No. 22-

IN THE

Supreme Court of the United States

VIRGIL M. LORENZO,

Petitioner,

v.

LLOYD J. AUSTIN III, SECRETARY,
DEPARTMENT OF DEFENSE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Title VII cases alleging discrimination based on national origin, does the reliance of federal courts on subjective judgments concerning the communicative competence of the plaintiff constitute an unreasonable obstacle to successful litigation of these claims, and if so, must a procedure for establishing communicative competence in such cases be instituted, which ensures its determination turns on objective evidence?

STATEMENT OF RELATED CASES

* *Virgil M. Lorenzo v. Patrick M. Shanahan, Acting Secretary, Department of Defense,* No. 19-cv-1128, U.S. District Court for the Southern District of California. Judgment entered October 29, 2021.

* *Virgil M. Lorenzo v. Lloyd J. Austin III, Secretary, Department of Defense,* No. 21-56381, U.S. Court of Appeals for the Ninth Circuit. Judgment entered November 4, 2022.

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INTRODUCTION

Plaintiffs bringing meritorious claims of discrimination based on national origin under Title VII may face insurmountable barriers in cases in which their communicative competence or accent is in issue. The reason is that courts may rely on the uninformed subjective assessment of the employer, or indeed upon their own uninformed subjective judgment, in deciding whether the plaintiff's oral expression is sufficiently intelligible. As a result, courts repeatedly, and likely unintentionally, have conflated intelligible communication expressed through a foreign accent with communication that is unintelligible. Indeed, in this case the appellate panel simply presumed -- contrary to the plain meaning of the language in issue -- that a critical reference to petitioner's accent actually was a reference to the intelligibility of his expression.

While the lower courts have recognized the need to closely examine claims of inadequate communicative competence in these cases, the current absence of any established procedure or even standards to guide such examination is the reason plaintiffs in these cases confront arbitrary and subjective judgments of their communicative competence, resulting in their losing meritorious discrimination cases.

In order to ensure that these plaintiffs receive the protection from national origin discrimination to which they are entitled, this Court must institute a requirement that communicative competence in these cases is evaluated through objective metrics, such as the expert testimony of linguists or tests such as the Educational Testing Service's Test of Spoken English. That the appellate panel

in this case slipped into equating the decisionmaker's reference to petitioner's accent as a reference to his communicative competence underscores the need to establish such standards, and the reason this case provides an outstanding opportunity for this Court's formulation of such standards.

OPINIONS BELOW

The unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit in *Virgil M. Lorenzo v. Lloyd J. Austin III, Secretary, Department of Defense*, docket number 21-56381, affirming the district court's judgment and filed November 4, 2022 is attached in the Appendix at 1a; it is unreported and available at 2022 WL 16707188.

The unpublished order of the U.S. District Court for Southern California, in *Virgil M. Lorenzo v. Lloyd J. Austin III, Secretary, Department of Defense*, docket number 19-cv-1128-WQH-BGS, granting defendant's motion for summary judgment and filed on October 29, 2021 is attached as Appendix at 6a; it is unreported and available at 2021 WL 5042109.

The unpublished order of the United States Court of Appeals for the Ninth Circuit, docket number 21-56381, denying petitioner's petition for rehearing was filed December 15, 2022; it is attached in the Appendix at 25a.

JURISDICTION

The court of appeals entered judgment on November 4, 2022. App. 1a. Petitioner filed a timely petition for rehearing on November 18, 2022 (Docket # 36), which

the court of appeals denied on December 15, 2022. App. 25a. In its order of March 3, 2023 this Court granted petitioner's motion to extend time to file this petition for writ of certiorari until May 14, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. §2000e-2(a) provides in relevant part:

> 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….

STATEMENT OF THE CASE

A. Procedural History

On June 17, 2019 Petitioner Virgil Lorenzo filed this case in the U.S. District Court for the Southern District of California. Appellant Lorenzo's Excerpts of Record, Ninth Circuit Court of Appeals (hereinafter "Docket # 11) at 176. The complaint alleged that Defendant Patrick Shanahan,[1] Acting U.S. Secretary of Defense, had

1. Since becoming Secretary of Defense on January 21, 2021, Lloyd J. Austin III has been substituted in as the defendant. Docket # 11 at 5 n. 1.

violated petitioner's rights under Title VII (42 U.S.C. § 2000e et seq.), the Rehabilitation Act of 1973 and the Age Discrimination in Employment Act[2] by terminating him from his position as a middle school teacher. Docket # 11 at 177-181. On October 29, 2021 defendant's motion for summary judgment was granted as to all claims, and judgment was entered for the defendant. Docket # 11 at 4, 11-17. Notice of Appeal was filed on December 27, 2021. Docket # 11 at 183.

The court of appeals affirmed the judgment on November 4, 2022. App. 1a. Petitioner filed a timely petition for rehearing on November 18, 2022 (Docket # 36), which the court of appeals denied on December 15, 2022. App. 25a. In its order of March 3, 2023 this Court granted petitioner's motion to extend time to file this petition for writ of certiorari until May 14, 2023.

B. Statement of Facts

Following a personal interview with Principal Altorn Grade, Petitioner Virgil Lorenzo, who is Filipino, was hired by Principal Grade on August 20, 2010 to teach science to middle school students at Lester Middle school in Okinawa, Japan. Docket # 11 at 29, 130. Lester Middle School is operated by the Department of Defense Education Activities (hereinafter "DodEA"), which manages pre-kindergarten through 12th grade educational programs for families of United States service members. Docket # 11 at 6.

Lorenzo, as a new DodEA educator, was hired on a provisional basis. Docket # 11 at 100 [23:16-25].

2. Petitioner subsequently withdrew his claim under the Age Discrimination in Employment Act. Docket # 11 at 5 n.2.

Provisional level educators are rated on five professional performance elements, each of which includes specific mandatory standards. Docket # 11 at 60-61, 121 [105:3-24]. Failure to satisfy any of the elements may result in the employee's receiving an "unacceptable" rating. Docket # 11 at 53, 55.

Principal Grade stated that in September he began to receive complaints about petitioner's teaching from students and parents. Docket # 11 at 131. On September 23, 2010 Principal Grade sent Lorenzo an email directing him to speak with Ms. Jump, a parent who had "concerns" about his accent and that her son had difficulty understanding some of the concepts he was teaching.[3] Docket # 11 at 40. Petitioner spoke with Jump. Docket # 11 at 32. During their meeting, Jump corrected his pronunciation and informed Lorenzo she thought the decision to hire someone with his accent warranted explanation. Docket # 11 at 32.

Thereafter, Grade said he received several additional complaints from parents and students about petitioner's teaching. Docket # 11 at 131-132. Grade stated that Jump was the only parent who had raised concerns about Lorenzo's accent. Docket # 11 at 105 [42:7-11]. Grade sent emails to Lorenzo on October 12, 2010 and October 19, 2010 advising him of deficiencies in his grading practices. Docket # 11 at 132-133.

On October 27, 2010 Grade imposed an "Intervention Plan," a program of remedial supervision, on Lorenzo.

3. The email stated: "Please contact Mrs. Jump about setting up a conference to discuss [her child]. She has some concerns about your accent and [her child's] understanding some of the concepts covered." Docket # 11 at 40.

Docket # 11 at 134. In establishing the plan with petitioner, Grade focused on three DodEA performance elements, including "Monitoring and Assessing Student Achievement." Docket # 11 at 134. Grade also asked Lorenzo to communicate his grading procedures to parents and to communicate with the parents of failing students. Docket # 11 at 134.

At petitioner's last weekly meeting with Grade, on December 3, 2010, petitioner stated that Grade expressed satisfaction with his progress in implementing Grade's recommendations. Docket # 11 at 29. In December 2010 Ms. Jump met again with Lorenzo. Docket # 11 at 32. During the meeting petitioner suggested her child's problems with the class might be the result of her having caused her child to miss considerable class time in order to take a vacation. Docket # 11 at 32. Jump became irate. Docket # 11 at 32. Grade terminated Lorenzo days later. Docket # 11 at 32, 164.

In his termination letter dated December 13, 2010 Grade stated Lorenzo was being terminated for failing to demonstrate acceptable performance in critical element 4 of the Department of Defense Dependents Schools (hereinafter "DoDDS") Performance Elements for Classroom Teachers. Docket # 11 at 164. Deficiencies cited in the letter included failure to consistently enter grades for students in "Gradebook," an online record system; failure to include activities in lessons that allowed students to analyze, synthesize and evaluate the objectives and standards he was trying to teach; and failure to adequately communicate with parents. Docket # 11 at 164.

In a subsequent termination conference with Lorenzo, Grade asserted that he had failed to communicate with parents adequately and that students were falling behind in science. Docket # 11 at 32. Petitioner stated that these allegations mirrored those raised in the meeting earlier in the month during which Ms. Jump had become irate. Docket # 11 at 32.

