if Plaintiff had satisfied the first step of the *McDonnell Douglas* framework by proving a *prima facie* case of discrimination, Plaintiff's claims would still fail under the framework's third step as he had failed to show that DPS's justifications for not hiring him were pretextual. (ECF No. 135 at 11.) In particular, Judge Crews found that Plaintiff "has offered no competent evidence suggesting that [DPS's] reasons [for not hiring Plaintiff] were pretextual." (*Id.*)

Judge Crews noted that "[w]hile Vazirabadi points to his 20 years of relevant experience and his written team facilitation narrative description of the group discussion he facilitated in his panel interview, the record is devoid of any 'facts showing an overwhelming disparity in qualifications' in his favor." (*Id.* at 12 (internal citation omitted) (quoting Johnson, 594 F.3d at 1211).)

Judge Crews then addressed Plaintiff's argument concerning the destruction of the interview notes taken by the panel members. Judge Crews found that "the fact that Johnson collected and discarded all the panelists' interview notes sometime after the interviews, and before offering the positions to the top-ranked candidates, [does not] support a finding of pretext." (ECF No. 135 at 13.) Judge Crews discussed how "Johnson collected and discarded the panelists' notes as they pertained to all five candidates . . . , [but] did not discard interview notes only as they pertained to Vazirabadi." (*Id.*)

In addition, Judge Crews noted how Plaintiff's argument concerning the destruction of the interview notes "is essentially an assertion that DPS is guilty of evidence spoliation." (*Id.*) 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).)

Judge Crews determined, however, that "DPS destroyed the interview notes at a time *before* its preservation duty was triggered." (ECF No. 135 at 14 (emphasis in original).) Specifically, Judge Crews found that the "evidence in the record indicates that these notes were destroyed sometime between September 10, 2015 . . . and September 24, 2015," but the "earliest date . . . DPS's duty to preserve could have been triggered" was October 20, 2015.

(*Id.* at 14–15.) Therefore, Judge Crews determined that "DPS's destruction of the interview notes does not raise any triable issue of material fact affecting summary judgment." (*Id.* at 15.) For all these reasons, Judge Crews concluded that Plaintiff failed to show that DPS's justifications for not hiring him were pretextual. (*Id.* at 11–15.)

Pursuant to a liberal reading of Plaintiff's Objection to Judge Crews's decision on his claim of national origin discrimination, the Court understands Plaintiff to be arguing that DPS's reasons for not hiring him were pretextual based on the following grounds: (1) DPS discarded the panel interview notes and thus an adverse inference should be applied against it to remedy the spoliation; (2) DPS presented contradictory testimony; (3) DPS's bilingual question caused a disparate impact; and (4) Plaintiff was more qualified than the candidates who were ultimately hired for the two PIE positions. (*See* ECF No. 136.) The Court will address each argument in turn.

a. *Adverse Inference Sanction*

"Even in cases where [schools] destroy evidence they are required to retain under 29 C.F.R. § 1602.[40], plaintiffs must be diligent in the defense of their own interests, and should seek sanctions under Federal Rule of Civil Procedure 37 to remedy any prejudice caused by spoliation." *Turner*, 563 F.3d at 1149 (internal quotations marks omitted). "When a plaintiff fails to seek sanctions under Rule 37 and thus forecloses access to the substantial weaponry in the district court's arsenal, the plaintiff's only remaining option is to seek sanctions under a spoliation of evidence theory." *Id.* (internal quotation marks omitted). Thus, parties proceed at their own peril in choosing not to seek lesser discovery-related sanctions at an earlier phase of litigation, then later requesting an adverse inference, as Plaintiff does here. *See Mueller v. Swift*, 2017 WL 2362137, at *5 & n.4 (D. Colo. May 31, 2017).

"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*, 563 F.3d at 1149 (quoting *Grant*, 505 F.3d at 1032). "But if the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith." *Id.* "Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case." *Id.* (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997)).

In the Objection, Plaintiff argues that Judge Crews erred in finding that a spoliation sanction should not be imposed against DPS because "regardless of any early, late or no notification to DPS" that litigation was imminent, "29 C.F.R. § 1602.40 and DPS GBA policy" required DPS to preserve the interview notes for two years. (ECF No. 136 at 4.) Plaintiff also argues that DPS should have known about its duty to preserve the interview notes because it is a "sophisticated litigator." (*Id.* at 5–6.) In addition, Plaintiff argues that an adverse inference sanction is proper because he was prejudiced by destruction of the interview notes, which DPS destroyed "intentionally and in bad faith." (*Id.* at 6–8.)

It is clear Plaintiff has misinterpreted the first prong that must be satisfied in order to obtain spoliation sanctions. Plaintiff does not dispute Judge Crews's findings that the interview notes were destroyed before September 24, 2015, and that the earliest date DPS's duty to preserve could have been triggered was October 20, 2015. (*See id.* at 2, 4–8, 17.) Instead, he argues that it matters not whether DPS knew, or should have known, that litigation was imminent because DPS violated a federal regulation and "DPS GBA policy." This is clearly not the standard. *See Turner*, 563 F.3d at 1149. 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.

Although more is surely not needed in this regard, the Court notes that the record does not support the finding that Plaintiff was prejudiced by the destruction of the interview notes. According to Plaintiff, the interview notes were "very extensive hiring documentation that proves Vazirabadi's excellent panel interview, as the highest ranked candidate for hiring." (ECF No. 136 at 6.) But there is simply nothing in the record to support this statement, other than Plaintiff's own subjective opinion about how he performed. Indeed, the record amply supports the finding that Plaintiff preformed poorly in his panel interview.

Moreover, the record is likewise devoid of anything that could support the notion that DPS or the panel interviewers acted in bad faith when they discarded the interview notes. 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. As a result of the foregoing, the Court denies Plaintiff's request for spoliation sanctions, including an adverse inference.

b. *Sham Affidavits*

In order to show that DPS's reasons for not hiring him were pretextual, Plaintiff argues that Johnson and Gwaltney produced "sham affidavits." (ECF No. 136 at 8–11.) In particular, Plaintiff argues that through their depositions and affidavits, "Johnson and Gwaltney present three different versions of hiring records destruction." (*Id.* at 2, 9, 17.) Plaintiff asserts that "by presenting Johnson and Gwaltney's contradictory affidavits, [DPS] is attempting to create a sham fact issue—a sham fact that Vazirabadi did poorly in [his] panel interview." (*Id.* at 9 (emphasis omitted).) Plaintiff claims that Judge Crews "erred in neither acknowledging nor considering Vazirabadi's arguments in support of Johnson and Gwaltney's sham affidavits." (*Id.* at 10.)

Plaintiff's allegation that Johnson and Gwaltney produced "sham affidavits" is based on the following sequence of events. (*See* ECF No. 122 at 7–8.) On September 10, 2015, Plaintiff's panel interview took place. (ECF No. 116-1 at 2, ¶ 9.) After the last panel interview on September 21, 2015, the panelists ranked the candidates. (ECF No. 122 at 7 (citing ECF No. 116-1 at 3, ¶ 11; ECF No. 116-5 at 2, ¶ 6).) In his deposition, Gwaltney acknowledged that he made notes on his two-page interview sheet during Plaintiff's panel interview. (ECF No. 122 at 14; *see also id.* at 12–13.)

At the bottom of the interview sheet's second page, there is an "Overall Ranking" index from "1" to "9"—with "1" being categorized as "Fail" and "9" being categorized as "Pass." (*Id.* at 13.) When asked whether he used the ranking index during the September 21 discussions, Gwaltney replied: "I believe I used that." (*Id.* at 15.) According to Plaintiff, Gwaltney thus confirmed that he used the interview sheet he took notes on throughout Plaintiff's September 10 panel interview during discussions that took place on September 21. (*Id.* at 7.)

Plaintiff claims that later in his deposition, Gwaltney "totally recants" his statement that he used the interview notes pertaining to Plaintiff during the September 21 discussions. (*Id.*) During the deposition, Plaintiff inquired as to when Gwaltney discarded the interview notes. (*Id.* at 7, 11.) Gwaltney responded that he "[does not] remember specifically" when he shredded the notes, but that it was "[s]hortly after the interview." (*Id.*)

Based on these sequence of events, Plaintiff claims that "Gwaltney is making very contradictory statements, where on one hand he claims 'shortly after' Vazirabadi panel interview on September 10, 2015, he 'shredded' Vazirabadi's interview notes. On the other hand, he also admits using Vazirabadi's two-page interview sheet on that Sep. 21, 2015 meeting—***11 days after*** Vazirabadi's interview." (*Id.* at 8

(internal citation omitted) (emphasis in original).)

