



For the convenience of the Court, Plaintiff OFCCP submits courtesy copies of cases not available on Westlaw which are cited in Plaintiff's May 15, 2020 Post-Trial Brief:

| Exhibit No. | Description  |
|-------------|--|
| 1           | <i>OFCCP v. WMS Solutions, LLC</i> , No. 2015-OFC-00009 (ALJ May 12, 2020)             |
| 2           | <i>Jewett v. Oracle America, Inc.</i> , No. 17-civ-02669 (Cal. Sup. Ct. Apr. 30, 2020) |
| 3           | <i>OFCCP v. Disposable Safety Wear, Inc.</i> , No. 92-OFC-11 (ALJ Aug. 20, 1992)       |

# EXHIBIT 1

**U.S. Department of Labor**

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**Issue Date: 12 May 2020**

Case No.: **2015-OFC-00009**

*In the Matter of:*

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

v.

**WMS SOLUTIONS, LLC,**  
*Defendant.*

**APPEARANCES:**

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For the Plaintiff

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Baltimore, Maryland  
For the Defendant

**BEFORE:** Larry S. Merck  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This matter arises under Executive Order (“EO”) 11246 (30 Fed. Reg. 12319), as amended by EO 11375 (32 Fed. Reg. 14303) and EO 12086 (43 Fed. Reg. 46501) and its implementing regulations at 41 C.F.R. Chapter 60. EO 11246 and regulations prohibit employment discrimination by government contractors based on race, color, religion, sex, sexual orientation, gender identity, or national origin.

## PROCEDURAL BACKGROUND

On June 15, 2015, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (the "OFCCP") filed an Administrative Complaint against WMS Solutions, LLC ("WMS"), located in Baltimore, Maryland, alleging that WMS violated EO 11246 and its promulgated rules and regulations.

On June 16, 2015, the Office of Administrative Law Judges (the "Office" or "OALJ") docketed the matter. On November 30, 2015, the Office issued a *Notice of Hearing and Pre-Hearing Order*. On March 21, 2016, WMS filed *Defendant's Motion to Compel*, arguing that the OFCCP had not properly invoke the informant's privilege, and that even if it did, the privilege did not protect the information WMS was seeking. On April 8, 2016, the OFCCP filed *Plaintiff's Response to Defendant's Motion to Compel*, arguing that it properly invoked the informant's privilege, and that WMS did not present "a need for the information sufficient to outweigh the purpose behind the privilege." On May 6, 2016, I denied WMS's *Motion to Compel*, because the OFCCP demonstrated that it properly invoked the informant's privilege; and WMS failed to show that the disclosure of the identities of the OFCCP's witnesses was necessary for a fair trial. *OFCCP v. WMS Solutions, LLC*, 2015-OFC-00009 (ALJ May 6, 2016).

I ruled on the parties' pre-hearing motions during a pre-hearing conference. On July 15, 2016, the OFCCP filed a *Motion to Exclude Defendant's Second Expert Report*, arguing that WMS was late in submitting the report. On July 18, 2016, WMS filed its *Opposition to Plaintiff's Motion to Exclude Second Expert Report*. On July 25, 2016, during a conference call with counsel for the OFCCP and counsel for WMS, pursuant 41 C.F.R. § 60-30.15(i) to extend time limits, I ruled that the report was allowed to come in; however, I granted the OFCCP the opportunity to file a response post-hearing. Tr. at 6-12. On July 19, 2016, the OFCCP also filed a *Motion to Exclude WMS's*

*Expert Principal Rebuttal Report*, arguing that it was insufficient, and therefore, inadmissible. Because the Federal Rules of Evidence are inapplicable during an administrative hearing, I ruled that the report was admissible and would be given the weight it deserved. *Id.*

On July 19, 2016, the OFCCP also filed a *Motion to Ask Leading Questions*, a *Motion for an Adverse Inference Due to Defendant's Failure to Preserve Employment Records*, and a *Motion to Exclude Evidence Concerning the Immigration Status of Witnesses*. I deferred ruling on the issue of leading questions, unless and until the OFCCP established an adverse witness through examination at the hearing. *Id.* at 21. I further deferred ruling on applying an adverse inference until the hearing ended and the record was closed. *Id.* at 19. I granted the OFCCP's *Motion to Exclude Evidence Concerning the Immigration Status of Witnesses*, because inquiries regarding immigration status were irrelevant to the claims and defenses of the parties. *Id.* at 20.

WMS filed *Objections to Plaintiff's Exhibits and Witnesses and Motion to Exclude*, moving to exclude the police and medical records of one of the OFCCP's witnesses and the testimony of those witnesses who were covered by OFCCP's informant's privilege. In response, the OFCCP filed *Response to Defendant's Objections to Plaintiff's Exhibits and Witnesses and Motion to Exclude*. I deferred ruling on the admissibility of the police and medical records until the OFCCP introduced the evidence at the hearing. *Id.* at 13-17. As to the witness' testimonies, I

ruled that regardless of the timeliness of the OFCCP's disclosure, I would allow the witnesses to testify, and granted WMS additional time to ensure due process. *Id.*

The case proceeded to hearing on July 26, 2016 through July 28, 2016 at the OALJ courtroom in Washington, D.C. I afforded both parties a full opportunity to present evidence and argument on each issue. The OFCCP and WMS submitted post-hearing briefs and reply briefs. The Findings of Fact and Conclusions of Law below are based upon a review of the entire record in light of the arguments of the parties, the applicable statutory provisions and regulations, and pertinent precedent.<sup>1</sup>

### ISSUES

- I. Whether WMS is a contractor pursuant to EO 11246;
- II. Whether WMS violated EO 11246 when it is alleged to have discriminated against white, black, Asian, and American Indian/Alaskan native laborers in favor of hiring Hispanic laborers;
- III. Whether WMS violated EO 11246 when it is alleged to have discriminated against female laborers based on their sex and male laborers based on their race or ethnicity concerning compensation;
- IV. Whether WMS violated EO 11246 when it is alleged to have failed to ensure and maintain a working environment free of harassment, intimidation, and coercion at construction sites where WMS's employees worked;
- V. Whether WMS failed to preserve and maintain all personnel and employment records for a period of two years from the date of creating the record or the relevant personnel action; and
- VI. The type and calculation of damages, if appropriate.

### TESTIMONIAL EVIDENCE

#### EDWARD WOODINGS

*Deposition – April 4, 2016 (GX 21)*

Edward "Ted" Woodings ("Woodings") testified that he started WMS<sup>2</sup> between 2006 and 2007, and is the sole owner. GX 21 at 7, 9. Woodings created the predecessor company, Environmental Manpower, in the 1990s. *Id.* at 33–34. WMS's business involves providing staffing, primarily for environmental contractors, to perform abatement and demolition work. *Id.* at 7. Abatement removal generally includes both asbestos and lead removal, but can also include

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<sup>1</sup> I admitted the following evidence at the hearing: the OFCCP's Exhibits ("GX") 1–31; WMS's Exhibits ("EX") 1–11 and 13. WMS's Exhibit 12 was marked for identification during the hearing. *See* Transcript ("Tr.") at 153.

<sup>2</sup> WMS is headquartered in Baltimore, Maryland, and provides workers that specialize in asbestos abatement and demolition to construction contractors. Compl. at 1; Answer at 1; Tr. at 471.

other types of removal, such as hazmat removal. *Id.* at 8. Woodings also owns Princeton Industrial Training (“PIT”), which provides training for asbestos removal certifications in “Maryland and Virginia, [and] possibly D.C.”<sup>3</sup> *Id.* at 8–9. Woodings started the business so that WMS could manage its own training programs and employ laborers who possessed the appropriate asbestos removal certifications. *Id.* at 10–12.

PIT is currently located in the same building as WMS in Baltimore, Maryland. *Id.* at 11. Woodings testified that he has worked in the same building where WMS is located (1301 Warner Street) for about 1 to 1.5 years. *Id.* at 13. He, however, works in a different area of the building and focuses his efforts on his software company. *Id.* at 14. The two businesses operate independently and share no physical work space, including any entrances. *Id.* at 15.

Paulo Fernandes (“Fernandes”) is the Chief Operating Officer (“COO”) of WMS. *Id.* at 15–16. Fernandes oversees a small management team and manages his own sales, recruiting, and placements. *Id.* at 16. Wes Black is a comptroller, and manages accounts payable and payroll for WMS. *Id.* at 16–17. Laborers report to their project managers, Hugo or Harold. *Id.* at 18.