REASONS FOR GRANTING REVIEW

I. THE EFFICACY OF TITLE VII'S PROHIBITION OF DISCRIMINATION BASED ON NATIONAL ORIGIN HAS BEEN VITIATED BY THE ABSENCE OF A CLEAR STANDARD DISTINGUISHING UNLAWFUL DISCRIMINATION BASED ON FOREIGN ACCENT FROM ASSURING POSSESSION OF ADEQUATE COMMUNICATION SKILLS

A. Evidence of a Decisionmaker's References to the Accent or Communication Skills of an Employee Whose National Origin Is Foreign Should Establish a Prima Facie Case of Discrimination, Rebuttable Through Objective Evidence the Employee's Communication Skills Were Inadequate, Or That Such Considerations Were Immaterial to the Challenged Decision

The court of appeals' determination in this case that the decisionmaker's express directive to Mr. Lorenzo to address a parent's concerns about his accent actually was a directive to address concerns about his communication of concepts highlights the need for this Court to establish

standards by which decisions reflecting justifiable concerns about an employee's job related communicative competence may be distinguished from discrimination based on national origin flowing from immaterial concerns about the employee's accent.[4]

While this court has not addressed the issue,[5] there is broad agreement in the lower courts that national origin and accent are tightly linked, and therefore that under Title VII discrimination based on accent may amount to prohibited discrimination based on national origin. *See, e.g.*, *Fragante v. City and County of Honolulu*,

4. The directive in issue, recited in an email, stated "[p]lease contact Mrs. Jump about setting up a conference to discuss [her child]. She has some concerns about your accent and [her child's] understanding some of the concepts covered." Docket # 11 at 40. The court of appeals found "the text of the email conveys only that the principal wanted Lorenzo to meet with a parent who believed her child was having difficulty understanding Lorenzo's accent in class -- a facially legitimate concern." App. at 3a.

To reach this conclusion, the court of appeals effectively construed the word "and" as a synonym for the word "because," which it is not. The plain everyday English construction of the text of the email -- which was favorable to petitioner and thus mandated on summary judgment-- was that it directed Lorenzo to discuss two concerns with the parent, 1) his accent and 2) the child's understanding of some of the concepts discussed in class. *See Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th Cir. 2011).

Manifestly, the panel mistakenly presumed employer concerns about accent necessarily amounted to concerns about comprehensibility.

5. In the context of equal protection analysis this Court noted that "[i]t may well be, for certain ethnic groups, and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." *Hernandez. v. New York*, 500 U.S. 352, 371 (1991).

888 F.2d 591, 596 (9th Cir. 1989) ("[a]ccent and national origin are obviously inextricably intertwined in many cases"); *Iyoha v. Architect of the Capitol*, 927 F.3d 561, 567 (D.C. Cir. 2019) ("a foreign accent and national origin often are intertwined"); *Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 549 (6th Cir. 1991) ("[a]ccent and national origin are inextricably intertwined"). Indeed, it is likely the extraordinary case in which a foreign accent reflects anything other than national origin. *See* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329, 1349 n. 74. (1991). For all practical purposes, therefore, it is almost impossible to discriminate based on foreign accent without discriminating based on national origin. Nonetheless, it is undisputed that adverse employment decisions based on accent do not constitute prohibited discrimination based on national origin in cases in which the accent renders the employee's communication skills inadequate to fulfill the requirements of the job. *See, e.g. Fragante v. City and County of Honolulu*, *supra*, 888 F.2d at 596. This line, as the Ninth Circuit has observed, is not entirely clear:

> [i]t would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem, but the candidate's inability to measure up to the communications skills demanded by the job. We encourage a very searching look by the district courts at such a claim.
>
> *Id*. at 596 n. 3.

The Ninth Circuit's conclusion is widely accepted. *See, e.g., Madiebo v. Division of Medicaid/State of Miss.*, 2 F.Supp.2d 851, 856 (S.D. Miss. 1997); *Dafiah v. Guardsmark, LLC.,* No. 10-cv-03119, 2012 WL 5187762, at * 5 (D. Colo. Oct. 19, 2012); *Surti v. G.D. Searle & Co.*, 935 F.Supp. 980, 986-987 (N.D. Ill. 1996); *see also Ang v. Proctor & Gamble Co.*, *supra*, 932 F.2d at 549. Indeed, any other approach would render discrimination in such cases effectively undetectable.

Notwithstanding the courts' general recognition of the need to scrutinize the validity of justifications of adverse employment decisions against persons classified as being of foreign national origin based on communication deficiencies, no guidelines exist for exercising such scrutiny. As a result, cases in which plaintiffs allege employment discrimination based on national origin may conclude in judgments for the employer based on apparently arbitrary and ad hoc determinations that the employee's communicative skills were deficient.

The unbridled subjectivity operative in such decisions was illustrated in *Fragante v. City and County of Honolulu*, 699 F.Supp. 1429, 1430-1431 (D. Haw. 1987). In that case, following a 30-year career as an officer in the Philippines armed force, and a total of 37 years in management and administration, Mr. Fragante, a naturalized citizen of Philippines national origin, had been denied a position as a clerk in the City and County of Honolulu's licensing department. *Id.* at 1429, 1431. Fragante, who was well educated, with honors, and most of his schooling had been conducted primarily in English, had finished first out of 721 applicants to take the civil

service written examination for the position and then was ranked first among 15 applicants certified to the department. *Id.* at 1429.

Following an interview lasting 10-15 minutes administered by two senior officials from the department, Fragante was ranked behind two other applicants and denied the position. *Id.* at 1431. The interview was conducted without standards, instructions, guidelines or criteria for its execution. *Id.* at 1430. Based thereon, Fragante was reported to have a "very pronounced accent, difficult to understand… would have problem working on counter and answering phone… heavy Filipino accent." *Id.* at 1431.

The district court concluded:

> Fragante … has a difficult manner of pronunciation … and the Court further finds as a fact from his general testimony that he would often not respond directly to the questions as propounded. He maintains much of his military bearing….
>
> The results of Plaintiff's interview show that his oral communications skills were hampered by his accent or manner of speaking, and pronouncing, which made it difficult for the City interviewers to understand his answers and statements during the course of the interview….. The two applicants, who were selected, satisfied the City's bona fide occupational requirement and therefore were better qualified than petitioner for the position…..
>
> *Id.* at 1432.

The district court's findings thereby turned on nothing more than the subjective impressions of the defendant's administrators, who possessed neither expertise nor guidance in measuring the efficacy of Fragante's communication, and its own subjective impressions.

Upon review the Ninth Circuit, noting, *inter alia*, that two expert witnesses at trial found Fragante's speech was comprehensible (the only non-subjective evidence thereon presented at trial), notwithstanding its being "heavily accented," and the exceptional written test score, presumed without deciding that Fragante had established a prima facie case of discrimination. *Fragante v. City and County of Honolulu*, *supra,* 888 F.2d at 595-596. Nonetheless, the Ninth Circuit found the lower court's reliance on the above-noted standardless, subjective evaluations by the defendant's administrators, and the trial judge's own standardless, subjective evaluation of Fragante's expression while testifying, sufficed to ensure Fragante had not been denied the position based on his accent, and thereby national origin. *Id*. at 598. Acknowledging defects in the evaluations of petitioner, the court explained that the evaluations sufficed, because their use did not indicate "discriminatory motive or intent." [6] *Ibid.*

6. In contrast, courts have found evidence sufficient to authorize a judgment for the employee in cases in which they have identified evidence of animus based on foreign accent and in which the defendant did not justify the challenged decision based on alleged defects in the employee's communication skills. *See, e.g., Akouri v. State of Fla Dept. of Transp.,* 408 F.3d 1338, 1347-1348 (11th Cir. 2005); *Iyoha v. Architect of the Capitol*, 927 F.3d 561, 567, 573 (D.C. Cir. 2019) (applying Title VII standards in finding substantial evidence of discrimination based on national origin under the Congressional Accountability Act).

Of course, as this Court recently observed in *Bostock v. Clayton County Georgia,* __U.S. __, 140 S.Ct. 1731, 1739-1743, 207 L.Ed.2d 218 (2020), neither motive nor intent to discriminate against an employee based on membership in a class protected under Title VII is required to run afoul of the statute's prohibition of such discrimination. So long as consideration of that classification, e.g. sex, is entailed in executing the challenged decision, intending discrimination based on sexual orientation or transsexual status, the discrimination is prohibited. *See ibid.* Accordingly, regardless of whether Fragante's employer was motivated by discriminatory animus or otherwise intended to discriminate based on his Philippine national origin, insofar as it denied Fragante the position based on an aversion to his accent, and that accent did not render his communication ineffective-- and the only objective evidence in the record showed it did not -- the decision in fact constituted prohibited discrimination under Title VII.

The same unfounded deference to subjective judgment was shown in *Ang v. Proctor & Gamble Co.*, *supra*, 932 F.2d at 549-550 in which the Sixth Circuit affirmed the district court's grant of summary judgment against the plaintiff, who alleged he had been denied a promotion based on his manner of speaking in violation of Title VII. The plaintiff, a U.S. citizen born in Indonesia, who was ethnically Chinese, held a Ph.D. and had worked in the United States for the defendant firm for 12 years. *Id.* at 542-543. Citing *Fragante,* the *Ang* court noted the inextricable link between accent and national origin rendered it difficult to assess claims of national origin discrimination based on accent. *Id.* at 549. Nonetheless, notwithstanding the defendant's at least ambiguous "Norms brochure" advising minorities to "'be aware that inability to speak the 'King's English' may be viewed by

those of the majority culture as equating to intelligence (i.e. lack of)," the Court held that the defendant's citation of the plaintiff's "communication problems" did not raise a triable issue about whether, in fact, his accent was a reason he was denied the promotion. *Id*. at 549-550.