Next, Plaintiff points to a sentence contained in DPS's Reply in Support of its Motion for Summary Judgment, wherein DPS stated: "[Johnson] collected and discarded all the panelists' notes as soon as the interviews were complete because once the team had ranked the candidates, she had all the data she needed to make a hiring decision."[7] (*Id.* (quoting ECF No. 121 at 3).)

Based on the forgoing events, Plaintiff discusses how "Johnson and Gwaltney present three different versions of hiring records destruction":

> [DPS's statement that Johnson] ***collected*** and ***discarded*** ***all*** the ***panelists' notes*** **as soon as the interviews were complete..." 100%** contradicts with ***both versions*** of Mr. Gwaltney's deposition narratives. In one version, Mr. Gwaltney "shredded" Vazirabadi's interview notes shortly after Vazirabadi's interview on **September 10, 2015**. Mr. Gwaltney did not give his notes to Ms. Johnson for its destruction. In another version, Mr. Gwaltney, again, without giving Vazirabadi's interview notes to Ms. Johnson to be "discarded", Mr. Gwaltney stated he "***used***" it on September 21, 2015. By simple fact checking, [DPS] should have noticed Ms. Johnson and Mr. Gwaltney statement are contradictory with no factual basis for Court's filing.

(ECF No. 122 at 8 (emphasis in original) (internal citations omitted).) Plaintiff alleges that by presenting Johnson and Gwaltney's contradictory, "sham affidavits," DPS is "attempting to create a sham fact...that Vazirabadi did poorly in [his] panel interview." (ECF No. 136 at 9 (emphasis omitted).)

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[7] In support of this statement, DPS cites Johnson's deposition testimony. (ECF No. 121 at 3 (citing ECF No. 121-1 at 17).) Although the testimony DPS references discusses how Johnson had all of the data she needed to make a hiring decision, it does not address who destroyed the interview notes or when. (ECF No. 121-1 at 17.)

"Sham affidavits, though 'unusual,' arise when a witness submits an affidavit that contradicts the witness's prior testimony." *Knitter v. Corvias Military Living, LLC*, 758 F.3d 1214, 1218 n.3 (10th Cir. 2014) (quoting *Law Co. v. Mohawk Const. & Supply Co.*, 577 F.3d 1164, 1169 (10th Cir. 2009)). Although "[a]n affidavit may not be disregarded solely because it conflicts with the affiant's prior sworn statements," the Court may nonetheless disregard a conflicting affidavit if it "constitutes an attempt to create a sham fact issue." *Mohawk*, 577 F.3d at 1169; *see also Knitter*, 758 F.3d at 1218 n.3. In determining whether

> an affidavit creates a sham fact issue, [courts] consider whether: "(1) the affiant was cross-examined during his earlier testimony; (2) the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence; and (3) the earlier testimony reflects confusion which the affidavit attempts to explain."

Mohawk, 577 F.3d at 1169 (quoting *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 973 (10th Cir. 2001)).

This is clearly not an instance of a witness submitting an affidavit that contradicts the witness's prior testimony. *See Knitter*, 758 F.3d at 1218 n.3. Notably, Plaintiff does not once point to where Johnson and Gwaltney's affidavits conflict with their prior sworn statements. (*See* ECF No. 136 at 8–11.) Instead, the alleged "inconsistent statements" Plaintiff points to solely occurred during earlier deposition testimony and a sentence in a Reply filing. (*See id.*)

Moreover, the affidavits do not attempt to explain any confusion that could potentially arise from these alleged inconsistent statements. (*See* ECF No. 116-1 at 1–4; ECF No. 116-5.) Indeed, the affidavits do not once mention the interview notes or when or how they were discarded. (*See id.*) Interestingly, in Plaintiff's analysis of the third consideration of the sham affidavit doctrine—whether the earlier testimony reflects confusion which the affidavit

attempts to explain—Plaintiff states "[Johnson and Gwaltney's] earlier testimony does not reflect[ ] confusion which the affidavit[s] attempt[ ] to explain." (ECF No. 136 at 9 (alteration incorporated) (emphasis added).) In sum, this is clearly not an issue implicating the sham affidavit doctrine.

To the extent Plaintiff is discussing these alleged inconsistent statements to show that DPS's reasons for not hiring him were pretextual, the Court finds Plaintiff's argument to be largely without merit. 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 . . . by producing evidence of such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [DPS's] proffered legitimate reasons." *Reinhardt*, 595 F.3d at 1134 (internal quotation marks omitted). Plaintiff clearly has not made such a demonstration. Notably, Plaintiff does not explain how the alleged inconsistent statements contradict DPS's proffered reasons for not hiring him. Even if the Court generously construes Plaintiff's argument and finds that there is an inconsistency as to whether Gwaltney or Johnson destroyed the interview notes, and whether that event took place before or after the September 21 discussion, the Court finds that this would not amount to a genuine issue of material fact as to pretext.

c. *Bilingual Questioning*

In his Objection, Plaintiff claims that Judge Crews entirely ignored his disparate impact claim. (ECF No. 136 at 6.) However, Plaintiff did not raise his disparate impact claim in his Response to the Motion for Summary Judgment or in his Surreply. (*See* ECF Nos. 117 & 122.) Nonetheless, Plaintiff 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. (ECF No. 136 at 11.) Thus, 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).

Nevertheless, the Court will briefly address the arguments Plaintiff raised in the Objection regarding his disparate impact claim. (*See* ECF No. 136 at 11–12.) "To survive summary judgment on an individual claim for disparate impact requires three steps":

> 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) (internal citations and quotation marks omitted). It is abundantly clear that Plaintiff has failed to establish a *prima facie* case that DPS's bilingual questioning causes a disparate impact on a protected group.

In the Objection, Plaintiff 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. (*See* ECF No. 136 at 11–12.) Plaintiff cites statistics about the number of DPS applicants who identified themselves as being bilingual in either "Amharic," "Arabic," "Somali," or an unlisted language. (*Id.* at 12.) That is the extent of Plaintiff's support for his disparate impact

claim. (*See id.* at 11–12.) 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. (*See id.*) 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. *See id.*

To 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. 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*, 595 F.3d at 1134. Plaintiff 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.*

d. *Plaintiff's Qualifications*

In his Objection, Plaintiff argues that Judge Crews mistakenly determined that DPS's justifications were not pretextual because the record was devoid of any facts showing that Plaintiff was more qualified than the applicants DPS ultimately hired. (ECF No. 136 at 16–17.) In support, Plaintiff discusses how: (1) Johnson's affidavit confirms that Plaintiff worked for over 20 years in the engineering profession, with experience in both process improvement and project management; (2) his cover letter reviewed in detail how his past projects correlated with the "essential functions" of a PIE, which Johnson commented on approvingly during his phone interview; (3) he performed well in response to the Facilitation Question, as displayed in his "Team Facilitation Narrative"; (4) Judge Crews failed to examine his cover letter and resume; (5) in comparing his

cover letter and resume with those of the hired candidates, "his qualification, unequivocally, in content, nature of the projects and accomplishments, is well above both hired candidates"; and (6) he has more applicable experience for the PIE position than the hired candidates. (*Id.* (emphasis omitted).)

A court "will draw an inference of pretext where the facts assure [the court] that the plaintiff is better qualified than the other candidates for the position." *Santana v. City & Cnty. of Denver*, 488 F.3d 860, 865 (10th Cir. 2007) (internal quotation marks omitted). The Tenth Circuit has "cautioned that pretext cannot be shown simply by identifying minor differences between plaintiff's qualifications and those of successful applicants, but only by demonstrating an overwhelming merit disparity." *Id.* (internal quotation marks omitted) (emphasis added). Moreover, it is not the Court's "role to act as a super personnel department that second guesses employers' business judgments." *Id.* (internal quotation marks omitted).

Under these standards, the differences between Plaintiff's and the hired candidates qualifications does not come close to suggesting pretext. Nguyen has a Bachelor of Science in Materials Science and Engineering from Cornell University's College of Engineering and had over six years of relevant engineering experience at CoorsTek and Surmet Corporation, with no gaps in his professional employment. (ECF No. 116-1 at 17–18.) Schroeder has a Bachelor in Science in Industrial Engineering from the University of Michigan's College of Engineering and had over five years of relevant engineering experience at Intel Corporation with no gaps in her professional employment. (*Id.* at 19–20.)

