09-3990-cv

To Be Argued By:
DAVID C. NELSON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-3990-cv

KIM E. LANHAM,
Plaintiff-Appellant,

-vs-

GORDON H. MANSFIELD, SECRETARY,
VETERAN'S AFFAIRS,
Defendant,

ERIC K. SHINSEKI,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE SECRETARY OF VETERAN'S AFFAIRS

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Statement of Jurisdiction

The district court (Janet B. Arterton, J.) had subject matter jurisdiction over this civil case arising under federal law pursuant to 28 U.S.C. § 1331. The district court issued a final decision granting summary judgment to the defendant on all of the plaintiff's claims on September 4, 2009. Joint Appendix ("JA") at 4, 330. Judgment entered the same day. JA at 4. On September 21, 2009, the plaintiff filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). JA at 4. JA at 4, 340. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues
Presented for Review

I. In this employment discrimination case, the district court granted summary judgment to the government because the plaintiff failed to timely file her administrative complaint with the agency.

   A. For the first time on appeal, the plaintiff argues that the government cannot rely on the plaintiff's untimely administrative complaint as a defense because it was not listed as a defense in the government's original answer. Did the plaintiff "waive the waiver" argument by failing to raise it in the district court?

   B. In the alternative, did the district court properly grant summary judgment to the government when the plaintiff failed to file her administrative complaint within the time specified by regulation?

II. Did the district court properly grant summary judgment in favor of the government when the plaintiff cannot show that the defendant's legitimate non-discriminatory reason for selecting a different candidate over the plaintiff was a pretext for discrimination?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-3990-cv

KIM E. LANHAM,
Plaintiff-Appellant,

-vs-

ERIC K. SHINSEKI, SECRETARY,
VETERAN'S AFFAIRS,
Defendant-Appellee.[1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR ERIC SHINSEKI, SECRETARY, VETERAN AFFAIRS

Preliminary Statement

This is a Title VII employment discrimination case. Plaintiff Kim Lanham worked for the Department of

[1] The Court's official caption should be modified as shown here. The current Secretary of Veteran's Affairs, Eric Shinseki, was substituted for the former Secretary, Gordon Mansfield. *See* JA at 330 n.1.

Veterans Affairs ("VA") in the West Haven, Connecticut Medical Center as part of the transportation unit. In 2006, the VA decided to seek a Supervisory Program Specialist to oversee the transportation unit. Lanham applied for the position, but was not selected. Forty-seven days after the effective date of the personnel action, Lanham contacted an EEO counselor to register her complaint about the promotion process. The district court granted summary judgment in favor of the VA because Lanham failed to bring an EEO administrative complaint within 45 days of the effective date of the action as required by regulation.

Now, for the first time on appeal, Lanham claims that the VA waived this defense by failing to include it in its answer. Lanham has "waived the waiver," however, because she never raised this issue with the district court. In any event, the district court properly granted summary judgment to the VA because Lanham's administrative complaint was untimely. Alternatively, the district court's decision should be affirmed because Lanham has failed to prove that the VA's legitimate, non-discriminatory reason for not promoting her was a pretext for discrimination.

Statement of the Case

This is a civil appeal from a final judgment of the United States District Court for the District of Connecticut (Janet B. Arterton, J.) granting summary judgment to the defendant, Eric K. Shinseki, Secretary of Veterans Affairs, on the plaintiff's Title VII claim.

On December 14, 2007, Lanham brought this action as a disparate treatment claim under Title VII, 42 U.S.C. §§ 2000e *et seq*., against the Secretary of Veterans Affairs, alleging that the VA discriminated against her based on her gender and race. JA at 2. The Secretary moved for summary judgment, JA at 3, and on September 4, 2009, the district court granted the Secretary's motion, JA at 4, 330. The judgment entered the same day, JA at 4, and Lanham filed a timely notice of appeal on September 21, 2009, JA at 4, 340.

Statement of Facts and Proceedings Relevant to this Appeal

In 2006, Kim Lanham worked as a Lead Transportation Assistant at the VA in West Haven, Connecticut. JA at 7. On March 22, 2006, the VA put out a vacancy announcement for the position of Supervisory Program Specialist. JA at 7. Lanham applied for this position. JA at 7.

Lanham submitted an application and a document listing her knowledge, skills, abilities, or other characteristics (commonly referred to in government service as "KSAO"s). JA at 117-31, 64. Lanham submitted her own set of KSAOs and Kurt Mischke, her supervisor, also submitted a set of KSAOs on her behalf. JA at 51-52, 121-31.

Lanham was not the only person who applied for this position. Eight other individuals applied for the position of Supervisory Program Specialist. JA at 65. Among those

eight was Anthony DiMone. JA at 108-15. During discovery, Lanham reviewed DiMone's application and testified that she had no reason to believe that anything contained in it was false. JA at 28, 192. At the time he applied, DiMone was working for the Department of Homeland Security in the Federal Air Marshal Service. JA at 108.

The promotional process took place in stages. The VA's Human Resources department and the Delegated Examining Unit selected the questions for the KSAOs. JA at 69. The VA then put together an interview panel, which consisted of Mischke, Michelle Will, and Robert Falcone. JA at 45. Mischke was the Site Manager for the VA's Newington, Connecticut location. JA at 64. Will's title was Chief, Health Administration Service. JA at 89. Falcone was chief of Accounting. JA at 94. The interview panel (Mischke, Will & Falcone) created the interview questions and each candidate was asked the same questions. JA at 65, 85, 94. After interviewing each candidate, the interview panel discussed the applicant's answers and decided on a joint score for each answer. JA at 64-66, 85-87, 94-96. The panel then totaled the scores and, based on the written materials and the interviews, ranked the candidates. JA at 64-66, 85-87, 94-96. The interview panel recommended the top four candidates to Leo Calderone, who was responsible for picking the successful candidate. JA at 64-66, 74-75, 85-87, 94-96. In 2006, Calderone was the Executive Assistant to the Director and the Acting Associate Director at the VA. JA at 75. In his role as Acting Associate Director, he had general oversight of the transportation unit at the VA. JA at 75.