The plaintiff in *Madiebo v. Division of Medicaid/ State of Miss*., *supra*, 2 F.Supp.2d at 852 was Nigerian, grew up speaking English, had earned a bachelors degree and four masters degrees at universities in Mississippi, and at the time of his job application with a state agency in Mississippi, already had seven years experience as an accountant/auditor at the Mississippi Department of Human Services. Citing the assessment of defendant's three senior managers who had interviewed *Madiebo*, none of whom was shown to have had any expertise in linguistics or communications, and its own idiosyncratic observation of the plaintiff's "thick accent," "unconventional" pronunciation, and the deliberate care with which he spoke, the court concluded *Madiebo* failed to carry his burden at trial to show discrimination based on his accent, rather than lack of communicative competence, caused the defendant to deny his promotion. *Id.* at 856-857. In reaching this determination, the *Madiebo* court also cited *Fragante's* admonition that district courts searchingly examine a defendant's contention that communication skills, rather than accent were the basis of the challenged employment decision. *Id*. at 856.

In *Meng v. Ipanema Shoe Corp.*, 73 F.Supp.2d 392, 399-400 (S.D.N.Y. 1999) the district court found the employer's simple assertion customers had trouble understanding the plaintiff sufficed to authorize summary judgment for the employer on the employee's Title VII

claim of discrimination based on her Chinese accent. The *Meng* court also cited *Fragante,* although not its admonition to searchingly examine such justifications. *Ibid.*

The casual deference to unsubstantiated assertions of deficient communicative competence and the courts' reliance on their own ad hoc assessments shown in these cases is antithetical to the "searching inquiry" courts correctly have recognized to be demanded, where the communicative skills of employees alleging discrimination based on national origin are in issue. Yet, absent clear standards for the conduct of such inquiry, courts almost certainly will continue to fail to conduct the sort of objective inquiry that is needed to ensure victims of discrimination in such cases have a fair opportunity to prevail. *See* Mari J. Matsuda, *supra, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L.J. at 1350-1351; Beatrice Bich Dao Nguyen, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers,* 81 Cal. L. Rev. 1325, 1334, 1339-1340 (1993).

Indeed, the absence of standards through which to assess these claims is particularly acute, since the parties (and courts) whose subjective judgment now often is relied upon may have no intention to discriminate on the basis of national origin or on the basis of accent, but rather may mistakenly conflate the demands posed by an unconventional -- although nonetheless understandable -- accent with a lack of the communicative competence required to effectively perform the job in issue. *See* Mari J. Matsuda, *supra, Voices of America: Accent,*

Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 Yale L.J. at 1355-1356; *see also Lee v. Walters*, No. 85-5383, 1988 WL 105887 at *7 (E.D. Penn. Oct. 11, 1988) ("[t]o avoid discrimination in the United States, it has always been necessary to make considerable allowance for a person's foreign accent and difficulty in being understood"). The magnitude of this problem is further exacerbated by the now well established fact that to prevail, petitioners with meritorious claims of employment discrimination already must overcome a series of unfair obstacles. *See*, *e.g.*, Hon. Denice B. Donald and J. Eric Pardue, *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*, 57 N.Y.L. Sch. L. Rev. 749 (2012/2013).

Much of the special problem attendant to litigating claims of employment discrimination based on national origin confronting a defense claiming inadequate communicative competence could be resolved if this Court established a framework for litigation of these claims analogous to that employed in so called "direct evidence" cases. In such a framework, evidence of references by a decisionmaker to the accent or communicative skills of the plaintiff would establish a prima facie case of national origin discrimination and would be rebuttable by showing it to have been more likely than not the plaintiff's communication deficiencies were inconsistent with effective discharge of the responsibilities attendant to the job or that neither accent nor communication skills were material to the challenged employment decision. *See, e.g.*, *Buckley v. Hospital Corp. of America, Inc.*, 758 F.2d 1525, 1529-1530 (11th Cir. 1985).

To show the former, that the plaintiff's communication deficiencies were inconsistent with effective discharge of the responsibilities attendant to the job, the employer would be required to introduce **objective** evidence, such as the expert testimony of linguists or the results of recognized standardized exams, such as the Educational Testing Service's Test of Spoke English. *See* Beatrice Bich Dao Nguyen, *supra*, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers,* 81 Cal. L. Rev. at 1346-1359; Gerrit B. Smith*, I Want to Speak Like a Native Speaker: The Case for Lowering the Plaintiff's Burden of Proof in Title VII Accent Discrimination Cases*, 66 Ohio St. L.J. 231, 260 (2005). While establishing such a regime of proof in these cases would substantially mitigate the unwarranted burden victims of national origin discrimination must overcome to secure relief under Title VII, it would do so without unreasonably impinging on the ability of employers to ensure that jobs were occupied only by persons possessing the requisite communicative skills.

Unless and until this Court addresses the lacuna in the law discussed herein, either by requiring the proposed mechanism for adjudication of these national origin claims or by establishing some functional equivalent, many victims of national origin discrimination will continue to be denied the recourse to which they are entitled under the law. As matters stand, given the increasing share of the labor force constituted by immigrants, it is likely the number of persons so affected will increase. *See* Abby Budiman, Pew Research Center, *Key Findings About U.S. Immigrants* (2020).

B. A REASONABLE JURY COULD HAVE FOUND THAT MR. LORENZO, WHO IS FILIPINO, WAS TERMINATED FROM HIS TEACHING POSITION TO ACCOMMODATE THE BIAS OF A PARENT AGAINST HIS NATIONAL ORIGIN

One month after petitioner Lorenzo was hired to be a sixth grade science teacher, a parent, Ms. Jump, complained to the school principal, Mr. Grade about Lorenzo's accent; Lorenzo is Filipino. Docket # 11 at 32, 130. Grade told petitioner that Jump was "concerned" about his accent and instructed petitioner to meet with Jump, which he did. Docket # 11 at 32, 40. At the meeting Jump questioned why someone with petitioner's accent had been hired. Docket # 11 at 32. Grade subsequently began efforts to address alleged deficiencies in petitioner's performance. Docket # 11 at 132-134.

Two and one half months after his initial meeting with Jump, petitioner met with her again and she became irate after he suggested Jump's child's difficulties in class might stem from her having caused the child to miss several days of class for a vacation. Docket # 11 at 32. Days later, echoing Jump's complaints of poor communication with parents and inadequate student progress, Grade terminated Lorenzo. Docket # 11 at 32, 164.

Finding petitioner failed to show he was qualified for the job, that another school employee was treated more favorably, and that defendant's justification of poor job performance was pretextual, the district court granted defendant's summary judgment motion. Docket # 11 at 13-15.

Title VII prohibits an employer from discharging any individual or otherwise discriminating against any individual with respect to "compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). Where an employer engages in such action, because of the individual's accent, the conduct may amount to discrimination based on national origin. *See Fonseca v. Food Services of Arizona, Inc.*, 374 F.3d 840, 848 n. 3 (9th Cir. 2004); *see also Thanongsinh v. Board of Educ.,* 462 F.3d 762, 782 (7th Cir. 2006).

To prevail under Title VII an employee need not show that discriminatory intent was the only cause of the challenged employment action, but only that it was an essential cause, i.e. the decision would not have been made absent discriminatory intent. *See Bostock v. Clayton County Georgia, supra*, 140 S.Ct. at 1739.

Moreover, an adverse employment decision based an employee's membership in a protected class violates Title VII, even where the decision is not motivated by animus, but rather to advance a legitimate non-discriminatory interest or to assuage the discriminatory animus of third party. *See id.* at 1743-1744; *see also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987). Accordingly, discrimination against an employee to satisfy perceived customer preferences violates the statute. *See Fernandez v. Wynn Oil Co.,* 653 F.2d 1273, 1276 (9th Cir. 1981); *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982); *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908, 913 (7th Cir. 2010); *Williams v. G4S Secure Solutions (USA), Inc.,* No. ELH 10-3476, 2012 WL 1698282, at * 22-23 (D. Md. May 11, 2012).

"In evaluating motions for summary judgment in the context of employment discrimination, [the Ninth Circuit has] emphasized the importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of witnesses." *McGinest v. GTE Services Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004); *see Weil v. Citizens Telecom Services, LTD*, 922 F.3d 993, 1002 (9th Cir. 2019). "[B]ecause of the inherently factual nature of the inquiry, the plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact." *Mustafa v. Clark,* 157 F.3d 1169, 1180 (9th Cir. 1998) (internal citation and quotes omitted).

"In responding to a summary judgment motion in a Title VII disparate treatment case, a plaintiff may produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the defendant's decision, or alternatively may establish a prima facie case under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *Dominguez-Curry v. Nevada Transport Dept.*, 424 F.3d 1027, 1037 (9th Cir. 2005). A plaintiff's evidence may be evaluated under both of these methods. *See Cordova v. State Farm Insurance Cos.*, 124 F.3d 1145, 1149 (9th Cir. 1997).

"When a petitioner has established a *prima facie* inference of disparate treatment through direct or circumstantial evidence of discriminatory intent -- *even if* the employer has a legitimate nondiscriminatory reason for taking the adverse employment action -- she 'will *necessarily* have raised a genuine issue of material fact with respect to the legitimacy or bona fides of

the employer's articulated reason for its employment decision.'" *Machado v. Real Estate Resources, LLC*, No. 12-00544, 2013 WL 3944551, at *5 (July 30, 2013)(quoting *Cordova v. State Farm Insurance Cos.*, 124 F.3d 1145, 1150 (9th Cir. 1997)); *see also McDonnell Douglas v. Green*, *supra*, 411 U.S. at 802-805.

