



In the Matter of:

**OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR**

ARB CASE NO. 2020-0057

ALJ CASE NO. 2015-OFC-00009

PLAINTIFF,

DATE: November 18, 2021

v.

WMS SOLUTIONS, LLC,

DEFENDANT.

Appearances:

For the Plaintiff:

Elena S. Goldstein, Esq; Kate S. O’Scannlain, Esq.; Beverly I. Dankowitz, Esq.; Jeffrey Lupardo, Esq.; Anna Laura Bennett, Esq.; Samuel Y. DePrimio, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

For the Defendant:

Eric Hemmendinger, Esq.; *Shawe Rosenthal LLP*; Baltimore, Maryland

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This matter arises under the nondiscrimination requirements of Executive Order (“EO”) 11246 (30 Fed. Reg. 12319), as amended, and its implementing regulations at 41 C.F.R. Chapter 60. WMS Solutions, LLC (“WMS”) appeals a Department of Labor Administrative Law Judge’s (“ALJ”) Recommended

Decision and Order (“Recommended D. & O.”) issued on May 12, 2020.¹ Specifically, WMS appeals the ALJ’s finding that it is liable under Executive Order 11246 for intentional and unlawful discrimination against non-Hispanic applicants with respect to hiring and female and non-Hispanic employees regarding wage rates and hour assignments.² After thoroughly examining the parties’ arguments and the record, we **AFFIRM** the ALJ’s Recommended D. & O.

BACKGROUND

WMS is a construction contractor based out of Baltimore, Maryland. WMS provides demolition, lead, and asbestos mitigation staffing to construction sites throughout the greater Baltimore-Washington area. This case arose out of a modernization project for the federal government’s General Services Administration building in Washington, D.C. (hereinafter the “GSA modernization project”). WMS was hired to provide staff for the GSA modernization project by Asbestos Specialists, Incorporated (“ASI”). ASI was a subcontractor on the GSA modernization project. ASI was hired by Interior Specialists, who was hired by the prime contractor for the project. The Office of Federal Contract Compliance Programs, U.S. Department of Labor (“OFCCP”) received a complaint about the working conditions at the GSA modernization project site, which led to an investigation and eventually a compliance review of WMS. The compliance review period was from February 1, 2011, to January 31, 2012. Upon completion of the review, OFCCP engaged in the conciliation process and eventually filed an administrative complaint on June 15, 2015, with the Office of Administrative Law Judges (“OALJ”) for violations of equal employment opportunity under Executive Order 11246.³ After a hearing in July of 2016, the ALJ issued a Recommended Decision and Order on May 12, 2020. After a motion for clarification from OFCCP, the ALJ issued a Supplemental Recommended Decision and Order Granting in Part and Denying in Part Plaintiff’s Motion for Clarification on July 21, 2020.

WMS has a sister company, Princeton Industrial Training (PIT), that provides the necessary training course to earn an asbestos mitigation license in

¹ 41 C.F.R. § 60-30.28 (2015) (providing for the filing of exceptions and responses with the Administrative Review Board (ARB or the Board)).

² OFCCP is authorized to enforce EO 11246 to ensure that Federal contractors and subcontractors doing business with the Federal government comply with the laws and regulations requiring nondiscrimination and equal opportunity in employment, as implemented through 41 C.F.R. Part 60-30.

³ Executive Order 11246 (EO 11246), 30 Fed. Reg. 12,319 (Sept. 24, 1965), was amended by Executive Order 11375, 32 Fed. Reg. 14,303 (Oct. 13, 1967) (adding gender to list of protected characteristics), and Executive Order 12086, 43 Fed. Reg. 46,501 (Oct. 5, 1978) (consolidating enforcement functions in the Department of Labor). All references herein to “Executive Order 11246” or “Executive Order” include such amendments.

Maryland. Both companies are housed in the same office building and owned by the same person, Edward Woodings. Paulo Fernandes is WMS's Chief Operating Officer and manages much of the business. Wesley Black handles finance and payroll. Two project managers,⁴ Hugo Rivera and Harold Ortega, handle recruitment and staffing in addition to their project manager duties. A former project manager, Hector Ortiz, was an employee during the review period (referred to in the testimony). Aside from support staff that are not relevant to this case, the remainder of WMS's staff are asbestos, lead abatement, and demolition workers. The number of people on payroll depends on the volume of projects that WMS works on at any given time, with summer being the busiest season of the year.⁵

WMS does not typically have written contracts with its clients and relies on purchase orders for recordkeeping.⁶ WMS provided copies of all purchase orders at issue and Wesley Black provided the payroll data to OFCCP.

To begin a project, clients contact WMS and provide information about the duration and nature of the work and how many employees are needed. Clients communicate their preferences to WMS, including requesting specific workers and specifying how many women to send to a job site.⁷ WMS then allocates existing staff or hires new staff to meet the needs of the project.

WMS pays its construction employees on an hourly basis. Pay is set according to whether a project is federal or non-federal, and whether there is asbestos mitigation involved.⁸ WMS helps new hires and rehires become licensed or renew their licenses in asbestos mitigation by sending them to PIT.⁹ Tuition for the license education is deducted out of WMS employee paychecks or is paid by WMS.¹⁰ The project managers conducted most of the hiring for WMS.

Ortega described his hiring process at the hearing. He does not require experience or licensure and will hire applicants with no experience, as well as applicants with certifications who have not yet worked in asbestos or lead

⁴ The project managers were referred to by different titles throughout the proceedings, but all witnesses consistently described their job duties.

⁵ Recommended D. & O. at 26 (Sensenig testimony).

⁶ *Id.*

⁷ *Id.* at 15 (Gonzalez testimony).

⁸ *Id.* at 29 (Sensenig testimony).

⁹ *Id.* at 62, 65 (Hugo Rivera Deposition).

¹⁰ There is some conflict in the record about whether WMS or the employee pays for the asbestos licensing training. All witnesses agreed that WMS helped employees become licensed through its sister company, PIT.

removal.¹¹ When OFCCP interviewed Ortega, he stated that he never told anyone they would not be able to work. To determine which employees will work on a project, he reviews the WMS system that stores employee information, as well as the notebook he uses to track applicants and employees. If there are more employees than projects, then he considers factors such as the length of time with specific companies and supervisor feedback. He tries to find as much work for the laborers as he can, and he spreads the work around. Ortega also considers how many hours each laborer is going to receive when making assignments.

At the hearing, testimony was provided by WMS workers, eligible workers who were not hired by WMS during the review period, and two expert witnesses. The expert witness testimony is discussed in more detail below.

Procedural History

OFCCP received a complaint about the working conditions at the GSA modernization project. It subsequently initiated a compliance review of WMS, covering the period of February 1, 2011, to January 31, 2012. OFCCP typically requests extensive documentation during a review. This documentation includes “all records of [a contractor’s] applicants, potential workers, hiring, promotion, termination, compensation or, in this case, payroll records; also evidence that they followed the equal opportunity and affirmative action laws and regulations; that they conducted the appropriate outreach and recruitment; notified the agencies of any subcontracts they may have in general.”¹²

OFCCP claimed that WMS’s record keeping was not thorough enough to provide OFCCP with a complete list of requested records.¹³ The data that WMS was able to provide had gaps in it. WMS was able to provide payroll data and a list of its current employees. WMS did not provide records about applicants, the compensation process, or employee transportation. WMS was able to provide information about the ethnicity of employees. WMS did not have a harassment or Equal Employment Opportunity policy.¹⁴

OFCCP concluded that WMS kept incomplete records of worker candidate profiles and did not have a system to track applicants. In total, WMS provided OFCCP with 182 worker candidate profiles, only 49 of which were complete with

¹¹ *Id.* at 10 (Ortega testimony).

