

its failure to hire the individuals is a pretext for discriminatory intent.

Despite Defendant's contentions, Plaintiff has adequately established the *prima facie* case. The Ninth Circuit has repeatedly emphasized that "[t]he requisite degree of proof necessary to

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establish a *prima facie* case for Title VII...claims on summary judgment is minimal and does not even need rise to the level of a preponderance of the evidence." <u>Coghlan v. Am. Seafoods Co. LLC</u>, 413 F.3d 1090, 1094 (9th Cir. 2005)(citing <u>Aragon v. Rep. Silver State Disposal</u>, 292 F.3d 654, 659-60 (9th Cir. 2002); <u>Wallis v. J.R. Simplot Co.</u>, 26 F.3d 885, 889 (9th Cir. 1994)). The most troubling issue raised by Defendant is the claim of Derbew Negash who never formally applied for a job after being told that he would have to quit his existing employment before being considered for employment by Nellis Cab.

Defendant argues that the "futile gesture doctrine" does not apply under the reasoning of Fox v. Baltimore City Police Dep't, 201 F.3d 526, 534-35 (4th Cir. 2000). In Fox, the appellate court denied police officers who had not placed their name on a waiting list to join armed forces reserve units the use of the futile gesture doctrine, because the evidence showed that some officers were selected off the waiting list and because the nature of the right at issue did not involve humiliation or rejection. See id. Looking at the facts in this case in a light most favorable to Plaintiff, there is evidence to show that non-Ethiopian cab drivers were hired while still working for other companies. However, Negash was told that he must quit his existing employment before being considered for hire. Thus, Negash's submission of an application may have been futile. Furthermore, the right at issue in the present case is more important than the right at issue in Fox. Negash had the right to be considered for employment without consideration of his national origin. The Fourth Circuit approves of application of the futile gesture doctrine in cases where there is "an unequal power dynamic" or "a climate of fear, prejudice, or antagonism discouraging potential applicants from submitting an application." Id. at 535. A jury could find from the facts as alleged by Plaintiff a climate of prejudice discouraging potential applicants from submitting an application. Therefore, the

¹In <u>Int'1 Bhd. of Teamsters v. United States</u>, 431 U.S. 324, 365-66 (1977), the Supreme Court allowed minority bus drivers who had not actually applied for more favorable positions to make claims for damages because it reasoned that one who fails to submit in an application in a futile gesture is "as much a victim of discrimination as is he who goes through the motions of submitting an application."

Court will allow Negash's claim to go forward, though he will bear "the not always easy burden of proving that he would have applied for the job had it not been for [the discriminatory] practices." Int'l Bhd. of Teamsters, 431 U.S. at 368.

Furthermore, in addition to establishing the *prima facie* case, Plaintiff has adequately met its burden in showing pretext using circumstantial evidence. In fact, Plaintiff has offered statistical evidence showing an affirmative case that the employer may be biased and Plaintiff has shown pretext negatively by showing that some of the employer's proffered explanations are "unworthy of credence." <u>Coghlan</u>, 413 F.3d at 1095. Plaintiff's evidence is specific and substantial enough to overcome Defendant's motion for summary judgment. See id. at 1096.

Finally, Defendant's objections to Plaintiff's statistical evidence are denied. Though this case may be prime for a showdown of dueling experts, the shortcomings complained of by Defendant are not material, and at best are fodder for argument by counsel or Defendant's expert. Particularly, the complaint that Plaintiff's experts did not consider the applicant pool is eviscerated by the fact that Defendants did not preserve the applications. See, e.g., Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561 (4th Cir. 1986)(applicant flow data need not be used where employer failed to keep applications). The Court finds that Plaintiff has raised genuine issues of material fact sufficient to defeat summary judgment. Therefore, the Court must deny Defendant's motion.

II. Conclusion

Accordingly, IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (#39) is **DENIED**;

IT IS FURTHER ORDERED that Plaintiff's Objections (#41) are **DENIED as moot**.

DATED this 9th day of March 2006.

Kent J. Dawson

United States District Judge