1. Grade's Instructing Petitioner to Meet With Ms. Jump to Discuss Her "Concerns" About His Accent Was Circumstantial Evidence Grade Acted to Accommodate Jump's Bias Against Petitioner's National Origin

"Accent and national origin are obviously inextricably linked in many cases." *Fragante v. City and County of Honolulu*, *supra*, 888 F.2d at 596. Absent evidence a particular accent is required to perform a job, adverse employment decisions based on accent amount to unlawful discrimination based on national origin. *See ibid*. Negative comments about a person's accent, such as asserting it to be "weird," suffice to establish bias based on national origin. *See Fonseco, supra,* 374 F.3d at 844, 849; *Thanongsinh v. Board of Educ.*, *supra*, 462 F.3d at 781-782.

Statements by decision makers that could be construed to indicate consideration of classifications prohibited under Title VII are circumstantial evidence of discrimination. *See Davis v. Team Electric Co.*, 520 F.3d 1080, 1092 n.7 (9th Cir. 2008); *Sampson v. Image 2000, Inc.*, No. 2:13-cv-01321, 2015 WL 1397118, at *7 (D. Nev. March 25, 2015); *Hamed v. Macy's West Stores, Inc.,* No. c-10-2790, 2011 WL 1935937, at *12 (N.D. Cal. May 20, 2011); *Curry v. Contra Costa County*, No. 12-cv-03940, 2014 WL 1724431, at *10 (N.D. Cal. April 30, 2014).

Here Principal Grade directed Petitioner Lorenzo, whose national origin is Filipino,[7] to arrange to meet with Ms. Jump, a parent, to address her "concerns" about his accent.[8] Docket # 11 at 32, 40. Particularly since there was no significant evidence petitioner's accent impaired his job performance (defendant asserts nothing to the contrary), a reasonable factfinder could construe Jump's "concerns" about his accent as evidence of her animus towards him based on his national origin. *See Thanongsinh v. Board of Educ.*, *supra*, 462 F.3d at 782; *see also Dominguez-Curry v. Nevada Transport Dept.*, *supra*, 424 F.3d at 1038-1039. That inference is corroborated by the fact that when petitioner met with Jump, as instructed by Grade, Jump treated him condescendingly, purported to "correct" his pronunciation, and stated petitioner's accent rendered his hiring a questionable decision. Docket # 11 at 32.

In *Mayes v. Winco Holdings, Inc.,* 846 F.3d 1274, 1281 (9th Cir. 2017) the court found that a reasonable jury could find a supervisor's statement that "a man would be better in this position" to have been discriminatory. Manifestly, a reasonable jury could find that Grade's directing Lorenzo to contact Jump based on her "concerns" about his accent supported the inference that Grade had thought it a problem that petitioner had an accent of which Jump disapproved, i.e. that it would "be better" if petitioner did not have such an accent -- and thereby that he was not Filipino. *See also Lowe v. City of Monrovia*, 775 F.2d 998,

7. As race, petitioner identifies Southeast Asian, Malay, and Filipino. Docket # 11 at 29.

8. Grade cited Jump's concerns about difficulty her child had in understanding certain concepts as another reason for petitioner to meet with her. Docket # 11 at 40.

1002-1003, 1007 (9th Cir. 1985); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991).

Thus, Grade's email supported the inference that, contrary to the mandate of Title VII, Grade was incorporating Ms. Jump's bias into his assessment of Lorenzo's performance.[9] *See Fernandez v. Wynn Oil Co., supra,* 653 F.2d at 1276. That Grade then began interventions to correct alleged deficiencies in petitioner's performance, including downgrading his standing by placing him on an "improvement plan," pursuant to which Lorenzo was subject to additional supervision and reporting duties corroborates that inference. Docket No. 11 at 31, 131-133; *see Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987).

2. Grade's Terminating Lorenzo Less Than Three Months After Indicating His Intent to Enforce Jump's Bias Against Him Authorized the Jury to Find the Termination Was Discriminatory; That the Termination Closely Followed A Meeting at Which Jump Became Irate With Petitioner Underscores that Conclusion

Close temporal proximity between an employer's discovery of an employee's membership in a protected class and the employer's subjecting the employee to adverse action suffices to raise a triable question of fact about whether the adverse action was unlawful

9. Petitioner's observation that Ms. Jump's husband held a high rank, and that parents of high rank exercise influence in schools serving military families further supports this inference. Docket # 11 at 32.

discrimination. *See Arriaza v. Leggett & Platt, Inc.*, No. CV-09-2242, 2009 WL 10674330, at * 2 (C.D. Cal. Nov. 9, 2009); *see also Buhrman v. Aureus Medical Group*, 519 F.Supp.3d 923, 931 (D. Colo. 2021).

Cases of unlawful employment discrimination based on participation in protected activities also apply this rule and thereby provide guidance in its application.[10] *See Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 507 (9th Cir. 2000). "Depending on the circumstances, three to eight months is easily within a time range that can support an inference of retaliation." *See Coszalter v. City of Salem*, 320 F.3d 968, 977-978 (9th Cir. 2003); *Bell v. Clackamas County*, 341 F.3d 858, 865-867 (9th Cir. 2003).[11]

There is no reason to believe Grade had discovered Jump's bias against petitioner substantially prior to his September 23, 2010 email instructing petitioner to contact Jump about his accent. Thus, it is reasonable to infer he first learned of Jump's bias on or about that date. Since the email supported inferences that Grade both discovered Jump's bias on or about that date and that he elected to apply Ms. Jump's bias to the assessment of Lorenzo's performance on or about that date, a reasonable jury could infer that the relatively short time lapse between the email and Grade's terminating petitioner in December 2010, less

10. "Normally temporal proximity is analyzed in the context of retaliation." *Buhrman v. Aureus Medical Group*, *supra*, 519 F.Supp.3d at 931.

11. *Coszalter* involved a claim of retaliation under the First Amendment; it employed the same three step method to identify a prima facie case of retaliation used under Title VII. *See Coszalter v. City of Salem*, *supra*, 320 F.3d at 973.

than three months, established that Grade's enforcement of Jump's bias against petitioner's national origin was a cause of the termination. These facts thereby sufficed to preclude summary judgment on this claim. *See Passantino v. Johnson & Johnson Consumer Products, Inc.*, *supra*, 212 F.3d at 507.

Additional facts underscore this conclusion. Days prior to his termination, petitioner again met with Jump to discuss her son's falling behind in his class. Docket # 11 at 32. Petitioner suggested this problem may have been a consequence of Jump having caused her child to miss considerable class time to take a vacation. ER-31. Jump became irate in response. Docket # 11 at 32.

Surrounding circumstance indicate Jump conveyed her anger at petitioner to Grade and thereby provided further impetus into Grade's decision to terminate petitioner. *See Hernandez v. Spacelabs Medical, Inc.*, 343 F.3d 1107, 1113-1114 (9th Cir. 2003).

Grade's September 23rd email directing Lorenzo to address Jump about her concerns demonstrates she previously, and, as of December 2010, relatively recently, had been motivated to communicate with Grade about her dissatisfaction with Lorenzo and in fact had done so. There is no reason to believe her motive or opportunity to apprise Grade of her dissatisfaction with Lorenzo was any less operative following her early December meeting with Lorenzo. As noted that September 23d email, and subsequent interventions to correct petitioner's alleged performance deficiencies leading to imposition of the "improvement plan," established Grade's determination to subject petitioner to Jump's bias against him.

Second, the extremely close temporal proximity of Jump's expressing anger towards petitioner and his termination, a matter of days, supports both the inference that Jump had communicated her anger to Grade in the December meeting, and that he, in turn had acted thereon. *See Jute v. Sundstrand Corp.*, 420 F.3d 166, 175 (2nd Cir. 2005); *see also Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163-1164 (11th Cir. 1993).

Third, that in his termination conference with petitioner, Grade echoed Jump's complaints of poor communication with parents and inadequate student progress, also supported the inference that Jump had complained to Grade about that meeting, and that complaint was a proximate cause of Grade's termination decision. Docket # 11 at 32.

There was, therefore, ample evidence from which a reasonable jury could conclude Grade fired petitioner, to enforce Ms. Jump's bias against petitioner's national origin.

3. Grade's Questionable Explanation for Terminating Petitioner Before Completion of the Improvement Plan, His Denying Petitioner's Contention that He Implemented All Grade's Suggestions, His Requiring More Work From Petitioner Than From Petitioner's Predecessor, and Petitioner's Teaching Accomplishments Each Authorize Finding Defendant's Justification to Be Pretextual

Evidence showing defendant's justification unworthy of credence also supports the inference of discrimination. *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 147 (2000).

Indeed, showing a single element of the defendant's justification to be unworthy of credence supports an inference of discrimination, since it constitutes grounds for doubting the truthfulness of the entirety of the defendant's explanation. *See Coszalter v. City of Salem*, *supra*, 320 F.3d at 978; *Burns v. AAF McQuay, Inc.*, 96 F.3d 728, 733-734 (4th Cir. 1996). Where a large organization justifies an adverse employment decision by reference to its policy, and that policy is not written, it is reasonable to infer the justification is false. *See McGinest v. GTE Service Corp.*, *supra*, 360 F.3d at 1123. Where there is reason to doubt the credibility of the decisionmaker, the decisionmaker's reliance on subjective judgment to justify his decision supports an inference of pretext. *See Juaregri v. City of Glendale*, 852 F.2d 1128, 1135-1136 (9th Cir. 1988).