¹² *Id.* at 27 (Sensenig testimony).

¹³ *Id.* (Sensenig testimony).

¹⁴ *Id.* at 29 (Sensenig testimony).

information like work history and licensure.¹⁵ WMS kept no written employment policies of any kind.¹⁶

OFCCP also determined that WMS lacked policies to prevent harassment and that employees were regularly harassed:

[T]hrough our interviews with employees of WMS, we learned of allegations of lack of water or water breaks, meaning no water breaks; sometimes daily racial and ethnic slurs by supervisors on the worksites. Employees reported to us that they felt that it was a hostile work environment, meaning they could not speak up about any conditions or the lack of safety equipment for the asbestos work that they were doing. They told OFCCP of a supervisor who would show them a video of Hispanic people being rounded up and deported and that they felt fearful to complain about conditions for fear that they would be deported; and also actual physical violence against workers on the worksites.¹⁷

OFCCP issued a Notice of Violations on November 12, 2012, and eventually filed an administrative complaint on June 15, 2015. The complaint alleged that WMS violated Executive Order 11246 because it engaged in systematic discrimination: “(1) on the basis of national origin in hiring; (2) on the basis of sex in rates of compensation and assignment of hours worked; (3) on the basis of national origin in assignment of hours worked; and (4) by permitting Hispanic workers to be subjected to harassment on the basis of national origin.”¹⁸ OFCCP requested extensive damages, as well as hiring and policy changes at WMS.

The hearing was held from July 26-28, 2016. The ALJ issued his Recommended Decision and Order on May 12, 2020. Following issuance, OFCCP moved for clarification under Federal Rule of Civil Procedure 60(a).¹⁹ The ALJ issued a Supplemental Recommended Decision and Order on July 21, 2020, granting in part and denying in part OFCCP’s order.

¹⁵ *Id.* at 28 (Sensenig testimony).

¹⁶ *Id.* (Sensenig testimony).

¹⁷ *Id.* at 29 (Sensenig testimony).

¹⁸ OFCCP exceptions at 6.

¹⁹ Under Federal Rule of Civil Procedure 60(a), “[t]he court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record.” The OFCCP Rules of Practice provide that, in the absence of a specific provision, proceedings shall be in accordance with the Federal Rules of Civil Procedure. 41 C.F.R. 60-30.1.

In his Recommended Decision and Order, the ALJ found that:

- 1) WMS Solutions, LLC is a contractor pursuant to EO 11246.
- 2) WMS Solutions, LLC violated EO 11246 when it discriminated against White, Black, Asian, and American Indian/Alaskan Native laborers in favor of hiring Hispanic laborers.
- 3) WMS Solutions, LLC violated EO 11246 when it discriminated against female laborers based on their gender and Black and White laborers based on their race/ national origin in hours and compensation.
- 4) WMS Solutions, LLC violated EO 11246 when it failed to ensure and maintain a working environment free of harassment, intimidation, and coercion at construction sites where WMS employees worked.
- 5) WMS Solutions, LLC did not violate EO 11246 by failing to preserve and maintain all personnel and employment records for a period of two years from the date of the record or the relevant personnel action.²⁰

The ALJ awarded the following damages:

- 1) An award of \$780,998 in back pay damages and interest to be paid to the non-hired workers who were injured by WMS Solutions, LLC's discriminatory hiring practices.
- 2) An award of \$179,907 in back pay damages and interest to be paid to the female laborers and non-Hispanic workers who were injured by WMS Solutions, LLC's discriminatory compensation practices.²¹

The ALJ also awarded the following affirmative relief, to take effect within 90 days of the Recommended Decision and Order:

- 1) Develop a corporate-wide, zero-tolerance policy prohibiting harassment, intimidation, threats, retaliation, and coercion against any employee at any worksite. WMS's zero tolerance policy should be in writing and should list the name, job title, and telephone number of the management official who is responsible and accountable for the company's compliance with EEO and affirmative action obligations and include a detailed description of the process for employees to make complaints concerning allegations of harassment, intimidation, retaliation, and coercion

²⁰ Recommended D. & O. at 88.

²¹ *Id.* at 89.

- based on race, color, religion, gender, national origin, disability, or veteran's status. Additionally, WMS shall distribute such policy in English and Spanish to all its employees and post and display the policy in both English and Spanish in a prominent place at each and every worksite where there are employees of WMS;
- 2) Provide to all of WMS's managers and supervisors, and separately, to all of WMS's other employees, training on equal employment opportunity and on the identification and prevention of harassment based on race, color, religion, sex, national origin, disability, or veteran's status. Such training must be provided annually;
 - 3) In no way retaliate, harass, or engage in any form of reprisal against any of its employees for opposing harassment or other forms of discrimination or participating in any investigation or inquiry into allegations of harassment or discrimination; and
 - 4) Identify and inform employees of the name, job title, and telephone number of the WMS official for employees to contact to report and/or secure relief from such harassment.²²

In the Supplemental Recommended Decision and Order, the ALJ denied several of OFCCP's requests, but changed references to the "Administrator" to "OFCCP Director" for the purposes of damages calculations.²³ WMS timely appealed to the Board.

JURISDICTION AND STANDARD OF REVIEW

In OFCCP cases such as this, the ALJ issues a recommended decision and "[t]he recommendations shall be certified, together with the record, to the Administrative Review Board, . . . for a final Administrative order."²⁴ The Board has jurisdiction to review the exceptions filed by the parties to the ALJ's Recommended D. & O. and to issue the final administrative order.²⁵ For cases arising under Executive Order 11246, the Board reviews ALJ decisions *de novo* in accordance with the Administrative Procedure Act.²⁶ "Even under a *de novo* review, nothing prohibits us from accepting as our own the ALJ's material findings that let up to the

²² *Id.* at 89-90.

²³ Supplemental Recommended Decision and Order Granting in Part and Denying in Part Plaintiff's Motion for Clarification at 4.

²⁴ 41 C.F.R. § 60-30.35.

²⁵ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020); 41 C.F.R. § 60-30.30.

²⁶ *OFCCP v. Bank of Am.* (hereinafter "BOA"), ARB No. 2013-0099, ALJ No. 1997-OFCC-00016, slip op. at 8 (ARB Apr. 21, 2016).

ALJ's ultimate findings of fact (i.e., intentional discrimination if those findings are supported by substantial evidence)."²⁷ The standard of proof is preponderance of the evidence.²⁸

DISCUSSION

On appeal, WMS raises several objections to the Recommended D. & O. Specifically, WMS made several constitutional and procedural challenges including arguing that the ALJ was improperly appointed, that OFCCP lacked authority to initiate the enforcement proceeding, that WMS is not subject to EO 11246, and that the enforcement proceeding was untimely. WMS further challenged the ALJ's finding that OFCCP proved its case of discrimination, arguing that the ALJ applied the wrong legal standard, and challenged the ALJ's damages award.

OFCCP also raised exceptions to the Recommended D. & O., all of which focused on the appropriate remedies and damages, including requiring WMS to make job offers and more interest on the damages award.