Lanham and the members of the interview panel knew each other. Lanham had not had any problems with either Will or Falcone in the past. JA at 46-47. Similarly, Lanham reported that she had positive interactions with Mischke prior to the interview; as she explained during her deposition: "I trusted him. We were good together; you know, we worked together. He trained me . . . as far as transportation – not transportation, but dealing with supervisory position[s]." JA at 48. Similarly, Mischke had given Lanham positive marks on her 2003-2004 and 2004-2005 performance appraisals. JA at 133-40. In contrast to Lanham, the interview panel did not know DiMone. JA at 64, 85, 94.

Lanham scored a total of 27 points during the interview. JA at 165. During the interview, she felt that the interview panel listened to her and accurately recorded her answers in their notes. JA at 53-54. DiMone scored 29 points during his interview. JA at 175.

The panel members and Calderone testified via affidavit about the promotional process.[2] The panel members discussed the candidates' answers and issued a joint score to each answer. JA at 64-66, 85-87, 94-96. The panel members testified that each member of the panel had the opportunity to speak his or her mind and that no panel

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[2] Notably, when testimony outlined in this paragraph was presented during summary judgment in the defendant's Local Rule 56(a)1 Statement, the plaintiff either agreed or averred that she "lacks sufficient information to agree or disagree." JA at 29-32, 192-195.

member's will or input was overborne by another member of the panel. JA at 64-66, 85-87, 94-96. No panel member exerted any undue influence over any other panel member. The interview panel was supposed to submit the top three candidates. Lanham was rated fourth, but because her score was close to the third candidate, the interview panel referred her along with the top three candidates to Calderone. JA at 64-66, 85-87, 94-96. In particular, Mischke testified that he did not attempt to influence Calderone in any way outside his recommendation with Will and Falcone. JA at 64-66. Mischke also testified that he never asked or told Calderone not to hire Lanham. JA at 64-66. Similarly, Calderone testified that Mischke did not unduly influence him and that he had no conversations with Mischke about the hiring process without Will and Falcone being present. JA at 75-76.

The interview panel recommended DiMone to Calderone and Calderone ultimately selected him. Mischke testified about why he believed DiMone was more qualified:

> Mr. DiMone had more managerial and supervisory experience than Kim Lanham. He interviewed better than Kim Lanham and was more detailed and complete in his responses to the questions asked during the interview. The following is the rating that was made for the top four candidates. The selectee Anthony DiMone was rated at 29, Jerilyn Fabiani was rated at 28.5, Richard Franklin was rated at 27.5 and Kim Lanham was rated at 27.

JA at 71. Mischke further explained:

> Mr. DiMone came from the Federal Air Marshalls [sic] Service. He is familiar with operations and procedures at non-VA facilities and federal facilities. He worked for IBM that had a (5) [sic] million dollar security budget. He was responsible for monitoring hours and payments for 125 security officers. He has worked with GSA and was responsible for a fleet of 73 vehicles. He understands the process of ordering and replac[ing] vehicles along with the policies that govern GSA vehicles. He has worked with a diverse group of individuals in the United States and abroad. He has written policies and procedures. After 9-11 he was involved in establishing a field office from start to finish for the Federal Air Marshalls [sic]. This was an eight month project. He has worked directly with other agencies such as the Department of Homeland Security. He researched the VA and transportation prior to the interview. This was done by use of the VA's websites and visiting the VA facility.

JA at 71-72.

Similarly, Will explained why she believed that DiMone was more qualified than Lanham: "I believe the selectee was more qualified and experienced with supervisory duties and budget responsibilities. . . . I saw no evidence during the interview process or review of the KSAOs that Kim was responsible for projecting or managing the budget or directly involved with analyzing

and submitting data for contract bids." JA at 91. Falcone also explained why he rated DiMone over Lanham. Falcone stated that DiMone "had transportation experience which included large fleet management; he was responsible for contracting; he set up the Federal Air Marshal's office at Armonk; and his interview reflected his competence in all these areas to a greater degree than [Lanham]." JA at 102.

Calderone, who was responsible for making the final decision, testified that he selected DiMone over Lanham for the following reasons:

> According to the panel members, the selectee was better prepared for the interview, and demonstrated a higher level of management, supervisory, and budget experience than the complainant. The selectee scored the highest of all applicants in the interview rating process. . . . Based on all applicants' packages and the interview scores, the complainant lacked the overall experience when compared to the selectee. Normally, the top three candidates would be considered for selection. The complainant was the 4th highest scoring applicant, however, her score was close enough to the third highest that the panel referred her as well. There were two additional VA employees that scored higher than the complainant. All panel members and I unanimously agreed that the selected individual was the best candidate.

JA at 81.

The VA selected DiMone for the position. JA at 157. On May 9, 2006, Mark Bain, the chief of human resources, sent a letter to Lanham informing her that she was not selected and that DiMone was chosen. JA at 155. On the same day, Bain sent a letter to DiMone informing him that the VA selected him for the position and listing the "effective date" of the personnel action as "May 14, 2006." JA at 157.

Lanham first made contact with the Equal Employment Opportunity counselor on June 30, 2006. JA at 159.[3] June 30, 2006 is 47 days after May 14, 2006, the effective date of DiMone's appointment. JA at 332.

After the EEO complaint was resolved against her, Lanham filed suit in federal court against the Secretary of Veteran's Affairs, alleging that she had been denied the promotion on account of her race and gender. JA at 7. The VA moved for summary judgment. JA at 11. The VA argued that summary judgment was appropriate both because Lanham had failed to timely exhaust her administrative remedies and because Lanham was unable to prove that the VA's reasons for hiring DiMone were pretextual. JA at 20, 21. The district court granted summary judgment to the VA, holding that Lanham failed

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[3] In her complaint, Lanham alleges that she filed her EEO complaint on July 3, 2006. JA at 7. The VA alerted the district court that Lanham first made contact with an EEO counselor on June 30, 2006, both in the VA's brief, JA at 20, and at oral argument, JA at 318-19.

to demonstrate that her EEO complaint was timely filed. JA at 337-38.

Summary of Argument

I. The district court granted summary judgment in favor of the VA because Lanham failed to timely exhaust her administrative remedies. For the first time on appeal, Lanham claims that VA waived this defense because it failed to plead the defense in its answer. Lanham waived this argument, however, by failing to raise it in her opposition to summary judgment or at oral argument before the district court. Lanham cannot raise this argument for the first time on appeal.