Here, there were several reasons jurors reasonably might have found defendant's justification for the termination, that Lorenzo's performance was deficient, to have been unworthy of credence. Docket # 11 at 164-165. First, at the time of his December 13, 2010 termination, petitioner was working on an informal "improvement plan" that was scheduled to conclude January 26, 2011. Docket # 11 at 42.

Defendant justified its decision to terminate petitioner prior to the conclusion of the improvement plan on the grounds that petitioner was failing to improve. Docket # 11 at 26, 164. Yet, petitioner's statement, which must be credited on summary judgment, is that he had implemented all Grade's instructions for improvement. Docket # 11 at 29; *see Reeves v. Sanderson Plumbing Products, Inc.*, *supra,* 530 U.S. at 150-151. Moreover, at petitioner's last weekly meeting with Grade, on December 3, 2010, Grade expressed satisfaction with petitioner's

progress in implementing his recommendations. Docket # 11 at 29. This, of course, also undermines the plausibility of the defendant's justification.

In addition, a principal reason cited by Grade for the termination was petitioner's failure to provide sufficient entries of student grades into Gradebook.[12] Docket # 11 at 102 [30:11-15], 107 [53:3-4], 164. While Grade asserted weekly entries into Gradebook was a formal requirement, defendant failed to identify any document supporting Grade's claim. Docket # 11 at 106-107 [48:22- 49:6], 107 [50:18-22, 52:2-4] The absence of a document memorializing this putatively key duty is in itself sufficient reason to find the explanation pretextual. *See McGinest v. GTE Service Corp.*, *supra*, 360 F.3d at 1123. That the other factors on which defendant justified its decision were subjective, e.g., lesson plans' inclusion of activities allowing students to analyze, synthesize, and evaluate the objectives and standards being taught, use of proper strategies to check for student learning, students understanding why they were learning what was being taught, provided additional reason for a factfinder to conclude the justification was pretext. Docket # 11 at 164; *see Juaregri v. City of Glendale*, *supra*, 852 F.2d at 1135-1136.

Furthermore, petitioner stated that Grade imposed materially greater teaching demands on him than he had on petitioner's predecessor -- whose compliance with DodEA standards Grade nonetheless had commended. Docket # 11 at 33. Specifically, Lorenzo's predecessor

12. Grade explained the terms "Gradebook" and "Gradespeed" are used interchangeably. Docket # 11 at 102 [30:11-18].

had been required to do no more than have students do a science project between August and December, while Grade required Lorenzo to have weekly lessons in addition to the science project. Docket # 11 at 30, 33. Grade also authorized petitioner's predecessor to use commercially prepared warm-up exercises in her classroom routine, but criticized Lorenzo for using those same exercises and required Lorenzo develop his own warm-up exercises, which he did. Docket # 11 at 30, 33. Such differential treatment also supports an inference of discrimination.[13]

Petitioner's evidence, thereby, far exceeded the threshold that would authorize reasonable jurors to find defendant's justification for the termination unworthy of credence. See *Reeves v. Sanderson Plumbing*, *supra,* 530 U.S. at 147.

4. The District Court's Holding Petitioner Failed To Adduce Evidence to Support an Inference of Discrimination Based on His National Origin Disregards the Evidence Defendant Fired Petitioner in Order to Accommodate the Bias of Ms. Jump and the Evidence Defendant's Justification for the Termination Was Unworthy of Credence

The district court found petitioner's evidence insufficient to show defendant's justification for the termination was pretextual, because: 1) it did not rebut

13. Petitioner also rebutted other claims of defective performance with which defendant had charged him. Docket # 11 at 29-31, 164.

the presumption that Grade's having hired him and fired him within a short period of time showed the firing was not discriminatory; 2) that petitioner's "intervention plan" had not been completed was not inconsistent with defendant's contention that he was terminated for inadequate performance; and 3) petitioner failed to show Grade was aware of his December 2010 conversation with Ms. Jump. Docket # 11 at 14-15. None of these grounds justified the district court's holding.

The first ground is inapposite, because the "same actor" presumption turns on the proposition that if a person was motivated by discriminatory animus against the class to which the employee belonged, the actor would not have hired the employee in the first place. *See Coughlan v. Am. Seafoods, Co., LLC*, 413 F.3d 1090, 1097 (9th Cir. 2005). Petitioner's claim, however, turns on the proposition that Grade discriminated against petitioner in order to accommodate Ms. Jump's bias-- not his own bias. There is no reason to believe Grade was aware of Jump's bias at the time he hired petitioner. Thus, there is no reason to believe the bias alleged to have caused petitioner's termination would have been operative at the time of his hiring.

Additionally, petitioner stated that at the time of his hiring, it appeared he was the only remaining qualified candidate who was local to Japan and that candidates living in Japan were given hiring priority over applicants from the United States. Docket # 11 at 31-32. Additionally, time was short, since school was to begin the following week. Docket # 11 at 32. Defendant denies none of these propositions nor does defendant show any logical flaw in petitioner's inference from these propositions that Grade

consequently almost was obligated to hire him.[14] For this reason also, the notion that any bias against petitioner due to his nationality would have prevented Grade from hiring him in the first place is inapposite.

The second and third grounds are inapposite for several reasons. First, they disregard that Grade's September 23rd email to petitioner sufficed to show he was enforcing Jump's bias against petitioner's national origin, and that in light thereof, his termination of petitioner within three months authorized a jury to find that enforcement was a cause of the termination, regardless of whether inadequate performance also was a cause or whether Grade had known of the December conversation with Jump. *See also Cordova v. State Farm Insurance Cos.*, *supra*, 124 F.3d at 1150.

The second ground is also immaterial, because defendant justified its decision to terminate petitioner prior to the conclusion of the improvement plan on the grounds that petitioner was failing to improve. Docket # 11 at 165. Since petitioner maintained that he had implemented all Grade's instructions for improvement, this created a material question of fact, which only could be resolved by the jury. Docket # 11 at 29; *see Reeves v. Sanderson Plumbing*, *supra*, 530 U.S. at 150-151.

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14. Neither did defendant deny that petitioner was asked to bring his transcripts to the job interview and that this is something that typically only is asked of applicants after a decision to hire has been made. Docket # 11 at 33. Similarly, defendant adduces no challenge to petitioner's reasoning that this fact also indicates Grade almost had no choice but to hire him. Docket # 11 at 33.

Relatedly, the second ground disregards the above-cited evidence authorizing jurors to find defendant's justification unworthy of credence.

The third ground, that petitioner failed to show Grade knew of the December meeting between him and Jump, is inapposite for the additional reason that it disregards the above-cited circumstantial evidence authorizing the inference that he did know.

C. THE COURT OF APPEALS CONFLATED CONCERN ABOUT FOREIGN ACCENT WITH CONCERN ABOUT INTELLIGIBILITY AND MISCONSTRUED THE RECORD

As noted the Ninth Circuit mistakenly construed an email directing Lorenzo to address a parent's concern about his accent to have been a directive to address her concern about his accent's impact on her child's understanding certain concepts. This email actually demonstrated that Principal Grade considered a parent's disapproval of petitioner's accent, and lacking justification therefore, her disapproval of his national origin in his decisionmaking. Grade's terminating him less than three months later established a triable issue of fact that Lorenzo's national origin was a cause of the termination. *See Passantino v. Johnson & Johnson Consumer Products, Inc.*, *supra*, 212 F.3d at 507; *see also Bell v. Clackamas County*, *supra*, 341 F.3d at 865-866.

While the panel asserted the relative proximity of the email to the date of petitioner's hiring rebuts the inference of causation, in fact no authority suggests that the causal inference arising from an adverse action closely following

discovery of employee's protected trait or protected conduct does not apply in cases in which that discovery closely follows the employee's hiring. *See* App. at 4a.

The panel also stated that the inference of causation does not apply, because there was evidence petitioner was terminated for poor performance. App. at 4a. Assuming *arguendo* that evidence could be credited on summary judgment, it cannot authorize summary judgment, because it does not negate his showing that consideration of his national origin also was a proximate cause of his termination.[15] *See Bostock v. Clayton County*, *supra*, 140 S.Ct. at 1739.

Moreover, the panel overlooked several other facts supporting petitioner's claim of termination based on his national origin, including that he was terminated days after his second meeting with Ms. Jump, and that at that meeting Jump became irate at petitioner. It asserts that there was no connection between the Jump's expression of hostility to petitioner and Grade's termination of petitioner, because there was no evidence Grade had been aware of the contents of petitioner's meetings with Jump. App. at 3a.

It thereby overlooked that under *Hernandez v. Spacelabs Medical, Inc.*, *supra*, 343 F.3d at 1113-1114 an inference of communication can be reasonably drawn

15. While the panel's opinion states that Grade already had been giving Lorenzo some assistance prior to the September email (App. at 4a), there was no formal intervention by Grade until after the email, when he imposed special tasks on Lorenzo, an "Intervention Plan," to rectify alleged deficiencies in Lorenzo's teaching. Docket # 11 at 134.

based on surrounding circumstances, as well as the presence of such circumstances here. *See supra* at 26-27.

