

JAMS NEW YORK

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Robert Jackson, Jr.,

Claimant,

-against-

PARTIAL FINAL AWARD

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

Respondents.

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This Partial Final Award addresses claims of race discrimination brought by Robert Jackson, Jr., against Kellogg Brown & Root, Inc., and Halliburton, Inc. (“KBR” or “Respondents”), which were presented in an arbitration hearing held on January 24 – 27, 2006, and in a supplemental hearing held on July 27, 2006.

Claimant is an African-American. Although Mr. Jackson’s Arbitration Demand makes a number of allegations of race discrimination, he has withdrawn his challenge to all but three asserted employment actions by KBR that Mr. Jackson contends were motivated at least in part by racial animus: (1) Jim King’s decision to eliminate Mr. Jackson’s position as a Senior Property Specialist in Kaposvar, Hungary, rather than give him Douglas Diffey’s position as a Senior Theater Property Specialist, and terminate or transfer Mr. Diffey; (2) Mr. Diffey’s decision not to consider/select Mr. Jackson for the Senior Theater Property Specialist position filled by Claude Killian; and (3) Mr. Diffey’s selection of Randall Ross, instead of Mr. Jackson, for the Senior Theater Property Specialist position vacated by Mr. Killian.

LEGAL FRAMEWORK

The legal standards with respect to these claims 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 the 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. *Id.*, 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 fact finder 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).

For purposes of this Award, I assume that Mr. Jackson has presented a *prima facie* case, and that Respondents have offered a legitimate, non-discriminatory reason with respect to each of the three challenged employment decisions. Accordingly, the

critical question is whether Mr. Jackson has proven by a preponderance of evidence that the reasons offered by Respondents were a pretext, and that any or all of the decisions was actually motivated by Mr. Jackson's race.

ANALYSIS OF CLAIMS

Mr. Jackson was hired by KBR in June 1998 as an Inventory Specialist in Kaposvar, Hungary, reporting to Roddy Allen, the Hungary Property Manager, to do inventory and property accountability for government-owned equipment in Hungary. Mr. Allen is an African American. Mr. Jackson was subsequently promoted to Property Specialist, and later to Senior Property Specialist. Property Specialists are also known as Company Owned Equipment (COE) Specialists or Senior Company Owned Equipment (SCOE) Specialists.

Immediately prior to joining KBR, Mr. Jackson served 21 years in the United States Marine Corps, largely in the area of property management. While working for KBR, Mr. Jackson became a Certified Professional Property Manager (awarded by the National Property Management Association). As Senior Property Specialist, Mr. Jackson took over Mr. Allen's responsibilities as Property Manager when Mr. Allen was absent from the base.

It is undisputed that throughout the time that Mr. Jackson was employed in Hungary, there were two distinct property accountability functions: the "site" property function and the "theater" property or "property book" function, each with separate chains of command. "Theater" refers to certain areas of Europe in which KBR supported American military operations, including Hungary, Albania, Bosnia, Kosovo and

Macedonia. Because the theater property book is to some extent a check on the accuracy of the inventories in each country, the site and theater property accountability functions are performed by different employees.

When Mr. Jackson was hired, the site property function in Hungary was headed by Mr. Allen. Mr. Allen reported to the Hungary Project Manager, John Downey. Mr. Allen supervised Mr. Jackson and Jesse Brooks, an African American Property Specialist, as well as several host country nationals (HCNs). Mr. Jackson, Mr. Brooks and the HCNs worked mainly in the field, tagging property and completing paperwork with inventory information that was input into a KBR computer system. In the course of his work in Kaposvar, Mr. Jackson was trained in and developed some facility with the "D-Base" computer system used by KBR to track property, including the ability to write basic programs.

The theater property function involved records pertaining to the entire theater. Theater Property Specialists worked in an office, spending approximately 85% of their time at the computer; their responsibilities required a somewhat more advanced knowledge of the D-Base computer program in order to collect inventory data from multiple locations for consolidation into one theater data base. When Mr. Jackson arrived in Kaposvar, the responsibilities associated with the theater property book were performed by Allison Scott, a white Senior Theater Property Specialist. Ms. Scott reported directly to the theater Project Manager, Robert Ellis (white), who had oversight for the KBR mission throughout the theater. Ms. Scott was succeeded in July 2000 by Douglas Diffey, who is white. Mr. Diffey, who transferred from a Senior Property Specialist position in Kosovo and Macedonia, was trained by Ms. Scott. Mr. Diffey also

reported to Mr. Ellis. Mr. Allen had no supervisory responsibility or authority with respect to Ms. Scott or Mr. Diffey, although as a matter of administrative convenience, Mr. Allen could and did sign Mr. Diffey's time sheets.

In early 2001, it was agreed that Mr. Allen would "swap" positions with the site Property Manager in Kosovo, Jim King. Mr. King determined that the site property operation in Hungary was overstaffed, due to the downsizing of the KBR operation in Hungary, and that a Senior Property Specialist position should be eliminated. There is evidence that even prior to his arrival in Hungary, Mr. King believed Mr. Jackson's position was the one to be eliminated.

