

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 19-5019**

**September Term, 2019**

FILED ON: JUNE 5, 2020

LISA LEWIS,

APPELLANT

v.

UNITED STATES DEPARTMENT OF THE TREASURY,  
APPELLEE

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Appeal from the United States District Court  
for the District of Columbia  
(No. 1:16-cv-02437)

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Before: ROGERS, GRIFFITH and RAO, *Circuit Judges*

**J U D G M E N T**

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

**ORDERED AND ADJUDGED** that the judgment of the district court be **AFFIRMED**.

Lisa Lewis sued the Department of the Treasury (“the Treasury”) pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, alleging that management’s decision not to promote her discriminated against her on the basis of race and sex. Second Am. Compl. ¶¶ 93–116. The district court, upon concluding that the Treasury had proffered a legitimate, non-discriminatory reason for the decision not to promote Lewis and that Lewis had not submitted sufficient evidence from which a reasonable jury could find that the Treasury’s reason was pretextual, granted the Treasury’s motion for summary judgment. *Lewis v. Mnuchin*, 2019 WL 120772, at \*1 (D.D.C. Jan. 7, 2019). On appeal, Lewis contends that the district court erred because it did not, as it must, regard the evidence of pretext in the light most favorable to her as the nonmoving party.

Briefly stated, Lewis, an African-American woman, and Evin Gossin, a white man, worked as Personnel Security Technicians in the Treasury’s Office of the Comptroller of the Currency

(“OCC”). In 2011, their second-level supervisor, Roger Mahach, requested the Human Resources Department to conduct a “desk audit” of Gossin in order to unilaterally promote him to a Security Specialist position. Human Resources advised Mahach to announce the position publicly to ensure fair and open competition for other qualified candidates within the OCC. Mahach did, and Lewis and Gossin applied for the position. When the two “subject matter experts” reviewed their applications and rated Gossin as more qualified, Mahach selected Gossin as the best qualified applicant.

Title VII makes it unlawful for an employer 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.” 42 U.S.C. § 2000e-2(a)(1). If an employer “articulate[s] some legitimate, nondiscriminatory reason for the employee’s rejection,” the plaintiff bears the burden “to show that [the] stated reason for [the] rejection was . . . pretext.” *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973). At this stage, “the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer’s asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?” *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008).

This court reviews the grant of summary judgment *de novo*, *Haynes v. D.C. Water & Sewer Auth.*, 924 F.3d 519, 523 (D.C. Cir. 2019), and upon viewing the evidence “in the light most favorable” to Lewis as the nonmoving party, *id.*, and “draw[ing] all reasonable inferences” in her favor, *id.* (quoting *Thompson v. District of Columbia*, 832 F.3d 339, 344 (D.C. Cir. 2016)), the court affirms.

First, the Treasury offered a “legitimate, non-discriminatory reason” for not selecting Lewis for the promotion. *See Brady*, 520 F.3d at 493–94. The Treasury asserted that Gossin was more qualified than Lewis given his stronger annual performance evaluations in 2010 and 2011, his training in process improvement methodologies such as Lean Six Sigma, and his superior scores from the “subject matter experts” on the application tracking and rating sheets. Lewis maintains that the Treasury’s grading systems in the annual performance evaluations and the application tracking and rating sheets were subjective and vague. But the grading systems relied on specific qualifications and skills and constituted a “clear and reasonably specific explanation” for the Treasury’s decision to promote Gossin instead of Lewis. *See Figueroa v. Pompeo*, 923 F.3d 1078, 1092–93 (D.C. Cir. 2019). Lewis objects to the Treasury’s reliance on Gossin’s higher summary score in his 2011 performance evaluation because the 2011 evaluations were not completed until several months after the promotion. But to the extent she maintains she and Gossin received “identical summary scores” in 2010, Reply Br. 15, the 2010 evaluations were not identical because Gossin received higher scores than Lewis on four skill elements. Thus, any error as to the 2011 scores, appears harmless. *See Colbert v. Potter*, 471 F.3d 158, 168 (D.C. Cir. 2006).

Second, Lewis otherwise fails to identify record evidence from which a reasonable jury could infer that the Treasury's "explanation was pretextual" and "that this pretext shielded discriminatory motives." *Murray v. Gilmore*, 406 F.3d 708, 713 (D.C. Cir. 2005). Lewis points to evidence that the management pre-selected Gossin for promotion and tailored the job description to match his qualifications. The *en banc* court has observed that "pre-selection by itself is neither unusual nor illegal." *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958, 969 (D.C. Cir. 1998), *vacated on other grounds*, 527 U.S. 526 (1999). Although "[e]vidence of pre-selection may of course be 'relevant to the question of discriminatory intent' insofar as an employer's departure from its own hiring and promotion procedures might suggest that the reasons it advances for its actions are pretextual," *id.* (quoting *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984)), Lewis points to no hiring or promotion procedures from which the Treasury departed to her detriment. Mahach originally proposed to act unilaterally but then adopted Human Resources' recommendation to advertise the position. In developing the position description he conferred with Gossin and referred to elements of his training. But Lewis does not show these actions foreclosed her opportunity to present evidence of her qualifications, including training in criminal justice that she considered made her the superior applicant. Human Resources had stated she was qualified for the position. Mahach chose to use a panel of two "subject matter experts" to rank the applicants and this procedure, according to Mahach and uncontested by Lewis, was approved by Human Resources. Even if Lewis's challenges to the selection of these "experts" may have some slight force, they do not give rise to a reasonable inference that their selection was evidence of race or sex discrimination.