Woodings explained the laborer hiring process used when he was actively involved in the business, approximately fifteen years ago. *Id.* at 18–20. Recruiting methods at the time ranged from networking to placing job placement advertisements, as well as visiting job banks and churches. *Id.* at 18–19. Woodings was familiar with some of the places where WMS has done recruitment activities, including Casa de Maryland, areas in Virginia and Wheaton, Maryland, and churches; however, he was unable to testify as to the specifics. *Id.* at 22.

Beginning February 1, 2012, WMS made an effort to improve the documentation used in its recruitment process, but Woodings did not know if WMS changed its recruiting practices since that time. *Id.* at 20. He also did not know what standards Fernandes uses to determine who is a qualified laborer, but he expected a qualified laborer is “someone healthy and able to work.” *Id.* at 21. The project managers (Hugo or Harold) and WMS’s client determine whether an applicant meets the job requirements. *Id.*

Woodings explained the process of how WMS provides laborers to contractors. *Id.* at 22–23. WMS does not draft written contracts between itself and the contractors. *Id.* at 23. The process generally starts with a phone call from a contractor asking for workers; and the contractor provides a set of requirements, such as the type of work, the location, and skills that workers must possess to perform the job. *Id.* Workers that are on existing jobs are rotated, and then, if needed, more workers are found through the network. *Id.* Since January 2011, WMS changed how it assigned employees based on the “corrective action discussions” that occurred between it and the OFCCP. *Id.* at 30.

The market rate determines wages, which fluctuates according to the workload. *Id.* at 24–25. Laborers negotiate their wages; however, factors such as parking and shift times affect the

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<sup>3</sup> Woodings also owns a software company (iCertainty), a data entry business (Peak Performance), and a variety of property companies. GX 21 at 8. There was some testimony about WMS used documentation software created by iCertainty, and Woodings testified that Peak Performance paid Fernandes’ paycheck; otherwise, these additional companies are irrelevant.

wages. *Id.* The bill rates to the contractors fluctuate based on whether there is a common bill rate as well as whether the job is a federal wage job or a commercial rate project. *Id.* at 26.

Woodings defined harassment as “belligerently bothering somebody else.” *Id.* at 30. He has never undergone harassment training, nor does he know WMS’s workplace harassment policy. *Id.* at 31. Fernandes is responsible for WMS’s policy and any other employee handbooks. *Id.* No one at WMS has ever reported incidents of harassment to Woodings, but he did hear rumors about altercations between a WMS employee and a contractor’s employee. *Id.* at 31–32. Woodings did not investigate further but commented that WMS’s should listen to employees’ concerns. *Id.* at 32.

**PAULO FERNANDES**

*Deposition – February 16, 2016 (GX 24)*

Paulo Fernandes is the COO of WMS, and has worked there for approximately seven years. GX 24 at 7. Woodings is his supervisor. *Id.* at 8. Fernandes is responsible for sales business development, supporting his recruiting team, and conducting follow-ups. *Id.* His team consists of WMS’s recruiters, Harold and Hugo, as well as administrative staff, Adrianna and Renee. *Id.* at 9. Fernandes and his team work in the Baltimore office at 1301 Warner Street. *Id.* at 11. Woodings owns WMS but is not involved in the day-to-day management of it. *Id.* at 12–13. Fernandes’ interactions with Woodings are limited to resolving issues. *Id.* at 13. PIT is located in the 1301 Warner Street building and is an asbestos training school, which Wooding operates. *Id.* at 18. Some of the WMS laborers received asbestos training at PIT. *Id.* at 18–19.

Fernandes describes WMS as a company that supplies asbestos work crews to abatement contractors. *Id.* at 9–10. He estimates that WMS has approximately 100 to 150 employees working in the field, which is roughly the same number of employees WMS had during the period of January 31, 2011 to February 1, 2012. *Id.* at 10. The number of employees fluctuates according to clients’ needs, which is seasonal. *Id.* Summer is the busy season in construction. *Id.* at 11.

Harold and Hugo report to Fernandes only for WMS-related issues; if an issue arises at a jobsite, they report to the client or client’s supervisors. *Id.* at 14. Laborers report issues to Harold or Hugo, and Fernandes only gets involved if they are unable to resolve the issue. *Id.* at 19–20. Fernandes did not know if WMS has a written policy regarding the procedure for reporting complaints. *Id.* at 20–21. If the project managers are unable to resolve issues amongst themselves or with clients’ supervisors, then they inform Fernandes. *Id.* He knows “the laborers are informed that they can obviously contact directly the PMs [Project Managers].” *Id.* The laborers are told they can contact their project manager or call an “800 number” on the back of their paychecks. *Id.* at 21. Fernandes testified that the 1-800 number has been around for “a long time.” *Id.*

WMS recruits laborers by posting on Craigslist, asking for referrals from current laborers, and working with community centers and Department of Labor (“DOL”) labor centers. *Id.* at 23–24. Specifically, WMS has worked with Green Civic Works for several years, and DOL labor centers in Maryland, Virginia, and the District of Columbia. *Id.* at 24–25. Fernandes was unsure

whether WMS recruited at the D.C., Maryland, or Virginia One Stop Shops. *Id.* at 25. *Id.* WMS does not maintain a website. *Id.* at 33–34.

WMS maintains records for its laborers in a document system, including contact information, asbestos certifications, physical exams, and other trade related documents. *Id.* at 31–32. WMS laborers are required to complete I-9s and W-4 forms as well as an application prior to beginning work. *Id.* at 23. Generally, if an individual appears at WMS’s office looking for a position, he or she would fill out a profile sheet, but individuals that called a project manager to inquire about a position may not have filled out a profile sheet. *Id.* at 33. WMS used profile sheets during the review period, which contained applicants’ contact information, skill level, and work location availability. *Id.* at 28; *see also* GX 2. After the OFCCP performed a review in 2012, WMS adopted a full application, which includes the race of applicants. *Id.* at 27.

WMS does not have written job requirements for job openings. *Id.* at 36. Certain jobs, such as asbestos jobs, are subject to state regulations mandating specific training or licensure. *Id.* Not possessing a license, however, does not preclude an applicant from employment; WMS also performs demolition jobs, although there are fewer of these jobs than the number of asbestos removal jobs. *Id.* at 67. Applicants must have some construction experience. *Id.* at 68.

The project managers hire employees and set laborers’ wages. *Id.* at 40. Client contractors inform WMS of potential jobs. *Id.* It is rare for a client contractor to request particular laborers. *Id.* at 54. The laborers are not required to have cars. *Id.* at 37. Background checks may be required if there is a “job site access requirement.” *Id.* at 37–38. The client contractor may require specific forms of background checks and/or drug tests. *Id.* at 39. If the client contractor tells Fernandes the job is subject to a prevailing wage, he also communicates that information to the project managers. *Id.* at 40–41. A majority of the time, prevailing wages are unknown at the start of a job but are resolved in time for payroll. *Id.*

Fernandes negotiates the bill rates with clients. *Id.* at 42. He sets bill rates by asking the project managers about the potential wage rate for the job, and then calculates an hourly bill rate based on cost plus profit. *Id.* at 42–44. Fernandes uses the bill rate to bid for a job, which the client can accept or decline. *Id.* at 43–44. If a client contractor requests a specific number of laborers, then it is included in the bid. *Id.* at 44–45. WMS does not have control over the number of hours the laborers work at a job, nor does it account for overtime when making bids; however, it provides an overtime bill rate to the client. *Id.* at 55–56. The length of a job is also unpredictable. *Id.* at 46.

After the OFCCP’s review, WMS implemented an EEO policy and informed the office staff but not the laborers. *Id.* at 56–57. The policy is in writing in English but may not be in Spanish. *Id.* During the review period, WMS’s policy on ethnicity harassment was that “it wasn’t tolerated or accepted,” which it verbally communicated it to its staff. *Id.* If a laborer was harassed, he or she could contact a project manager, call the Baltimore office, or call the 1-800 number. *Id.* WMS did not keep any form of formal documentation of reports of harassment. *Id.* at 59.

Fernandes was aware of an individual alleging that a supervisor struck him but was unsure whether the employee continued to work for WMS. *Id.* at 59–62.

Q: What did WMS do about it?

A: Like we tried to do any time we hear of something like that. We talk to the contractors and try to understand the situation. If it's something that can get resolved, our PMs go and talk to the worker. And if the worker is not comfortable with that job site, we try to get them on another job site.

We try to reinforce to our contractors that, you know, their behavior towards our workers, you know, should be correct and needs to be as good as their own behavior towards their own workers.