In any event, the district court properly granted summary judgment in favor of the VA because Lanham failed to file her administrative claim within 45 days of the effective date of the adverse personnel action. Lanham does not dispute the relevant dates. The district court properly rejected Lanham's argument that the VA was estopped from making this argument merely because it accepted and processed her untimely administrative complaint. The district court correctly held that, absent a specific administrative finding that the administrative complaint was timely filed, the VA may raise untimeliness in the district court.

II. Alternatively, the district court's grant of summary judgment to the VA should be affirmed because Lanham cannot show that the VA's legitimate, non-discriminatory reason for hiring DiMone instead of her was a pretext for

discrimination. There is no evidence that any of the interview panel members considered Lanham's race or gender. Further, DiMone was more qualified than Lanham. Finally, Lanham cannot prove that she was so much more qualified than DiMone that no reasonable person would select him over her absent a discriminatory reason.

Argument

I. The district court properly granted summary judgment to the VA because Lanham failed to file a timely administrative complaint within 45 days of the allegedly adverse employment action.

A. Relevant facts

1. Summary judgment proceedings

On January 26, 2009, the VA moved for summary judgment. JA at 3, 11. The VA argued that summary judgment was appropriate both because Lanham had failed to timely exhaust her administrative remedies and because Lanham was unable to prove that the VA's reasons for hiring DiMone were pretextual. JA at 20, 21. The VA had not previously raised an objection to the fact that Lanham had failed to timely initiate her original agency complaint pursuant to the agency's administrative regulations.

In her opposition brief, Lanham argued that the untimeliness argument was unavailable to the VA because that agency and the EEO office had accepted, processed, and investigated the plaintiff's complaint. JA at 186.

Lanham's discussion of this issue relied solely on this Court's decision in *Briones v. Runyon*, 101 F.3d 287 (2d Cir. 1996), which held that an agency's failure to appeal an agency finding of timeliness precluded the defendant from asserting untimeliness as a defense in subsequent federal court litigation. JA at 186-87.

In its reply brief, the VA argued that *Briones* was inapposite in this case in light of this Court's decision in *Belgrave v. Pena*, which clarified that where an agency has made no express finding on the issue of timeliness, there is no waiver of that defense in federal court. 254 F.3d 384, 386 (2d Cir. 2001). JA at 304-305.

On August 31, 2009, the district court heard oral argument on the issue of timeliness. JA at 311. At the hearing, plaintiff's counsel noted that Lanham's complaint was in fact untimely. JA at 313. Lanham's only arguments at oral argument were as follows: (1) that the VA was estopped from asserting untimeliness because the agency had processed the claim without notifying her of its untimeliness, JA at 312-13; and (2) that the time limit should be treated flexibly, JA at 325-26.

When asked directly, plaintiff's counsel was unable to distinguish this case from *Belgrave*, JA at 315-16, but continued to rely on the fact that the agency had processed Lanham's complaint as the basis for her estoppel claim. JA 314-15. Lanham also sought to persuade the court to find a mandate for flexibility in the text of 29 C.F.R. §1614.105(a)(2), which permits the agency to extend the 45-day time limit under certain circumstances. Plaintiff's

counsel twice conceded that there was no evidence in the record, nor reason to believe, that the plaintiff was unaware of, or unable to meet, the time limits for proper filing. JA at 325, 328.

At no point in either her opposition brief, or during the oral hearing, did Lanham argue that the VA had waived the defense of untimely exhaustion by not pleading it as an affirmative defense in its answer. Lanham raises this argument for the first time on appeal.

2. The district court's decision

The district court issued a written decision on the VA's motion for summary judgment after briefing and oral argument. JA at 330. The district court described the hiring process, specifically noting that Lanham was notified of the selection of DiMone in a letter dated May 9, 2006. JA at 331-32. The district court went on to find that "[a]ccording to the Investigative Report of Ms. Lanham's claims by the [VA]'s Office of Resolution Management, after Ms. Lanham 'was notified of her non-selection for [the] Supervisory Program Specialist position,' she 'contacted an EEO Counselor on June 30, 2006,' 47 days after the effective date of Mr. DiMone's hire." JA at 332. The district court also found that, after Lanham filed her formal complaint,

> Her claim was denied at various levels of administrative review, and on November 14, 2007, the [VA]'s Office of Employment Discrimination Complaint Adjudication issued a Final Agency

> Decision applying "the analytical framework in *McDonnell Douglas*" to her claims and evidence and concluding that she had not proffered any evidence rebutting VA Connecticut's legitimate, nondiscriminatory rationales or suggesting that such rationales were pretextual.

JA at 332-33.

The district court then turned to the issue of timeliness. It looked to 29 C.F.R § 1614.105, one of the regulations governing complaints of discrimination in federal-sector employment. The district court observed that, pursuant to § 1614.105(a)(1), "An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." The district court found that "the parties agree that May 14, 2006 is the 'effective date of the action' for purposes of § 1614.105(a)(1), and Plaintiff concedes that she 'contacted the EEO counselor at the VA on June 30, 2006, more than 45 days after she had notice of the adverse employment action.'" JA at 334-35. Furthermore, the district court noted that "[a]t oral argument, Plaintiff's counsel agreed that Ms. Lanham's request was untimely. Plaintiff has made no claim, and there is no record evidence to support any claim, that Plaintiff did not know or had not been notified of the deadlines for contacting an EEO Counselor." JA at 335.

The district court addressed the two arguments raised by Lanham. Lanham argued that the district court should

read § 1614.105 expansively or leniently and allow Lanham additional time to file an EEO complaint. JA at 335. The district court rejected this argument noting that "an expansive or flexible reading of § 1614.105(a) is inappropriate because compliance with pre-suit administrative procedures, including exhaustion of remedies, for claims of discrimination 'is a condition of the waiver of sovereign immunity and thus must be strictly construed.' *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94, 95-96 (1990)." JA at 335.