Plaintiff has a Bachelor of Science in Industrial Engineering from the University of Wisconsin–Stout and over 20 years of engineering experience. (*Id.* at 15–16.) While it is undisputed that Plaintiff had many years of relevant experience, his sole occupation for the two years

before he applied for the PIE position had been as an UberX driver. (*Id.* at 2, 15 ¶ 7.) Moreover, although Plaintiff worked as a project engineer for Cablenet Wiring Products from July 2005 through September 2013 and held various engineering positions at eight different companies from 1987 until 2001, he had a gap in professional employment from April 2001 until May 2005 when he served as an unpaid caregiver. (*Id.* at 15–16.) In addition, when comparing Plaintiff's cover letter and resume with that of Schroeder and Nguyen, the Court simply cannot conclude that there is an "overwhelming merit disparity." *Santana*, 488 F.3d at 865. (*Compare* ECF No. 116-1 at 13–16, *with id.* at 17–20.)

The record also provides that an important qualification for the position was the applicant's facilitation skills. (ECF No. 116-1 at 2, ¶¶ 4, 8; *see also id.* at 11–12.) Plaintiff has made no argument that he was overwhelmingly more qualified than Schroeder or Nguyen in this regard, nor does the record support such a proposition. (*See, e.g.*, ECF No. 116 at 2–3, ¶ 9; ECF No. 116-5 at 1, ¶ 4; ECF No. 116-6 at 8–9.) Indeed, the record firmly supports the finding that Plaintiff demonstrated inferior facilitation skills when compared to Schroeder and Nguyen. (*See, e.g.*, ECF No. 116 at 2–3, ¶¶ 9–12; ECF No. 116-5 at 1–2, ¶¶ 4–6.) Notably, this finding is only countered by Plaintiff's own subjective opinion that he exemplified stronger facilitation skills than DPS contends. (*See* ECF No. 117 at 25–26.)

In sum, when considering the qualifications of all three applicants, the Court finds that Schroeder and Nguyen's qualifications were arguably superior, and certainly not overwhelmingly inferior, to Plaintiff's. As a result, Plaintiff is not entitled to an inference of pretext. *See Santana*, 488 F.3d at 865.

5. Failure to Pursue Age Discrimination Claim in Objection

The Court notes that Plaintiff does not appear to dispute the Recommendation's findings in regard to his age discrimination claim. (*See* ECF No. 136.) Plaintiff's Objection does not reference his age discrimination claim, the ADEA, or Judge Crews's findings in regard to the claim. (*See id.*) Notably, in his conclusion, Plaintiff discusses how he "was refused hiring because of his Iranian national origin," but makes no reference to his age or DPS's alleged age discrimination. (*Id.* at 19; *see also id.* at 15,¶ 7.10.) As a result, the Court reviews Judge Crews's analysis of Plaintiff's ADEA claim for clear error, and finds none. *See Bertolo*, 2013 WL 1189508, at *1 ("In the absence of a timely and specific objection, 'the district court may review a magistrate . . .[judge's] report under any standard it deems appropriate'") (quoting *Summers*, 927 F.2d at 1167). Accordingly, the Court adopts the Recommendation to the extent it grants summary judgment in DPS's favor on Plaintiff's ADEA claim.[8]

6. Summary of Section V

DPS produced legitimate, non-discriminatory reasons for its decision not to hire Plaintiff. Because Plaintiff failed to put forth sufficient evidence to create a genuine issue of material fact on the issue of pretext, the Court adopts the Recommendation to the extent it grants DPS's Motion for Summary Judgment. As a result, the Court will direct the Clerk of the Court to enter judgment in favor of DPS on all claims and terminate this case. Therefore, Plaintiff's Objection to Denial of Motion to Compel (ECF No. 107) is overruled as moot and Plaintiff's Motion for Leave to File Surreply (ECF No. 113) is denied as moot.

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[8] In any event, the foregoing analysis makes clear that Plaintiff's ADEA claim would likewise not survive summary judgment as he has failed to show that DPS's justifications for not hiring him were pretextual.

B. The Doe Defendants

In the caption of his Second Amended Complaint, Plaintiff listed as putative Defendants in this action DPS, the Doe Corporations, the Doe Entities, and the Doe Individuals. (ECF No. 67 at 1.) In his Recommendation, Judge Crews recommended that the Doe Corporations and Doe Entities be dismissed without prejudice. (ECF No. 135 at 15–16.)

In discussing why the "various John and Jane Does" should be dismissed from this action, Judge Crews discussed how there is "no provision in the Federal Rules of Civil Procedure for naming fictitious or unknown parties in a lawsuit." (*Id.* at 15–16, n. 8–9 (citing *Watson v. Unipress, Inc.*, 733 F.2d 1386, 1388 (10th Cir. 1984); *Coe v. U.S. Dist. Court for Dist. of Colo.*, 676 F.2d 411, 415 (10th Cir. 1982)).) Judge Crews recognized that Rule 10(a) of the Federal Rules of Civil Procedure specifies that the "title of a complaint must name all the parties." (ECF No. 135 at 15–16, n. 8.) Judge Crews then concluded that "[b]ecause unnamed parties are not permitted by the Federal Rules, and because Vazirabadi has not identified or named these unknown defendants, these various John and Jane Does should be dismissed from the action." (*Id.*)

In his Objection, Plaintiff does not dispute Judge Crews's analysis regarding the Doe defendants, nor his dismissal of the Doe Corporations or the Doe Entities. (*See* ECF No. 136.) As a result, the Court reviews Judge Crews's analysis of the Doe defendants for clear error and finds none. *See* 2121 East 30th St., 73 F.3d at 1060 ("[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court") (emphasis added); *see also Bertolo*, 2013 WL 1189508, at *1 ("In the absence of a timely and specific objection, 'the district court may review a magistrate . . . [judge's] report under any standard it deems appropriate'") (quoting

Summers, 927 F.2d at 1167).

While Judge Crews ultimately recommended that the Court dismiss the Doe Corporations and the Doe Entities, but not the Doe Individuals, it is clear from his analysis that he intended to likewise recommend the dismissal of the Doe Individuals. (*See* ECF No. 135 at 15–16, & n.8 ("these various John and Jane Does should be dismissed from the action").) This finding is supported by the fact that Judge Crews did not recommend that the Doe Individuals remain as party defendants in this action. (*See id.* at 15–16.) Accordingly, the Court adopts the Recommendation as modified and dismisses without prejudice Plaintiff's claims against the Doe Corporations, the Doe Entities, and the Doe Individuals.

VII. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. The March 6, 2019 Recommendation (ECF No. 125) is ADOPTED in its entirety;
2. Plaintiff's March 12, 2019 Objection (ECF No. 129) is OVERRULED;
3. Plaintiff's November 30, 2018 Motion to Amend (ECF No. 108) is DENIED;
4. Plaintiff's February 8, 2019 Motion to Amend (ECF No. 118) is DENIED;
5. The March 28, 2019 Recommendation (ECF No. 135) is ADOPTED AS MODIFIED;
6. Plaintiff's April 11, 2019 Objection (ECF No. 136) is OVERRULED;
7. Defendant DPS's Motion for Summary Judgment (ECF No. 116) is GRANTED as to all claims;
8. Plaintiff's claims against Defendants Doe Individuals are DISMISSED WITHOUT PREJUDICE;

9. Plaintiff's claims against Defendants Doe Corporations are DISMISSED WITHOUT PREJUDICE;

10. Plaintiff's claims against Defendants Doe Entities are DISMISSED WITHOUT PREJUDICE;

11. Plaintiff's Objection to Denial of Motion to Compel (ECF No. 107) is OVERRULED AS MOOT;

12. Plaintiff's Motion for Leave to File Surreply (ECF No. 113) is DENIED AS MOOT;

13. The Clerk of the Court shall enter judgment in favor of Defendant DPS and against Plaintiff, and shall terminate this case; and

14. Each party shall bear his or its own costs.

Dated this 25th day of June, 2019.

BY THE COURT:

s/
William J. Martinez
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Appellate Case: No. 19-1245
(D.C. No. 1:17-CV-01194-WJM-SKC)(D. Colo.)

Filed: August 24, 2020

ALIREZA VAZIRABADI,

Plaintiff - Appellant,

v.

DENVER PUBLIC SCHOOLS; JOHN AND JANE DOES 1 THROUGH 10; JOHN AND JANE DOE CORPORATIONS 1 THROUGH 10; OTHER JOHN AND JANE DOE ENTITIES 1 THROUGH 10, all whose true names are unknown,

Defendants - Appellees.