*Id.* at 60. WMS does not control which supervisors are working at which job sites, and it did not communicate to the contractor that it did not want its laborers working under the supervisor involved in the altercation. *Id.* at 60–61. The message to the contractors, however, was that they could not treat the laborers any different from their best workers, and that if there was any issue, the contractors should contact the WMS project manager. *Id.* at 61.

Fernandes did not know of any other complaints of harassment or assault. *Id.* at 62. Other complaints have arisen, such as insufficient water and gloves, and the temperature in the building worksites. *Id.* In those situations, Fernandes talks to the contractors to resolve the issue, or the project managers address the issue themselves until the contractor does. *Id.* at 62–63. There is no contractual obligation to provide the laborers with items like water, gloves, and respirators, because there is no written contract with the contractors. *Id.* at 63–64. It is understood in the marketplace that the contractor will provide those items, and the items are “related to the scope or condition of the job site,” which is controlled by the contractor. *Id.*

**WESLEY BLACK**

*Deposition – February 17, 2016 (GX 22)*

Wesley Black (“Black”) has worked at Staffing Unlimited since July 2010. GX 22 at 8. Woodings, who owns WMS, also owns Staffing Unlimited. *Id.* Black reports to Woodings. *Id.* at 18. Black is the “Comptroller,” and is responsible for maintaining WMS’s accounting records. *Id.* at 10–11. He also reviews timecards, enters data into the payroll system, pays taxes, bills clients, and issues paychecks. *Id.* at 13. Black works with Adrianna, who is responsible for collecting time sheets, following up with workers’ compensation issues, and other related issues. *Id.* at 16. Black’s office is located at 1301 Warner Street, but he also works from home 1 to 4 days per week. *Id.* at 14. During the OFCCP review period, his office was located in Bethesda, Maryland where he worked four-to-five days per week. *Id.*

Black described WMS’s business as providing temporary labor for various types of construction jobs including demolition and asbestos removal. *Id.* at 14. He is responsible for determining the correct prevailing wage, because he produces certified payroll reports. *Id.* at 16. If there is an error in the wages paid, then he is responsible for correcting the amount paid. *Id.* at

17. If there is an error in a certified payroll report, then the client and/or the laborers usually report it, and he then corrects the error. *Id.* Clients provide the prevailing wage information to him or Fernandes. *Id.* at 17–18.

Black’s client interaction is usually limited to other comptrollers or financial workers. *Id.* at 18. He rarely communicates with laborers, and estimates that he has only been in contact with laborers five-to-ten times in the last five years. *Id.* at 19. He has no responsibility over laborers’ employment conditions. *Id.* at 19–20. Black is not involved in WMS’s recruitment or hiring processes. *Id.* at 20. During the review period, Hugo and Harold were responsible for hiring laborers. *Id.* at 21.

Black is familiar with clients’ bill rates; however, he is not privy to the financial terms in the contracts. *Id.* at 22. Fernandes sends him the bill rates by email, and he enters them into the system; or Fernandes enters the bill rates and then notifies Black by email. *Id.* at 22–23. He does not negotiate bill rates with clients. *Id.* at 23. Black also performs payroll and billing adjustments. *Id.* at 44–45.

WMS pays laborers either by check or direct deposit. *Id.* at 23. Those that receive paper checks can report to WMS’s office, get it delivered to the worksite, or ship it. *Id.* There is no fee for shipping or worksite delivery. *Id.* WMS uses the QuickBooks accounting software to generate paychecks. *Id.* at 24. WMS maintains data on the laborers in its software system including employee ID numbers, names, addresses, phone numbers, social security numbers, gender, ethnicity, project names, payroll week-end dates, hourly pay rates pay types, and gross pay and hours. *Id.* at 26–35. Black was not sure whether WMS maintains data on race. *Id.* at 27.

Project names are part of payroll tracking because some projects have different pay rates. *Id.* at 29. Pay rates may vary based on variable such as whether the job is a prevailing wage job and distance. *Id.* Workers’ ethnicity was not tracked as part of WMS’s original process; however, WMS began tracking ethnicity after the OFCCP requested the data. *Id.* at 35–36. Black was unsure how WMS collects ethnicity data. *Id.* at 36.

Black explained certain line items on the WMS payroll report presented to him by the OFCCP. *Id.* at 41–53. Specifically, he explained why a laborer might have received two payouts for one week-ending date: he issues a second check if the initial check used an incorrect wage rate or should have used on a prevailing wage. *Id.* at 41–44. The only way to determine if there was an adjustment based on a payroll report is to calculate. *Id.* at 44–45. If an adjustment is made at a different period, Black changes the job name on the line entry to show he is adjusting a different period for billing purposes. *Id.* at 45. This is WMS’s general practice if a laborer is missing hours on a paycheck due to a late or incomplete timesheet, and it has billed the client for that week. *Id.* at 45–46.

Black was unable to explain some of the line items. *Id.* at 53–57. He did not know how the OFCCP compiled the data, because the OFCCP gave him information not contained in the same data module. *Id.* at 57–58. He was unable to answer questions about line items concerning overtime, but he stated that anything over forty hours per week, which is “standard hours,” is overtime. *Id.* at 62–63. Black surmised that if a laborer receives overtime without working forty

hours in a week, then the overtime paid was either an adjustment from another week or an error; however, he was unable to provide a concrete explanation by looking solely at the payroll data. *Id.* at 63–65. Pursuant to the OFCCP’s request, he produced as complete a payroll and ethnic and gender data as possible. *Id.* at 58, 68.

Black did not know how WMS assigned laborers to contractors or job sites. *Id.* at 66. He also did not know how hours were assigned. *Id.* He is aware of an EEO policy at WMS but has no knowledge of its substance. *Id.* He does not handle any issues regarding workplace harassment. *Id.* Black testified that if a laborer informed him of harassment, then he would first discuss the situation with Fernandes; however, he reiterated it is not his responsibility. *Id.* at 66–68.

### **HAROLD ORTEGA**

*Deposition – April 4, 2016 (GX 23)*<sup>4</sup>

Harold Ortega (“Ortega”) is a Project Manager, and is responsible for recruiting personnel to perform demolition and asbestos abatement work. GX 23 at 8. He has worked at WMS for nine-to-ten years, and reports to Fernandes. *Id.* at 8, 13. He works at WMS’s office at 1301 Warner Street in Baltimore, Maryland. *Id.* at 9. There are two other Project Managers at WMS—Hugo Rivera, and Carlos Ruiz, who is located in Florida. *Id.* at 8–9. He does not consider himself the boss of anyone, but the workers he recruits report to him. *Id.* at 11.

Ortega has not changed his recruitment method since February 2012. *Id.* at 24. He recruits laborers through friends and sometimes through Craigslist and work centers. *Id.* He posts Craigslist advertisements<sup>5</sup> in Spanish<sup>6</sup> when WMS has a higher demand for laborers, and he has searched for laborers at Casa de Maryland in Hyattsville and Baltimore, Maryland, as well as Green Jobs in Baltimore. *Id.* at 14–15, 30. He has not recruited from any work centers in Virginia. *Id.* at 16. Ortega does not use any other forms of written advertisement, nor does he recruit from One Stop Shops or unemployment centers in the District of Columbia, Maryland, or Virginia. *Id.* at 24–25, 29–30. Ortega has never recruited at churches, but he did have a contact named Jose at a church who sent applicants to WMS. *Id.* at 31–32.

The majority of Ortega’s recruits originate from contacts developed through other workers. *Id.* at 16. He also searches the WMS computer system for available workers. *Id.* at 12. He hires workers without an asbestos license for demolition jobs only; but offers asbestos certification classes to demolition workers who are interested in performing asbestos removal work, and sends them to classes at WMS or a school in Virginia. *Id.* at 12–13. WMS pays for classes, but classes at the school located in the WMS office building are free. *Id.* at 13–14.

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<sup>4</sup> I note that Mr. Ortega was also deposed prior to April 4, 2016. GX 23 at 5. The earlier deposition began in English; the April 4, 2016 deposition was in Spanish with the assistance of an interpreter. *Id.* The earlier deposition was not submitted as evidence. Ortega stated he speaks, reads, and writes a little bit of English. *Id.* at 7–8.

<sup>5</sup> Ortega stated his Craigslist advertisements state: “I’m looking for workers for asbestos with Maryland, Washington, Virginia license. Please contact me.” *Id.* at 24.

<sup>6</sup> Ortega would only post Craigslist advertisements in Spanish; however, he would ask fellow WMS Project Manager Hugo Rivera to post the same Craigslist advertisement in English. *Id.* at 15.