1. Appointments Clause

WMS argues that the ALJ was improperly appointed under the Appointments Clause of the Constitution and, thus, the ARB should remand the case to be assigned to a new ALJ, consistent with the Supreme Court's June 21, 2018 decision in *Lucia v. Securities and Exchange Commission* ("SEC").²⁹ In *Lucia*, the Court held that SEC ALJ appointments were invalid because the ALJs were "Officers of the United States" under the Constitution, which requires appointment by the President, "Courts of Law" or "Heads of Department." The Court held that because the ALJs had not been properly appointed, the appropriate remedy was for the case to be reassigned to a new, properly appointed ALJ. In light of the Appointments Clause issue working its way through the courts, many Secretaries of federal agencies that followed similar ALJ appointment schemes, including the Secretary of Labor, ratified the appointments of the agency's ALJs. The Department of Labor's ALJ appointments were ratified in December of 2017, before the Court issued *Lucia*.

OFCCP counters that *Lucia* requires a party to make a timely objection to the ALJ's appointment, which did not happen in this case. According to OFCCP, WMS was under an obligation to raise an Appointments Clause challenge to the ALJ before the case was on appeal to the Board and failed to do so, and, thus, the

²⁷ *Id.* at 9.

²⁸ *Id.*

²⁹ *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

objection was not timely. The Board has adopted OFCCP's argument on timely raising Appointments Clause objections in several prior cases, including recently in *Riddell v. CSX Transportation, Inc.*³⁰ In that case, the Board held that CSX's Appointments Clause argument was forfeited or waived when it failed to raise the issue before the ALJ.

However, the Supreme Court's issuance of *Carr v. Saul* in early 2021, which resolved a circuit split as to whether claimants at the Social Security Administration ("SSA") are required to raise Appointments Clause challenges before an ALJ, requires us to re-examine our approach to Appointments Clause challenges.³¹ In *Lucia*, the Court afforded relief to "one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case."³² *Carr* expanded upon this holding in the context of SSA proceedings. At the crux of the timeliness dispute is whether a party is required to exhaust the issue at the agency level in order to preserve the issue for appeal. Put another way, if the party is required to exhaust the issue at the agency, then an initial objection to the appointment at a later stage is untimely. The *Carr* Court explained:

Administrative review schemes commonly require parties to give the agency an opportunity to address an issue before seeking judicial review of that question. The source of this requirement (known as issue exhaustion) varies by agency. Typically, issue-exhaustion rules are creatures of statute or regulation. Where statutes and regulations are silent, however, courts decide whether to require [judicial] issue exhaustion based on "an analogy to the rule that appellate courts will not consider arguments not raised before trial courts."³³

In *Carr*, the Court held that the plaintiffs were not required to exhaust the Appointments Clause issue in front of the agency and could raise it for the first time in federal court. The Court found there was no statutory or regulatory requirement to exhaust, and the Court declined to impose a judicial exhaustion requirement based on facts specific to the SSA context. The Court cited the nature of SSA cases, focusing its analysis on how dissimilar an SSA hearing is to a traditional judicial proceeding where judicial exhaustion might be appropriate. SSA proceedings are

³⁰ ARB No. 2019-0016, ALJ No. 2014-FRS-00054 (ARB May 19, 2020). *See also Perez v. BNSF Ry. Co.*, ARB Nos. 2017-0014, -0040, ALJ No. 2014-FRS-00043 (ARB Sept. 24, 2020).

³¹ *Carr v. Saul*, 141 S. Ct. 1352 (2021).

³² *Lucia*, 138 S. Ct. at 2055 (quoting *Ryder v. United States*, 515 U.S. 177, 182-83 (1995)) (emphasis added).

³³ *Carr*, 141 S. Ct. at 1358 (citing *Sims v. Apfel*, 530 U. S. 103, 107-08 (2000); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 36 n.6 (1952)).

non-adversarial. In SSA proceedings, the ALJ can hold a hearing with no one present, the claimant is not making a case for herself, and no one from the government is arguing against the claimant. The ALJ decides the issues and can raise new issues at any time, and claimants are not prompted to raise issues.

The Court further stated that in addition to the non-adversarial nature of the proceedings, two factors weighed against requiring judicial issue exhaustion. First, agency adjudications can be ill-suited to structural challenges, like constitutional challenges. In prior cases involving the SSA, courts have not required the claimant to raise constitutional issues. Second, the Court generally does not require issue exhaustion before administrative agencies when it is futile. An SSA ALJ lacks authority to address the Appointments Clause issue and it “makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.”³⁴ For these reasons, the Court refused to apply judicial exhaustion requirements. Because there were no statutory, regulatory, or judicial exhaustion requirements, the Appointments Clause issue raised for the first time on appeal in federal court was timely.

Based on the reasoning in *Carr*, the Board invited the parties in this case to submit supplementary briefing on the Appointments Clause challenge. The Solicitor’s Office argues in its briefing that OFCCP regulations require issue exhaustion, and, thus, *Carr* is inapplicable to this case because it establishes the requirements for judicial issue exhaustion when the statute or regulations are silent. The Solicitor’s Office further argues that, even if *Carr* were to apply to this case, the factors the Supreme Court applied in *Carr* would weigh in favor of requiring the parties to raise the Appointments Clause issue before the ALJ. WMS, on the other hand, argues that *Carr* requires remand and assignment to a new ALJ.

For the reasons set forth below, we hold that the OFCCP regulations require issue exhaustion, which WMS did not do in this case. Because WMS failed to exhaust the issue by not raising an Appointments Clause challenge at any point during the ALJ proceedings, its Appointments Clause challenge is waived.

To start, we address whether the regulations governing OFCCP cases require administrative issue exhaustion. The Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246, located at 41 C.F.R. part 60-30 (“OFCCP Rules”), govern these proceedings. The Secretary of Labor is authorized to initiate enforcement proceedings by filing an administrative complaint, in which the contractor—in this case WMS—is called a defendant.³⁵ The defendant then must answer the administrative complaint, each allegation of which

³⁴ *Carr*, 141 S. Ct. at 1361.

³⁵ 41 C.F.R. § 60-30.5(a).

it “shall specifically admit, explain, or deny.”³⁶ Each party then bears the responsibility to develop its case under procedures prescribed for motions, discovery, and hearings.³⁷ The proceedings are adversarial.³⁸ In addition to granting the ALJ all the powers necessary “to conduct a fair hearing,” the OFCCP Rules authorize the ALJ to “[h]old conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding by consent of the parties or upon his own motion.”³⁹ The regulations further allow the ALJ to “[r]equire parties to state their position with respect to the various issues in the proceeding.”⁴⁰ Once a Recommended Decision and Order is issued by the ALJ, the parties may file exceptions with the ARB.⁴¹ The ARB then issues a final order, relying on the record developed before the ALJ, and taking into account the parties’ exceptions.

Taken together, the OFCCP Rules outline an adversarial process where the record is developed in front of an ALJ and the ARB operates as a reviewing body. The process overall is very similar to the process in an Article III court, where the district court is the trial court and the appellate court reviews the record developed at the trial court. The OFCCP Rules empower the ALJ to fully develop the record by setting the issues. The parties each are responsible for presenting their own case, and there is an opportunity for discovery and cross-examination. Importantly, once the Recommended Decision and Order arrives at the ARB, the OFCCP Rules presume that the entire record has been developed. The ARB issues a final order on the record developed before the ALJ. The parties are permitted to file exceptions with the ARB, but those exceptions are to the Recommended Decision and Order. Examining the OFCCP Rules in their entirety, we find that they require issue exhaustion.