ORDER

Before TYMKOVICH, Chief Judge, EBEL, and HARTZ, Circuit Judges.

Appellant's petition for rehearing is denied. The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

s/
CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-CV-01194-WJM-MEH
Filed: October 10, 2017

ALIREZA VAZIRABADI,

Plaintiff,

v.

DENVER PUBLIC SCHOOLS; JOHN AND JANE DOES 1 THROUGH 10; JOHN AND JANE DOE CORPORATIONS 1 THROUGH 10; OTHER JOHN AND JANE DOE ENTITIES 1 THROUGH 10, all whose true names are unknown,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Plaintiff Alireza Vazirabadi ("Vazirabadi"), proceeding *pro se*, initiated this employment discrimination action against Denver Public Schools ("DPS") and the individual Defendants, Tom Boasberg ("Boasberg") and Terri Sahli ("Sahli") (collectively, "DPS Defendants") on May 15, 2017. Vazirabadi filed the operative First Amended Complaint as a matter of course on July 14, 2017 alleging essentially that Defendants violated his rights under the Fourteenth Amendment to due process and equal protection of the law and under the First Amendment's Establishment Clause (religious discrimination) by engaging in "extreme vetting" of his employment application, and violated Title VII of the Civil Rights Act of 1964, as amended ("Title VII") based on Vazirabadi's national origin. *See* First Amended Complaint ("FAC"), ECF No. 26.

The DPS Defendants filed the present motion to dismiss in response to the FAC on July 28, 2017, arguing

that Vazirabadi's facts support neither his constitutional claims nor his Title VII national origin claim and he has failed to exhaust administrative remedies as to any claim for religious discrimination under Title VII. Construing the allegations liberally and taking them as true, the Court finds that Vazirabadi fails to state violations of his constitutional rights, but plausibly states a violation of Title VII and, thus, the Court recommends that the DPS Defendants' motion be granted in part and denied in part.

I. Statement of Facts

The following are factual allegations (as opposed to legal conclusions, bare assertions, or merely conclusory allegations) made by Vazirabadi 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).

On or about August 3, 2015, Vazirabadi responded to the DPS Defendants' job advertisement for the position of Process Improvement Engineer ("PIE"), which required five years' experience. His response included submission of his Industrial Engineer resume with a two-page cover letter itemizing the job requirements against his ten-plus years of direct experience. The advertised position did not require or prefer bilingual applicants. Vazirabadi registered at careers.dpsk12.org to submit his resume and cover letter and was asked to answer certain questions. For example, from a pull-down menu listing "Arabic," "Somali," "Amharic," and "Swahili" languages, Vazirabadi was asked in which of the languages he is bilingual. The menu also stated: "If your language was not listed above... please indicate it here." Vazirabadi entered "Farsi/Persian" as his other language, which Vazirabadi believes identified him as Iranian and Muslim.

A report attached to the FAC reflects that in 2014, DPS had enrolled a total of 87,389 students and, of those

students, 1,605 (or 1.84%) were "Non-Exited" English Language Learners ("ELLs"). FAC Ex. 2.[1] The top five languages (making up the majority of the ELLs) spoken were Arabic, Vietnamese, Somali, Nepali, and Amharic. *Id.*

On or about August 31, 2015, Vazirabadi had his first interview by telephone with DPS's hiring manager, Karen J., who states she was "drawn" to his application by his "meticulous" itemization of job requirements against matched experience. Karen J. told Vazirabadi that he would be considered for two open PIE positions. On or about September 10, 2015, Vazirabadi met with Karen J. and DPS's Process Improvement team members, Jeff G., Katie W., and Andrea M., for a sixty-minute in-person panel interview. Vazirabadi believed he had great interaction and chemistry with the panel members. During the last ten minutes of the interview, the panel members asked Vazirabadi to facilitate the meeting for an outside group activity. Vazirabadi believed he performed "greatly." Just before he left the interview room, Jeff G. asked him, "do you like to be called Alireza or Ali?" Vazirabadi noticed the other panel members awaiting his response and he answered, "Ali." Vazirabadi considered this question to be a positive indication of his interview performance. Then, on September 15, 2015, Vazirabadi met with Defendant Sahli, Director of Enterprise Risk Management and Process Improvement, for a thirty-minute interview.

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[1] The Court may consider certain documents without converting a Rule 12(b)(6) motion to one for summary judgment, including documents attached to the complaint and "documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (citation omitted).

On or about September 23, 2015, Karen J. emailed Vazirabadi to inform him that "it was a tough decision and, in the end, we decided on other candidates." Reading this email made Vazirabadi feel emotionally and physically sick, numb, humiliated, and rejected, because he was "100% sure" he had the perfect experience and educational background for the position and performed well in the interviews.

The candidates hired by DPS for the PIE positions were a "28-year-old Asian male" and a "29-to-33-year-old" female whose national origin is not indicated.

II. Legal Standards[2]

A. Dismissal under Fed. R. Civ. P. 12(b)(6)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pled facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. Twombly* requires a two-prong analysis. First, a court must identify "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 678-80. Second, the Court must consider the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 680.

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[2] In addition to the standards set forth here, Defendants argued Vazirabadi failed to exhaust his administrative remedies for any claim for religious discrimination under Title VII, which would be analyzed under Fed. R. Civ. P. 12(b)(1). However, Vazirabadi confirmed in his response brief that he does not allege a claim for religious discrimination under Title VII. Resp. 4. Therefore, the Court's discussion need not include an analysis pursuant to Rule 12(b)(1).

Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008)). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011). Thus, while the Rule 12(b)(6) standard does not require that a plaintiff establish a *prima facie* case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim. *Khalik*, 671 F.3d at 1191.

However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. The complaint must provide "more than labels and conclusions" or merely "a formulaic recitation of the elements of a cause of action," so that "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has made an allegation, "but it has not shown that the pleader is entitled to relief." *Id.* (quotation marks and citation omitted).

B. Treatment of a Pro Se Plaintiff's Complaint

A federal court must construe a *pro se* plaintiff's "pleadings liberally, applying a less stringent standard than is applicable to pleadings filed by lawyers. [The] court,

however, will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." *Whitney v. N. M.*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (quotations and citations omitted). The Tenth Circuit interpreted this rule to mean, "if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, this interpretation is qualified in that it is not "the proper function of the district court to assume the role of advocate for the pro se litigant." *Id.*; *see also Peterson v. Shanks*, 149 F.3d 1140, 1143 (10th Cir. 1998) (citing *Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989)).

III. Analysis

A. Section 1983 – Official-Capacity Claims

1. Boasberg and Sahli

The Court finds first that Plaintiff's official-capacity claims against Boasberg and Sahli are duplicative of his claims against DPS. "[A] section 1983 suit against a municipality and a suit against a municipal official acting in his or her official capacity are the same." *Stuart v. Jackson*, 24 F. App'x 943, 956 (10th Cir. 2001) (quoting *Myers v. Okla. Cnty. Bd. of Cnty .Comm'rs*, 151 F.3d 1313, 1316 n.2 (10th Cir. 1998)); *see also Watson v. City of Kan. City*, 857 F.2d 690, 695 (10th Cir. 1988) (treating as one claim the plaintiff's claim against a municipality and claims against municipal officials acting in their official capacities). As the Supreme Court explained, "[o]fficial-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other

than name, to be treated as a suit against an entity." *Ky. v. Graham*, 473 U.S. 159, 165-66 (1985) (citations and quotations omitted).

Consequently, where a plaintiff sues both the municipality and municipal official in an official capacity under the same theory of recovery, courts have dismissed the official capacity claim as "duplicative" or "redundant" of the claim against the municipal entity. *Barr v. City of Albuquerque*, No. 12-CV-01109-GBW, 2014 WL 11497831, at *13 (D. N.M. Apr. 8, 2014) (citing *Starrett v. Wadley*, 876 F.2d 808, 813 (10th Cir. 1989) (despite presence of official capacity claim, "the appeal effectively is between only two parties: the County and plaintiff")); *see also Doe v. Douglas Cnty. Sch. Dist.*, 775 F. Supp. 1414, 1416 (D. Colo. 1991) ("redundant" official capacity claim dismissed); *Riendl v. City of Leavenworth*, 361 F. Supp. 2d 1294, 1302 (D. Kan. 2005) (same).