In light of these circumstances, that petitioner was terminated days after Jump having become irate with him clearly authorizes the inference that Jump again had communicated with Grade about what she believed had transpired during her meeting with Lorenzo, and that in firing Lorenzo, Grade again had exercised his supervisory authority to accommodate that concern. *See Jute v. Sundstrand Corp.*, *supra*, 420 F.3d at 175; *see also Goldsmith v. City of Atmore*, *supra*, 996 F.2d at 1163-1164.

The above-cited circumstantial evidence amply established a triable issue of fact, regardless of defendant's justification for the termination. *See Cordova v. State Farm Insurance Cos.*, *supra*, 124 F.3d at 1150. Nonetheless, petitioner also presented copious evidence of pretext. The evidence also was overlooked by the panel in asserting petitioner failed to show pretext. *See Reeves v. Sanderson Plumbing, Inc.*, *supra,* 530 U.S. at 147.

Moreover, while petitioner's evidence did show defendant's justification to be pretextual, assuming *arguendo* it failed to show poor performance was was not a cause of termination, since he was not required to show discrimination was the only cause of his termination, such failure could not authorize the panel's finding that he failed to establish a triable issue of fact concerning his claim for discrimination based on national origin. *See Bostock v. Clayton County, Georgia*, *supra*, 140 S.Ct. at 1739.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 12, 2023

APPENDIX

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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED NOVEMBER 4, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-56381

D.C. No. 3:19-cv-01128-WQH-BGS

VIRGIL M. LORENZO,

Plaintiff-Appellant,

v.

LLOYD J. AUSTIN III,
SECRETARY, DEPARTMENT OF DEFENSE,

Defendant-Appellee.

October 4, 2022, Argued and Submitted,
Pasadena, California; November 4, 2022, Filed

Appeal from the United States District Court for
the Southern District of California.
William Q. Hayes, District Judge, Presiding.

MEMORANDUM[*]

Before: FORREST and SANCHEZ, Circuit Judges, and FREUDENTHAL,[**] District Judge.

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

** The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

Appendix A

Mr. Virgil Lorenzo was terminated from his position as a middle school science teacher at a Department of Defense school in Okinawa, Japan.[1] Lorenzo appeals the district court's grant of summary judgment against his claim under Title VII, 42 U.S.C. § 2000e et seq., that he was terminated because of his Filipino nationality, and his claim under the Rehabilitation Act, 29 U.S.C. § 794(a), that he was terminated because of his actual or perceived hearing impairment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. When responding to a summary judgment motion, the plaintiff may establish his or her case "by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004). Under either approach, Lorenzo "must produce some evidence suggesting that [his termination] was due in part or whole to discriminatory intent, and so must counter [Defendant's] explanation." *Id.* Because Lorenzo has not produced evidence suggesting discriminatory intent and does not counter Defendant's reasons for termination, his claim fails under either approach. *See id.* at 1123; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

Lorenzo's argument is based on an email that he received from the principal on September 23, 2010. It reads:

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1. The current Secretary of Defense, Lloyd J. Austin III, was automatically substituted as Defendant on January 22, 2021, pursuant to Fed. R. Civ. P. 25(d).

> Mr. Lorenzo, Please contact [parent] about setting up a conference to discuss [student]. She has some concern's [sic] about your accent and [student] understanding some of the concepts covered. Thank you.

Lorenzo has failed to connect any animus held by the parent to the principal who decided to terminate Lorenzo. The text of the email conveys only that the principal wanted Lorenzo to meet with a parent who believed her child was having difficulty understanding Lorenzo's accent in class—a facially legitimate concern. *See Fragante v. City and Cnty. of Honolulu*, 888 F.2d 591, 596-97 (9th Cir. 1989) (explaining that, regarding an employee's accent, "[t]here is nothing improper about an employer making an honest assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance" (emphasis omitted)).

Lorenzo's statements about his meetings with the parent cannot establish the connection. There is no evidence that the principal knew about the events of Lorenzo's first meeting with the parent during which she displayed an "air of superiority" and "wondered aloud why a middle school would hire someone with [Lorenzo's accent]," or that the principal knew about Lorenzo's second meeting with the parent when she became irate.

Moreover, temporal proximity does not indicate causation under the circumstances. Since Lorenzo's probationary employment lasted only four months, the events at issue generally occur as close to his August 10,

2010, hiring as to his December 17, 2010, termination. Moreover, the September 23 "accent" email was sent after the principal had already began giving Lorenzo "support and specific directions." Further, the school received a number of other parent and student concerns regarding Lorenzo's teaching practices that were unrelated to Lorenzo's accent. The school's termination decision followed a reasonable chronology of escalating support, counseling, and intervention.

Finally, Lorenzo fails to demonstrate a genuine dispute of material fact that the employer's proffered nondiscriminatory reasons for termination—failure to monitor and assess student achievement—were pretextual. Additionally, the discrete instances raised by Lorenzo in his post-termination meeting fail to contradict the principal's documented assessment of Lorenzo's poor performance. The record is replete with evidence that Lorenzo failed to meet the requirements of his employment.[2]

2. Even assuming Lorenzo has established the first two elements of his Rehabilitation Act Claim,[3] he cannot establish that he was terminated because of his disability. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999).

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2. We need not address the "same actor" presumption because Lorenzo's Title VII claim fails even without it. *See generally Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996).

3. Rehabilitation Act claims are evaluated under the same standards as the Americans with Disabilities Act (ADA). *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004) (citing 29 U.S.C. § 794(d)).

Lorenzo relies on an incident in November 2010, when a student's cell phone chimed during the principal's observation of Lorenzo's class. Lorenzo argues that the principal excoriated him for not taking the phone, but the record fails to show that the principal's response related to Lorenzo's diminished hearing. Rather, the record supports the principal's conclusion that "[Lorenzo] heard the cell phone. He reacted to the cell phone. He just didn't manage the cell phone."

Under the circumstances, temporal proximity does not create an inference of causation. As noted above, the principal's escalating support, counseling, and intervention were ongoing by the time of the cell phone incident.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FILED OCTOBER 29, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 19-cv-1128-WQH-BGS

VIRGIL M. LORENZO,

Plaintiff,

v.

LLOYD J. AUSTIN III, SECRETARY, DEPARTMENT OF DEFENSE,

Defendant.

ORDER

HAYES, Judge:

The matter before the Court is the Motion for Summary Judgment filed by Defendant Lloyd J. Austin III (ECF No. 31).[1]

I. BACKGROUND

On June 17, 2019, Plaintiff initiated this action by filing a Complaint against Patrick Shanahan, the Acting

1. On January 22, 2021, Lloyd J. Austin III became Secretary of Defense. Pursuant to Federal Rule of Civil Procedure 25(d), Secretary Austin is automatically substituted as Defendant.

Secretary of the Department of Defense.[2] (ECF No. 1). In the Complaint, Plaintiff alleges three causes of action as a result of his termination: (1) discrimination on the basis of race and national origin under Title VII of the Civil Rights Act; (2) discrimination on the basis of age under the Age Discrimination in Employment Act; and (3) discrimination on the basis of disability under the Rehabilitation Act.[3]

The parties engaged in fact discovery. On July 26, 2021, Defendant filed a Motion for Summary Judgment, seeking summary judgment on all claims in the Complaint. (ECF No. 31). On August 13, 2021, Plaintiff filed an Opposition to the Motion. On August 20, 2021, Defendant filed a Reply.

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2. Prior to filing the Complaint, Plaintiff filed an administrative complaint and received an adverse final decision from the Equal Employment Opportunity Commission (EEOC). Plaintiff filed the Complaint within the 90-day window after Plaintiff's receipt of the EEOC decision, as required by 42 U.S.C. § 2000e-16(c).

3. Plaintiff states in his Opposition to Defendant's Motion for Summary Judgment: "Mr. Lorenzo is withdrawing his claim that the termination was based on his age . . . ." (ECF No. 33 at 7). As a result, summary judgment is granted on Plaintiff's second claim.

II. FACTS [4]

In August 2010, Plaintiff Lorenzo was hired as a provisional middle school science teacher at Lester Middle School, a facility operated by the DoDEA. Lester Middle School is an education facility serving Camp Lester Marine Corps Base in Chatan Town, Okinawa, Japan. The school is operated by the DoDEA, which manages pre-kindergarten through 12th grade educational programs for families of United States servicemembers domestically and abroad. Plaintiff was employed by Defendant until December 2010, when he was terminated from his position.

Altorn Grade, Jr., the principal of Lester Middle School, interviewed Plaintiff for the teaching position. At the time of Plaintiff's interview there were "five potential candidates" for the teaching position. (Grade Affidavits, Ex. 4 to Keehn Decl., ECF No. 31-3 at 95). In the interview, Grade and Plaintiff did not discuss that Plaintiff had "any issues at all with any kind of disability." (Grade Deposition, Ex. 2 to Keehn Decl., ECF No. 31-3 at 57). On August 20, 2010, Grade offered Plaintiff the teaching position. Plaintiff's race is "Southeast Asian, Malay, [and] Filipino"

4. Defendant filed evidentiary objections. (ECF No. 34). The objections to evidentiary materials not relied upon in this Order are denied as moot. The objections to the portions of evidentiary materials that are cited in this Order are overruled because there is no indication that the evidence relied upon in this Order could not be presented in an admissible form at trial. *See Fonseca v. Sysco Food Servs. Of Ariz., Inc.*, 374 F.3d 840, 846 (9th Cir. 2004) (evidence is "admissible for summary judgment purposes [if it] 'could be presented in an admissible form at trial.'" (quoting *Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir. 2003))).

and his national origin is the "Philippines." (Lorenzo Affidavit, Ex. B to Prato Decl., ECF No. 33-2 at 12). At the time of the hiring, Grade was aware of Plaintiff's "skin color and physical features." (Grade Deposition, Ex. 2 to Keehn Decl., ECF No. 31-3 at 56-57).

