JAMS NEW YORK

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Rory Bennett and Curtis Hedgeman,

Claimants,

-against- FINAL AWARD

Kellogg Brown & Root, Inc., and
Halliburton, Inc.,

Respondents.

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This Final Award addresses claims of race discrimination brought by Rory Bennett and Curtis Hedgeman against Kellogg Brown & Root, Inc., and Halliburton, Inc. ("KBR" or "Respondents"), which were presented in an arbitration hearing held on March 7, 8, 9, and 10, 2006. These claims are addressed together because evidence was presented at the arbitration hearing that pertains to both claims.

CLAIMS OF RORY BENNETT

Claimant Rory Bennett is an African-American, who was hired by KBR in July 1999, to work as a Supply Technician at Camp Able Sentry in Macedonia. Claimant's employment was terminated in January 2001, as a result of a reduction in force. Mr. Bennett does not allege that the reduction in force was itself discriminatory; rather, he contends that his termination was unlawful because he was not offered the opportunity to transfer to another KBR position.

Mr. Bennett bases his claim on the contention that most African-Americans terminated during the reduction in force at Camp Able Sentry were not given the opportunity to transfer to other jobs, while KBR found transfer opportunities for most of the white employees.

Legal Framework

Mr. Bennett asserts that this is a "disparate impact," as opposed to "disparate treatment" claim. According to Claimant, "it is undisputed that KBR had a facially neutral employment policy that required it to look for other available positions for employees whose jobs terminated (the "transfer policy"). It is also uncontested that it had a policy in the Balkans and Hungary of not posting job openings (the "posting policy")."

The Supreme Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact. The Court has said that "disparate treatment" is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or other protected characteristic. Liability in a disparate-treatment case depends on whether the protected trait actually motivated the employer's decision. By contrast, disparate-impact claims involve employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Under a disparate-impact theory of discrimination, a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate that is required in a "disparate-treatment" case. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003). A

disparate impact analysis may be applied in cases involving subjective employment criteria, as well as objective criteria or standardized tests. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

In proving a claim of disparate impact, it is not enough for a plaintiff to show that there are statistical disparities in the employer's workforce; rather a plaintiff must also prove causation, "that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. . . [and] statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Watson*, 487 U.S. at 994-95.

Analysis of Mr. Bennett's Claims

Mr. Bennett first alleged race discrimination in connection with the reduction in force at Camp Able Sentry in charges filed with the Texas Commission on Human Rights (November 28, 2001) and with the Equal Employment Opportunity Commission (EEOC) (undated). KBR responded to the EEOC charge on January 7, 2002, in a letter to Investigator David Liggins.

In his charges of discrimination, Claimant asserted that "Larry Pryor terminated all African-American employees and the other Caucasian employees were not terminated," and that "no African-American employee who was terminated was offered a transfer or given the opportunity to obtain another position." In its response, KBR stated that the reduction in force took place gradually from December 1999 to August 2001. KBR provided a roster of all Camp Able Sentry (CAS) Warehousing/Materials employees, which consisted of Fuels, Warehousing, Ammunition, and Material Control

personnel as of November 30, 1999. The roster lists 42 employees, along with their race, project classification, status code, and demobilization date if applicable. Claimant subsequently identified three additional African-American Warehousing/Materials employees who were terminated as a result of the reduction in force. Blacks constituted 49% of all Warehousing/Materials employees (22/45); Whites constituted 44% (20/45); and Hispanics 7% (3/45).

The evidence shows that 17 of the 45 employees received transfers; the remaining employees were terminated as a result of the reduction in force ("riffed") (13 employees); terminated for other reasons not at issue (2 employees); classified as "job completed" (5 employees), resigned (4 employees), or remained active (4 employees).

With respect to the 17 employees who received transfers, four (4) were Black (23%); ten were White (59%); and three (3) were Hispanic (18%). Notably, all ten of the employees classified as Ammunition Handler (2 Black, 6 White, 2 Hispanic) were transferred. Accordingly, with respect to over one-half of the transfers, KBR's transfer policy had no adverse impact on African-American employees. The remaining seven (7) transfers were two (2) Black (29%); four (4) White (57%); and one (1) Hispanic (14%).

With respect to the 13 employees who lost their positions as a result of the reduction in force, nine (9) were Black (69%), and four (4) were White (31%). Of the four employees who retained their positions, three (3) were Black and one (1) was White.