As such, the Court respectfully recommends that Plaintiff's claims against Defendants Boasberg and Sahli in their official capacities be dismissed. *See Hays v. Ellis*, 331 F. Supp. 2d 1303, 1306 n.2 (D. Colo. 2004).

2. DPS

"[M]unicipal defendants—public school districts and school boards included—can't be held liable under 42 U.S.C. § 1983 solely because they employ a person who violated the plaintiff's constitutional rights." *Lawrence v. Sch. Dist. No. 1*, 560 F. App'x 791, 794 (10th Cir. 2014) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)); *see also Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993) ("[a] municipality may not be held liable under § 1983 solely because its employees inflicted injury on the plaintiff.") (quoting *Monell*, 436 U.S. at 692). Hence, local governments can be liable under Section 1983 "only for their own illegal acts." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (internal quotation and citations omitted) (emphasis in original).

Thus, to establish a Section 1983 claim against a municipality, a plaintiff must "show that the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury" by plausibly alleging (1) the existence of a municipal policy or custom, (2) causation, and (3) state of mind. *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013).

In establishing the first requirement, a plaintiff may show a municipal policy or custom in the form of any of the following:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions - and the basis for them - of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Bryson v. City of Okla. City, 627 F.3d 784, 788 (10th Cir. 2010) (quoting *Brammer-Hoetler v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189-90 (10th Cir. 2010)) (internal quotations omitted).

Here, Vazirabadi's allegations supporting his First, Second, and Fifth Claims for Relief, taken as true and liberally construed, assert that DPS' online employment application system, which seeks information as to whether the applicant is bilingual and, if so, in what language, violated his rights against national origin and religious ("Muslim") discrimination by subjecting him to "extreme vetting" which is governed by a formal policy, or serves as an informal custom/widespread practice, or is the result of a decision by a final policymaker, Defendant Superintendent

Boasberg. *See* FAC ¶ 40 ("Such targeted software application could not just appear on its own, without [the] highest direct approval, funding and support in the organization by established policy, procedure and customs.").

Plaintiff also alleges for his Fourth Claim for Relief that DPS subjected him to a "warrantless search" by its "extreme vetting," which he describes as an "out of [the] norm background check that not-bilingual [sic] applicants do not experience."[3] FAC ¶ 62. The Court finds these allegations, liberally construed, involve the same policy or custom underlying the online application system.

Finally, Plaintiff alleges for his Third Claim for Relief that DPS made false assertions and provided "altered" documents to the Equal Employment Opportunity Commission ("EEOC") during its investigation of the Plaintiff's Title VII claim. FAC ¶ 55. Vazirabadi alleges no municipal policy nor custom underlying DPS's submission to the EEOC and, thus, the Court will recommend dismissing this claim against DPS.

Because Vazirabadi alleges the existence of a municipal policy, custom, or final decision in the form of DPS's online employment application system, which seeks information concerning its applicants' proficiencies for second languages for the purpose of subjecting these applicants to extreme vetting, the Court must determine whether his allegations are plausible for a municipal liability claim.

"When 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

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[3] Considering Vazirabadi's repeated use of the "warrantless search" language, the Court will liberally construe this claim as brought under the Fourth Amendment, rather than under the Fourteenth Amendment's due process clause. FAC 17, 24.

F.2d 1512, 1529 (10th Cir. 1988) (citation omitted); *abrogated on other grounds as recognized in Schneider*, 717 F.3d at 767. Consequently,"[w]here a plaintiff seeks to impose municipal liability on the basis of a single incident, the plaintiff 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); *see also Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir.1993) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under [*Monell*] unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.").

Here, DPS asserts that Vazirabadi fails to establish the online system constitutes a "custom" or "widespread practice" because he "identifies no other specific job applicants who were subjected to extreme vetting" due to the questions seeking bilingual proficiency. Mot. 5–6. The Court agrees that Vazirabadi's allegations identify only a single incident of discrimination—Defendant Sahli's extreme vetting based on national origin and religion—and, thus, Vazirabadi must allege that the system itself is illegal and was implemented by a person with authority to make policy decisions on behalf of DPS. At this early stage of the litigation during which no discovery has occurred, and taking Vazirabadi's allegations as true, the Court recommends finding he plausibly alleges the existence of a municipal policy sufficient to meet the first requirement. *See* FAC ¶ 40 ("Defendant's [sic] bilingual application design, creation and deployment require multi-department involvement within Defendants' organization from the highest level (Superintendent Boasberg) to Information Technology (IT) and Human Resources, each contributing

according to expertise and responsibilities for its creation, development, implementation, usage and distribution of collected data back into Defendants' organization.").

Second, Vazirabadi must allege plausibly that his stated injuries were caused by the extreme vetting implemented from information obtained by DPS's online employment application system. To establish the causation element, the challenged policy or practice must be "closely related to the violation of the plaintiff's federally protected right." *Schneider*, 717 F.3d at 770 (quoting *Martin A. Schwartz*, Section 1983 Litigation Claims & Defenses, § 7.12[B] (2013)). This requirement is satisfied if the plaintiff shows that "the municipality was the 'moving force' behind the injury alleged." *Id.* (quoting *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997)). Vazirabadi must therefore "demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.*

As set forth above, Vazirabadi's allegations, taken as true and construed liberally, assert that DPS implemented its online employment application system with questions regarding an applicant's bilingual proficiency (particularly in Somali, Amharic, Arabic, Ethiopian, and Farsi languages) for the purpose of subjecting any such bilingual applicants to "extreme vetting." The Court finds Vazirabadi's allegations do not demonstrate the alleged challenged practice—profiling applicants for special investigation—is closely related to DPS's failure to hire him. Vazirabadi alleges:

> Defendant, Terri Sahli, without any legal reason, solely because of Plaintiff's bilingual confirmation, subjected him to extreme vetting. Terri Sahli accomplished this vetting by her access to various online databases, which upon Discovery, Plaintiff will be able to identify exact databases she accessed. Of course, until completion of Discovery, Plaintiff will not be able to present the Court what exact database or method Defendant used for Plaintiff extreme

> vetting, but Defendant's position, as Enterprise Risk Management under color of law gives her wide range of government and non-government database access.
>
> Plaintiff presented evidence that he was perfectly qualified and had excellent interviews and great chemistry with the interview panel members, yet all of a sudden, out of nowhere, he got rejected with no explanation or reason. All circumstantial evidence leads to Terri Sahli's role and her access to restricted databases to subject Plaintiff to extreme vetting. Plaintiff finds Sahli equally responsible, in official and individual capacities, for Plaintiff s deprivation of Due Process and loss of Property Interest.

FAC ¶¶ 60, 61. These allegations, even taken as true, reflect nothing more than speculation that Defendant Sahli engaged in any "extreme" vetting of Vazirabadi's application through "access to various online databases." Varizabadi [sic] alleges no indication of actual search results, whether electronic or otherwise, by Sahli culminating in the rejection of his application. His baseless assertion that "all of a sudden, out of nowhere, he got rejected" is insufficient to demonstrate that Sahli engaged in "extreme" vetting of his application, particularly considering the ranking he received following his in-person interview which, contrary to Vazirabadi's contention, reflects he ranked last (5 out of 5) of those selected for in-person interviews. FAC Ex. 9, ECF No. 26 at 40.[4]

Accordingly, the Court finds Vazirabadi fails to allege plausibly that DPS's rejection of his application was directly caused by any "profiling for extreme vetting" by the Defendants and, thus, recommends that the District Court

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[4] Vazirabadi alleges that this document's "metadata" reveals that the "originator" of the document is "Starecki Kim, DPS Attorney" and reflects that the document underwent "ample changes." FAC ¶ 30. However, even if changes were made to the document "2-3 months after [the] interview" (FAC ¶ 31), such information does not demonstrate the information contained in the document is contrived or otherwise untrue; rather, Vazirabadi's allegations are nothing more than speculation.

grant the motion to dismiss Vazirabadi's First, Second, Third, Fourth, and Fifth Claims for Relief against DPS.[5]

B. Section 1983 – Individual-Capacity Claims

As set forth above, Vazirabadi alleges First (Establishment Clause), Fourth (warrantless search), and Fourteenth (due process and equal protection) Amendment claims against the individual Defendants. The Defendants assert they are, in their individual capacities, entitled to qualified immunity from liability for Vazirabadi's claims. Qualified immunity protects from litigation a public official whose possible violation of a plaintiff's civil rights was not clearly a violation at the time of the official's actions. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "It is an entitlement not to stand trial or face the other burdens of litigation." *Ahmad v. Furlong*, 435 F.3d 1196, 1198 (10th Cir. 2006) (internal quotations and citations omitted). "The privilege is an immunity from suit rather than a mere defense to liability." *Id.*