Lanham's second argument was that the VA was estopped from claiming untimeliness because the VA accepted her complaint throughout the EEO process despite the late filing. JA at 335. The district court explained that this Court, in *Briones*, 101 F.3d at 290-91, held that a government agency cannot relitigate the issue of timeliness when it failed to challenge the EEOC's express determination that the complaint was timely. JA at 336. The district court noted,

> However, where, as here, no agency has made any express finding about timeliness, the *Briones* waiver rule does not apply. *See Belgrave v. Pena*, 254 F.3d 384, 386 (2d Cir. 2001) ("adopt[ing] th[e] rule" of the Second Circuit's "sister circuits," and quoting *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992) ("In order to waive a timeliness objection, the agency must make a specific finding that the claimant's submission was timely.")).

JA at 336. The district court further explained that, "as a general matter, government agencies do not waive a defense of untimely exhaustion merely by accepting and investigating a discrimination complaint." JA at 336 (internal quotation marks omitted).

The district court concluded its analysis by noting that Lanham failed to prove several points. First, Lanham failed to prove that the tolling or waiver was applicable. Second, Lanham failed to prove "any express finding of timeliness of her EEO counselor contact by any agency," thus there was no basis hold that the VA was estopped from raising the issue. JA at 336-37. Because Lanham failed to demonstrate that her EEO complaint was timely filed, the district court granted summary judgment in favor of the VA. JA at 337-38.

B. Governing law and standard of review

1. The law governing summary judgment

This Court reviews *de novo* a district court's grant of summary judgment. *Town of Southold v. Town of East Hampton,* 477 F.3d 38, 46 (2d Cir. 2007). This Court has "discretion to consider issues that were raised, briefed, and argued in the District Court, but that were not reached there." *Booking v. General Star Management Co.*, 254 F.3d 414, 418-19 (2d Cir. 2001) (footnote omitted). *See also In re U.S. Lines, Inc.*, 216 F.3d 228, 233 (2d Cir. 2000) (noting that Court may affirm district court on any basis supported by the record, even if the district court did not rely on that basis in its decision).

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall render summary judgment when a review of the entire record demonstrates "that there is no genuine issue as to any material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The relevant question is not whether the non-moving party has provided any evidence, but

> whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict – whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (internal quotation marks omitted). In determining whether there is a genuine issue of material fact, the court must resolve ambiguities and draw factual inferences in favor of the non-moving party. *Id.* at 255.

Although the Court has a duty to resolve ambiguities in favor of the non-moving party, "[a] defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial." *Parker v.*

Sony Pictures Entertainment, Inc., 260 F.3d 100, 111 (2d Cir. 2001). When the moving party points to an absence of evidence regarding an essential element, the non-moving party must "show the presence of a genuine issue by coming forward with evidence that would be sufficient, if all reasonable inferences were drawn in his favor, to establish the existence of that element at trial." *Grain Traders v. Citibank, N.A.*, 160 F.3d 97, 100 (2d Cir. 1998).

On summary judgment, the Court's "obligation to draw all reasonable inferences in favor of plaintiffs does not mean [the Court] must credit a version of the facts that is belied by the record." *Tabbaa v. Chertoff*, 509 F.3d 89, 93 n.1 (2d Cir. 2007). "The Supreme Court held in *Anderson* . . . that a plaintiff may not defeat summary judgment by merely asserting that the jury might, and legally could, disbelieve the defendant's denial." *LaFrenier v. Kinirey*, 550 F.3d 166, 167 (1st Cir. 2008) (citing *Anderson,* 447 U.S. at 252). As such, summary judgment is appropriate "'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 884 (1990) (quoting *Celotex*, 477 U.S. at 322).

2. Arguments not raised in the district court are waived

"'[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.'" *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) (quoting *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994)); *see also Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000) ("In general, a federal appellate court does not consider an issue not passed upon below.") (internal quotation marks and citation omitted). Because the rule is "one of prudence and not appellate jurisdiction," however, this Court may exercise its discretion to consider arguments waived below. *Lo Duca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996).

This Court has held that it is most likely to exercise its "discretion to consider waived arguments in order to avoid manifest injustice or where a question of law is at issue and there is no need for additional factfinding." *United States ex rel. Kirk v. Schlinder Elevator Corp.*, 601 F.3d 94, 111 n.10 (2d Cir. 2010), *petition for cert. filed*, no. 10-188 (Aug. 5, 2010). This Court has held, however, that "the circumstances normally do not militate in favor of an exercise of discretion to address . . . new arguments on appeal where those arguments were available to the [parties] below and they proffer no reason for their failure to raise the arguments below." *In re Nortel Networks Corp. Securities Litigation*, 539 F.3d 129, 133 (2d Cir. 2008); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005) ("The law in this Circuit is clear that where a party has shifted his position

on appeal and advances arguments available but not pressed below, . . . waiver will bar raising the issue on appeal.") (internal quotation marks and citation omitted).

District courts are similarly given discretion when considering the waiver of affirmative defenses. "The general rule in federal courts is that a failure to plead an affirmative defense results in a waiver" of that defense. *Travellers International, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1580 (2d Cir. 1994). However, once the defendant carries its burden of establishing an affirmative defense, "the burden shifts to the plaintiff to provide facts sufficient to counter the affirmative defense" including "facts showing equitable tolling, estoppel, [or] waiver . . . ." *Lewis v. Connecticut Dep't. of Corrections*, 355 F. Supp. 2d 607, 616 n.5 (D. Conn. 2005). *See, e.g., Belgrave*, 254 F.3d at 387 (affirming summary judgment on the basis of untimely exhaustion of remedies where plaintiff "failed to assert a valid basis for finding that the government had waived that defense").

Courts within this Circuit have stated that "[a]bsent prejudice to the plaintiff, a defendant may raise an affirmative defense in a motion for summary judgment for the first time." *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706, 715 (S.D.N.Y 1987). In such cases, despite a defendant's failure to timely plead a defense, "a district court may still entertain affirmative defenses at the summary judgment stage in the absence of undue prejudice to the plaintiff, bad faith or dilatory motive on the part of the defendant, futility, or undue delay of the proceedings." *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir.

2003). *See also Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 283 (2d Cir. 2000); *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993); *accord Curtis v. Timberlake*, 436 F.3d 709, 711 (7th Cir. 2005) (finding no abuse of discretion where defendants raised affirmative defense of lack of exhaustion for first time in motion for summary judgment on that issue); *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) (finding that an affirmative defense may be raised for the first time at summary judgment absent a showing of prejudice by the plaintiff).