To determine which recruits to hire, Ortega asks the recruit about his or her qualifications and interest level in certain jobs during the interview. *Id.* at 16–17. He fills out a worker profile form only if he is in the office and the recruit provides the relevant data. *Id.* at 19–20. For demolition positions, the recruit must have an interest in the job, and WMS provides safety protection including a helmet, glass protectors, goggles, and a safety vest. *Id.* at 18. For asbestos or lead removal, the recruit must have the appropriate licenses and must undergo a physical examination/breathing test. *Id.* at 17.

The worker profile form that Ortega fills out during an interview is in English, but he asks questions in Spanish. *Id.* at 20–21. All candidates fill out an application, regardless of whether or not they are hired. *Id.* at 22–23. The application asks for a full address, contact information, and has I-9 and W-4 forms attached. *Id.* at 23. The application form changed approximately three years ago so that applicants are more aware of the type of work applied for and the work conditions. *Id.* at 23–24. During the applicant interviews, Ortega asks about the applicant’s experience, the companies he or she has worked for, and the types of work he or she has performed. *Id.* at 32. He keeps some of this information in his personal notebooks including names, licenses, qualifications, and demolition experience. *Id.* at 32–33.

Ortega determines if applicants’ meet the requirements of jobs and decides who is hired. *Id.* at 24. He will hire applicants with no experience, as well as applicants with certifications who have not yet worked in asbestos or lead removal. *Id.* at 33. Once he receives a work order from Fernandes, he contacts hires and sends them to job sites. *Id.* at 25. He sets the laborers’ pay rates primarily based on experience, which he determines from the number of certifications the laborer possesses. *Id.* at 26–28. A laborer that has been working longer in the field will have more certifications than someone who just started based on annual recertification requirements. *Id.* at 29. A laborer who drives may receive a higher rate to cover gas expenses. *Id.* at 27. Pay rates may also change if a job is certified, which is generally a job in a government or state location that pays more. *Id.* at 27–28. A laborer who has been working for the same contractor supervisor for a period of time may receive an increase in his or her pay rate if the supervisor expresses an interest in retaining the laborer’s services. *Id.* at 28.

To determine which laborers will work on a project, he reviews the WMS system (also known as “iCertainty”) that stores the laborers’ information, as well as his notebook. *Id.* at 34–37. If there are more laborers than projects, then he considers factors such as the length of time with specific companies and supervisors’ feedback of laborers. *Id.* at 34–35. He tries to find as much work for the laborers as he can, and he spreads the work around. *Id.* at 35. Ortega also considers how many hours each laborer is going to receive when making assignments. *Id.* at 36–37. Laborers are paid weekly by company check. *Id.* at 37. The contractors submit the laborers’ work hours, Ortega reviews them, and Black prints the checks. *Id.* at 37–38.

Ortega defined harassment as “bothering a person.” *Id.* at 40. WMS does not have a formal policy on harassment, nor has he received any training on harassment; however, if he received a complaint, he would immediately report it to Fernandes. *Id.* Ortega has never received any complaints of harassment. *Id.* He has never had a laborer report that he or she was hit or punched at work. *Id.* at 42. He also has not received any complaints of racial harassment. *Id.* The only complaint he has received was a complaint of age discrimination from two women. *Id.* In

that instance, the contractor reduced the number of people working at the job site, and Ortega believed the women took it “personally.” *Id.* at 42–43. Ortega contacted Fernandes about the complaint, who then discussed the situation with the contractor; however, nothing else happened. *Id.* at 43. Both women continued working after the incident, and one is still actively working. *Id.*

There is some signage about harassment, in both English and Spanish, at the Baltimore office explaining how workers should look after themselves and what they should do, including immediately reporting any incidents. *Id.* at 40–41, 44, 49. Ortega advises laborers to report immediately any issues to him before he sends them to a job site. *Id.* at 42. Local laborers come into the office once or twice a week when they are picking up checks, but laborers in rural areas in Virginia, North Carolina, and other states rarely visit the office. *Id.* at 45.

Ortega makes daily visits to job sites during the day and evening and sometimes overnight. *Id.* at 45, 50. He visits before lunch or before the beginning of a shift to speak with laborers, or he talks to them during water breaks and when laborers are picking up tools.<sup>7</sup> *Id.* at 50–51. He asks the laborers and their supervisors about the types of work they are performing at the job sites. *Id.* at 45–46. Ortega also checks laborers’ well-being, including whether they have any complaints. *Id.* He believes it is his responsibility to make sure the laborers are safe and to ensure the supervisors are treating the laborers fairly. *Id.* at 46. Laborers occasionally complain about insufficient drinking water at job sites. *Id.* at 45. In such situations, he immediately calls the jobsite supervisor, and in most instances, the water was at a different location. *Id.* He has never received any complaints from laborers about supervisors harassing them, watching videos of deportation raids, or hearing racial slurs. *Id.* at 46.

Ortega testified that “Eric S.” is a supervisor for Asbestos Specialists, Inc. (“ASI”), WMS’s client. *Id.* Ortega heard from a laborer that Eric S. punched a laborer in the eye. *Id.* at 46–48. Other laborers told Ortega that Eric S. accidentally hit the laborer when pushing open a plastic curtain. *Id.* Ortega did nothing, because no one reported the incident until two-to-three weeks after it occurred. *Id.* at 48. The laborer continued to work, and Eric S. continued to supervise laborers. *Id.* at 47.

#### **HUGO RIVERA**

*Deposition – February 16, 2016 (GX 25)*

Hugo Rivera is an Operations Manager<sup>8</sup> at WMS and has worked there for five years. GX 25 at 10. Fernandes is his supervisor. *Id.* Rivera works at the office located at 1301 Warner Street in Baltimore, Maryland with Fernandes and Ortega, as well as an office assistant, Adrianna. *Id.* at 14. Ortega and Rivera are the only Operations Managers. *Id.* at 17. Rivera is responsible for organizing laborers for work, receiving and filling job orders for company projects, hiring laborers, ensuring laborers receive their checks, ensuring compliance with certifications and physical examinations, and receiving reports of jobsite issues from the laborers. *Id.* at 11–12.

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<sup>7</sup> Ortega cannot enter the worksites, because he is no longer holds a current asbestos certification. *Id.* at 50–51.

<sup>8</sup> Rivera referred to his title as “Operations Manager” during his deposition, but it is clear from his hearing testimony that he and Ortega are “Project Managers/Recruiters.” See GX 25 at 10, 17; Tr. at 172, 471, 505–06.

Rivera recruits laborers to work on projects in the District of Columbia, Maryland, and Virginia. *Id.* at 14, 21. The recruitment process is dependent on the type of job. *Id.* at 22. He recruits laborers from nearby streets, stores, cafeterias, and bus stops to the project sites in the District of Columbia. *Id.* For some asbestos projects, he assigns a crew that has worked for him for a long time. *Id.* Rivera also posts advertisements in both English and Spanish on Craigslist and in Spanish on Facebook.<sup>9</sup> *Id.* at 32–33, 36–37. He has also recruited at veterans’ events in Baltimore a “long time ago.” *Id.* at 37. Rivera has not recruited at the unemployment centers in the District of Columbia, Maryland, or Virginia, nor has he recruited at Casa de Maryland, but he has recruited from the unemployment office in California.<sup>10</sup> *Id.* at 23, 32. Approximately eighty percent of his hires are employee referrals. *Id.* at 51. The recruitment process has not changed since February 2012, but Rivera has attempted to incorporate new methods. *Id.* at 30–31.

Applicants complete an application, which asks for their name, address, and access to personal transportation.<sup>11</sup> *Id.* at 25–26. Fernandes gives the form to Rivera. *Id.* at 52. Rivera uses the applications to contact applicants for interviews.<sup>12</sup> *Id.* at 54. He keeps the applications of those that are hired, but he does not know if WMS retains the applications of candidates it does not hire. *Id.* at 30. Adrianna keeps the applications in WMS’s office, and Rivera keeps applicants’ phone numbers.<sup>13</sup> *Id.* at 57–59. Rivera’s practice is to assign new hires to projects immediately if there are any positions available. *Id.* at 58.