After Mr. King arrived in Hungary, he found it difficult to communicate with Mr. Jackson, and found his performance, including his verbal and written skills, unsatisfactory. Mr. King found it easier to communicate with Mr. Brooks, whose performance he considered superior to Mr. Jackson's. Mr. King reassigned certain of Mr. Jackson's responsibilities to Mr. Brooks (including signing the HCN timesheets). Mr. King officially decided in mid-July 2001 to eliminate Mr. Jackson's position. Notwithstanding his concerns about Mr. Jackson's performance, Mr. King he did not attempt to terminate Mr. Jackson on that basis; accordingly, Mr. Jackson was able to apply for other positions with KBR.

Mr. King's decision to eliminate Mr. Jackson's position was supported by the theater Property Manager, Charlie Carr, who is white. Mr. Carr nonetheless took it upon himself to try to find another position for Mr. Jackson with KBR, so that he would remain employed. Before Mr. Jackson was formally advised of the elimination of his position, Mr. Carr contacted Karl Murray, the site Property Manager in Bosnia regarding potential

openings in that country. Mr. Murray is an African American. Mr. Murray called Mr. Jackson to discuss the possibility of transferring to Bosnia as a Property Specialist, which was the only available position in the Bosnia property department. This position was a demotion that reduced Mr. Jackson's base salary by \$400 per month, but with a 55% "uplift" for Bosnia, and additional overtime, Mr. Jackson would receive greater total compensation as a Property Specialist in Bosnia than as a Senior Property Specialist in Hungary.

Although Mr. Jackson did not question the need for a reduction in force in Hungary, he was unhappy that he was forced to accept a demotion and reduction in base pay, and was upset that others in the KBR operation had learned of the elimination of his position before he had been notified by his immediate superior, Mr. King. Mr. Jackson was especially disturbed that when he announced his departure to the HCNs under his supervision, they already knew his position was being eliminated. Mr. Jackson believed that the HCNs were informed of his termination by Mr. King (Mr. King denies this).

On July 22, 2001, Mr. Jackson sent an anonymous e-mail to Dave Lesar, the Chairman, President, and CEO of Halliburton in Houston, complaining about the elimination of his position, transfer, and reduction in pay. He asserted that "there is another job as mine and they want to put someone else in that position."¹ Mr. Jackson complained that his manager [Mr. King] had failed to advise him of the elimination of his position prior to telling other managers, as well as the HCNs, about Mr. Jackson's termination. Mr. Jackson also stated that "I am the lowest paid person doing my job." Mr. Jackson did not identify himself as an African American, and made no claim of

¹ This comment apparently refers to a position in Macedonia that was no longer open because another employee had been hired and was being processed in Houston.

discrimination on the basis of his race; nor did he assert that he should have been given Mr. Diffey's job.

On July 23, Mr. Lesar advised Mr. Jackson that he would forward his e-mail to the Human Resources department, and in an e-mail later that day, Margaret Carriere, a KBR Vice President responsible for Human Resources at the global level, advised Mr. Jackson that his e-mail had been referred to her "so that I might assist you." * * * I hope you will trust me enough to tell me your name, so that I can discretely determine what the situation is. Please know that we handle matters confidentially."

Although Mr. Jackson did not respond to Ms. Carriere's July 23 e-mail, word of Mr. Jackson's e-mail to Mr. Lesar somehow quickly reached the Balkans. Mr. Jackson was asked about the e-mail by a Mr. Brooks, following which Mr. Jackson contacted Mr. Downey (the Hungary Project Manager) to explain his actions. Mr. Downey obtained a copy of the e-mail (it is not clear from whom) and showed it to Kara Hall, who was at that time the KBR Human Resources Manager in Hungary. Mr. Hall is an African American and a personal friend of Mr. Jackson. Mr. Downey directed Mr. Hall to "fix it," and to "make Mr. Jackson happy," which Mr. Hall understood to mean "find out what the problem was, and if we can solve it, go ahead and do so." Mr. Hall understood Mr. Jackson's complaint to be that he was the lowest paid Senior Property Specialist, that he was "the last to find out about a transfer," and that he was being forced to accept a demotion and reduction in pay. Mr. Hall did not understand Mr. Jackson to be complaining that he should be given Mr. Diffey's position or to be making a claim of race discrimination.

Although KBR has an “open door” policy in which employees may bring issues directly to the highest levels of management, Mr. King confronted Mr. Jackson and “chewed him out” for going to Mr. Lesar, rather than through the “chain of command.” (Mr. King was later reprimanded and counseled for this confrontation.)

Meanwhile, Mr. Hall confirmed that several KBR managers were aware of Mr. Jackson’s situation before he was formally notified by Mr. King. (He was unable to determine whether Mr. King had notified the HCNs prior to notifying Mr. Jackson.) With respect to Mr. Jackson’s claim that he was the lowest paid Senior Property Specialist, Mr. Hall confirmed that a former employee with the same title (Jean Shields) had made more than Mr. Jackson, but concluded that Mr. Jackson was currently the highest paid Senior Property Specialist in the Balkans.² Mr. Hall arranged a meeting with Mr. Jackson, Mr. Carr, Mr. King and himself, in which he expected the matter to be resolved by Mr. King and Mr. Carr apologizing for the manner in which the situation had been handled. Mr. Hall’s findings were also reported to John Culp in KBR’s Employee Relations department in an e-mail dated July 30. Mr. Hall advised Mr. Culp that a “final meeting” with Mr. Jackson would take place “to again apologize, and to bring this issue to an end.”