To make a showing of prejudice, a plaintiff must show that permitting the defense would: "(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction." *Block*, 988 F.2d at 350. Prejudice cannot be shown by merely showing that the plaintiff has spent time, effort and money in litigation efforts which turn out to be unnecessary in light of the affirmative defense. *Id.* at 351 (distinguishing *Evans v. Syracuse City School Dist.*, 704 F.2d 44, 48 (2d Cir. 1983) (finding bad faith where defendant was aware of facts that provided an affirmative defense but waited over two and a half years to amend his complaint and notify plaintiff's counsel of those facts) and *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152, 1157-58 (2d Cir. 1968) (finding plaintiff demonstrated that he could have timely brought his action in another forum had the defendant promptly raised its statute of limitations defense)). Where no such showing by the plaintiff is made,

leave to amend to raise a new affirmative defense, even at the summary judgment stage, should be permitted. *Block*, 988 F.2d at 350.

3. Title VII requires that claims be filed in a timely manner

Federal employees challenging an employment action "are given 45 days from the alleged discriminatory act in which to initiate administrative review of alleged employment discrimination." *Fitzgerald v. Henderson*, 251 F.3d 345, 359 (2d Cir. 2001). The Code of Federal Regulations sets forth the rule for federal employees:

> (a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.
>
> (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

29 CFR § 1614.105. This Court has held that "government agencies do not waive a defense of untimely exhaustion merely by accepting and investigating a discrimination complaint." *Belgrave*, 254 F.3d at 387 (internal quotation marks omitted). In contrast, if an agency dismisses a EEO

complaint as untimely, the EEOC reverses the agency's decision, and the agency does not challenge the final order of the EEOC, the agency cannot raise timeliness as a defense in federal court. *Briones*, 101 F.3d at 290-91. Timely exhaustion of administrative remedies is a precondition to filing a Title VII claim in federal court but it is not a jurisdictional requirement. *Francis v. City of New York*, 235 F.3d 763, 768 (2d Cir. 2000).

C. Discussion

The district court's decision should be affirmed because Lanham waived any argument that the VA failed to raise this issue and Lanham did not begin the administrative action within 45 days of the adverse act in any event.

1. Lanham waived any argument that the VA failed to raise the issue of timeliness.

Lanham advances an argument on appeal which was not raised below, namely whether the VA waived its untimeliness defense by not raising that defense in its initial answer. The Court should not exercise its discretion to hear this issue because this case does not present a situation in which doing so is "necessary to avoid a manifest injustice." *Nortel Networks Corp.*, 539 F.3d at 133. This is particularly true because Lanham has "proffer[ed] no reason for [her] failure to raise the argument[] below." *Id.* As this Court has explained, the "law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available

but not pressed below, . . . waiver will bar raising the issue on appeal." *Wal-Mart Stores, Inc.*, 396 F.3d at 124 n.29 (internal quotations omitted).

Rather than addressing the defendant's failure to plead during the proceedings below, Lanham based her opposition to the VA's motion for summary judgment on an incorrect reading of this Court's holding in *Briones*. JA at 186. Further, even when the district court held a hearing on the issue of the VA's untimeliness defense, Lanham again addressed the issue of waiver only on the basis of *Briones*. JA at 312-13. The district court flatly rejected the plaintiff's sole argument below, correctly basing its decision on this Court's decision in *Belgrave*, 254 F.3d at 387. JA at 336-37.

At no point in either her briefing or oral argument did Lanham argue that the VA had waived its affirmative defense by failing to plead it in the original answer. Only now, for the first time on appeal, having lost on the argument she advanced below, does Lanham seek to challenge VA's affirmative defense of untimeliness on this basis, despite the fact that the argument was readily available to her since VA filed its motion for summary judgment. Given that Lanham had ample opportunity to raise the issue of waiver by failure to plead while the matter was properly before the district court, and has given no reason for her failure to do so, this Court should not entertain this argument here.

Even if this Court were to exercise its discretion to consider the plaintiff's newly raised argument, it should

find that the district court did not commit error by deciding the case on the affirmative defense of untimeliness. Courts within this Circuit have the discretion to accept an unpled affirmative defense even where it is raised for the first time in a motion for summary judgment. *See e.g., Saks*, 316 F.3d at 350; *Monahan*, 214 F.3d at 283; *Block*, 899 F.2d at 350; *Steinberg*, 663 F. Supp. at 715. In such cases, the district court may accept the affirmative defense as it would in a motion to amend the defendant's pleadings. *Saks*, 316 F.3d at 350.

Generally, where, as here, the defendant is able to establish its affirmative defense, the "burden shifts to the plaintiff to provide facts sufficient to counter the affirmative defense . . . ." *Lewis*, 355 F. Supp. 2d at 616 n.5. This includes "facts showing equitable tolling, estoppel, [or] waiver. . . ." *Id.* Further, where the defendant raises an affirmative defense in a motion to amend its pleadings or in a motion for summary judgment, it is up to the plaintiff who wishes to oppose that motion to show "undue prejudice [to herself], bad faith or dilatory motive on the part of the defendant, futility, or undue delay of the proceedings." *Saks*, 316 F.3d at 350.

Lanham has not alleged any bad faith on the part of the VA, nor that the unintentional delay in raising the affirmative defense caused Lanham any undue harm or prejudice. *See Block*, 988 F.2d at 350. As the district court correctly noted, "it is the plaintiff's burden to demonstrate the applicability of tolling, waiver, or estoppel to the administrative remedy timing requirements under § 1614.105(a)(1)." JA at 337. Here, Lanham not only

failed to carry her burden to counter the VA's affirmative defense in the proceedings below, but also, even in this proceeding, raised no valid objection to the district court's acceptance of the affirmative defense other than the fact that it was not pled in the initial answer. As such, this Court should affirm the decision of the district court.

2. Lanham's first contact with an EEO counselor was untimely, therefore, she did not meet a required prerequisite to file suit in federal court.

Lanham did not exhaust her administrative remedies in a timely manner. Federal employees have "45 days from the alleged discriminatory act in which to initiate administrative review of alleged employment discrimination." *Fitzgerald*, 251 F.3d at 359. According to the Code of Federal Regulations, "[a]n aggrieved person must initiate contact with a Counselor within 45 days *of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action*." 29 CFR § 1614.105 (emphasis added). Lanham did not make contact within 45 days.