To obtain employment as an asbestos laborer, applicants must possess asbestos or lead training and the corresponding certification. *Id.* at 26, 33–34. WMS has provided training to laborers in the past, approximately two-to-three years prior to 2016. *Id.* at 27. The laborers that took the WMS-provided training went to PIT, as well as other schools and instructors. *Id.* at 27–29. If a laborer wanted to be an asbestos worker, then Rivera helped him or her get appropriate asbestos training. *Id.* at 29. He also helped laborers undergo lead training. *Id.*

Rivera is responsible for ensuring that laborers receive their pay, so he collects the proper identification and I-9 forms from the laborers. *Id.* at 39–40. He is also responsible for setting the laborers’ rates of pay, which depends on a number of factors including the number of candidates, the job, the day, and the pace of the season. *Id.* at 40–45. Rivera also considers other factors, such as driving and parking, when setting pay rates. *Id.* at 61. Sometimes, Fernandes gives him information on what the average wage or minimum wage should be. *Id.* at 48, 60. Fernandes also specifies whether the job is a prevailing wage job, and if so, Rivera pays a higher rate. *Id.* at 63–64. Rivera also keeps track of the laborers’ hours. *Id.* at 49. He contacts the supervisors<sup>14</sup> who send timesheets to Adrianna. *Id.* Fernandes and Adrianna are responsible for calculating the payroll hours worked by the laborers weekly for the hours reflected on the timesheets. *Id.* at 19, 49. Rivera distributes paychecks to the laborers, although approximately half receive their pay by direct deposit. *Id.* at 49.

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<sup>9</sup> Rivera’s Craigslist advertisements stated: “Looking [for] demo workers. Please contact this number.” GX 25 at 33.

<sup>10</sup> WMS also has laborers in Texas, California, New York, Pennsylvania, and Baltimore, Maryland. *Id.* at 23–24.

<sup>11</sup> Owning a car is not a requirement. *Id.* at 25–26. Rivera helps arrange carpooling amongst laborers. *Id.* at 26.

<sup>12</sup> Rivera stated that the applications were not the same as the worker profile sheets. *Id.* at 51.

<sup>13</sup> Rivera maintains a list of phone numbers, dating back to “a long time ago” and still has it. *Id.* at 59.

<sup>14</sup> The laborers’ supervisors at jobsites are the client’s employees, but at WMS, Rivera is their supervisor. *Id.* at 19.

Rivera assigns laborers to jobsites based on Fernandes' job orders, which state the number of workers needed, the type of work, and a timeframe. *Id.* at 44–45. Rivera also considers the location of the job and shift times. *Id.* at 65, 67–71. He testified that he memorizes the laborers' preferences, such as when and where they prefer to work and who likes to work at night or during bad weather conditions. *Id.* at 67–71. Rivera shares this information with Harold and Fernandes. *Id.* at 69. For the last five years, he has used the same method for choosing and assigning laborers to jobs. *Id.* at 72–73.

WMS has a policy that prohibits harassment based on race, ethnicity, religion, and gender. *Id.* at 76–77. Rivera stated that the policy has existed since he began working at WMS, and later stated that the policy started recently, but he was not sure exactly when. *Id.* at 76, 80. The policy states that laborers have the right to contact someone at the office, and must report their issues to Rivera. *Id.* at 77. If an issue does arise, Rivera arranges a meeting with the supervisor and the laborer to resolve it. *Id.* at 19, 74. Rivera has not received any formal training on race or ethnicity harassment. *Id.* at 81.

Rivera has never received reports of laborers being assaulted or called “nasty names.” *Id.* at 74–75. He also has never received any complaints of ethnic slurs, nor has he received any complaints about laborers watching videos of deporting Latinos. *Id.* at 78. Rivera has never received any complaints of laborers being hit, but if that were to occur, then he would go to the supervisor and the supervisor's supervisor. *Id.* at 78–79. He has only had laborers complain about not liking supervisors, particularly one named Jose. *Id.* at 75–76.

Rivera has never considered ethnicity or gender when assigning jobs. *Id.* at 81–82. He does review whether all the workers at a particular worksite receiving equal pay. *Id.* at 83. Rivera uses the market rate to maintain fair compensation practices. *Id.* at 82–83. Women work as much as men, at night, on weekends, and at prevailing wage jobs. *Id.* at 83–84.

#### **JOSE GONZALEZ**

*Hearing Testimony – July 26, 2016 (Tr. at 76–111)*

Jose Gonzalez (“Gonzalez”) has worked for the Labor International Union (“LiUNA”) for five years as an organizer. *Tr.* at 76–77. LiUNA is a union that focuses on education and work safety. *Id.* He works for the national office of LiUNA, located in the Washington metropolitan area. *Id.* at 101. He works at LiUNA “because it’s an institution that is consistent with [his] values and principles and[,] [] [it protects] the general welfare of workers.” *Id.* at 77. Prior to working at LiUNA, Gonzalez worked for a community organization called Tenants and Workers United. *Id.* at 77–78.

LiUNA representatives have collective bargaining agreements with employers in the Washington, D.C. area in the construction, asbestos, lead, demolition, landscaping, and cleaning industries. *Id.* at 102. During Gonzalez' time with LiUNA, he was involved in organizing the workers at the GSA job site. *Id.* at 101–02. As part of his duties, he attends LiUNA meetings with its membership. *Id.* At the national level, LiUNA has about 650,000 members, but Gonzalez does not know about the overall size of the membership at the local level. *Id.* at 110. At the local

level of LiUNA, approximately 60% of the membership is Latino. *Id.* at 103. Different locales within the local level have varying percentages of Latino membership; one locale, as an example, is approximately 80% Latino. *Id.*

There is only one locale in the Washington metropolitan area that represents workers in the cleaning industry, and approximately 80% of its membership is Latino. *Id.* Only one locale, which is approximately 75% Latino, represents landscaping workers. *Id.* at 104. There are two locales in the Washington metropolitan area that represent demolition workers; one is located in D.C. and is approximately 80% Afro-American, and the other is in Virginia and is approximately 85% Latino. *Id.*

Some of the membership works in construction, including highway, building, and residential construction. *Id.* at 105. Approximately 60-65% of LiUNA's membership who works in highway and residential construction is Latino, and approximately 70-75% of the membership in building construction is Latino. *Id.* Of the membership that works for drywall companies, approximately 10-15% is Latino. *Id.* at 106. Approximately 50-55% of the membership that works in asbestos abatement is Latino.<sup>15</sup> *Id.* Gonzalez testified that he did not have knowledge of these percentages in 2011 because at that time, he was just beginning to work at LiUNA. *Id.*

Gonzalez testified that WMS is a staffing company that staffs asbestos, lead, demolition, and cleaning projects. *Id.* at 78. He first learned about WMS through a church where he volunteers. *Id.* Hector Ortiz came to Gonzalez's office in Falls Church at Tenants and Workers United and explained that he had heard from a laborer that Gonzalez was doing outreach at the church. *Id.* Ortiz was there to represent a company called WMS. *Id.* Ortiz told him WMS had good job opportunities and wanted to discuss ways to work together. *Id.* During their third meeting, Ortiz told Gonzalez he was recruiting for WMS. *Id.* at 78-79.

During the first meeting, Ortiz and Gonzalez discussed their respective jobs. *Id.* Both the first and the second meeting were only between Ortiz and Gonzalez, but the third meeting included laborers and people from the community. *Id.* Gonzalez discussed his meetings with the community and helped Ortiz, because he thought it was a good opportunity for the workers. *Id.* at 108-10. The goal of the meetings was to teach the community how to find jobs, how to travel without personal transportation, and how to coordinate transportation. *Id.* Gonzalez also talked about existing programs at the church and ways to get help. *Id.* He and Ortiz held five or more meetings over a period of eight-to-nine months. *Id.* at 80.

Meetings were held at Culmore United Methodist Church in Falls Church, Virginia. *Id.* at 85, 107. During the meetings, Ortiz discussed the opportunities and benefits of working at WMS. *Id.* at 81. He also discussed the equal opportunity of the jobs. *Id.* Ortiz explained that WMS offered opportunities for growth, equality of employment for men and women, and good pay. *Id.* He did not talk about worker qualifications. *Id.* at 84. Ortiz also told Gonzalez to not mention the temporary nature of the job opportunities, because the "workers do not like it." *Id.* at 108. Approximately 96% of the attendees were Latino, and the other 4% were Afro-Americans. *Id.* at 86. The majority of the Latino attendees was either Salvadorian or Central American. *Id.* An equal amount of men and women attended the meetings. *Id.* at 93. The church's congregation

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<sup>15</sup> Lina offers an asbestos training program in Washington, D.C. and Virginia. Tr. at 110.

consisted of Filipinos, Caucasians, and some Afro-Americans; however, the majority was Filipino. *Id.* at 86–87. Meetings were held in Spanish. *Id.* at 88.