As a provisional teacher, Plaintiff was subject to DoDEA's performance appraisal requirements. All new Department of Defense Dependents Schools educators are placed at a "provisional" level for an introductory two-year period. (DoDEA EPAS, Ex. 1 to Keehn Decl., ECF No. 31-3 at 11). One of the purposes of the provisional level is to "provide an appraisal system which determines retention and dismissal of educators." (*Id.*). Provisional educators are rated on five critical "professional performance elements," each of which contains specific mandatory standards. (*Id.* at 12). Performance Element Four, "Monitoring and Assessing Student Achievement," is defined as follows:

> The effective educator uses a variety of assessment techniques and procedures to evaluate learning and guide instruction.
>
> A. Uses a variety of assessment tools and strategies:
>
> 1) Assures assessment methodology is appropriate to the instructional goal
>
> 2) Communicates assessment criteria and standards to students

3) Provides timely, accurate and constructive feedback to students

4) Uses information gained from student assessment to guide teaching

5) Assesses learner progress in relation to adopted curriculum standards on a continuous basis

6) Communicates student progress to parents

B. Documents student progress:

1) Maintains accurate documentation of student progress in a retrievable record-keeping system

2) Documents student progress toward meeting school goals and community strategic plan

(*Id.* at 19 (emphasis omitted)). "An unacceptable rating may be rendered at any time an employee's performance does not meet any critical element." (*Id.* at 13). As part of the provisional process, educators also must undergo "a minimum of three formal observations per year." (*Id.* at 12).

In September 2010, Grade began receiving complaints from Plaintiff's students and their parents regarding

Plaintiff's teaching. Grade forwarded one parent's emailed complaint to Plaintiff and asked him to speak with the parent. The parent had concerns about "[Plaintiff's] accent and [her child] understanding some of the concepts covered." (November 18 Email, Ex. E to Prato Decl., ECF No. 33-2 at 23). Grade began giving Plaintiff "support and specific directions" to improve Plaintiff's teaching performance. (Grade Affidavits, Ex. 4 to Keehn Decl., ECF No. 31-3 at 89).

On October 1, 2010, Grade "sat down with [Plaintiff] and reviewed [Plaintiff's] performance standards, performance elements, and the DoDDS Educator Performance Appraisal System." (*Id.* at 88). Plaintiff "left the meeting with a signed copy of the Performance Standards" and was "reminded" that "three formal observations" were required during the year. (*Id.*). On October 7, 2010, Grade provided Plaintiff with curriculum support from an Instructional Systems Specialist.

On October 12, 2010, Grade sent Plaintiff an email that stated:

> We are beginning the seventh week of school and I am very concerned about your grading practices. Today I reviewed LMS Teachers' GradeSpeed Grade Books.
>
> Currently, you have only five or six assignments listed for your classes.
>
> Some students do not have any grades listed . . . .

> You should have at least a grade a week for each student entered into Gradespeed. I would expect to see at least double what you have entered.
>
> I have included a copy of Performance Element 4. For a lot of your students it would be hard for you to prove that you have satisfied any part of this element.
>
> . . . .
>
> Please rectify this situation. On Friday, October 15, 2010, I will again review Gradespeed and let you know of my findings.

(October 12 Email, Ex. 7 to Keehn Decl., ECF No. 31-3 at 108). Grade did not recall sending a "direct letter e-mail to any person about their entering grades in Gradespeed, other than [Plaintiff]" that year. (Grade Deposition, Ex. 2 to Keehn Decl., ECF No. 31-3 at 65-66).

On October 19, 2010, Grade presented Plaintiff with a "Letter of Counseling." (Letter of Counseling, Ex. 5 to Keehn Decl., ECF No. 31-3 at 98). The letter informed Plaintiff that he had "failed to satisfactorily perform in Critical Element 4 Monitoring and Assessing Student Achievement." (*Id.* at 98). The letter stated that "[l]ess than a quarter of your students have all six grades entered into GradeSpeed." (*Id.* at 99). The letter stated that a student had complained to Grade that Plaintiff had lost "all her work" and that Plaintiff required the student to "redo all the lost assignments." (*Id.* at 100).

Appendix B

On October 27, 2010, Grade placed Plaintiff on an "In[t]ervention Plan," which identified Plaintiff as deficient on three of the five required Performance Elements—Elements Two, Three, and Four. (Intervention Plan, Ex. 8 to Keehn Decl., ECF No. 31-3 at 110). The DoDEA Educator Performance Appraisal System provides that educators at the professional level may be placed on an "Intervention Plan" prior to termination. (DoDEA EPAS, Ex. 1 to Keehn Decl., ECF No. 31-3 at 15). The purpose of an Intervention Plan is to "provide assistance to educators who are not meeting one or more of the professional performance critical elements." (*Id.*). Educators placed on an Intervention Plan are monitored and afforded "professional growth opportunities" including "peer assistance, mentoring, resource teams, or staff development." (*Id.*). The Educatory Performance Appraisal System does not provide educators at the provisional level with an opportunity to be placed on an Intervention Plan.

On November 18, 2010, Grade "discovered" that Plaintiff, as a provisional teacher, could not be placed on a formal Intervention Plan prior to termination. (Grade Affidavits, Ex. 4 to Keehn Decl., ECF No. 31-3 at 89). Despite Plaintiff's ineligibility, Grade and Plaintiff agreed to "continue this [intervention] process" informally. (*Id.*). Plaintiff agreed to perform a number of tasks, including sending Grade "Weekly Lesson Plan[s]," providing "pre-observation documentation," "Communicat[ing] To Parents of Failing Students," and improving classroom management. (Intervention Plan, Ex. 8 to Keehn Decl., ECF No. 31-3 at 110; Grade Deposition, Ex. 2 to Keehn Decl., ECF No. 31-3 at 68-69).

Appendix B

Between September and November 2010, Grade received at least ten student and parent complaints. "As late as November or December," Plaintiff was still failing to record grades. (Grade Deposition, Ex. 2 to Keehn Decl., ECF No. 31-3 at 75). Plaintiff failed to provide to Grade "pre-observation documentation" required to organize additional classroom observations. (*Id.* at 68-69).

In the first week of December, the parent who had previously expressed concern about Plaintiff's accent "became irate" in a conversation with Plaintiff after Plaintiff "suggested that her son's extended absence . . . has something to do with his getting behind in [Plaintiff's] class." (Lorenzo Affidavit, Ex. B to Prato Decl., ECF No. 33-2 at 15).

On December 13, 2010, Grade issued Plaintiff a notice terminating Plaintiff's employment, effective December 17, 2010. The notice stated that Plaintiff was terminated for "failure to demonstrate acceptable teacher performance in critical element 4: Monitoring and Assessing Student Achievement, of [the] DoDDS teacher performance plan." (Notice of Termination, Ex. 10 to Keehn Decl., ECF No. 31-3 at 122). In a subsequent termination conference, Grade told Plaintiff that he did not "communicate well with parents" and expressed concern that "students were getting behind in science." (Lorenzo Affidavit, Ex. B to Prato Decl., ECF No. 33-2 at 15).

III. LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A material fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The materiality of a fact is determined by the substantive law governing the claim or defense. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The moving party has the initial burden of demonstrating that summary judgment is proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). Where the party moving for summary judgment does not bear the burden of proof at trial, "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325; *see also United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542-43 (9th Cir. 1989) ("[O]n an issue where the plaintiff has the burden of proof, the defendant may move for summary judgment by pointing to the absence of facts to support the plaintiff's claim. The defendant is not required to produce evidence

showing the absence of a genuine issue of material fact with respect to an issue where the plaintiff has the burden of proof. Nor does Rule 56(c) require that the moving party support its motion with affidavits or other similar materials negating the nonmoving party's claim.").

If the moving party meets the initial burden, the burden shifts to the opposing party to show that summary judgment is not appropriate. *Anderson*, 477 U.S. at 256; *Celotex Corp.*, 477 U.S. at 322, 324. The nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 586; *see also Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient."). The nonmoving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324 (quotations omitted). The nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 256.

IV. DISCUSSION

Defendant seeks summary judgment on Plaintiff's remaining claims: (1) discrimination on the basis of race and national origin under Title VII of the Civil Rights Act; and (2) discrimination on the basis of disability under the Rehabilitation Act. The parties agree that the claims are

governed by the burden shifting framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). "Under *McDonnell Douglas*, a plaintiff alleging disparate treatment . . . must first establish a prima facie case of discrimination." *Chuang v. Univ. of California Davis, Bd. of Trs.*, 225 F.3d 1115, 1123 (9th Cir. 2000). "The burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action. If the employer does so, the plaintiff must show that the articulated reason is pretextual" by either persuading the court that a discriminatory reason was the more likely motivation or by showing that the employer's explanation is unworthy of credence. *Id.* at 1123-24.

Title VII Claim

Title VII makes it unlawful for any employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of his employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1).