Even if the OFCCP Rules do not require exhaustion, the Court’s reasoning in *Carr* supports requiring issue exhaustion at the administrative level in OFCCP cases like this one. As described above, the procedures of these cases are very similar to those in Article III courts. Unlike the SSA proceedings discussed in *Carr*, OFCCP proceedings involve both parties fully developing the record and ample issue development. WMS argues that ALJs do not have expertise in constitutional matters. The ALJs in OFCCP proceedings regularly address as-applied constitutional issues, including Fourth Amendment issues. On this point, ALJs can

³⁶ *Id.* § 60-30.6(b).

³⁷ *See generally id.* §§ 60-30.7–.24.

³⁸ *See, e.g., id.* §§ 60-30.9 (service on “an opposing party”), 60-30.17(a) (witnesses of “the opposing parties”).

³⁹ *Id.* § 60-30.15(a).

⁴⁰ *Id.* § 60-30.15(b).

⁴¹ *Id.* § 60-30.36.

and have in the past awarded remedies for Appointments Clause claims, a factor in favor of issue exhaustion. In the aftermath of *Lucia*, multiple Department of Labor ALJs reassigned OFCCP cases to new ALJs when the parties requested a reassignment due to Appointments Clause concerns.⁴² The ALJs in these cases not only have the authority to address this issue—they have a prior history of doing so.

Requiring issue exhaustion at the agency level is appropriate in OFCCP cases, even if the OFCCP Rules do not require it. The harm to judicial integrity and efficiency caused by permitting a party to undertake a lengthy proceeding before an ALJ only to challenge the ALJ’s authority on appeal, perhaps after an unfavorable decision, is not insignificant.⁴³

Turning to the specifics of this case, we observe that the ALJ gave WMS ample opportunity to raise the issue and also warned WMS of the consequences for failing to raise an issue with the ALJ. In his “Notice of Hearing and Pre-Hearing Order,” the ALJ specifically directed the parties to exchange, and file with the court, “pre-hearing statements setting forth the issues and any defenses that may be raised at hearing . . . and a simple statement of the issues to be decided and the relief or remedies sought.”⁴⁴ The ALJ also required the parties to file post-hearing briefs and warned the parties that issues would be considered abandoned if they were not briefed:

(a) Each party is to file a post-hearing brief unless otherwise directed at the hearing. Failure to file a brief by any party may be construed as a waiver of all arguments concerning the issues presented. Briefs shall address each of the contested issues identified either at the hearing or by Order. Any ISSUE not specifically addressed on brief will be considered abandoned by that party for decisional purposes.

(b) Each party will make specific, all-inclusive FINDINGS OF FACT with respect to each issue being briefed. The absence of factual findings or arguments concerning record evidence will constitute an

⁴² *OFCCP v. Oracle Am., Inc.*, No. 2017-OFC-00006, Order Granting Motion to Reassign (ALJ Oct. 15, 2018); *OFCCP v. JPMorgan Chase & Co.*, No. 2017-OFC-00007, Order Granting Plaintiff’s Motion to Reassign (ALJ Sept. 25, 2018) (each of these ALJ orders are available at <https://www.oalj.dol.gov>, “Search Tools,” > “Keyword Search/Case Number Search,” > “Search by Case Number”).

⁴³ *Forrester Trucking v. Dir., Off. of Workers’ Comp. Programs*, 987 F.3d 581, 592 (6th Cir. 2021) (“While we do not see evidence that the operators acted with a nefarious motive, we are nonetheless mindful not to invite ‘sandbagging’ or ‘judge-shopping’ in future black lung proceedings.”).

⁴⁴ Notice of Hearing and Pre-Hearing Order at 2.

admission that they are of no importance in the disposition of the issue and that the party has abandoned any contention concerning the applicability of the ignored evidence to the pertinent issue.⁴⁵

WMS has vigorously contested these charges since OFCCP commenced its review and continued to do so at the hearing. There is no indication in the record that WMS did not have an opportunity to raise the Appointments Clause, or any other relevant issue. The record shows that WMS raised other threshold issues—for example, whether it is a “subcontractor” pursuant to EO 11246—during the proceedings in front of the ALJ. WMS also had ample opportunity to raise the issue once it came to the forefront in the lead up and aftermath to the Supreme Court’s *Lucia* decision. In the time between the conclusion of the hearing in 2016, and the date of the decision in 2020, the Secretary of Labor ratified all ALJ appointments and the *Lucia* decision was issued. WMS could have, at any time, raised the Appointments Clause issue before the ALJ, but did not. We conclude that because WMS failed to raise the issue before the ALJ, raising it now in the proceeding before the Board is untimely.

2. WMS is Subject to EO 11246

WMS raised several arguments on appeal alleging that OFCCP lacks the authority to initiate this enforcement proceeding: EO 11246 is invalid, WMS is not subject to EO 11246, OFCCP brought the complaint too late, and only WMS’s *federal* contracts should be bound by the nondiscrimination clauses of the EO. For the reasons set forth below, we find that WMS is subject to EO 11246 and that OFCCP had the power to bring this enforcement action.

A. Validity of EO 11246

WMS argues that EO 11246 is an invalid exercise of power. This is an issue that has been extensively litigated in the Federal courts.⁴⁶ The Department of Labor is bound by its own regulations, and the Secretary of Labor—and in this case, his designee, the Board—acting in an adjudicatory capacity has no authority to review the validity of those regulations.⁴⁷ There is ample precedent holding that the

⁴⁵ *Id.*

⁴⁶ *See generally Contractors Ass’n of E. Pa. v. Sec’y of Labor*, 442 F.2d 159 (3d Cir. 1971); *Liberty Mut. Ins. Co. v. Freidman*, 639 F.2d 164 (4th Cir. 1981); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

⁴⁷ Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186, 13187 (Mar. 6, 2020) (“The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof. . .”); *Stouffer Foods Corp. v. Dole*, No. 7:89-2149-3,

validity of EO 11246 and the regulations promulgated pursuant to it are not proper subjects for an administrative proceeding.⁴⁸ Thus, the Board declines to address WMS's challenges to Executive Order 11246 in this proceeding.⁴⁹

B. Whether WMS is Subject to EO 11246

WMS argues that it is not subject to EO 11246 because it had no written agreements with ASI, and WMS's role was simply to supply labor to projects. The ALJ concluded that WMS was a contractor within the meaning of EO 11246. The ALJ determined that WMS provided workers to ASI as a client. Those workers worked at the GSA site. In addition, the ALJ found that WMS billed an agreed upon wage rate per laborer and that WMS submitted weekly invoices. Therefore, the ALJ concluded there was a subcontract between the two entities even though there was no written agreement.

We agree with the ALJ. The word "contract" in the context of Federal government contracting is broadly construed. Under the regulations, a "contract" is defined as any "Government contract or subcontract."⁵⁰ A "Government contract" is any "agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services," and the term "Contractor" could mean either "a prime contractor or subcontractor."⁵¹ 41 C.F.R. § 60-1.3 defines a subcontract, in relevant part, as:

(1) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

1990 WL 58502, * 1 (D. S. C. Jan. 23, 1990) (citations omitted) ("Defendant's [Department of Labor] administrative law judges are bound by Executive Order 11246 and its implementing regulations; they have no jurisdiction to pass on their validity.").