Certification was required for the types of work WMS was offering. *Id.* at 87. The attendees were actively seeking work and were willing to take classes and trainings, if required. *Id.* at 88–89. Ortiz mentioned that WMS would provide a four-day training course for workers to obtain a certificate and license for asbestos removal. *Id.* at 89. He disclosed that workers were required to report to the office and pay out-of-pocket for their transportation.<sup>16</sup> *Id.* at 90.

Gonzalez volunteered and coordinated carpools for the laborers to attend certification classes. *Id.* at 91, 109. He is not aware of any drivers receiving any additional money from WMS for driving other workers to classes or job sites. *Id.* at 109. After taking the class, Ortiz gave the laborers start dates. *Id.* at 91. Gonzalez helped the laborers enroll in classes, contacted the course instructors, and communicated the necessary class information to the laborers. *Id.* About 98% of the laborers he assisted were Latino or Hispanic. *Id.* The remaining 2% were African-American. *Id.* at 93. An instructor from Honduras, who spoke Spanish, taught the classes.<sup>17</sup> *Id.* at 91–93.

During the meetings, Ortiz offered demolition, asbestos removal, and lead removal opportunities to women. *Id.* at 94. Gonzalez testified that, in practice, women were offered different job opportunities. *Id.* at 95.

Q: You said there was a difference between in theory and in practice, as it came to equal opportunity.

A: Right.

Q: What do you mean by that?

A: I was the person [Ortiz] called when the companies were asking for workers. In several occasions we had disagreements because during the meetings he talked about equal opportunity. But when he called me and he would ask, say, for 10 workers, he would say eight had to be male and two females and preferably who could drive.

Q: Why was that?

A: I asked him and he answered that the companies were not satisfied by the production of the women and that they had to pay them equally. And also that asbestos, they had to put on [a suit].

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<sup>16</sup> It is unclear whether the “office” refers to the location of the meetings or the WMS office. *Id.* at 90.

<sup>17</sup> Gonzalez was able to describe the class based on his personal experience taking the class. *Id.* at 92.

A: And that a woman would go to the bathroom 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.

*Id.* at 95–96.

Ortiz told Gonzalez that he could call the supervisors at the worksites to verify the information about the workers that the companies wanted. *Id.* at 98–99. The women driving cars with four-to-five workers to a worksite were paid five dollars per worker, so they received \$25 for one day of work. *Id.* Gonzalez talked to a supervisor at a company called ACM on at least two occasions, and was told that the company “needed a heavy workforce and it had to be males.” *Id.* at 99–100, 109. The supervisor also told Gonzalez that he had already discussed the male workforce with Ortiz and others who were in charge of making decisions in the company. *Id.* at 100. Gonzalez also spoke with a woman at ACM, whom he understood to be in charge of negotiations on at least one occasion. *Id.* at 109.

#### **PORFIRIO ARIAS**

*Hearing Testimony – July 26, 2016 (Tr. at 136–165)*

Porfirio Arias (“Arias”) is Hispanic and came to the United States from El Salvador. Tr. at 141, 149. He has worked at Access Demolition for almost two years, where he performs demolition work, asbestos removal, and lead removal. *Id.* at 136. His pay rate is \$13.00 per hour. *Id.* Previously, he worked at Green Jobs and WMS. *Id.* He began working at WMS in 2009 and left in 2013. *Id.* He used to frequent a local 7-Eleven in search of day laborer work, which is where he met some friends who told him WMS needed workers. *Id.* at 137, 150. When he and his friends visited a WMS office, located between Randolph Road and Veirs Mill Road in Maryland, Harold Ortega hired them. *Id.*

He filled out an application, and Ortega told him he would receive a one-week course for an asbestos license in Maryland. *Id.* at 138. He attended a class in Baltimore, Maryland. *Id.* He took the asbestos course with Ortega and other men that worked with Ortega. *Id.* at 140. The course was in Spanish, and approximately twenty-five people attended. *Id.* at 140–41. All of the attendees were Hispanic. *Id.* He also received a certification from an organization called MILDA in Virginia. *Id.* at 139. He paid for his license, and when Ortega (WMS) did not pay for his classes, he paid for them out-of-pocket. *Id.*

While employed at WMS, Arias was assigned to work at the GSA worksite. *Id.* at 138. The supervisor at the site was Eric Salminen, who worked for ASI. *Id.* at 141. Arias does not understand English, except when “[Eric Salminen] mistreat [him].” *Id.* Salminen, who was the boss at the worksite, only spoke English, so the Hispanic ASI supervisors translated for the laborers. *Id.* Arias explained that Salminen mistreated him and the other workers:

Q: You said that they, ASI, would offend you. What do you mean by that?

A: The person who insulted us was Eric, the American. Forgive me for what I am going to say to you, but he used to call me a [expletive]. I had never

been spoken to that way. He would throw the electrical extension cords at me, and he did that to me and he did it to the other fellow workers as well. One time he pulled me down from the ladder and pulling me by my shirt and me practically fell. All of us, in order not to lose our jobs, myself and all my fellow workers had to just hold our head down.

*Id.* at 141–42.

Arias continued to describe the mistreatment:

Q: You testified that Eric pulled you by your shirt.

A: Yes.

Q: Prior to that, had you ever been touched by Eric in a way that you found inappropriate?

A: Yes. Well, on the occasions of the extension cords, he would pull our shirts. And when we didn't pay attention, he would pull our shirts and drag us to the place where he wanted us to work.

Q: What do you mean by when you didn't pay attention?

A: Well, because we would get angry because we didn't want to do the work, and he would get angry and take us to the place where the job was, because he offended us a lot.

Q: Why did you get angry?

A: Because of the mistreatment that we got from him.

Q: Can you describe the mistreatment?

A: The insults, he would swear at us, as well as the physical abuse. He would pull our shirts and take us to the place and he would throw the materials at us.

Q: Who are you referring to when you say us?

A: To the other coworkers.

Q: What race were these other coworkers?

A: Primarily Guatemalans. And when Eric would mistreat them and swear at them, they would just put their heads down.

Q: How did that make you feel?

A: I didn't like it, but we could not defend ourselves because we didn't want to lose our jobs and at that time we needed the work. So we just had to put our heads down, including myself.

*Id.* at 144–45.

Arias did not specify the location of the mistreatment, but stated that between 2009 and 2013, “[Salminen] treated us very badly at all the different worksites we went to.” *Id.* at 142. He did not see Ortega or anyone else from WMS at the worksites. *Id.* at 143–44. Arias worked at ASI through WMS. *Id.* at 142. He was nervous about losing his job, because he needed the job and had no other job opportunities. *Id.* at 145. So he accepted the mistreatment and continued working for Ortega at WMS. *Id.*

Arias told Ortega about Salminen's mistreatment multiple times. *Id.* at 146–48. Ortega instructed him to continue working and “not to pay heed to Mr. Eric.” *Id.* at 146. Other workers also reported Salminen's treatment to Ortega. *Id.* at 147. Arias told Ortega in person several times, including at the office in Baltimore when he picked up his paychecks.<sup>18</sup> *Id.* He also told Ortega about the mistreatment over the phone. *Id.* Arias estimates that he told Ortega in person about eight times and over the phone about ten times. *Id.* Ortega consistently instructed Arias to ignore Salminen and continue to work. *Id.* Arias believed he had no support and that Ortega would not talk to Salminen because ASI would have stopped using WMS laborers. *Id.* at 148.

Arias remembers meeting Salminen at the GSA project in Washington, D.C., where he worked on asbestos removal and demolition. *Id.* at 154. At the jobsite, the containment had three separate areas including a dirty room where the laborers remove their suits, a middle room for washing off, and a third room that the laborers entered into after cleaning. *Id.* The laborer's first task at a job site is to build the containment by putting up plastic on the windows and doors and sealing off the job site from the outside area, which prevents the asbestos from escaping. *Id.* This process includes sealing off the ventilation vents, which essentially shuts off the heating and air conditioning inside the job site. *Id.*

Laborers entering the job site have to wear a Tyvek suit and a mask. *Id.* at 156. Laborers must be clean-shaven to wear the mask. *Id.* Laborers break down walls, remove hot water pipes, and remove asbestos. *Id.* Arias stated that the tools (e.g., sledgehammers and chipping guns) were heavy, and the work was difficult and dangerous. *Id.* According to his training, asbestos is dangerous, because it can cause cancer. *Id.* at 157.