On the same day that Mr. Hall e-mailed his report to Mr. Culp (July 30), Mr. Jackson e-mailed Ms. Carriere (copying Mr. Lesar), reporting that “my confidentiality was broken,” and that he had been asked by a co-worker [Mr. Brooks] whether he had

² The basis of this conclusion is somewhat unclear. It is undisputed that certain KBR employees in the Balkans with the title of “Senior Property Specialist” were paid more than Mr. Jackson earned in that position. KBR apparently contends that the Senior Property Specialists who earned more than Mr. Jackson were on the theater or property book side, and were therefore not similarly situated to Mr. Jackson. Because Mr. Jackson is not pressing a pay discrimination claim with respect to his salary as a Senior Property Specialist, it is not necessary to resolve this issue.

written to Mr. Lesar. Mr. Jackson stated that he had then gone to the Project Manager [Mr. Downey], who had told him that he should have come to management “before going to you all and that you all could not help me any way. But they would look into this and see what they could do to fix it.” Mr. Jackson acknowledged that some management personnel had apologized for how the case was handled, but that his supervisor (not identified but referring to Mr. King) had called him into his office and shouted at him for going to Mr. Lesar rather than through the chain of command. Mr. Jackson complained that one of the people keeping his position (not identified by name, but apparently referring to Mr. Diffey) had less experience than Mr. Jackson, and that “this person makes more money than I do however, we have the same job title. What is wrong with this picture?” Mr. Jackson further complained that his supervisor had given a number of Mr. Jackson’s responsibilities, and directed all of his questions to Mr. Brooks, who was junior to Mr. Jackson.

In his July 30 e-mail to Ms. Carriere and Mr. Lesar, Mr. Jackson did not expressly identify himself as an African American, or make a claim of race discrimination; he did, however, report that “[i]ronically, someone that works for the government a GS worker called my old boss [Mr. Allen] and me to his house one night to tell me that my manager [Mr. King] was after me. “He said ‘you nigger better cover your ass because he is after your ass.’ What did this mean?”³ Later the same day (July 30), Mr. Jackson advised Ms. Carriere that he would be disconnecting his personal e-mail account in Hungary.

³ The “GS worker” was identified during the course of the arbitration proceedings as Dave Vest, a Department of Defense (DOD) employee. Although it is not clear from the quoted remark that it was Mr. King, as opposed to Mr. Vest who used the word “nigger” to refer to Mr. Jackson, Mr. Vest testified at the arbitration hearing that Mr. King used the term “nigger” in reference to Mr. Jackson. Mr. Vest’s testimony is discussed further *infra*, at pp. * * *. Mr. Hall did not recall if he ever saw Mr. Jackson’s July 30 e-mail. However, Mr. Hall acknowledged that he had been told about the referenced conversation with an unnamed DOD employee, in which the DOD employee reported the use of the word “nigger” by Mr. King in

On July 31, Jill King, a KBR Vice President of Human Resources, e-mailed Mr. Jackson, advising him that she had been asked by Mr. Lesar to look into the issues raised in his July 30 e-mail, "and to respect your confidentiality." Ms. King did not at that time have Mr. Jackson's full name, or know where he was located. She requested that Mr. Jackson provide contact information so that she would not compromise his confidentiality by "searching" in the organization. Mr. Jackson provided the requested information by e-mail the same day, stating that he would provide a contact number once he arrived in Bosnia. This e-mail was acknowledged by Ms. King on August 9, following which there was no further communication between Mr. Jackson and Ms. Carriere or Ms. King until October 12.

Meanwhile, on July 31, the "final meeting" among Mr. Hall, Mr. Carr, Mr. King and Mr. Jackson took place in Kaposvar, but did not go as expected by Mr. Hall, because Mr. Carr declined to apologize, based on having made extraordinary efforts to find Mr. Jackson another position, and Mr. King insisted that he had properly notified Mr. Jackson of the elimination of his position. Mr. Jackson accepted the job in Bosnia and agreed to report in early August as scheduled. According to Mr. Hall, Mr. Jackson did not suggest during this meeting that he should be given Mr. Diffey's position and made no complaint of race discrimination; nor did he allege that Mr. King had referred to him as a "nigger."