Bain, the VA's Chief of Human Resources, sent letters to both Lanham and DiMone on May 9, 2006. JA at 155 & 157. The letter to Lanham informed her that she was not selected and that DiMone was the successful candidate. JA at 155. The letter to DiMone informed him that he had been hired for the position and that the "effective date" of the hiring was "May 14, 2006." JA at 157. "Normally it is assumed that a mailed document is received three days

after its mailing. . . . And normally it may be assumed, in the absence of challenge, that a notice provided by a government agency has been mailed on the date shown on the notice." *Sherlock v. Montefiore Medical Ctr.*, 84 F.3d 522, 525-26 (2d Cir. 1996) (citations omitted).

The letter to Lanham was sent on May 9, 2006, JA at 155; so it would have been received by Lanham on May 12, 2006, *Sherlock*, 84 F.3d at 525-26. The effective date of the personnel action, according to the letter to DiMone, was May 14, 2006. JA at 157. Giving Lanham the benefit of every inference, the latest possible date the Court could use to begin the 45 day calendar is May 14, 2006. *See* § 1614.105 (45 days from effective date of personnel action). Using May 14, 2006 as the operative date, Lanham's deadline was June 28, 2006. Lanham made first made contact with an EEO counselor on June 30, 2006. JA at 159. Lanham missed the deadline by two days. She knew, as of May 12, 2006, that the VA had selected a man instead of her. She simply did not contact an EEO counselor within the required time limit.

In the district court, Lanham argued that the VA was estopped from raising this defense because the VA had accepted and processed her complaint. JA at 186. In support of this argument, Lanham relied exclusively on *Briones*, 101 F.3d at 290. In *Briones*, the Postal Service

> initially dismissed the complaint as untimely based on Briones's failure to request EEO counseling within 30 days. Thereafter, the EEOC made an express finding that the complaint was timely,

> remanding the proceedings back to the Postal Service, and directing it to begin an investigation. . . . [T]he Postal Service neither appealed the EEOC's determination nor refused to proceed, but, rather, began its investigation.

101 F.3d at 291. Under those facts, this Court held that "a governmental agency defendant may not have a second bite at the apple by arguing lack of timely filing in federal court after failing to challenge an EEOC determination that the complaint was timely filed." *Id.* (internal quotations omitted).

Briones, however, does not apply here. In this case, the VA never challenged the timeliness of Lanham's initial EEO contact, there was no explicit finding that the complaint was timely or untimely, the EEOC never made a finding of timeliness, and the VA had, therefore, no opportunity to challenge a finding of timeliness. *See* JA at 275-86 (the Final Agency Decision). On these facts, the result in this case is dictated by this Court's decision in *Belgrave*, 254 F.3d at 387. In *Belgave*, the defendant-agency did not make any explicit finding of timeliness. *See Belgrave v. Pena*, No. 98 Civ. 2517DABHBP, 2000 WL 1290592, at *5 (S.D.N.Y. Sept. 13, 2000). Affirming the district court's decision in *Belgave*, this Court explained that

> government agencies do not waive a defense of untimely exhaustion merely by accepting and investigating a discrimination complaint. . . . Indeed, were we to [hold] otherwise we would

> vitiate any incentive for [government] agencies to investigate and voluntarily remedy instances of discrimination, lest the agencies risk forfeiting a valid defense to a *potential* suit.

254 F.3d at 387 (citations and internal quotation marks omitted). *Belgrave* relied, in part, on *Rowe v. Sullivan*, where the Fifth Circuit held that "[i]n order to waive a timeliness objection, the agency must make a specific finding that the claimant's submission was timely." 967 F.2d 186, 191 (5th Cir. 1992).

The VA never made a specific finding that Lanham's complaint was timely. JA at 275-86; *see also* JA at 337 ("Because Ms. Lanham cannot point to any express finding of timeliness of her EEO counselor contact by any agency, there is no basis on which to conclude that the government has waived its defense."). Lanham has not argued that she was unaware of the deadline or unable to meet the deadline. JA at 325, 328. This Court should affirm the district court's decision to grant summary judgment to the VA because Lanham failed to contact an EEO counselor in a timely fashion.

II. The district court's decision may be affirmed on the alternate ground that Lanham has failed to prove that the VA's legitimate non-discriminatory reason for not promoting her was a pretext for discrimination.

A. Relevant facts

The relevant facts are set forth in the statement of facts, above.

B. Governing law and standard of review

1. The law governing summary judgment

Please see section I.B.1 for the law regarding summary judgment and the standard of review.

2. The standard for Title VII disparate treatment claims

The plaintiff's disparate treatment claim is analyzed under the *McDonnell Douglas* burden shifting framework. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973). To make a prima facie case, the plaintiff must show that (1) she is a member of a protected class; (2) she was qualified for the position in question; (3) she did not get the position; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination based on the plaintiff's protected class. *Mario v. P & C Food Mkts.,*

Inc., 313 F.3d 758, 767 (2d Cir. 2002); *Howley v. Town of Stratford*, 217 F.3d 141, 150 (2d Cir. 2000).

If the employee can make a prima facie case, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for its actions. *Howley*, 217 F.3d at 150. The plaintiff is then

> given an opportunity to adduce admissible evidence that would be sufficient to permit a rational finder of fact to infer that the employer's proffered reason is pretext for an impermissible motivation. However, merely showing that the employer's proffered explanation is not a genuine explanation does not in itself entitle the plaintiff to prevail; the plaintiff is not entitled to judgment unless she shows that the challenged employment decision was more likely than not motivated, in whole or in part, by unlawful discrimination. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

Id. (citations and internal quotation marks omitted). Regarding the plaintiff's burden to prove pretext, "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). *Cf. Henry v. Wyeth Pharm. Inc.*, ___ F.3d ___, No. 08-1477-cv, 2010 WL 3023807, *19 (2d Cir. Aug. 4, 2010) (discussing *St. Mary's Honor Center* in dicta and stating "In short, what

the statute prohibits is discrimination in employment. It does not require proof in addition of deceitful misrepresentation.").