⁴⁸ The ALJ and Assistant Secretary have the power to decide if an employer has committed a violation, but may not determine the underlying validity of the regulations. *OFCCP v. W. Elec. Co.*, Case No. 1980-OFC-00029, slip op. at 12-13 (Dep'y Under Sec'y Apr. 24, 1985) (Remand Decision and Order). In *OFCCP v. Goya De Puerto Rico, Inc.*, ARB No. 1999-0104, ALJ No. 1998-OFC-00008, slip op. at 6 (ARB Mar. 21, 2002), the ARB held that the ALJ was without authority to rule on the validity of the Executive Order or its implementing regulations. See *Stouffer Foods Corp. v. Dole*, 1990 WL 58502, *1 (D. S.C. Jan. 23, 1990) (citing *Oesterich v. Selective Serv. Sys.*, 393 U.S. 233, 241-42 (1968) (concurring opinion)).

⁴⁹ Any contractor with standing may challenge EO 11246 and the implementing regulations in Federal court.

⁵⁰ 41 C.F.R. § 60-1.3.

⁵¹ *Id.*

(i) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(ii) [W]hich any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

Other parts of the regulation define nonpersonal services to include construction services.⁵²

The arrangement between WMS and ASI falls within this definition because there was an arrangement for the use of nonpersonal services that was necessary to the performance of a contract. WMS assumed a portion of the contractor's obligations, namely providing labor that could engage in construction demolition and asbestos and lead abatement. Accordingly, we affirm the ALJ's finding that WMS had a subcontract with ASI.

We also agree with the ALJ that WMS's subcontract with ASI is subject to the terms of EO 11246.⁵³ WMS argues, in essence, that it only provided labor and that there was no contract specifying the terms of EO 11246. While WMS did provide staff, that staff executed construction work, which is covered by the regulation. It is also well established that contracts subject to EO 11246 incorporate the equal employment provisions of EO 11246 regardless of whether those provisions are actually contained in a written contract.⁵⁴ For all of these reasons, we affirm the ALJ's conclusion that WMS is a "subcontractor" with a subcontract and, therefore, is bound by EO 11246.

⁵² "The term 'nonpersonal services' as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository." 41 C.F.R. § 60-1.3.

⁵³ 41 C.F.R. §60-1.3 ("any person holding a subcontract and, for the purposes of Subpart B of this part, any person who has held a subcontract subject to the order").

⁵⁴ 41 C.F.R. § 60-1.4(e) ("Incorporation by operation of the order. By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.").

C. OFCCP Was Not Required to Bring This Proceeding within 180 Days of Receiving a Complaint

WMS argues that because OFCCP received a complaint about working conditions at the GSA modernization project, OFCCP must bring an enforcement proceeding within 180 days pursuant to the regulation governing complaints.⁵⁵

A close reading of the regulations indicates that the regulation WMS cites to applies to individuals bringing a complaint, not to OFCCP. Section 41 C.F.R. 60-1.21 provides that “[c]omplaints shall be filed within 180 days of the alleged violation.” Subsequent regulations, located at §§ 60-1.22 to 1.24, specify that complaints are filed by “complainants.” Section 60-1.24 further provides that OFCCP must conduct a thorough investigation when a complaint is received. When the investigation indicates a potential violation, “the Director shall proceed in accordance with § 60-1.26.”⁵⁶ In turn, Section 60-1.26 outlines, in relevant part, the procedures for administrative enforcement matters:

OFCCP may refer matters to the Solicitor of Labor with a recommendation for the institution of administrative enforcement proceedings, which may be brought to enjoin violations, to seek appropriate relief, and to impose appropriate sanctions. The referral may be made when violations have not been corrected in accordance with the conciliation procedures in this chapter, or when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate.⁵⁷

When read together, the regulations provide that individuals can bring complaints and must do so within 180 days of the incident giving rise to the complaint. Upon receiving a complaint, OFCCP has an obligation to thoroughly investigate the complaint. However, the regulations do not require OFCCP to begin enforcement within 180 days. In this case, OFCCP received a complaint, commenced an investigation, and conducted a compliance review of WMS’s practices. At the end of its compliance review, OFCCP engaged in conciliation and eventually decided to initiate an enforcement proceeding. The record shows that OFCCP appropriately followed the process outlined in the regulations. Therefore, the OFCCP’s enforcement proceeding against WMS was not untimely and did not violate the cited regulations.

⁵⁵ 41 C.F.R. § 60-1.21.

⁵⁶ 41 C.F.R. § 60-1.24(c)(3).

⁵⁷ *Id.* § 60-1.26(b)(1).

D. All of WMS's Contracts During The Review Period Are Subject to EO 11246

WMS next argues that only its federal contracts should be subject to EO 11246. The plain language of EO 11246 indicates, however, that EO 11246 applies to the contractor, rather than to individual contracts. Specifically, Section 202 states that “[t]he contractor will not discriminate against any employee or applicant for employment.”⁵⁸ The plain language of the implementing regulations further support the conclusion that EO 11246 applies to a contractor, and not to individual contracts, stating, in part, “[t]he regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts.”⁵⁹ WMS is a subcontractor under EO 11246, and thus, the executive order and regulations promulgated thereunder apply to WMS. Accordingly, we find that OFCCP’s review of all of WMS’s contracts during the review period was appropriate.

3. WMS Violated Executive Order 11246

OFCCP alleged that WMS violated EO 11246 when it discriminated against non-Hispanic applicants in its hiring and discriminated against women and non-Hispanics in assigning hours and setting pay during the review period of February 1, 2011, through January 31, 2012. OFCCP relied upon a theory of intentional disparate treatment at the hearing to prove that WMS used race and ethnicity as main factors during hiring. OFCCP also relied on intentional disparate treatment to prove that WMS discriminated against women and non-Hispanics in assigning hours and pay.

In addition to relevant provisions of EO 11246, the implementing regulations, and Department precedent, the Board looks to federal appellate court decisions addressing similar pattern or practice claims of intentional discrimination adjudicated under Title VII of the Civil Rights Act of 1964.⁶⁰

To prevail on a claim of a pattern or practice of intentional disparate treatment, OFCCP must show that unlawful discrimination was WMS’s regular procedure or policy.⁶¹ OFCCP bears the burden to produce sufficient evidence that there was a disparity and that being a member of a protected class was the cause. A

⁵⁸ EO 11246, § 202.

⁵⁹ 41 C.F.R. § 60-1.1.

⁶⁰ *OFCCP v. Greenwood Mills, Inc.* ARB Nos. 2000-0044, 2001-0089, ALJ No. 1989-OFC-00039, slip op. at 5 (ARB Dec. 20, 2002); *BOA*, ARB No. 2013-0099, slip op. at 11.