The work at the GSA worksite originally required preparing the area in the morning and working during the day. *Id.* The job changed to working at night from 6:00 p.m. to 3:00 a.m. *Id.* Arias did not own a car, so he carpooled with coworkers. *Id.* All of the laborers working in the containment were from WMS, but all of the supervisors were from ASI. *Id.* Arias worked at the GSA project for six months, and then began working at other job sites for WMS. *Id.* at 157–58. He left the GSA job site, because Ortega sent him to work on a different job. *Id.* at 158. Arias

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<sup>18</sup> Arias stated that this checks listed “Eureka Technology” as the employer. *Id.* at 142.

received a different rate of pay for different jobs. *Id.* He accepted all of the jobs that Ortega offered him. *Id.*

Arias was working at the GSA job site when an incident occurred between Salminen and a laborer named Fonseca. *Id.* Salminen was angry and mistreating laborers, because they did not complete a job. *Id.* at 162. He was walking into the containment area through plastic curtains as Fonseca was walking out when he hit Fonseca in the eye with his thumb. *Id.* at 162–64. Arias did not actually see the incident, but a coworker did. *Id.* at 164–65. After the incident, Salminen returned to the GSA project, but a different supervisor was in charge. *Id.* at 159. Salminen only entered the containment area to check whether the laborers completed their work. *Id.*

Arias worked on both asbestos and demolition jobs at WMS. *Id.* Some jobs were interior demolition only while others involved demolition and asbestos removal. *Id.* On a job involving only demolition, he was not required to wear any protective clothing except a hardhat, boots, and a mask for dust. *Id.* at 159–160. Demolition jobs involve demolishing interior walls by using sledgehammers and pry bars. *Id.* It is hot and hard work and paid less than asbestos work. *Id.*

Arias stopped working for WMS in 2013, because he suffered carbon monoxide poisoning. *Id.* at 138. During a job in 2013, he and a fellow worker were removing flooring while using a machine that had a gas cylinder, and both he and his fellow worker were poisoned. *Id.* at 139. Ortega picked up both of them when they were discharged from the hospital. *Id.* Ortega told them not to file a claim, because they would not receive any more work. *Id.*

#### **LUIS FONSECA**

*Hearing Testimony – July 27, 2016 (Tr. at 172–199)*

Luis Fonseca was born in Honduras and graduated from high school as a “commercial expert and public accountant.” Tr. at 190–91. He currently resides in Maryland, and works at Green Jack, where he performs asbestos removal work. *Id.* at 172, 191. Before Green Jack, he worked at D&H, where he also performed asbestos removal. *Id.* at 172, 196. Before D&H, he worked at WMS Solutions and did asbestos removal; he stopped working there sometime between 2014 and 2015. *Id.* at 172.

His first experience working for an asbestos company was in 2000 at Potomac Abatement, where he worked for three years. *Id.* at 190–92. After Potomac Abatement, he worked at a construction company called Gilford, and while there, he worked for WMS a few days. *Id.* at 192. He received an asbestos license for D.C. and Maryland while working at Potomac Abatement; he took his classes in Virginia at a school named Global Environmental. *Id.* at 191. He is required to take refresher courses annually and/or biannually depending on the state. *Id.* at 192. He paid for his initial license, but the companies paid for his renewals. *Id.* at 198.<sup>19</sup>

He met Harold Ortega between 2001 and 2002 who told him that WMS was accepting applications and encouraged him to apply. *Id.* at 172–73. He began working regularly for WMS

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<sup>19</sup> Fonseca stated that as part of asbestos work, he wears a protective suit and a respirator in asbestos areas. *Id.* at 195.

between 2006 and 2007. *Id.* at 192. There were times of less work, particularly during the winter. *Id.* at 193. In 2011, he worked at the 1800 F Street job site where Salminen was a supervisor. *Id.* at 173–74. There were also other supervisors at the job site, and they were all from ASI. *Id.* at 174.

On July 25, 2011, Fonseca started his work shift at the 1800 F Street job site at 6:00 p.m. *Id.* Salminen, another ASI supervisor, and laborers, including Fonseca, went to the fifth floor of the building.<sup>20</sup> *Id.* at 174–75. Salminen told the laborers to remove a wall and seal the area with plastic before 11:00 p.m. *Id.* at 175. Fonseca testified:

A: [I]f we didn't have it done, he was going to send us all home like dogs on the street. . . . He was telling us, move your butt. Move. You're stupid. Get this work done. And then we did everything, we did everything in a rush. We were not able to finish everything because it was a big job. We couldn't do it in the time that he had given us.

Q: Mr. Fonseca, let me just interrupt you for one second. What language did Eric explain the work in?

A: He explained it to [the other supervisor] in English and [the other supervisor] told us in Spanish. The words in Spanish that he would tell us – I apologize to all of you – were move el cool, move your ass, and stupid [expletive].

Q: When you say always – what do you mean, well, he said, he always said these words? What do you mean by always Eric says?

A: It was the way he treated us from the moment he saw us. Well, one felt – I don't know whether it was racism or hatred, but he always treated us in that harassing way.

[. . .]

A: Well, let me tell you something. When I arrived at that courthouse, the first day I arrived I saw how Eric grabbed a Guatemalan, a fellow worker, by the neck or by the collar and pushed him hard against the wall and told him this is what you're going to do for me. And then I saw how he fought another Guatemalan. He tied him around the arms and dragged him along the hallway.

. . . .

And I asked a coworker why did they allow Mr. Eric [to mistreat] them. I was told that he was the boss and he was the general manager, and if somebody complained, the person might lose their job and be sent to the

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<sup>20</sup> There were not any WMS supervisors present at the job site. *Id.* at 194. WMS only provides laborers, and the company using the laborers provides the supervisors. *Id.*

street. And that same coworker told me the time will come when he's going to hit you, too.

*Id.* at 175–76.

As Fonseca and other laborers were cleaning up the decontamination area on the evening of July 25, Salminen entered the decontamination area. *Id.* at 177. Fonseca was moving bags of asbestos. *Id.* He was outside of the decontamination area while laborers inside of the decontamination passed the bags to Fonseca. *Id.* When he was picking up the bags, he felt a punch to his left eye. *Id.* at 178. Salminen had punched Fonseca in the eye and another laborer in the chest. *Id.* Salminen then went into the decontamination area to check on the work progress. *Id.* Fonseca further testified:

A: [I] was there with pain in my face, my eye and my whole head, and I asked my coworker if he was going to do anything, if things were just going to stay like that or if he was going to do anything, because he got hit, too. He said no, nothing has happened here. I haven't seen anything. I'm not going to say anything. I'm not going to be a witness for anybody. I don't want to lose my job. I said I am going to call the police and Eric is going to find out that he can't do this, he can't hit me.

Q: Mr. Fonseca, when you were punched, what happened to your eye?

A: I felt an intense pain in my head and in my eye. I felt as if, when I tried to open it, there were – it was as if someone was sticking needles in my eye. And then Eric came in and I was getting dressed because we were in our underwear and I had my hand over my eye because I couldn't stand the light when Eric came.

*Id.*

At that point, Salminen asked him what had happened, and Fonseca told him to call the police. *Id.* at 178–79. Salminen told him no and continued to speak to Fonseca in English even after Fonseca told him that he does not understand English.<sup>21</sup> *Id.* at 179. Salminen then left and brought back the other supervisors at the job site who spoke Spanish. *Id.* Fonseca testified:

A: [The supervisors] said not to say anything, not to do anything, that Eric was just going to come and sign and say that I had come to work and then I could go home; that I shouldn't call the police, that I shouldn't make a scene, that Eric would pay for everything and that Eric was going to pay for everything, that I would receive my check. All I had to do was I had to go and sign and then I would get the check, even though I didn't work.

*Id.* Fonseca felt humiliated because the supervisors, who were also Hispanics, sided with Salminen, because “he's American and because he's the boss.” *Id.* at 180.

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<sup>21</sup> Fonseca stated that he speaks very little English. Tr. at 180.

Fonseca walked to the first floor of the building, where the security guards were located. *Id.* He asked the other supervisors not to intervene and told them it would be better for them to return to work, or he would report them to the police as well. *Id.* He told the security guard that Salminen had punched him in his left eye. *Id.* Fonseca was unable to uncover his eye due to the amount of pain. *Id.* The light made him “feel as if needles were stabbing inside [his] eye.” *Id.* at 180–81. The security guard only spoke English, so a monitor acted as a translator. *Id.* at 181. Fonseca told the security guard to call the police, the person in charge of the project,<sup>22</sup> and the security officer for Whiting-Turner, the contracting company. *Id.* at 181.