When evaluating the defendant's legitimate non-discriminatory reasons and the plaintiff's arguments regarding pretext, a court may not substitute its business judgment for that of the defendant. The business judgment rule is well established in this Circuit. *See Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) (quoting with approval *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.,*, 165 F.3d 1321, 1330 (10th Cir. 1999) ("'Our role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second guesses employers' business judgments'")); *Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002) (quoting with approval *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002) ("[F]ederal courts are not in the business of adjudging whether employment decisions are prudent or fair. Instead, [a federal court's] sole concern is whether unlawful discriminatory animus motivates a challenged employment decision.") (internal quotation marks omitted)). As the court explained in *Chapman v. AI Transport*:

> A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply

> quarreling with the wisdom of that reason. . . . [F]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions. . . . Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior.

229 F.3d 1012, 1030 (11th Cir. 2000) (internal citations and quotation marks omitted).

The plaintiff can attempt to prove that the defendant's legitimate non-discriminatory reason is a pretext by comparing her qualifications to the successful candidate.

> When a plaintiff seeks to prevent summary judgment on the strength of a discrepancy in qualifications ignored by an employer, that discrepancy must bear the entire burden of allowing a reasonable trier of fact to not only conclude the employer's explanation was pretextual, but that the pretext served to mask unlawful discrimination. In effect, the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that "no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999).

Byrnie, 243 F.3d at 103. "Title VII liability cannot rest solely upon a judge's determination that an employer

misjudged the relative qualifications of admittedly qualified candidates." *Fischbach v. District of Columbia Dep't of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996). "Short of finding that the employer's stated reason was indeed a pretext, however – and here one must beware of using 20/20 hindsight – the court must respect the employer's unfettered discretion to choose among qualified candidates." *Id.* Moreover, "the fact that a management decision has a subjective component does not render it automatically suspect. *Cf. Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427 (7th Cir. 1986) ('A subjective qualification assessment does not convert an otherwise legitimate reason into an illegitimate one.')." *Poer v. Astrue*, 606 F.3d 433, 441 (7th Cir. 2010).

To show pretext under the *McDonnell-Douglas* framework, therefore, the plaintiff must show that discrimination was the motivating factor for the employer's decision; it is not enough to show that the employer's stated reason was false. *See St. Mary's Honor Ctr.*, 509 U.S. at 515. The plaintiff must show that the defendant acted (or failed to act) because it wanted to discriminate against the plaintiff, not merely that other courses of action were available or even preferable to the defendant's actions or inactions. *Chapman*, 229 F.3d at 1030. If the plaintiff relies on comparing her qualifications to the successful candidate, she must show that no reasonable person would have hired the other person over the plaintiff, *Byrnie*, 243 F.3d at 103. Although the Court might have chosen a different candidate, absent evidence of discrimination, the employer has the right to decide who to hire. *Fischbach*, 86 F.3d at 1183.

C. Discussion

Lanham's discrimination case fails on its merits. Both parties briefed the merits of the case to the district court. JA at 21-26, 187-91. Although the district court did not decide this case on the merits, JA at 337, this Court may "consider issues that were raised, briefed, and argued in the District Court, but that were not reached there," *Booking*, 254 F.3d at 418-19, and affirm on any basis supported by the record, *In re U.S. Lines, Inc.*, 216 F.3d at 233.

Assuming *arguendo* that Lanham made a prima facie case, she cannot prove that the VA's legitimate non-discriminatory reason for hiring DiMone was a pretext for discrimination. The VA set forth its legitimate non-discriminatory reason during the EEO process and at summary judgment.

Mischke, Will, and Falcone all explained that, based on the written documentation and the interviews, they believed that DiMone was a more qualified and better candidate for the position than Lanham. JA at 71-72, 91, 102. Mischke believed that "DiMone had more managerial and supervisory experience than Kim Lanham." JA at 71. Mischke noted, *inter alia*, that DiMone "worked for IBM that had a (5) [sic] million dollar security budget. He was responsible for monitoring hours and payments for 125 security officers. He has worked with GSA and was responsible for a fleet of 73 vehicles." JA at 71.

Will and Falcone expressed similar sentiments. Will stated that she "saw no evidence during the interview process or review of the KSAOs that Kim was responsible for projecting or managing the budget or directly involved with analyzing and submitting data for contract bids." JA at 91. Falcone noted that DiMone "had transportation experience which included large fleet management; he was responsible for contracting; he set up the Federal Air Marshal's office at Armonk; and his interview reflected his competence in all these areas to a greater degree than [Lanham]." JA at 102. Calderone, the man responsible for making the final selection, agreed with the assessment of Mischke, Will, and Falcone, and hired DiMone over Lanham. JA at 81.

Lanham has not provided any evidence that a jury could rely upon to find that the VA's reason for hiring DiMone was a pretext for race or gender discrimination. In discovery and at summary judgment, Lanham advanced the following arguments: (1) Mischke controlled the hiring processing and influenced Calderone, JA at 189; (2) the scoring of the interviews was amiss, JA at 190; and (3) Lanham was more qualified than DiMone, JA at 32-33. There is no evidence to support the first two arguments. The third argument fails because Lanham was not more qualified, and, in any event, she was not so much more qualified than DiMone that no reasonable person would have selected him over her.

Lanham has no evidence that Mischke controlled or exercised undue influence over the hiring process or the other individuals. Lanham's only evidence for her

proposition that Mischke told the panel how to vote is that each member of the panel gave her answers the same score. JA at 59-60. However, the panel explained that, for every candidate, the panel discussed the candidate's answers and arrived at a joint score. JA at 64-66, 85-87, 94-96. There is nothing inherently discriminatory about this process and the VA has the right to exercise its business judgment in determining how to conduct an interview. *See Byrnie*, 243 F.3d at 103; *Alfano*, 294 F.3d at 377. Moreover, Will, Falcone, and Calderone all denied that Mischke exerted any undue influence over them during this process.[4] JA at 75-76, 85-87, 94-96. Most

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[4] Lanham has never explained how Mischke could influence Calderone, who held a higher position than Mischke, Will, and Falcone. JA at 75. Lanham has also never addressed why Will, who is a woman, would want to discriminate against Lanham because of her *gender*. "[A] well-recognized inference against discrimination exists where the person who participated . . . [in the alleged discrimination] is also a member of the same protected class. . . . Although this does not end the inquiry, it provides an additional inference which plaintiff must overcome." *Drummond v. IPC Int'l, Inc.*, 400 F. Supp. 2d 521, 532 (E.D.N.Y. 2005) (citations omitted); *see also Toliver v. Community Action Comm'n to Help the Economy, Inc.*, 613 F. Supp. 1070, 1074 (S.D.N.Y. 1985) (discrimination less plausible if decision maker is same protected class as plaintiff). Finally, Lanham has not addressed why Will, Falcone, and Calderone, with whom she had no prior history, would suddenly chose to discriminate against her. JA at 47. Indeed, Lanham even had a positive relationship with Mischke; she testified that she "trusted him" and that they "were good (continued...)

importantly, Lanham did not dispute this evidence at summary judgment. JA at 29-32 & 192-95.