Defendant contends that Plaintiff failed to demonstrate membership in a protected class. Defendant contends that Plaintiff was terminated because he was not performing his job satisfactorily. Defendant contends that Plaintiff has insufficient evidence of pretext. Plaintiff contends that he was qualified for the position and that his performance was improving. Plaintiff contends that a parent's complaint about his accent before he was terminated demonstrates that his termination was racially motivated.

Appendix B

"In determining whether a prima facie case has been established, the overriding inquiry is whether the evidence is sufficient to support an inference of discrimination." *Douglas v. Anderson*, 656 F.2d 528, 532 (9th Cir. 1981). A plaintiff must show that he (i) belongs to a protected class; (ii) was performing his job in a satisfactory manner; (iii) was discharged; and (iv) that other employees with similar qualifications were treated more favorably. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998); *Dorn-Kerri v. Sw. Cancer Care*, No. 06-cv-1754-NLS, 2008 U.S. Dist. LEXIS 137401, 2008 WL 11337441, at *5 (S.D. Cal. Oct. 6, 2008). "The requisite degree of proof necessary to establish a prima facie case for Title VII . . . on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994).

Plaintiff is "Southeast Asian, Malay, [and] Filipino." (Lorenzo Affidavit, Ex. B to Prato Decl., ECF No. 33-2 at 12). This is sufficient at summary judgment to demonstrate that Plaintiff belongs to a protected class. *See Lyons v. England*, 307 F.3d 1092, 1113 (9th Cir. 2002) ("Here, appellants have satisfied the first prong of *McDonnell Douglas*, by establishing that, as African—Americans, they all belong to a protected class."). Plaintiff was terminated from his position. The first and third elements of Plaintiff's prima facie case are satisfied.

The second element requires that Plaintiff show that he was performing his job satisfactorily. Only objective performance criteria should be considered at this stage of the inquiry. *See Nicholson v. Hyannis Air Serv., Inc.*,

580 F.3d 1116, 1123 (9th Cir. 2009) (holding that subjective criteria should not be considered in the prima facie case for determining whether the plaintiff was qualified to perform a particular employment role). The record shows that in October 2010 Plaintiff was failing to meet the DoDEA performance standards. The record contains no evidence that Plaintiff's performance satisfied all the applicable performance requirements at any time during his employment. The second element of Plaintiff's prima facie case is not satisfied.

The fourth element of the prima facie case requires a showing that Plaintiff was treated differently than other similarly situated employees not in the same protected class. "[I]ndividuals are similarly situated when they have similar jobs and display similar conduct." *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 641 (349 F.3d 634). The record contains no evidence that Defendant treated any other school employee more favorably than Plaintiff. The fourth element of Plaintiff's prima facie case is not satisfied.

Even if the requirements of the prima facie case were met, Defendant provides evidence of a legitimate nondiscriminatory reason for the termination. According to the termination letter, Plaintiff's termination was the result of his "failure to demonstrate acceptable teacher performance in critical element 4." (Notice of Termination, Ex. 10 to Keehn Decl., ECF No. 31-3 at 122). Defendant has met his burden of production with respect to the second stage of *McDonnell Douglas*.

To prevail, Plaintiff must demonstrate that Defendant's stated reason for the termination is pretextual. "Where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory action." *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-271 (9th Cir. 1996). Grade hired and fired Plaintiff in the span of less than four months. At the time of hiring, Grade was aware of Plaintiff's "skin color and physical features." (Grade Deposition, Ex. 2 to Keehn Decl., ECF No. 31-3 at 56-57). Grade hired Plaintiff over multiple other candidates. The facts of this case warrant a strong inference of no discriminatory action.

"[A] plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer." *Chuang*, 225 F.3d at 1127 (quoting *Godwin*, 150 F.3d at 1220-22). "Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Godwin*, 150 F.3d at 1221 (quoting *Davis v. Chevron, U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir. 1994). "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." *Id.* Indirect evidence "tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable" and must be "specific" and "substantial." *Id.* at 1222.

In this case, there is no direct evidence of discrimination based on Plaintiff's race or national origin. Plaintiff relies upon inferences from the facts that Grade terminated Plaintiff shortly after Plaintiff had a conversation with the same parent who had earlier raised a concern about Plaintiff's accent and that Grade cut short the Intervention Plan. Defendant's proffered reason for the termination—that Plaintiff continuously failed to satisfy Performance Element Four—is not "inconsistent" with the early termination of the Intervention Plan. There are no facts in the record to show that Grade was aware of Plaintiff's December conversation with the parent. The evidence of Plaintiff's conversation with the parent and Plaintiff's subsequent termination prior to the end of the Intervention Plan is not "substantial" evidence to show that Defendant's proffered reason for the termination is "not believable." *Id.* The evidence in the record is insufficient to demonstrate pretext. Summary judgment on Plaintiff's Title VII claim is granted.

Rehabilitation Act Claim

The Rehabilitation Act prohibits employment discrimination on the basis of disability. 29 U.S.C. §§ 791, *et seq.* "The standards used to determine whether an act of discrimination violated the Rehabilitation Act are the same standards applied under the Americans with Disabilities Act" ("ADA"). *Coons v. Sec'y of the Treasury*, 383 F.3d 879, 884 (9th Cir. 2004) (citations omitted).

Defendant contends that Plaintiff has failed to meet the burden of showing a prima facie case because Plaintiff was not performing his job satisfactorily and because

Plaintiff fails to demonstrate that he had a disability. Defendant contends that Plaintiff was terminated for a legitimate, nondiscriminatory reason—poor work performance—and that there is insufficient evidence of pretext. Plaintiff contends that he was disabled due to his difficulty hearing, or in the alternative, that he was perceived as having a hearing disability. Plaintiff contends that he was qualified for the position and that his performance was improving. Plaintiff contends that Grade's attitude toward him changed after learning of Plaintiff's difficulty hearing.

To make out a prima facie case under the Rehabilitation Act, a plaintiff must bring forward facts to show that (1) he is disabled; (2) he is otherwise qualified for employment; and (3) he was terminated because of his disability. *Brown v. Potter*, 457 Fed. Appx. 668, 670 (9th Cir. 2011); *see also Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (discriminatory termination under ADA).

The Rehabilitation Act adopts the ADA's definitions for "disability." 29 U.S.C. §§ 705(20)(B), 794(d). Under the ADA, a disability is defined as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such impairment.

42 U.S.C. § 12102(1). Grade acknowledged that he became aware that Plaintiff was "a little hard of hearing" during Plaintiff's tenure. (Grade Affidavits, Ex. 4 to Keehn Decl., ECF No. 31-3 at 96). Plaintiff is not required to present evidence that Grade regarded him as being substantially limited by his condition. *Nunies v. HIE Holdings*, 980 F.3d 428, 434 (9th Cir. 2018). Plaintiff has a sufficient factual basis for the assertion that he was "regarded as" having an impairment. Being regarded as having an impairment meets the definition of "disabled." 42 U.S.C. § 12102(1)(C). The first element of the prima facie case is met.

An otherwise qualified person is one who can perform the essential functions of the job in question "with or without reasonable accommodation." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 989 (9th Cir. 2007). The record shows that Plaintiff's hearing disability did not prevent him from being able to perform the essential functions of his job. The second element of the prima facie case is met.

The stated reason for Plaintiff's termination was his failure to monitor and assess student achievement. There is no connection between Plaintiff's ability to hear and the stated reason for termination, as a hearing disability would have no impact on Plaintiff's ability to, for instance, enter grades. *See Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1140 (9th Cir. 2001) ("The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability."). The third element of Plaintiff's prima facie case is not satisfied.

Even if the requirements of the prima facie case were satisfied, Defendant has met his burden to demonstrate a legitimate nondiscriminatory reason for the termination. Plaintiff's statement that "when Mr. Grade learned of my hearing disability . . . he decided he needed to get rid of me" (Lorenzo Affidavit, Ex. B to Prato Decl., ECF No. 33-2 at 16), is not a sufficient basis for a finding of pretext. *See Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) ("A plaintiff's belief that a defendant acted from an unlawful motive, without evidence to support that belief, is no more than speculation or unfounded accusation about whether the defendant really did act from an unlawful motive. To be cognizable on summary judgment, evidence must be competent."). Plaintiff has not come forward with any fact showing Plaintiff's termination was because of a disability. Summary judgment on Plaintiff's Rehabilitation Act claim is granted.

V. CONCLUSION

IT IS HEREBY ORDERED that the Motion for Summary Judgment filed by Defendant Lloyd J. Austin III (ECF No. 31), is granted. The Clerk of the Court shall enter Judgment in favor of Defendant and against Plaintiff.

Dated: October 28, 2021

/s/ William Q. Hayes
Hon. William Q. Hayes
United States District Court

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED DECEMBER 15, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-56381

VIRGIL M. LORENZO,

Plaintiff-Appellant,

v.

LLOYD J. AUSTIN III, SECRETARY,
DEPARTMENT OF DEFENSE,

Defendant-Appellee.

D.C. No. 3:19-cv-01128-WQH-BGS
Southern District of California, San Diego

Before: FORREST and SANCHEZ, Circuit Judges, and FREUDENTHAL,* District Judge.

ORDER

The panel has unanimously voted to deny the petition for panel rehearing. Judges Forrest and Sanchez have

* The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

voted to deny the petition for rehearing en banc and Judge Freudenthal so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.