There is no question that there are disparities between African Americans and non-African Americans in the number and percentage of employees transferred during the reduction in force, as well as in the number and percentage of employees who were "riffed." These disparities are troubling, as is KBR's failure to conduct a meaningful

investigation of Mr. Bennett's allegations by interviewing the relevant decisionmakers to determine the precise circumstances that resulted in African Americans being unable to obtain transfers in greater numbers than would be expected based on their percentage of the workforce.

The critical question, however, is whether the statistical disparities in this case are sufficiently probative to establish that the practice in question caused the absence of transfer opportunities for employees because of their membership in a protected group.

The probative value of the statistical evidence in this case with respect to causation is limited by a number of factors.

First, it is well-established that statistical evidence derived from an extremely small universe has little predictive or probative value. *See, e.g., Watson*, 487 U.S. at 996-997; *see also Stout v. Potter*, 276 F.3d 1118 (9th Cir. 2002) (sample involving 6 female applicants in a pool of 38 applicants likely too small to produce statistically significant results); *Contreras v. County of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981) (discounting probative value of statistical sample consisting of 57 test-takers, 17 of whom belonged in the plaintiffs' protected class). The available evidence in this case consists of 17 transfers, 10 of which arguably should be eliminated because all of the employees in the ammunition handler classification were transferred, and there was therefore no adverse impact on African-American employees in that job.

Second, there is substantial evidence in this case that the failure of an employee to obtain a transfer was caused by factors other than race, primarily the availability of openings for specific job functions in other areas in the Balkans. When transfers are looked at *by job classification*, disparities disappear or are statistically insignificant.

Finally, I note that Mr. Bennett has not offered any evidence that there was an opening for a supply clerk anywhere in the Balkans at the time he was terminated; nor has he offered any evidence of discrimination with respect to any available position, *i.e.*, that a White as opposed to a Black employee at any time received a transfer to a specific open position.

For all of these reasons, I find that Mr. Bennett has failed to prove by a preponderance of the evidence that his termination was the result of a discriminatory KBR policy or practice.

CLAIMS OF CURTIS HEDGEMAN

Claimant is an African-American, who was hired by KBR as a Logistics Services Manager at Camp Able Sentry in Macedonia in April 1999. Mr. Hedgeman claims that in 2000, he was denied promotion to the position of Director of Logistics based upon his race.

Legal Framework

The legal standards with respect to Mr. Hedgeman's claim are not in dispute. The United States Supreme Court has recognized that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "there will seldom be 'eyewitness' testimony as to the employer's mental processes," *Postal Service Bd. of Governors* v. *Aikens,* 460 U.S. 711, 716 (1983). Accordingly, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), and subsequent cases, the Court articulated a burden shifting framework for discrimination cases that are based principally on circumstantial evidence. To prevail on a claim of race discrimination, the plaintiff must initially establish a *prima facie* case by satisfying a four element test from which

discriminatory motive may be inferred, thereby creating a rebuttable presumption of intentional discrimination." The plaintiff must show (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802. Put another way, plaintiff must prove: 1) he is a member of a protected class; 2) he was qualified for the position; 3) he suffered an adverse employment action; and 4) others similarly situated were treated more favorably. *Rutherford v. Harris Co.*, 197 F.3d 173, 184 (5th Cir. 1999).

Once the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate—but not prove—a legitimate, nondiscriminatory reason for its employment decision. *McDonnell Douglas Corp.*, 411 U.S. at 802. The employer's burden is satisfied if it simply explains what it has done or produces evidence of legitimate, nondiscriminatory reasons. If the employer meets this burden, the *prima facie* case is dissolved, and the burden shifts back to the plaintiff to establish that the reason proffered by the employer is merely a pretext for discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 802.

To demonstrate a "pretext for discrimination," the plaintiff must show both that the employer's proffered reason was false and that discrimination was the real reason for the employment decision. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000), the Court held that a plaintiff's *prima facie* case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its

decision, may be adequate to sustain a finding of liability for intentional discrimination. The Court held that proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and that in appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.