Lewis offers evidence of an environment that she claims tilted the scales in Gossin's favor. She points, for example, to testimony of a minority female co-worker that her supervisory responsibilities were shifted to a recently hired white male. She also notes that the last four hires in her office were white males. Perhaps recognizing that these anecdotal examples are not sufficient to establish pretext, Lewis argues that her supervisors have also offered inconsistent explanations for promoting Gossin. Specifically, Lewis emphasizes that one of her supervisors stated "that the promotion was not created for Mr. Gossin," even though employees in Human Resources have said that the position was in fact tailored for him. Appellant's Br. 22–23 (citing Mahach Decl. at 4 (Nov. 7, 2011)). As noted, Mahach admitted that he initially wanted to promote Gossin on the basis of a desk audit. Lewis's counsel conceded during oral argument that he could have done so absent a contrary "internal policy" and could point to no such policy in the record. Oral Arg. Tape at 11:00–12:05 (May 8, 2020). In any event, Lewis never explains how advertising the position to allow fair and open competition as Human Resources recommended is comparable to the type of "improper procedures and uncreditable testimony" the court has upheld as evidence of discrimination. *Krodel*, 748 F.2d at 709. The minor inconsistencies in the statements Lewis identified are not sufficiently inconsistent to be "probative of pretext." *Geleta v. Gray*, 645 F.3d 408, 413 (D.C. Cir. 2011) (quoting *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 853 (4th Cir. 2001)); *see Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1299 (D.C. Cir. 1998) (*en banc*).

Lewis's more concerning argument rests on her contention that management provided only Gossin with career advancement opportunities that "played an integral part in Mr. Gossin's promotion," and that this preferential treatment is probative of pretext. Appellant's Br. 26–28. Her coworker's deposition testimony indicates that in 2008, the entire office volunteered to participate in a Lean Six Sigma training but her supervisor selected only Gossin to attend, and that Gossin received more adjudication assignments as well as permission to travel for training during a spending freeze. But Lewis provides almost no evidence that she ever asked for or was denied these opportunities. Although she did ask for Lean Six Sigma training and it was denied, her request was oral, she can't recall when she made it, and she admits she did not pursue the matter further. Neither does she dispute that when Gossin was selected for Lean Six Sigma training there was only one slot available. Even accepting Lewis's claim that she requested training and did not receive the same training or assignments as Gossin, the evidence she proffers is insufficient to show discrimination. *See Weber v. Battista*, 494 F.3d 179, 186–88 (D.C. Cir. 2007). Viewed in the light most favorable to her, the evidence of Gossin's preferential treatment fails to "cast doubt upon" management's statements that Gossin actively pursued these opportunities whereas Lewis did not "show the real reason" for denying Lewis access to these same opportunities was discriminatory. *Cf. id.* at 186. According to Gossin's supervisors, he was a "self-starter," who repeatedly asked for these sorts of opportunities. Gossin's 2011 Performance Evaluation at 3; *see also* Gossin's 2010 Performance Evaluation at 4.

Taken together, Lewis's evidence of possibly problematic office practices is not sufficiently developed for a reasonable jury to find that the Treasury was doling out career advancement opportunities in a discriminatory manner based on race or sex. *See Evans v. Sebelius*, 716 F.3d 617, 620–22 (D.C. Cir. 2013). To the extent Lewis maintains that a jury could infer pretext because she was more qualified than Gossin, her burden was to show that she was "significantly better qualified," *Adeyemi v. District of Columbia*, 525 F.3d 1222, 1227 (D.C. Cir. 2008) (quoting *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006)), and she has not. The expert panel identified Gossin's specific qualifications, including his Lean Six Sigma training and his experience conducting personnel security adjudications and working with emergency management and information security programs; the panel noted that Lewis lacked these skills and experiences. Lewis may be more senior in length of service, receiving glowing performance evaluations and have a bachelor's degree in criminal justice, but these qualifications do not create a gap between Lewis and Gossin that is "great enough to be inherently indicative of discrimination," *id.* at 1227 (quoting *Jackson v. Gonzales*, 496 F.3d 703, 707 (D.C. Cir. 2007)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy  
Deputy Clerk