On October 12, 2001, Mr. Jackson e-mailed Ms. Carriere and Ms. King from Bosnia. Mr. Jackson related a conversation with a co-worker in Bosnia, regarding an incident in Haiti in 1995 in which the co-worker observed Mr. Jackson's manager [Mr. King] scream and shout at and also spit on a taxi driver who was a Haitian local national

reference to Mr. Jackson. Mr. Hall attempted to pursue this matter, but was told by Mr. Jackson that the DOD employee wished to remain anonymous and would not confirm the alleged statement by Mr. King. At the arbitration hearing, Mr. Vest denied ever refusing to speak to Mr. Hall.

employed by KBR. Mr. Jackson stated that the incident was reported to KBR, but that nothing was done about it, and that he had obtained a statement from the co-worker. Mr. Jackson then reiterated at length the circumstances surrounding his transfer to Bosnia, focusing in particular on the fact that he had not been informed of the elimination of his position before other KBR employees, and stating that "I know that I have not and will not get a fair opportunity because everyone is covering up for one another." Mr. Jackson also specifically complained that as a Senior Property Specialist in Hungary, he had been paid less than three other Senior Property Specialists in the Balkans, including Mr. Diffey,⁴ and complained generally that other KBR employees had obtained transfers without a reduction in pay. Mr. Jackson suggested that Mr. Carr knew of other open positions, but "maybe did not want me to get one of those jobs." Mr. Jackson requested that he be "transferred from the Balkans Support Contract to another area or country if at all possible." Mr. Jackson did not identify himself as an African American, or allege that his transfer to Bosnia or the compensation disparities he complained about were the result of race discrimination. Nor did he suggest that he should have been given Mr. Diffey's position.

On October 19, KBR's Director of Employee Relations, Keith Trainer, e-mailed Mr. Jackson, advising him that "[b]ased on the report I have read concerning the meeting conducted on 7/31/01 * * * attended by Charlie Carr, Jim King, Kara Hall and yourself, I believe [the] concerns raised in your July [22] letter have been appropriately answered." With respect to Mr. Jackson's request for a transfer, Mr. Trainer advised Mr. Jackson to contact the theater Human Resources Manager, Roger Manuel (there is no evidence as to whether Mr. Jackson in fact contacted Mr. Manuel).

⁴ See note 2, *supra*.

Notwithstanding Mr. Trainer's e-mail to Mr. Jackson, KBR's investigation in response to Mr. Jackson's October 12 e-mail was apparently not completed until on or about October 22, when Fred Bridgewater, KBR's "Director of HR/Americas Region," received a detailed report from Mr. Manuel. Mr. Manuel recommended that Mr. Jackson receive an apology from Mr. King, that Mr. King receive a written counseling for telling an employee he should not go to management as part of the open door policy, and that Mr. King be told that no retaliation of any kind should ever be used against Mr. Jackson. Mr. Bridgewater agreed with this recommendation. Mr. Manuel's report does not address Mr. Jackson's complaints with respect to the pay of other KBR employees.⁵

There is no evidence that Mr. Jackson was ever advised of the findings and recommendations reflected in the October 22 e-mails.

On January 6, 2002, Mr. Diffey was promoted to the position of Property Manager in Hungary, creating an opening for the Senior Theater Property Specialist position. At that time KBR did not "post" openings in the Balkans, and Mr. Jackson did not learn of the opening prior to the time it was filled. However, as noted above, in connection with complaints filed with KBR regarding his transfer to Bosnia, Mr. Jackson had requested a transfer to a Senior Property Specialist position. Mr. Diffey selected Claude Killian, who is white. Mr. Killian began work in January 2002.

Mr. Jackson remained unsatisfied with KBR's response to his complaints. On or about February 23, he reported his concerns to the KBR Employee Hotline. There is no documentary record of the contents of this report. Mr. Jackson was advised that his complaint would be handled by Mr. Culp, to whom Mr. Jackson immediately sent an e-

⁵ See note 2, *supra*.

mail; Mr. Culp responded that he would be in Bosnia in early March and suggested that they get together then to discuss Mr. Jackson's hotline call.

Mr. Culp and Mr. Jackson met in Bosnia on March 7. There is no documentary record of the conversation. On March 20, Mr. Culp e-mailed Mr. Jackson, stating that he had spoken with Cathy Gist, who had replaced Mr. Hall as Human Resources Manager in Hungary. Ms. Gist is white. Mr. Culp related Ms. Gist's explanation of the elimination of Mr. Jackson's position as a reduction in force. Mr. Culp noted that "difficult decisions have to be made when positions go away," and that "I really don't see anything that I can do for you."

The next day Mr. Jackson sent Mr. Culp's e-mail to Mr. Hall, who had been transferred to Macedonia, asking Mr. Hall for his thoughts, and advice regarding what he should do.

Mr. Hall responded:

Robert, I really do not know what to tell you. It appears you have tried to use the system and the system has fail[ed] to provide you with the answers we know exist but the questions are being directed to personal friends of the person they should be investigating. I guess if there is to be a fair investigation it should be conducted by an outside agency not someone from the good old boy party. The investigation [should] be conducted theater wide on the comparison of black managers, supervisors ad senior positions where do they go when the going get[s] easy. How many are going forward to higher positions compared to whites with lesser time and knowledge with the same classifications. Robert you are not the only one over here who has or is being screwed. GO FOR WHAT YOU FEEL IS RIGHT FOR YOU.