At all times, the plaintiff has the ultimate burden to prove intentional discrimination. *St. Mary's Honor Ctr.*, 509 U.S. at 507. When a plaintiff alleges disparate treatment, liability depends on whether the protected trait actually motivated the employer's decision. *Hazen Paper Co.* v. *Biggins,* 507 U.S. 604, 610 (1993). That is, the plaintiff's protected trait must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." *Id.*

Analysis of Mr. Hedgeman's Claims

At the time he was hired in 1999, Mr. Hedgeman reported to the Director of Logistics (DOL), Brian Hodge, who in turn reported to the Project Manager for Macedonia. Mr. Hedgeman eventually had responsibility for 100 ex-pats and 600-700 host country nationals. Mr. Hedgeman's performance at Camp Able Sentry was excellent; he received numerous certificates of appreciation, and Brown & Root coins for outstanding work.

Mr. Hodge left Camp Able Sentry in early 2000. Prior to leaving he told Mr. Hedgeman that he expected Mr. Hedgeman would replace him as DOL. However, although Mr. Hedgeman was considered for the DOL position, another candidate, Larry Pryor, who is white, was selected in June or July 2000.

In terms of the *McDonald Douglas* burden shifting scheme, I assume that Mr. Hedgeman has made out a *prima facie* case that he was unlawfully denied the promotion and that KBR has articulated a legitimate non-discriminatory reason for selecting Mr. Pryor, as opposed to Mr. Hedgeman, *i.e.*, that Mr. Pryor had a stronger background in transportation logistics, which was increasingly the focus of the mission in Macedonia. Thus, the burden rests upon Claimant to establish that the reason asserted by KBR was false and that discrimination was the real reason for denial of the promotion. I find that Claimant has failed to meet this burden.

The decision to hire Mr. Pryor was made by Rick Reuter, who was at that time the Director of Logistics for Macedonia and Kosovo. Mr. Reuter testified persuasively that the mission in Macedonia was going to be dominated by transportation, rather than supply functions, which Mr. Reuter believed to be the area of Mr. Hedgeman's expertise. Mr. Hedgeman contends that this testimony was false because Mr. Hedgeman's broader experience and qualifications made him a better overall candidate. However, it cannot be reasonably disputed that Mr. Pryor had far more extensive experience in transportation logistics that Mr. Hedgeman. As the Fifth Circuit has held, "differences in qualification are generally not probative evidence of discrimination unless those disparities are of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job I question. *Deines v. Dept. of Prot. & Regulatory Servs.*, 154 F3d 277, 281 (5th Cir. 1999).

As further evidence of pretext, Mr. Hedgeman relies upon KBR's asserted "pattern and practice" of discrimination against African-Americans, which is based for the most part upon the statistical evidence regarding transfers set forth in connection with

Mr. Bennett's case. For the reasons set forth above, I find that this evidence has limited probative value, which is further diminished with respect to Mr. Hedgeman's claim by the lack of any significant connection between the statistical evidence of disparities in transfer opportunities and the denial of promotion complained of by Mr. Hedgeman.

I therefore find that Mr. Hedgeman has not proved by a preponderance of the evidence that he was denied promotion to DOL on the basis of his race.

CONCLUSION

Based upon all of the evidence, I find that neither Mr. Bennett nor Mr. Hedgeman has proved by a preponderance of the evidence that race was a motivating factor in the employment actions they have challenged,[1] and their claims are accordingly dismissed.

SO ORDERED.

Kathleen A. Roberts

KATHLEEN A. ROBERTS
ARBITRATOR
Dated: February 13, 2007

[1] In December 2000, as part of a reduction in force, Robert McNamara (the Project Manager at the time) eliminated Mr. Hedgeman's position and terminated Mr. Hedgeman. Mr. Hedgeman was subsequently told by a co-worker that a white employee, Kenneth Pitcher, had been brought in to do Mr. Hedgeman's job, which led Mr. Hedgeman to suspect that he had been terminated on the basis of his race. This information turned out to be incorrect; in fact, Mr. Pryor assumed Mr. Hedgeman's duties. Based upon this evidence, it appears that Mr. Hedgeman has abandoned this claim, which is not addressed in his post-hearing brief. In any event, I find that Claimant has failed to offer any evidence from which it could reasonably be concluded that his position was selected for elimination based upon his race.

PROOF OF SERVICE BY FACSIMILE & U.S. MAIL

Re: Bennett, Rory et al. vs. Brown & Root, Inc. and Halliburton, Inc.
Reference No. 1420012080

I, Elizabeth Ryan, not a party to the within action, hereby declare that on February 14, 2007 I served the attached Final Award on the parties in the within action by facsimile and depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at New York, NEW YORK, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at New York, NEW YORK on February 14, 2007.

Elizabeth Ryan