Lanham's second argument, that the scoring of interviews was suspect, also fails from a lack of evidence. At summary judgment, Lanham argued "[t]he scores arrived at by the interview panel on the oral interviews of candidates were curious and irrational," and referenced Lanham's and DiMone's answers to interview question #7. JA at 190. Lanham did not depose any of the panel members or conduct any written discovery to determine why they scored the answers as such. However, the panel's score has a foundation in the answers given. In response to the question #7, which was: "Tell me about a time when you had to gather data, analyze the facts and develop an action plan based on the data," DiMone described managing workers compensation data, analyzing training routines, making assessments of whether to continue training, and handling a data base of invoices. JA at 180. In contrast, Lanham described dealing with courier services, listed the couriers, and spoke about the courier contract. JA at 170. The difference in the answers provides a foundation for the VA to make an assessment and the VA has the right, under the business judgment rule, to make an assessment of these answers. Ultimately, the Court does not sit "as a super personnel department that second guesses employers' business judgments," *Simms*, 165 F.3d at 1330, and Lanham cannot carry her burden "by simply quarreling with the wisdom of [the employer's]

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[4] (...continued)
together." JA at 48.

reason," *Chapman*, 229 F.3d at 1030; which is what she is attempting to do. Although there is an element of subjectivity in the interview process, that alone does not make is suspect. *Poer*, 606 F.3d at 441 ("[T]he fact that a management decision has a subjective component does not render it automatically suspect."). It is also noteworthy that in other areas, the panel scored Lanham's answers much higher than DiMone's. For example, for interview question #2, Lanham scored a "5" while DiMone scored a "2." JA at 162, 172. Thus, there is no evidence that the panel gave Lanham lower scores because she was a black woman.

Lanham's final argument is that she was simply more qualified that DiMone for the position and, therefore, because she was not selected the VA must have discriminated against her. Lanham was given two opportunities to explain why she was more qualified than DiMone. In response to an interrogatory, she stated:

> In April of 1997, Darla French started the patient transportation program. As Program Assistant, I helped with the birth of this program and have been involved ever since. I have been the third in demand [sic] in the West Haven campus and have been in charge of training subordinates. When my supervisors were out, I ran the entire office. The entire West Haven VA assumed that I would be getting the position. The individual who was hired for Supervisory Program Specialists now asks me for assistance in doing his job.

JA at 145. Lanham gave a similar answer when asked again in her deposition.

> Because I felt like I was already in the position, I had already did the position for the last – from – that was ten years, I would think. That's about ten years, had already did the position. I know everything about the position, the transportation procedure, the budget, the vendors, familiar with everybody. I don't have to come in and get to know people and be trained. I'm familiar with the whole setting of transportation. So, social workers, the doctors, the lawyers, everybody, you know, know Kim is in transportation.
>
> So, I felt like I already had a reputation in transportation and it was a good reputation, and I was already involved and the budget and everything else I knew. I knew everything about transportation. There was no reason why Mr. Dimone has to come in transportation.

JA at 56-57.

Based on her statements, Lanham's argument regarding qualifications can be summed up as follows: I was more qualified because I worked in the transportation unit and covered the duties of the position sometimes. The problem with her argument is she never explains why her experience made her so much more qualified than DiMone that no reasonable person would have selected him. Employers are not restricted to only hiring internal

candidates, *see Byrnie*, 243 F.3d at 103; and the decision to hire an outside candidate is not, on its own, evidence of discrimination. The panel found that Lanham was the fourth ranked candidate and although Lanham disagreed, her "own opinions about [her] . . . qualifications [do not] give rise to a material factual dispute." *Simms*, 165 F.3d at 1329 (internal quotations omitted).

Even if this Court believed that DiMone's and Lanham's qualifications were close, summary judgment would still be warranted. As the District of Columbia Circuit recently explained:

> In cases where the comparative qualifications are close, a reasonable jury would not usually find discrimination because the jury would assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. . . . We must respect the employer's unfettered discretion to choose among qualified candidates. . . . To conclude otherwise, we have said, "would be to render the judiciary a super-personnel department that reexamines an entity's business decisions – a role we have repeatedly disclaimed.

Adeyemi v. District of Columbia, 525 F.3d 1222, 1227 (D.C. Cir.) (citations and quotations omitted), *cert. denied*, 129 S. Ct. 606 (2008). In affidavits, the panel members explained why they believed that DiMone was the most qualified candidate. *See* JA at 71, 91, 102. Lanham has

failed to carry her burden of proof to show interview panel's reasons for hiring DiMone were a pretext for discrimination because she cannot show that she was so much more qualified than him that no reasonable person would have selected him over her, absent discrimination.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: September 20, 2010

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 10,147 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

29 C.F.R. § 1614.105: Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(b)(1) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with § 1614.108(f), election rights pursuant to §§ 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under the ADEA instead of an administrative

complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the claims raised in precomplaint counseling (or issues or claims like or related to issues or claims raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

(2) Counselors shall advise aggrieved persons that, where the agency agrees to offer ADR in the particular case, they may choose between participation in the alternative dispute resolution program and the counseling activities provided for in paragraph (c) of this section.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the aggrieved person chooses an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling. If the matter has not been resolved, the aggrieved person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

(f) Where the aggrieved person chooses to participate in an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the pre-complaint processing period shall be 90 days. If the claim has not

been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

(g) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.