Mr. Hall testified at the arbitration hearing that at the time he wrote this e-mail, he believed that he himself had been "screwed" by being demoted and transferred to Macedonia with a reduction in base pay, and by his position in Hungary being given to Ms. Gist at a higher salary. He testified that his view of the matter changed when he

learned that Ms. Gist, who had a background in public relations, had been given additional responsibilities as a result of labor unrest among the HCNs, and acknowledged that he did not know of any other KBR employees who had been “screwed”; nor did he have any evidence of systemic race discrimination by KBR.

One month later, on April 22, Mr. Jackson filed a charge of race discrimination with the EEOC. In his Charge, and in an accompanying letter, Mr. Jackson sets forth the history of his transfer to Bosnia with a demotion and reduced pay, alleges that Mr. Diffey was paid more than he as a Senior Property Specialist in Hungary, complains about Mr. Diffey’s promotion to Property Manager, as well as the hiring of Mr. Killian as a Senior Property Specialist at a rate of pay higher than Mr. Jackson had made in the same position, and asserts that other unnamed KBR employees had been transferred or been rehired without a reduction in pay. Mr. Jackson states that he had raised these issues with KBR, but that the problem had not been corrected. Finally, Mr. Jackson alleges that “[t]his company has repeatedly failed to promote minority employees.” He requests compensation for loss of income and promotion, and an immediate evaluation of KBR in the Balkans. The Charge does not assert that Mr. Jackson should have been given Mr. Diffey’s position.

On or about April 25, Mr. Jackson learned that Mr. Killian had resigned from the Senior Theater Property Specialist position in Hungary. Mr. Jackson immediately e-mailed Mr. Diffey, Mr. Carr and Mr. Murray that he would like to be considered for the position. On May 2, having received no response, Mr. Jackson sent an e-mail to Mr. Downey (copying Mr. Lesar and John Cowings, also in Houston, who Mr. Jackson testified was “the guy over the whole entire Balkans”). Mr. Jackson complained that he

had not been recruited for the Senior Theater Property Specialist position in Hungary when Mr. Diffey became Property Manager there, that the person hired (Mr. Killian) had been brought from the United States and was less qualified than Mr. Jackson, and that Mr. Killian was paid more than Mr. Jackson had earned as a Senior Property Specialist when he was in Hungary. Mr. Jackson requested that he be given “an equal and fair opportunity” to interview for the open position.

Mr. Downey responded immediately, acknowledging that “there is a potential that a requisition will be initiated for a property position within Kaposvar,” but that “a determination must be made to fill the position,” and “if filled, what level is needed; i.e., Property Specialist or Sr. Property Specialist?” Mr. Downey stated that as a result of a new initiative, the position would be posted in Hungary and Bosnia, as well as the Kosovo region. Mr. Downey assured Mr. Jackson that “you will receive fair and equal treatment.”

Mr. Diffey testified that he received five or six resumes, but remembered the names of only three candidates: Mr. Jackson, Mr. Brooks, and Randall Ross, who was at that time a site Property Specialist⁶ in Kosovo. Mr. Ross is white.

On May 14, Mr. Diffey acknowledged receipt of Mr. Jackson’s resume, and advised him that he (Mr. Diffey) would be in touch with the Human Resources department on a proficiency examination on D-Base programming and that there was the possibility of a telephone interview after all resumes had been received.

On May 14, Mr. Diffey responded to the receipt of Mr. Brooks’s resume, by inquiring if he was certified as a Property Administrator and whether he was proficient in D-Base programming. According to Mr. Diffey, Mr. Brooks never responded to these

⁶ Mr. Ross was promoted to Senior Property Specialist in Kosovo on June 5, 2002.

inquiries. Mr. Brooks testified that he never received the May 14 e-mail, but was advised by Mr. Carr that he was not qualified because he lacked proficiency in D-Base.

Although Mr. Diffey testified that he corresponded with Mr. Ross by e-mail regarding the open position, KBR produced no documentation of their communications.

Mr. Diffey testified that the Human Resources Department assisted him in developing and grading a test for D-Base proficiency, which was administered to only two candidates: Mr. Jackson and Mr. Ross. Neither the test nor the answers submitted by Mr. Jackson and Mr. Ross have been retained by KBR. According to Mr. Diffey, Mr. Ross performed better on the proficiency test. On May 20, Mr. Jackson was advised by Mr. Diffey that “[a]fter thoroughly reviewing resumes and required qualifications, to include D-Base programming proficiency, the position has been filled from within Theater by the most qualified candidate.” Mr. Ross assumed the Senior Theater Property Specialist position in Hungary on or about July 13, 2002.

Meanwhile, the EEOC requested that KBR provide a written response to Mr. Jackson’s Charge of race discrimination. Employee Relations Representative Frederick Jones requested and received information from Mr. Manuel, Ms. Gist and Mr. Hall, including a report of all property employees, showing the race, sex, location, classification and pay for all positions. This report shows that several SCOE Specialists or Senior Property Specialists were paid \$3,557 or \$3,600 per month (more than Mr. Jackson, who had been paid \$3,400). Two of these individuals were African American and four were white. This report was attached to a letter to the EEOC dated June 29, in which KBR asserted that all of the employment decisions with respect to Mr. Jackson were based upon legitimate non-discriminatory business reasons. KBR explained the

circumstances regarding the elimination of Mr. Jackson's position, and stated (without explaining the higher salaries noted above)⁷ that at the time of his transfer, Mr. Jackson was "the highest paid SCOE Specialist." KBR did not address Mr. Jackson's complaints regarding not being considered or selected for the position vacated by Mr. Diffey, and filled by Mr. Killian.