When a defendant asserts the defense of qualified immunity, the burden shifts to the plaintiff to overcome the asserted immunity. *Riggins v. Goodman*, 572 F.3d 1101,

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[5] Unlike his Title VII claim against DPS in which Vazirabadi alleges a "failure to hire," Vazirabadi focuses on the Defendants' alleged "extreme vetting" for his constitutional claims. *See* FAC ¶ 44 ("Defendants reaped liability for Plaintiff's Cause of Actions for targeting bilingual job applicants for extreme vetting." (First Claim for Relief)); ¶ 50 ("Plaintiff alleges Defendants subjected him to extreme vetting because of his bilingual confirmation that not-bilingual [sic] applicants do not experience." (Second Claim for Relief)); ¶ 60 ("Defendant Terri Sahli . . ., solely because of Plaintiff's bilingual confirmation, subjected him to extreme vetting." (Fourth Claim for Relief)); ¶ 68 ("Defendants' conduct in identifying and classifying job applicants from Muslim[ ] Middle East and African countries for extreme vetting clearly shows, under color of law, the depth of animus against this class of people." (Fifth Claim for Relief)). In addition, Vazirabadi alleges Defendants submitted "false statements" and "doctored documents" to the EEOC for his Third Claim for Relief. FAC ¶ 56.

1107 (10th Cir. 2009). "The plaintiff must demonstrate on the facts alleged both that the defendant violated his constitutional or statutory rights, and that the right was clearly established at the time of the alleged unlawful activity." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). The Supreme Court affords courts the discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236; *see also Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1277 (10th Cir. 2009).

In this case, the Court will first determine whether Vazirabadi has stated plausible violations of his constitutional rights and, if he has, the Court will next determine whether that right was clearly established.

1. Fourteenth Amendment Due Process Claims (First and Third Claims)

A plaintiff cannot allege a violation of either procedural or substantive due process if he does not first show that he had a protected property right. *Potts v. Davis Cnty.*, 551 F.3d 1188, 1192 (10th Cir. 2009) (citing *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000)). "Protected property interests arise, not from the Constitution, but from state statutes, regulations, city ordinances, and express or implied contracts." *Dill v. City of Edmond, Okla.*, 155 F.3d 1193, 1206 (10th Cir. 1998); *see also O'Gorman v. City of Chicago*, 777 F.3d 885, 890 (7th Cir. 2015) (same). The Tenth Circuit has "recognized that 'if state statutes or regulations place substantive restrictions on a government actor's ability to make personnel decisions, then the employee has a property interest' protected by the procedural due process clause." *Potts*, 551 F.3d at 1192 (quoting *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998)).

Vazirabadi argues that his property interest in the PIE position arises from his "legitimate claim of entitlement" to the position based on his having been ranked "higher" than other candidates following the telephone interviews and having been ranked "highest" after the in-person interviews. Resp. 13. Even taking these allegations as true, the Court rejects Vazirabadi's argument as not supported by prevailing law. Vazirabadi fails to identify any "rights" he might have that were "created by state statutes, state or municipal regulations or ordinances, [or] contracts" with DPS to be hired for the PIE positions. Moreover, he has alleged no "substantive restrictions on a [DPS official's] ability to make personnel decisions" with respect to hiring for the PIE positions. *See, e.g., McDonald v. City of St. Paul,* 679 F.3d 698, 705 (8th Cir. 2012) ("Even if the mayor was constrained to appoint from the initial list of three finalists, the fact that an appointment from that list still would have been subject to the approval of the city council prevents McDonald from possessing a legitimate claim of entitlement to the director position.").

For Vazirabadi's failure to show he possessed a protected property right in the PIE positions,
the Court recommends that the District Court find Sahli and Boasberg are entitled to qualified immunity for Vazirabadi's failure to state his due process claims and grant the motion to dismiss Vazirabadi's First and Third Claims for Relief against the Defendants.

2. Fourteenth Amendment Equal Protection Claims (Second Claim)[6]

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[6] The applicability of Title VII does not interfere with Vazirabadi's right to sue under the Equal Protection Clause. The Tenth Circuit has ruled that "[i]f a plaintiff can show a constitutional violation by someone acting under color of state law, then the plaintiff has a cause of action under Section 1983, regardless of Title VII's concurrent application." *Starrett* , 876 F.2d at 814.

The Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently. *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 605 (2008). To state a claim for an equal protection violation, a plaintiff must allege that a government actor intentionally discriminated against him or her on the basis of a suspect class. *Lobato v. N.M. Env't. Dep't, Envtl. Health Div.*, 838 F. Supp. 2d 1213, 1223 (D.N.M. 2011) (citing *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999)); *see also Ingram v. Cooper*, 163 F. Supp. 3d 1133, 1139 (N.D. Okla. 2016) ("To establish a violation of the Equal Protection Clause, a plaintiff must allege that a defendant acted with the intent to discriminate against the plaintiff because of the plaintiff's protected status."). Suspect classifications include those based on national origin. *Lobato*, 838 F. Supp. 2d at 1223 (citing *Edwards v. Valdez*, 789 F.2d 1477, 1482 (10th Cir. 1986)); Ingram, 163 F. Supp. 3d at 1139 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) and *Ramirez v. Dep't of Corrs.*, 222 F.3d 1238, 1243 (10th Cir. 2000)).

> [I]ntentional discrimination can be demonstrated in several ways. First, a law or policy is discriminatory on its face if it expressly classifies persons on the basis of race or gender. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 227–29, 115 S. Ct. 2097, 2105, 2112–14, 132 L. Ed.2d 158 (1995). In addition, a law which is facially neutral violates equal protection if it is applied in a discriminatory fashion. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373–74, 6 S. Ct. 1064, 1072–73, 30 L. Ed. 220 (1886). Lastly, a facially neutral statute violates equal protection if it was motivated by discriminatory animus and its application results in a discriminatory effect. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264–65, 97 S. Ct. 555, 563, 50 L. Ed.2d 450 (1977).

Hayden, 180 F.3d at 48; *see also SECSYS, LLC v. Vigil*, 666 F.3d 678, 685–86 (10th Cir. 2012) (same). Discriminatory

intent "requires that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' the law's differential treatment of a particular class of persons." *SECSYS, LLC*, 666 F.3d at 685 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

In this case, Defendants argue the prevailing law provides that "language, by itself, does not identify members of a protected class, to support an equal protection claim" and "[c]lassifying applicants based on their proficiency in other languages is not unconstitutional." Mot. 9 (internal quotations and citations omitted). In other words, an online employment system that asks applicants whether they are bilingual and, if so, in what language does not itself violate the Equal Protection Clause. The Court agrees. *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) ("the Secretary's failure to provide forms and services in the Spanish language, does not on its face make any classification with respect to Hispanics as an ethnic group.").

But, as in *Soberal-Perez*, Vazirabadi's claim is that DPS's employment system, although neutral on its face, nevertheless discriminates against Muslim Iranians by its application to "profile" Muslim Iranian's applications for "extreme vetting." "[F]acially neutral conduct can constitute discrimination in violation of the Equal Protection Clause; however, such a claim requires that a plaintiff show an intent to discriminate against the suspect class." *Soberal-Perez*, 717 F.2d at 41–42; *see also SECSYS, LLC*, 666 F.3d at 685. Here, Vazirabadi fails to allege the requisite intent. As set forth above, his allegations that Sahli engaged in "extreme" vetting of Vazirabadi's application through "access to various online databases" have no foundation and are merely speculative. Vazirabadi's other allegations, taken as true, demonstrate that DPS officials selected Vazirabadi for a telephone interview, a panel interview, and a final interview with Sahli, all the while knowing that

Vazirabadi spoke "Farsi/Persian" based on his answer on the initial online application.

For Vazirabadi's failure to plausibly allege an "intent to discriminate against the suspect class," the Court recommends that the District Court find Sahli and Boasberg are entitled to qualified immunity for Vazirabadi's failure to state an equal protection claim and grant the motion to dismiss his Second Claim for Relief.