⁶¹ *OFCCP v. Enterprise RAC Co. of Baltimore, LLC*, ARB 2019-0072, ALJ No. 2016-OFC-00006, slip op. at 5 (ARB Nov. 3, 2021).

pattern or practice claim requires that “discrimination was the company’s standard operating procedure[,] the regular rather than the unusual practice.”⁶²

OFCCP’s threshold burden is to make a prima facie showing that a pattern or practice of intentional discrimination on the part of the employer existed.⁶³ A prima facie case of a pattern or practice of discrimination can be proven by both statistical and anecdotal evidence.⁶⁴ Courts have held that a statistical analysis that demonstrates a disparity in selection rates of job applicants of two to three standard deviations (*i.e.*, a likelihood of less than five percent) is not likely due to chance or random variations and, therefore, may be sufficient evidence to meet the initial burden and establish a prima facie case of discrimination.⁶⁵ In other words, the probability of an event occurring by chance alone becomes less and less likely at higher standard deviations.

In analyzing these type of cases, the Board may apply a burden-shifting framework, just as the ALJ properly did at the hearing in this case.⁶⁶ If OFCCP establishes a prima facie showing of discrimination, the burden shifts to the employer to rebut the presumption by either offering legitimate, non-discriminatory reasons for its actions, or by showing that the statistical proof was unsound.⁶⁷ This is a “burden of production, of ‘going forward’ with evidence of ‘some legitimate, nondiscriminatory reason for the [action].”⁶⁸ The employer’s burden is “to defeat the prima facie showing of a pattern or practice by demonstrating that the proof is

⁶² *Int’l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 336 (1977).

⁶³ *Id.* at 360.

⁶⁴ *See Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 307 (1977).

⁶⁵ *Palmer v. Schulz*, 815 F.2d 84, 94 (D.C. Cir. 1987).

⁶⁶ Recommended D. & O. at 59-60. Cases such as this involve complicated fact-finding, and the burden-shifting framework assists all parties, including the fact finder, in ascertaining whether the plaintiff met their ultimate burden of proving discrimination by a preponderance of the evidence. *See U.S. v. City of New York*, 717 F.3d 72, 84-87 (2d Cir. 2013) (discussing plaintiff’s initial burden and the broad evidence that a defendant may produce to rebut the prima facie case).

⁶⁷ *Palmer*, 815 F.2d at 99; *BOA*, ARB No. 2013-0099, slip op. at 11.

⁶⁸ *Wright v. Nat’l Archives and Recs. Serv.*, 609 F.2d 702, 713-14 (4th Cir. 1979) (quoting *Furnco Constrs. Corp. v. Waters*, 438 U.S. 567, 578) (1978)).

either inaccurate or insignificant.”⁶⁹ The burden can be met by “provid[ing] a nondiscriminatory explanation for the apparently discriminatory result.”⁷⁰

However, an employer’s purported, legitimate nondiscriminatory reasons must be articulated with some specificity to avoid “conceal[ing] the target” at which employees must aim pretext arguments.⁷¹ Although there is a risk that a nefarious employer may attempt to use subjective standards as “cover” for unlawful discrimination, subjective evaluation criteria “can constitute legally sufficient, legitimate, nondiscriminatory reason[s]” for an employer’s business decisions.⁷² In fact, “subjective evaluations of a job candidate are often critical to the decision-making process.”⁷³ The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated remains at all times with the plaintiff.⁷⁴

If the employer satisfies its burden of production, the presumption arising from plaintiff’s prima facie case drops out. The trier of fact must then determine whether the plaintiff has sustained its burden of proving by a preponderance of the evidence the ultimate facts at issue.⁷⁵ In other words, if the employer meets the burden to produce a legitimate, nondiscriminatory reason, the plaintiff must demonstrate that the proffered reason was not its true reason but was a pretext for unlawful discrimination.⁷⁶ If, however, the employer “fails to rebut the plaintiff’s prima facie case, the presumption arising from an unrebutted prima facie case

⁶⁹ *Teamsters*, 431 U.S. at 360. As “*Teamsters* sets a high bar for the prima facie case the Government or a class must present in a pattern-or-practice case: evidence supporting a rebuttable presumption that an employer acted with the deliberate purpose and intent of discrimination against an entire class . . . An employer facing that serious accusation must have a broad opportunity to present in rebuttal any relevant evidence that shows that it lacked such an intent.” *City of N.Y.*, 717 F.3d at 87 (citing *Teamsters*, 431 U.S. at 358).

⁷⁰ *Teamsters*, 431 U.S. at 360 n.46.

⁷¹ *Figueroa v. Pompeo*, 923 F.3d 1078, 1088 (D.C. Cir. 2019) (citing *Lanphear v. Prokop*, 703 F.2d 1311, 1316 (D.C. Cir. 1983)).

⁷² *Denney v. City of Albany*, 247 F.3d 1172, 1185 (11th Cir. 2001); *Figueroa*, 923 F.3d at 1088.

⁷³ *Denney*, 247 F.3d at 1185-86 (internal quotations omitted). For example, use of race-neutral subjective negative interview comments, when “similar comments are made of white and non-black applicants, negating any possible inference that the comments were codes for race . . . do not create an inference of pretext, but instead merely indicate that the candidates were lacking traits needed for the job.” *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1176 (7th Cir. 2002).

⁷⁴ *Tex. Dep’t. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

⁷⁵ See *Teamsters*, 431 U.S. at 336 (the government in pattern or practice cases must prove that intentional discrimination was the defendant’s “standard operating procedure.”).

⁷⁶ *Burdine*, 450 U.S. at 253.

entitles the plaintiff to prevail on the issue of liability and proceed directly to the issue of appropriate relief.”⁷⁷

A. Discrimination Against Non-Hispanic Applicants

i. OFCCP’s Prima Facie Case of Intentional Disparate Treatment

To prove its case, OFCCP relied on both statistical and anecdotal evidence. For the statistics, Dr. Madden was hired to examine 1) racial and ethnic differences in hiring, 2) gender, racial, and ethnic differences in hours worked, and 3) gender differences in hourly pay. Dr. Madden approximated the applicant pool using U.S. Census data for the construction laborer occupation in the Washington, D.C. metropolitan area. Dr. Madden did not use WMS data because WMS only provided 180 incomplete Worker Candidate Profile forms. These forms were used by WMS to track potential hires for a workforce of over 700. The Worker Candidate Profile Forms were deficient and lacked the worker’s race, gender, and other demographic information. WMS was unable to provide a complete list of applicants or other information that would have allowed Dr. Madden to use their actual applicant pool. The ALJ noted that “[c]ourts allow the production of evidence of other statistical measures to establish discrimination when applicant flow figures are either flawed or otherwise unavailable, as they are here.”⁷⁸

Dr. Madden’s first finding was that non-Hispanic persons were less likely to be hired by WMS during the review period.⁷⁹ According to the U.S. Census data, 41.1% of the construction labor pool in the Washington, D.C. metro area is non-Hispanic, while 7.5% of WMS’s employees were non-Hispanic. Dr. Madden’s analysis determined that the likelihood of this discrepancy occurring by chance was 1 in 781 trillion (781,000,000,000).⁸⁰ Put another way, the proportion of non-Hispanic workers that WMS hired is 19.36 standard deviations below the census proportion.

Using this data and other testimony, the ALJ determined that OFCCP met its burden to establish by a preponderance of the evidence a prima facie case of intentional discrimination against non-Hispanic applicants in hiring. A thorough review of the record and the ALJ’s decision supports this finding.

⁷⁷ *City of N.Y.*, 717 F.3d at 87.

⁷⁸ Recommended D. & O. at 61.

⁷⁹ *Id.* at 33.