Mr. Jackson responded to KBR's letter on August 16, correctly pointing out that other Senior Property Specialists were paid more than he. Mr. Jackson criticized the qualifications and/or performance of these individuals, complaining that they had received preferential treatment, and further complained about the selection of Mr. Killian and Mr. Ross for the Senior Property Specialist position in Hungary. Mr. Jackson did not assert a claim that he should have been given Mr. Diffey's position.

On September 20, the EEOC advised Mr. Jackson, that "[a]t this time, the information in the file does not indicate that any further investigation of your case would necessarily result in any finding of discrimination," and dismissed his Charge. The letter further stated that "[t]his dismissal is not a statement on the merits of your case."

Mr. Jackson left KBR in January 2003, as a result of a reduction in force that is not challenged in this case. Mr. Jackson knew in advance that the Army was eliminating his position, and found a job working for the Department of Defense before he was terminated by KBR. Mr. Jackson filed a demand for arbitration on July 20, 2003.

⁷ See note 2, *supra*.

Discussion

Elimination of Mr. Jackson's Position in Hungary

Mr. Jackson contends that Mr. King could (and should) have chosen to transfer Mr. Jackson to Mr. Diffey's position as a senior theater property specialist, and to terminate or transfer Mr. Diffey rather than Mr. Jackson, and that the decision not to do so was based upon Mr. Jackson's race.

The evidence that Mr. King harbored racial animus toward African Americans or toward Mr. Jackson consists of the testimony of Dave Vest, a white Department of Defense employee working in Kaposvar, and a friend of Mr. Jackson. Mr. Vest testified that Mr. King had used the word "nigger" several times in Mr. Vest's presence, specifically referring to Mr. Jackson, and that Mr. King had made statements to the effect that African Americans should "go back to Africa."

Mr. Vest's testimony, if true, is seriously troubling. However, Mr. King adamantly denied Mr. Vest's allegations, and the reliability of Mr. Vest's testimony is questionable.⁸

Moreover, even assuming that Mr. King used the term "nigger" or was prejudiced against African Americans, I find that Claimant has failed to establish that Mr. King's decision to eliminate Mr. Jackson's position--rather than transfer him into Mr. Diffey's position and terminate or transfer Mr. Diffey--was motivated by racial animus.

The undisputed evidence established that the site property operation at Kaposvar was overstaffed in comparison to other locations in the Balkans theater, which had responsibility for far larger inventories. Accordingly, it was clearly a legitimate business

⁸ There are significant inconsistencies between Mr. Vest's testimony and the testimony of those to whom he reported Mr. King's remarks.

decision to eliminate a Senior Property Specialist position in Hungary. There was, however, no evidence of diminished need for a Senior Theater Property Specialist. Although Mr. Jackson may have been qualified (or even better qualified) to perform the duties of the Senior Theater Property Specialist, it is undisputed that Mr. Diffey was satisfactorily performing his duties, and Mr. Jackson had no right to “bump” Mr. Diffey from his job, especially since Mr. Diffey had worked for KBR much longer than Mr. Jackson. Moreover, Mr. King had significant performance issues with Mr. Jackson—which clearly were not racially based since Mr. King had no such issues with Mr. Brooks, also an African American. Under all of these circumstances, it cannot reasonably be concluded that Mr. Jackson was not given Mr. Diffey’s position as a result of race discrimination. This claim is accordingly dismissed.

The Decision to Hire Claude Killian

Mr. Jackson contends that he could and should have been considered for the position filled by Mr. Killian, and that Mr. Diffey’s failure to consider him for the position and his decision to hire Mr. Killian was based on Mr. Jackson’s race. Mr. Killian began working for KBR as a pipe fitter (plumber) in the early 90s. He had no prior military service. Mr. Killian worked as an Inventory Specialist on a KBR mission in Haiti in the mid-90s, where he met Mr. Diffey. Mr. Killian also worked for KBR in Kosovo in 1998-2000 as a site Property Coordinator, where Mr. Diffey assisted in his training. Mr. Killian was working for KBR in Houston as a Construction Foreman when he was recruited by Mr. Diffey for the Senior Theater Property Specialist in Hungary.

Based upon Mr. Killian’s resume, there is no question that Mr. Jackson was better qualified for the Senior Theater Property Specialist position than Mr. Killian. However,

Mr. Diffey testified that he had no knowledge of any complaint by Mr. Jackson regarding his transfer to Bosnia and had no communications with Mr. Jackson following his transfer to Bosnia until after Mr. Killian resigned as Senior Theater Property Specialist. There is no evidence that Mr. Diffey knew of Mr. Jackson's communications with KBR regarding a transfer,⁹ or otherwise knew of Mr. Jackson's interest in transferring to a Senior Property Specialist position in Hungary. In the absence of such evidence, I cannot conclude that Mr. Jackson's race played a role in Mr. Diffey's selection of Mr. Killian. This claim is therefore dismissed.