3. Fourth Amendment Warrantless Search Claims (Fourth Claim)

Although Vazirabadi brings his Fourth Claim for Relief under the Fourteenth Amendment, he alleges the Defendants engaged in a "warrantless search" by conducting a "totally different and out of [the] norm background check that not-bilingual applicants do not experience." FAC ¶ 62. The Court liberally construes these allegations as raising a Fourth Amendment claim for warrantless search or seizure.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "A search subject to Fourth Amendment protection occurs 'when the government violates a subjective expectation of privacy that society recognizes as reasonable.'" *Mimics, Inc. v. Village of Angel Fire*, 394 F.3d 836, 842 (10th Cir. 2005) (quoting *Kyllo v. United States*, 533 U.S. 27, 33 (2001)). "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Id.* (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 528–29 (1967)).

The Court will recommend that the District Court find Sahli and Boasberg are entitled to qualified immunity for Vazirabadi's failure to state a Fourth Amendment claim and grant the motion to dismiss Vazirabadi's Fourth Claim for Relief. Again, the allegations, taken as true, show only that Vazirabadi *supposes* that Sahli engaged in an "out-of-the-norm" background check; the allegations reflect no indication that such "extreme" check actually occurred. Vazirabadi's assertion that "[a]ll circumstantial evidence leads to Terri Sahli's role and her access to restricted databases to subject Plaintiff to extreme vetting" (FAC ¶ 61) is pure speculation and insufficient to demonstrate that the "warrantless search" Vazirabadi alleges plausibly occurred. Thus, the allegations fail to state a claim under Rule 12(b)(6).

4. First Amendment Establishment Clause Claims (Fifth Claim)

The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (citing *Wallace v. Jaffree*, 472 U.S. 38, 49–50 (1985)).

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."

Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). Thus, for his claim under the Establishment Clause, Vazirabadi must have suffered

injury because of alleged government action coercing him to practice any particular religion or tending in any way to create a state-endorsed religious faith. *See id.* at 588. Or, standing under the Establishment Clause may exist when a plaintiff's injuries result from religious bias or endorsement, such as being "subjected to unwelcome religious exercises or [being] forced to assume special burdens to avoid them." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 n.22 (1982).

For the same reasons described herein, Vazirabadi's allegation that "Defendants' conduct in identifying and classifying job applicants from Muslim[ ] Middle East and African countries for extreme vetting clearly shows, under color of law, the depth of animus against this class of people" is conclusory and lacks any foundation. In addition, the allegations taken as true reflect that the online employment application system requests whether the applicant is bilingual in the following languages—Arabic, Amharic, Somali, and Swahili (FAC ¶ 22)—which, Vazirabadi admits, includes at least one language for which the general population is not Muslim (Amharic). Resp. 2.

The Court recommends that the District Court find Sahli and Boasberg are entitled to qualified immunity for Vazirabadi's failure to state a First Amendment claim and grant the motion to dismiss Vazirabadi's Fifth Claim for Relief against Defendants.

5. Title VII National Origin Discrimination Claim (Sixth Claim)

"A plaintiff proves a violation of Title VII either by direct evidence of discrimination or by following the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973)." *Khalik*, 671 F.3d at 1192. In this case, Vazirabadi brings his Title VII claim

for discrimination based on national origin[7] against DPS and, despite his assertions to the contrary (FAC ¶ 75), alleges no direct evidence of discrimination.

"[The] *McDonnell Douglas* ... three-step analysis requires the plaintiff first prove a *prima facie* case of discrimination." *Jones v. Okla. City Public Schs.*, 617 F.3d 1273, 1279 (10th Cir. 2010). "While the 12(b)(6) standard does not ***require*** that Plaintiff establish a *prima facie* case in her complaint, the elements of each alleged cause of action help to determine whether [a plaintiff] has set forth a plausible claim." *Khalik*, 671 F.3d at 1192 (emphasis added).

To establish a *prima facie* case for a failure-to-hire claim, a plaintiff must establish that (1) [he] belongs to a protected class; (2) [he] applied and was qualified for a job for which the employer was seeking applicants; (3) despite being qualified, [he] was rejected; and (4) after [his] rejection, the position remained open and the employer continued to seek applicants from persons of [his] qualifications." *Fischer v. Forestwood Co., Inc.*, 525 F.3d 972, 982–83 (10th Cir. 2008). If Vazirabadi makes out a *prima facie* case, "[t]he burden then shifts to the defendant to produce a legitimate, non-discriminatory reason for the adverse employment action." *Id.* If DPS meets that burden, "the burden then shifts back to the plaintiff to show that

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[7] Vazirabadi states in his response brief that his "sixth [sic] Cause of Action under Title VII clearly states his discrimination was based on his national origin and age." Resp. 4 (emphasis added). The Court disagrees; the FAC mentions nothing about discrimination based on Vazirabadi's age (which itself is not identified), but only references DPS's position statement to the EEOC in which it allegedly "lied" about the successful applicant's age being "over 40." Because Vazirabadi fails to plead any allegations of discrimination based on his age (and there is no indication that he exhausted his administrative remedies for an age claim), the Court will not construe the FAC as bringing a claim under the Age Discrimination in Employment Act, as opposed to Title VII which does not govern age discrimination.

[his] protected status was a determinative factor in the employment decision or that the employer's explanation is pretext." *Id.*

Here, DPS argues that Vazirabadi fails to meet the first requirement of a *prima facie* case[8] because "interchanging national origin and language is a legal and logical error." Mot. 13 (citing *Napreljac v. John Q. Hammons Hotels, Inc.*, 461 F. Supp. 2d 981, 1030 (S.D. Iowa 2006)). DPS's position might be correct if Vazirabadi alleged only that DPS's profiling of Iranians through its online system for extreme vetting violated Title VII. *See, e.g., Soberal-Perez*, 717 F.2d at 41 (classification on the basis of language does not by itself "identify members of a suspect class"); *see also Velasquez v. Goldwater Mem'l Hosp.*, 88 F. Supp. 2d 257, 262 (S.D. N.Y. 2000) (raising a triable issue of fact regarding the existence of an English-only policy will not suffice to demonstrate national origin discrimination).

However, and as DPS acknowledges (Mot. 13), Vazirabadi's allegations can be liberally construed as stating a "straight-forward" failure-to-hire claim—that is, DPS failed to hire Vazirabadi, an Iranian national who was qualified for the PIE positions, based on his national origin. *See* FAC ¶¶ 74–77; Resp. 5. Thus, the Court finds that Vazirabadi plausibly alleges the first, second, and third requirements of a *prima facie* case: (1) Vazirabadi's national origin is Iranian; (2) he applied for and was qualified for the PIE positions (based on the allegations that he was selected for three interviews with DPS officials); and (3) despite his qualifications, Vazirabadi was not selected for hire.

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[8] DPS does not actually reference the first requirement of a *prima facie* case in its analysis (Mot. 12), but the Court infers that DPS argues language is not a "protected class."

As for the fourth requirement stated in *Fischer, supra*, the allegations in this case do not fit and, thus, the Court will need to modify it as it is currently stated. *See Plotke v. White*, 405 F.3d 1092, 1099 (10th Cir. 2005) ("[T]he articulation of a plaintiff's *prima facie* case may well vary, depending on the context of the claim and the nature of the adverse employment action alleged."). In *Roberts v. Okla.*, 110 F.3d 74, 1997 WL 163524, at *4 (10th Cir. Apr. 8, 1997), the Tenth Circuit stated the fourth requirement for a similarly-pled failure-to-hire *prima facie* claim as follows: "(4) the defendant hired other persons possessing [the plaintiff's] qualifications who were not members of [his] protected class." Regarding whether the hired candidates were "not members of his protected class," the allegations in this case, taken as true, reflect that DPS hired a "28-year-old Asian male" and a "29-to-33-year old" female, Ashley S., for the open PIE positions. FAC ¶ 28. Vazirabadi fails to identify Ashley S.'s national origin, both in the FAC and in his response brief. Although an exhibit attached to the motion includes a black-and-white photograph of Ashley S., who appears to be a blonde Caucasian (FAC Ex. 8), such information is insufficient to demonstrate plausibly that Ashley S. is not Iranian.

As for whether the Asian male, "T," possessed Vazirabadi's qualifications, Vazirabadi had more than ten years of work experience, while "T" had five years of work experience. FAC Ex. 9. DPS documents attached to the FAC appear to reflect "scores" each candidate received during telephone interviews (FAC ¶ 23); Vazirabadi received a score of "9/8," and "T" received a score of "7/8." *Id.*; FAC Ex. 3. Based on these scores, DPS invited Vazirabadi and "T" for panel interviews. *See* FAC ¶ 24. Based on these allegations, the Court finds Vazirabadi plausibly alleges the fourth requirement for a *prima facie* case.