⁸⁰ *Id.* at 33-34.

ii. WMS's Rebuttal of Hiring Discrimination

The ALJ found that WMS's rebuttal centered on three factors: 1) Hispanic construction laborers have more of an interest in asbestos removal work than non-Hispanic construction laborers; 2) WMS hired more Hispanic workers because Hispanic workers were more likely to have an asbestos license when hired; and 3) WMS required applicants to have an asbestos license before considering them for employment.⁸¹

To support this argument, WMS relied on its own expert analysis by Dr. White, who is also a statistician. Dr. White developed an alternative labor pool and argued that the U.S. Census data that Dr. Madden used was unreliable because those benchmarks did not "account for individuals' interest or qualifications for working in asbestos abatement at WMS."⁸² Dr. White further argued that OFCCP's analysis was flawed because the U.S. Census data that defines the general construction labor pool is overly broad. He then speculated that because of the uniquely dangerous work WMS engages in, its workforce is more likely to be recent immigrants of Hispanic background. In his initial report, Dr. White created a labor pool using asbestos licensure data from parts of Virginia that are in the Baltimore-Washington metropolitan area. Because this data lacked complete ethnicity or race data, he presumed anyone with a Latino or Hispanic surname to be Hispanic. Based on this data, Dr. White concluded that 12% of the labor pool was non-Hispanic. However, this figure included only 261 workers, which is far less than WMS's employee total of over 700 during the review period. In his rebuttal report, Dr. White also included data from Maryland, but it also did not contain ethnicity or race data. It did, however, contain data on the language in which the licensure exam was taken, and 86% took the exam in Spanish. Data from the District of Columbia was never obtained.

Dr. White also took issue with Dr. Madden's approach to the data. First, he argued that Dr. Madden's hiring analysis did not accurately account for rehires because she chose to use the January 29, 2011 pay period as her starting point for rehires. In all proposed measures of the number of new hires, the percentage of the WMS's workforce that is non-Hispanic remains consistent. Dr. White's second concern was that Dr. Madden's analysis did not consider the types of jobs that laborers were hired to perform during the review period. Asbestos work accounted for the largest projects during the review. Across all projects, 73.1% of WMS's workforce was working on asbestos abatement projects, and 26.9% was working on demolition projects.⁸³

⁸¹ *Id.* at 64.

⁸² *Id.* at 45.

⁸³ *Id.* at 45.

WMS's attempts to rebut OFCCP's case do not actually rebut the case. Importantly, many of its theories are not supported. For example, WMS says it only hired licensed asbestos workers, but the record evidence directly contradicts WMS's assertions.⁸⁴ Indeed, WMS's own managers testified that they hired anyone "able to work" and with no experience.⁸⁵ Further, WMS was affiliated with a training school and provided employees with the opportunity for asbestos certification. With regard to its assertion that Hispanic workers are more interested in asbestos removal than workers in the general population, WMS failed to provide evidence to support this conclusion, other than the incomplete licensure data that did not include race. WMS similarly only provided incomplete data to show that Hispanics are more likely to be licensed upon hire.⁸⁶ In short, WMS's arguments center on data that is incomplete (the asbestos licensure data) and data that is not available (client preferences, worker preferences, worker experience, and credentials).

WMS also argues that the ALJ required it to sustain the burden of proof to show that it did not discriminate, rather than requiring OFCCP to carry the burden. According to WMS, "the [ALJ] subjected the statistical evidence to a burden shifting analysis which imposed the ultimate burden of persuasion on WMS[.]"⁸⁷ WMS continued, "The [ALJ] subjects the OFCCP's statistics to the minimal burden of raising an inference of discrimination. It then intensely challenges every aspect of WMS's response [...], before ultimately concluding that 'WMS failed to rebut the OFCCP prima facie case.'"⁸⁸

WMS misunderstands both the burden-shifting framework and the ALJ's application of it. WMS is correct in asserting that OFCCP always has the burden of proof. Decades of legal precedent consistently demonstrate that OFCCP carries the burden throughout the entire proceeding. WMS's job is to rebut the evidence OFCCP puts on—as in any typical civil case. Rebuttal in a case relying on statistical evidence is not as simple as articulating possible reasons OFCCP's statistical analysis may be flawed. WMS needed to show that curing the flaws in the analysis would change the resulting disparity.⁸⁹ Here, it failed to do so. Instead, WMS merely offered piecemeal explanations that either lacked evidence or were directly contradicted by uncontested evidence in the record.

⁸⁴ *Id.* at 65.

⁸⁵ *Id.* at 4, 65.

⁸⁶ *Id.* at 45 (stating that Dr. White was only able to obtain data from Virginia and Maryland); *id.* at 67 (discussing that WMS's data had inaccuracies and missing data).

⁸⁷ WMS Br. at 3 (citations omitted).

⁸⁸ *Id.*

⁸⁹ Recommended D. & O. at 71; *see also EEOC v. Gen. Tele. Co. of Northwest, Inc.*, 885 F.2d 575, 579 (9th Cir. 1989); *Hemmings v. Tidyman's*, 285 F.3d 1174, 1188 (9th Cir. 2004).

On the other hand, the ALJ specifically found that OFCCP provided sufficient evidence to sustain its burden and that WMS failed to provide evidence to rebut it. Simply put, OFCCP's evidence met the preponderance of the evidence burden, and WMS failed to show how that evidence was flawed, unreliable or otherwise undermined OFCCP's case. We note in particular that WMS never proffered legitimate, nondiscriminatory reasons for its hiring practices. After a thorough review of the record and available evidence, we conclude that the ALJ's holding is supported by the record and consistent with the law.

B. Discrimination Against Female and Non-Hispanic Employees

i. OFCCP's Prima Facie Case of Intentional Disparate Treatment

Dr. Madden's second finding was that women and non-Hispanics of both genders were assigned fewer weekly hours than male and Hispanic workers during the review period.⁹⁰ According to her analysis, a gender neutral assignment process would give women 13.9% more hours each week than they were assigned. This difference is 7.98 standard deviations. When reviewing the data on a project basis, it was clear "that most of these differences are being generated by Hispanics and men being assigned to the projects that offer more hours."⁹¹ Among non-Hispanic employees as a whole, the total discrepancy was 9.6% and 3.10 standard deviations.

Dr. Madden's third finding was that female laborers at WMS received lower hourly wages than male laborers during the review period.⁹² A gender neutral wage assignment process would result in women being paid 14.1% more per hour. This difference is 18.68 standard deviations. She assumed that "men and women in the same job category for the same company, working at the same time period, should . . . have the capacities to be paid the same wages."⁹³

In addition to Dr. Madden's analysis, OFCCP offered testimony to support her findings. The ALJ noted that Ortega confirmed that clients asked for men instead of women at job sites because the work is "too heavy, too hard" for women.⁹⁴ There was also testimony that clients requested more men than women.⁹⁵ Women would not be assigned to the job sites because "a woman would go to the bathroom

⁹⁰ Recommended D. & O. at 35.

⁹¹ *Id.* at 37.

⁹² *Id.* at 38.

⁹³ *Id.* at 38.

⁹⁴ *Id.* at 69.