The Decision to Hire Randall Ross

The circumstances surrounding the hiring of Mr. Ross are considerably more troubling.

KBR has not produced a copy of the posting or job specification for the senior theater property specialist position ultimately filled by Mr. Ross. Mr. Diffey apparently chose to impose two requirements not contained in the standard job description for Senior Property Specialist, and not previously imposed for the position: certification in property management, and a test for proficiency in the D-Base computer program. It is undisputed that Mr. Killian was not a certified property manager, and that neither Mr. Diffey nor Mr. Killian had been required to take a D-Base proficiency test prior to being hired as a Senior Theater Property Specialist.¹⁰

Mr. Jackson contends that the examination was unnecessary because any applicant could have been trained in the necessary D-Base skills in a matter of weeks—as Mr. Diffey was by his predecessor, Ms. Scott, and as Mr. Killian presumably was by Mr.

⁹ As noted above, although Mr. Jackson was advised in October 2001 to contact Mr. Manuel regarding his desire for a transfer, there is no evidence that he did so.

¹⁰ Notably, both of these requirements excluded Mr. Brooks from consideration.

Diffey. Mr. Diffey asserted that the test--which concededly demanded greater D-Base proficiency than either Mr. Diffey or Mr. Killian had possessed as an applicant--was needed because he did not have time to train Mr. Killian's successor. This testimony is simply not credible.

that Mr. Diffey implemented the test in an effort to eliminate Mr. Jackson as a candidate, based on racial animus.

Mr. Diffey testified that he selected Mr. Ross for the Senior Theater Property Specialist position on the basis of his superior performance on the D-Base test. Apart from Mr. Diffey's testimony, there is no evidence of the relative proficiency of the two applicants. KBR itself failed to produce a copy of the test or the answers of the candidates.¹¹ KBR also chose not to present testimony from any of the Human Resources employees who assertedly assisted in developing, administering and grading the test. Notably, there is no evidence that Mr. Ross had any greater experience in D-Base than Mr. Jackson; both had worked exclusively in the site property function, and neither had held a theater property book position.

Mr. Jackson contends that he in fact performed well on the D-Base proficiency examination. He had studied for the test using a KBR D-Base training manual, and following the test showed his answers to the HCN who had developed the D-Base program, who told Mr. Jackson that the test was difficult but he had done well.

¹¹ KBR was aware that Mr. Jackson was likely to challenge the selection of Mr. Ross at the time it was preparing its response to Mr. Jackson's EEOC Charge. In an e-mail to Mr. Manuel dated June 26, 2002, Mr. Gist provides information as to why Mr. Jackson was not selected, stating that "a test was administered to all applicants and clear documentation may be provided to demonstrate that Robert did not have the proficiency required in Dbase programming to hold the job of SCOE specialist in Hungary." KBR has not provided a satisfactory explanation for its failure to retain any documentation to support Mr. Diffey's testimony. As noted above, KBR also failed to retain documentation of Mr. Diffey's pre-selection communications with Mr. Ross.

Accordingly, Mr. Jackson contends that the asserted reason for his rejection was false, and a pretext for race discrimination.

The evidence presented at the arbitration hearing provides significant support for this contention.

On direct examination, Mr. Diffey asserted that Mr. Ross was able to program in dBase but that Jackson could only do searches:

Q Can you recall or can you compare for us, please, the differences in Mr. Jackson -- well, let me ask you a simpler question. How did Mr. Jackson do on the test?

A He didn't do very well, ma'am.

Q What did you conclude based on your review of Mr. Jackson's answers?

A That he was not very well in the programming side of D base. Q Was he able to do searches on D base?

A Correct. That is what most of it was, I believe.

Q Was he able to write programs?

A No, ma'am. That was not a program he wrote.

Q I know D base was not a program he wrote, but concentrating on the proficiency exam, what if any conclusions did you draw regarding his ability to write programs on D base?

A He couldn't write programs very well, ma'am.

Q Now, did you also review the test results for Randall Ross?

A Yes, ma'am, I did.

Q How did Mr. Ross do?

A Mr. Ross did write a program. He had a few mistakes in there, but nothing major.

During cross-examination, Mr. Diffey was confronted with a copy of the test and the answers given by Mr. Jackson, which Mr. Jackson had retained.¹² Mr. Diffey was then asked:

¹² Mr. Jackson provided these documents to his attorney during pre-hearing discovery, but his attorney inadvertently failed to produce them to KBR until shortly before the arbitration hearing. In light of KBR's failure to retain documentation regarding the test results, I find that the untimely production of the documents has not given Mr. Jackson an unfair advantage over KBR, and that Mr. Jackson would be unduly prejudiced by preclusion of these documents.

Q Here's my question: Answers one, two and three, these are not searches, are they?