DPS asserts that it declined to select Vazirabadi for hire because he was "not a good team fit" for the PIE positions. Assuming this is a legitimate, non-discriminatory reason for failure to hire, Vazirabadi must show that DPS's reason is pretext. *See Khalik*, 671 F.3d at 1192. A document attached to the FAC and titled, Ranking Matrix, allegedly lists the names of ten potential candidates for the PIE positions, including Vazirabadi and the two hired candidates; four of the ten candidates were not selected for panel interviews and a fifth candidate declined the interview. FAC Ex. 9. The remaining candidates were ranked "1-5," with Vazirabadi ranked as a "5" and the hired candidates ranked "1" and "2." *Id.* DPS argues that this document confirms that the two highest ranking individuals were selected for the PIE positions; Vazirabadi counters that the document reflects he is the highest ranked candidate. Although the document lists the apparent reason for Vazirabadi's non-selection ("not a good team fit"), he is also noted to have "good experience" and the candidate ranked third also is noted to be "not a good team fit." In addition, the 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).

Construing the allegations liberally and taking them as true, the Court finds Vazirabadi states the elements of a Title VII failure-to-hire claim showing that DPS selected "T" rather than Vazirabadi based on Vazirabadi's national origin. Therefore, the Court recommends that the Court deny the motion to dismiss Vazirabadi's Sixth Claim for Relief as it relates to DPS's selection of "T" for hire.

CONCLUSION

The Court concludes that Vazirabadi fails to state plausible constitutional claims against the Defendants; however, he states a claim under Title VII as described herein. Accordingly, the Court respectfully recommends that Judge Martinez **grant in part and deny in part** Defendants' Motion to Dismiss Amended Complaint [filed July 28, 2017; ECF No. 29], dismiss Vazirabadi's First, Second, Third, Fourth, and Fifth Claims for Relief, and dismiss the individual Defendants from the case.[9]

Dated at Denver, Colorado, this 10th day of October, 2017.

BY THE COURT:

s/
Michael E. Hegarty
United States Magistrate Judge

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[9] Be advised that all parties shall have fourteen days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676–83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen days after being served with a copy may bar the aggrieved party from appealing the factual and legal findings of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Michael E. Hegarty

Civil Action No. 1:17-CV-01194-WJM-MEH
Document: 82
Filed: July 30, 2018
Courtroom Deputy: Amanda Montoya
FTR: Courtroom A 501

Parties:	*Counsel:*
ALIREZA VAZIRABADI,	Pro se
Plaintiff,	
v.	
DENVER PUBLIC SCHOOLS, Defendant.	Jonathan Fero

COURTROOM MINUTES
DISCOVERY CONFERENCE

Court in session: 1:29 p.m.

Court calls case. Appearances of counsel.
Parties are in dispute regarding Plaintiff's request for documents regarding bilingual applicants. A portion of the Plaintiff's application is tendered to the court.

ORDERED: Within two weeks, defendants 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.

Status Conference is set for August 13, 2018 at 10:00 a.m.
Parties are reminded that they must confer before bringing a discovery dispute before the court.
Court in recess: 2:22 p.m. Hearing concluded.
Total in-court time 00:53
* To obtain a transcript of this proceeding, please contact Patterson Transcription Company at (303) 755-4536 **or** AB Court Reporting & Video, Inc. at (303) 629-8534.

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-CV-01194-WJM-SKC
Document: 85
Filed: August 6, 2018

Doc. No. 85 Filed & Entered: 08/06/2018, Docket Text

Full docket text for document 85:
REASSIGNING MAGISTRATE JUDGE.

This action is reassigned to Magistrate Judge S. Kato Crews, upon his appointment. All future pleadings should reference Magistrate Judge Crews at the end of the civil action number (such as 15-cv-00001-PAB-SKC). Unless otherwise ordered, the dates and times for all previously scheduled matters will be maintained and will now be handled by Magistrate Judge Crews in Courtroom C-204. His chambers are located in Room C-253 of the Byron G. Rogers Courthouse. His telephone number is 303-335-2117. (Text only entry) (angar,)

Non Spanish Bilingual Language	Unique Candidates	Total Apllications	Spanish Speaking Applications	Spanish Speaking Hires	NOT Spanish Speaking Applications	NOT Spanish Speaking Hires	All Hires
None	43,009	143,475	24,381	1,631	119,094	5,453	7,084
Amharic	90	181	40	5	141	**19**	24
Arabic	328	919	116	6	803	**51**	57
Burmese	14	18	2	0	16	**3**	3
Chines-Mandarin	193	475	73	3	402	**23**	26
French	776	2262	759	42	1503	**99**	141
Karen	10	26	1	0	25	**2**	2
Khmer	21	42	9	1	33	**4**	5
Nepalese	69	151	5	0	146	**12**	12
Russian	198	574	63	5	511	**22**	27
Sign Language	366	1200	319	12	881	**39**	51
Somali	34	120	13	1	107	**7**	8
Tigrigna	17	22	2	1	20	**2**	3
Vietnamese	179	518	23	1	495	**26**	27
Total	**45,304**	**149,983**	**25,806**	**1,708**	**124,177**	**5,762**	**7,470**

EXHIBIT A
Page 1 of 64
District 000170

Ranking Matrix

Names	Local?	Exp Yrs	In Person Interviews	Final Rank	Comments
Al	Chicago	3	No		
Tongche	Westmin	10	No		
Mike O.	Albq		No		
Michael	TX	4	No		
David	Lwood	13	Yes	4	Could do the job but he just started a new job 2 weeks ago and seemed like he applied just to get any job
Ashley	C Rock	5	Yes	1	Accepted: start 10/12
Thach	Denver	5	Yes	2	Accepted: start 10/6
Tracy	N York	12	Yes		Not intestested in Salary so won't come to Denver for an interview.
Alireza	Aurora	10+	Yes	5	Good experience, not a good team fit. Not sure if he would work well on a team.
Thanis	Denver	10+	Yes	3	Excellent experience, not a good team fit.

STATUTORY AND REGULATORY PROVISIONS

1. 42 U.S.C. § 2000e provides in pertinent part:

Definitions

For the purpose of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * * *

2. 42 U.S.C. § 2000e-2 provides in pertinent part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

3. 42 U.S.C. § 2000e-2(k) provides in pertinent part:

Burden of proof in disparate impact cases.

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;

* * * *

4. 29 C.F.R. § 1602.14 provides

Preservation of records made or kept.

Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual

terminated shall be kept for a period of one year from the date of termination. Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII, the ADA, or GINA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action. The term "personnel records relevant to the charge," for example, would include personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected. The date of final disposition of the charge or the action means the date of expiration of the statutory period within which the aggrieved person may bring an action in a U.S. District Court or, where an action is brought against an employer either by the aggrieved person, the Commission, or by the Attorney General, the date on which such litigation is terminated.

* * * *

5. 29 C.F.R. § 1602.40 provides:

Preservation of records made or kept.

Any personnel or employment record made or kept by a school system, district, or individual school (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff, or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by such school system, district, or school, as the case may be, for a period of 2 years from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of

an employee, the personnel records of the individual terminated shall be kept for a period of 2 years from the date of termination. Where a charge of discrimination has been filed, or an action brought against an elementary or secondary school by the Commission or the Attorney General, the respondent elementary or secondary school system, district, or individual school shall preserve similarly at the central office of the system or district or individual school which is the subject of the charge or action, where more convenient, all personnel records relevant to the charge or action until final disposition thereof. The term "personnel record relevant to the charge," for example, would include personnel or employment records relating to the person claiming to be aggrieved and to all other employees holding positions similar to that held or sought by the person claiming to be aggrieved; and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the person claiming to be aggrieved applied and was rejected. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which a person claiming to be aggrieved may bring an action in a U.S. district court or, where an action is brought against a school system, district, or school either by a person claiming to be aggrieved, the Commission, or the Attorney General, the date on which such litigation is terminated.

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6. 29 C.F.R. § 1606.1 provides:

Definition of national origin discrimination.

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern

charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general title VII principles, such as disparate treatment and adverse impact.

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7. 29 C.F.R. § 1607.3 provides in pertinent part:

Discrimination defined: Relationship between use of selection procedures and discrimination.

A. Procedure having adverse impact constitutes discrimination unless justified. The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

* * * *

8. 29 CFR § 1607.16 provides in pertinent part:

Selection procedure definition:

Q. Selection procedure. Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.