⁹⁵ *Id.* at 15-16 (testimony of Gonzales).

two or three times a day and that that was a loss of time, time and money, because every time you went in, you had to take suit off and then put on a new one to go back to the job.”⁹⁶ Using this data and testimony, the ALJ determined that OFCCP met its burden to establish a prima facie case by a preponderance of the evidence that WMS discriminated against non-Hispanic workers in hours and women in pay and hours. A thorough review of the record and the ALJ’s decision supports this finding.

ii. WMS’s Rebuttal of Pay and Hour Discrimination

WMS’s rebuttal case again focuses on Dr. Madden’s analysis and argues that women and other workers were not interested in working as many hours. The ALJ rejected WMS’s assertions because it failed to: 1) call into question the validity of Dr. Madden’s statistical conclusions about its discriminatory compensation practices; and 2) provide any reasonable supporting evidence that would result in a different conclusion. WMS also failed to articulate how client preferences factor into rebutting a prima facie showing of discrimination. After a thorough review of the record and available evidence, we find that the ALJ’s findings are supported by the record and consistent with the law.

4. Damages

A. Standard of Review of Damages

The ARB generally adopts the ALJ’s methodology for awarding damages if the ALJ exercised reasonable discretion given the complexity of determining back pay compensation.⁹⁷

B. Damages Calculations

After a finding of discrimination, the remedy is damages “to make persons whole for injuries suffered on account of unlawful employment discrimination.”⁹⁸ Back pay is one element of the “make whole” relief analysis, which may be awarded to an individual or to a class of individuals affected by the unlawful discrimination.⁹⁹ Rather than individual assessments of the loss of each victim,

⁹⁶ *Id.*

⁹⁷ *BOA*, ARB No. 2013-0099, slip op. at 21.

⁹⁸ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

⁹⁹ 41 C.F.R. § 60-1.26 (a)(2); *OFCCP v. Greenwood Mills, Inc.*, ARB Nos. 2000-0044, 2001-0089, slip op. at 5.

class-wide procedures may be used in calculating back pay.¹⁰⁰ If the case is complex, the class is large, or the illegal practices continued over an extended period of time, a class-wide approach to measure back pay may be necessary.¹⁰¹

In *Greenwood Mills*, the Board discussed back pay awards. While recognizing they are imprecise and may not fully compensate the aggrieved, the Board highlighted federal case law that outlined three basic principles of back pay awards: “(1) [U]nrealistic exactitude is not required; (2) [A]mbiguities in what an employee or group of employees would have earned but for discrimination should be resolved against the discriminating employer; and (3) [T]he [trier of fact] . . . must be granted wide discretion in resolving ambiguities.”¹⁰² Interest is paid on back pay awards to compensate the discriminatee for the loss of the use of her money.¹⁰³

On appeal, OFCCP argues that the ALJ erred in his damages calculations by failing to order offers of employment, back pay that extended to the date of the trial due to ongoing discrimination, and interest on back pay until the date of the decision. WMS argues against damages altogether, and specifically objects to the issuance of class-based damages.

Dr. Madden concluded that the racially discriminatory hiring process resulted in damages in the amount of \$926,298. Including interest until the date of the hearing, that totaled \$1,081,473. She determined the amount of lost wages by calculating the average actual WMS earnings of the group multiplied by the group’s hiring shortfall. The ALJ altered this total to \$780,998, to account for the difference between Dr. Madden’s rehire number and WMS’s rehire number.

Dr. Madden concluded that women were underpaid by \$74,875, due to their lower hourly pay rate. Adding interest yields total damages of \$87,418.¹⁰⁴ She calculated the damages by taking the average actual hours worked by women, the shortfall in hours, their average hourly wage, and the shortfall in their hourly wage. She calculated the damages for non-Hispanic workers assigned fewer hours and determined that total to be \$16,900. For women assigned fewer hours, the total was

¹⁰⁰ *Greenwood Mills, Inc.*, ARB Nos. 2000-0044, 2001-0089, slip op. at 5. See *Segar v. Smith*, 738 F. 2d 1249 (D.C. Cir. 1984).

¹⁰¹ *McClain v. Lufkin Indus.*, 519 F.3d 264, 280-81 (5th Cir. 2008); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974).

¹⁰² *Greenwood Mills, Inc.*, ARB Nos. 2000-0044, 2001-0089, slip op. at 6 (citing *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976) (citations omitted).

¹⁰³ OFCCP Compliance Manual, § 7F07(e) (1998).

¹⁰⁴ Recommended D. & O. at 86.

\$75,985. The ALJ adopted Dr. Madden’s findings. In total, the ALJ awarded \$179,907 in damages due to compensation disparities.¹⁰⁵

We find that the ALJ’s award of damages is reasonable. The ALJ damages award is appropriately designed to make the class of discrimination victims whole. The ALJ carefully outlined the eligible class of workers in his decision. WMS fails to offer a credible reason to disrupt this award, other than WMS’s belief that it should not be liable at all. OFCCP’s arguments against the ALJ’s damages award are also flawed. While OFCCP is correct to emphasize that in EO 11246 and Title VII cases, the courts have substantial remedial powers, including equitable remedies, such remedies must be practical and possible. Here, the ALJ’s reasoning is thorough and sensible—that the appropriate remedy for the class of non-Hispanic workers is back pay calculated on a class-wide basis. We have previously held that “‘exactitude’ is not required in calculating the amount of back wage damages.”¹⁰⁶ We find that the ALJ neither abused his discretion, nor clearly erred in determining the amount of the back pay award. As WMS does not contest them, we also find that the ALJ did not abuse his discretion or clearly err in ordering additional affirmative remedies.

After the ALJ issued his decision, OFCCP asked the ALJ to clarify several points, including asking the ALJ to award interest to the date of the decision as opposed to the ALJ’s award of interest to the hearing date. The ALJ denied this motion in a supplemental order.¹⁰⁷ OFCCP filed a petition for review asking us to reverse the ALJ. We defer to the ALJ’s discretion on this matter.¹⁰⁸

¹⁰⁵ *Id.* The parties do not challenge these calculations.

¹⁰⁶ *BOA*, ARB No. 2013-0099, slip op. at 21.

¹⁰⁷ Supplemental Recommended Decision and Order Granting in Part and Denying in Part Plaintiff’s Motion for Clarification (ALJ July 21, 2020).

¹⁰⁸ *See U.S. v. Brennan*, 650 F.3d 65, 138 (2d Cir. 2011) (“Our function is not to exercise our own discretion, but to determine . . . whether the [] judge has abused his”) (internal citations omitted). In *Brennan* the Court stated: “In any event, we need not and do not decide exactly what remedy the district court should impose (or to what extent the district court should find the liability on which any remedy would necessarily be premised). It is for the district court to decide what, if any, is the scope of the City Defendants’ liability, and then to exercise appropriate equitable discretion in imposing a remedy. In doing so, the district court should explain why it exercised its discretion in the way that it did, so that a reviewing court can determine whether that discretion has been abused.” *Id.* at 139-140.

CONCLUSION

We conclude the ALJ's findings that WMS engaged in a pattern or practice of intentional discrimination against non-Hispanic applicants, non-Hispanics, and women in determining hours, and women in hourly wages are supported by the record and are **AFFIRMED**.

In addition, we conclude that the ALJ's damages award and other affirmative relief is reasonable. Therefore, the ALJ awards of \$780,998 in back pay damages to the defined class of non-Hispanic workers, \$179,907 in back wages for women and non-Hispanic workers who were assigned less hours and paid lower wages, and other affirmative relief are **AFFIRMED**.

SO ORDERED.