A No, sir, they are not. The only problem --

Q I only wanted to know a yes or no answer to my question. These are not searches, are they, and I believe you answered that they are not, correct?

A That is correct.

On re-direct Diffey testified:

Q You were cut off when you answered a question about the new exhibit number 30 and 31. You said it's not a search. Did you have more to add to your answer, sir?

A Basically I was just going to say that there are still some errors in this. That is all I was going to say.

Q Did Mr. Jackson make more errors than Mr. Ross made?

A At this time I can't remember exactly what Mr. Ross made in his errors compared to this, and -- I mean it's been a while since I have seen either of them until today.

This testimony raises substantial concerns regarding the reliability and credibility of Mr. Diffey's assertion that Mr. Jackson's answers were limited to searches, as opposed to programming, and his assertion that Mr. Ross's performance was superior to that of Mr. Jackson.

In addition, Claimant presented evidence that Mr. Diffey was prejudiced against African Americans.

Prior to Mr. Jackson's employment with KBR, Mr. Diffey had worked under Roddy Allen as a Property Specialist in Kaposvar. Mr. Allen received a number of verbal complaints from the Hungarian HCNs regarding Mr. Diffey, and in May or June 1998, received a written complaint from the Hungarian HCNs that Mr. Diffey had made disparaging remarks against Hungarians and against African-Americans. This complaint

is contained in a written statement signed by Akos Favari and Sebastian Balazs, which was submitted to Mr. Allen, and introduced as an exhibit at the arbitration hearing.

Mr. Favari testified at the arbitration hearing that “we were driving on the civilian airfield in Kaposvar and there was a African American truck driver who tried to make a maneuver, * * * but it was pretty hard for him to turn around. And Mr. Diffey at once he just said that oh, look at these black guys, they are -- how did he say -- look at these black guys, they are not good for nothing else but driving trucks.”

Mr. Allen testified at the arbitration hearing that the HCNs told him this was not the first time Mr. Diffey had made racial statements. In addition, Mr. Allen testified that the Hungarians had several times asked him, “if he feels that blacks are so not intelligent, why are you our boss? Why are – you have a degree and stuff like that, because those guys were very intelligent, they had degrees and everything.”

Mr. Allen discussed the HCNs’ complaint with Mr. Diffey, although he did not specifically mention the racial remarks; nor did Mr. Allen report these comments to his supervisors or to KBR’s Human Resources department. Mr. Allen testified “I told him that I had complaints on him, the way he treated people. I didn’t get into the racial things about it, but I did get into the complaint.”

As a result of the HCNs’ complaint, and after consultation with the then Project Manager Dave Capouya, Mr. Allen required Mr. Diffey to transfer out of the site property operation. Mr. Diffey, whose employment background was primarily as a mechanic, found a job in Kaposvar at lesser pay working in maintenance as a technical inspector. In 1999, when KBR began operating in Albania, Mr. Allen recommended Mr. Diffey for a Property Specialist position there, “which is how Doug Diffey got back into

property from being an inspector.” (Mr. Allen described Mr. Diffey as a “go-getter as far as going to work and getting property.”) From Albania, Mr. Diffey transferred to Kosovo, and also worked in Macedonia, eventually becoming a Senior Property Specialist. As noted above, Mr. Diffey ultimately returned to Kaposvar (without objection by Mr. Allen) as a Senior Theater Property Specialist in July 2000, reporting to Mr. Ellis.

Mr. Diffey denied making the statements reported by Mr. Favari. He also testified that the reason he was released from the property specialist position by Mr. Allen was that “my contract was not going to be renewed and my services were no longer needed.” I credit the testimony of Mr. Favari, which is corroborated by the testimony of Mr. Allen. By contrast, I find Mr. Diffey’s denial of the statements, and his denial that he lost his property position as a result of complaints by HCNs to be incredible.¹³

Based upon all of the above evidence, and the applicable law, I am persuaded that Mr. Jackson’s race was a substantial motivating factor in Mr. Diffey’s failure to select Mr. Jackson for the Senior Theater Property Specialist position filled by Mr. Ross. Judgment is therefore entered for Mr. Jackson on this claim.

Damages

Mr. Jackson’s calculation of damages is set forth for the first time in his post-hearing brief, to which KBR has not had an adequate opportunity to respond. Counsel are requested to contact JAMS to schedule a telephone conference to address the calculation of damages.

¹³It is undisputed that Mr. Diffey was relieved of his position as Site Property Manager in the fall of 2002 based upon allegations of mistreatment of Hungarian nationals. Notably, at the arbitration hearing Mr. Diffey referred to this as his “second” counseling, and then corrected himself.

Attorney's Fees and Costs

As the prevailing party on his claim regarding the selection of Mr. Ross, Mr. Jackson is entitled to recover from KBR the reasonable attorney's fees, expenses and costs incurred in prosecuting this claim. Counsel are requested to confer and to agree upon a schedule for the submission of Claimant's fee application (supported by contemporaneous time records and other appropriate documentation) and KBR's response.

SO ORDERED.



KATHLEEN A. ROBERTS
ARBITRATOR

Dated: February 26, 2007