The superintendent of the project and the police came to the jobsite. *Id.* The police questioned Fonseca, and the monitor continued to act as a translator. *Id.* The police took pictures of Fonseca’s eye, called an ambulance, and said they were going to arrest Salminen. *Id.* The police took a report from Fonseca, and they talked to Salminen and requested his identification. *Id.* at 182. Salminen threw the identification at the officer, and the officer made him pick it up and hand it over. *Id.* The police then handcuffed Salminen and took him away in a patrol car. *Id.*

An ambulance transported Fonseca to George Washington Hospital, and the monitor continued to interpret in the ambulance. *Id.* He arrived around midnight and was released around 3:00 a.m. *Id.* Fonseca was directed to visit the ophthalmological center affiliated with the hospital, because he needed to see a specialist for damages to his eye. *Id.* He went to appointments for approximately nine months, and received a series of eye exams. *Id.* Fonseca saw a retina specialist and an optic nerve specialist. *Id.* The specialists determined that Fonseca lost thirty-to-forty percent of his sight in his left eye. *Id.* at 183. He still suffers from complications when he works at night or stays up late, and continues to experience pain and watery eyes. *Id.* The damage to his eye prevents Fonseca from working at night. *Id.*

Fonseca testified that WMS paid his medical bills in the beginning, but he was later told he was responsible for paying them. *Id.* WMS stopped paying in 2011, and the bills were sent to collections with balances exceeding \$3,000 for an MRI scan to check for skull fractures. *Id.* at 183–84. WMS was on notice of the incident, because Fonseca contacted Ortega the night it occurred. *Id.* at 185. Fonseca testified:

A: [T]he day Eric punched me, I called Harold Ortega. The blow was between 11:00 and 11:30 p.m. At that time I called Harold Ortega because he was my boss, he was my immediate boss, and I told him what was happening, that Eric had punched me in my left eye. He told me, Mr. Luis, it is too late at night to go over. Let it be. So try to resolve things in some other way, because they are a client that has given us work. I told him, Harold, the work that they give you is more important than my life and my health? And he told me we’ll resolve it later. Leave it like that. Don’t do anything.

*Id.*

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<sup>22</sup> Fonseca was referring to the superintendent of the entire project but did not know the person’s name. *Id.* at 182.

A doctor placed Fonseca on disability for two weeks, and WMS paid him. *Id.* at 185. The doctor released him to work after the two weeks but directed Fonseca to avoid contaminated and dusty work areas. *Id.* He reported to Ortega that his disability ended and asked for work, so Ortega told him to return to the job site at 1800 F Street. *Id.*

Fonseca returned to work around the middle of August. *Id.* at 186. When he reported to the 1800 F Street job site, a supervisor, Salminen's replacement, informed Fonseca that he was not allowed to work there. *Id.* Using an interpreter, the supervisor for ASI also told him he could not be within 100 meters of the job site, because he "had a problem with the company and the regulations of the company were that [he] had to be away from the company." *Id.* The supervisor gave Fonseca five minutes to vacate the premises before he called immigration to report him. *Id.* at 187. He was afraid, so he left the job site. *Id.* Fonseca called Ortega and told him about the issue. *Id.* After this incident, he received less work assignments. *Id.* at 189. He eventually left in 2015 due to less work and began working at Green Jack. *Id.*

Fonseca knew another laborer at the 1800 F Street job site named Porfirio Arias. *Id.* at 195. He does not know whether Arias was terminated for stealing. *Id.* Fonseca stated that because he was not able to work at the job site after the incident, he does not know about anything that happened after he left. *Id.* at 195–96. He also did not know whether Arias was terminated prior to his injury. *Id.* at 196.

#### **TERENCE WELLS**

*Hearing Testimony – July 26, 2016 (Tr. at 114–124)*

Terence Wells works at Capitol Exhibits, where he builds exhibits for the Smithsonian, other museums, trade shows, and events. *Tr.* at 114. Prior to working at Capitol Exhibits, he worked at B-Dry Waterproofing doing demolition work, asbestos removal, and mold removal in preparation for waterproofing buildings. *Id.* at 115. He earned a certificate in asbestos removal in 2012 when he started working for B-Dry. *Id.* The company paid for the mandatory three-day course in Richmond, Virginia. *Id.* at 123. He is not a member of a labor union. *Id.*

In 2011, Wells was unemployed and looking for work. *Id.* at 115. He was searching Craigslist, the internet, and looking through unemployment papers, including One Stop. *Id.* He searched for jobs in the surrounding cities in Maryland, D.C., and Virginia. *Id.* at 116. He was interested in blue-collar jobs, such as construction and other jobs where he would work with his hands. *Id.* Prior to 2011, he performed brick masonry and carpentry for Clark Construction. *Id.* If offered, he would have accepted a job doing asbestos removal, lead removal, and demolition in 2011, as long as the employer provided him the necessary equipment to work in a hazardous environment. *Id.* at 116–17.

In 2010, Wells worked at Jiffy Lube and performed preventative maintenance. *Id.* at 117. He worked there for almost one year but quit, because the commute was not worth the pay. *Id.* He was living in Woodbridge, Virginia at the time, and the job was near Silver Spring, Maryland. *Id.* at 118. Wells supervisor also was no longer working there, and the replacement supervisor did not want to keep the employees, so he left. *Id.* at 121. His wage at Jiffy Lube was

\$8.50 or \$9.00 per hour, and he was commuting to work by “slugging.”<sup>23</sup> *Id.* at 118–19. Wells believed his Jiffy Lube job was a “waste of time,” because he spent his salary on commuting costs and food. *Id.* at 118.

Wells moved to D.C. around July 2010. *Id.* at 120. He was out of work approximately nine months before he started working at B-Dry in January 2012. *Id.* B-Dry is located in Woodbridge, Virginia, but most of the jobs were in the Silver Spring, Maryland area. *Id.* B-Dry provided work trucks, Wells had access to his mother’s car. *Id.* at 20–21. Wells could justify commuting, because B-Dry paid him \$12.00 per hour. *Id.* He was amenable to accepting any job as long as it paid more than \$8.50 per hour. *Id.* at 124.

Wells did not receive unemployment benefits for the nine months between his job at Jiffy Lube and B-Dry, because he was not aware he was eligible to apply for it. *Id.* at 122. He did apply for unemployment in Virginia during a slow period of about eight or nine months during his employment with B-Dry. *Id.* He also registered for the One Stop in D.C. but never received any job offers, phone calls, or other contacts. *Id.* He visited the One Stop once in person and called twice. *Id.* at 123. Wells did not turn down any job offers prior to accepting the job at B-Dry. *Id.*

#### **CHRISTOPHER WALSH**

*Hearing Testimony – July 26, 2016 (Tr. at 125–134)*

Christopher Walsh began working at Jewett Machine as a machinist apprentice in June 2015. *Tr.* at 126. From August 2013 to June 2015, he worked at Virginia Semiconductor as a semiconductor-processing technician. *Id.* at 126–27. He regularly handled chemicals, hydrofluoric acid, sulfuric acid, and hydrogen peroxide. *Id.* at 127. Walsh wore safety gear, such as latex gloves and a Tyvek jacket, and sometimes he was required to wear a face shield, eye protection, and hearing protection. *Id.* From February 2012 to August 2013, he worked at H.H. Gregg as a part-time warehouse and furniture assembly associate. *Id.* at 127.

While Walsh was unemployed from September 2011 to February 2012, he looked for work through Craigslist, Monster, general Google searches, the Virginia workforce website, and snagajob.com. *Id.* at 127–28. He was looking for general labor, warehouse, light industrial, and construction work in the D.C. and Northern Virginia area, as well as anywhere he could reasonably commute by car. *Id.* at 128, 130. He was not willing to commute to the Baltimore area at that time. *Id.* at 130.

Prior to September 2011, he visited staffing/temporary companies in search of work. *Id.* at 130–31. Walsh stopped going due to a lack of callbacks and available positions. *Id.* at 131. He was dissatisfied with the service he received; however, he was not “sour.” *Id.* He believed his job search would have been successful if he had a “greater skill set.” *Id.* at 132.

Walsh has never obtained an asbestos or lead removal license. *Id.* He knows that asbestos removal work is “generally regarded as dangerous and needs safety and caution involved”;

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<sup>23</sup> “Slugging” is “organized hitch-hiking.” *Id.* at 119. Wells would go to a community parking lot and get a free ride to D.C., because in order to use the HOV lanes to commute into D.C., you need at least three passengers. *Id.* at 118–19. Once in D.C., Wells took the bus to work. *Id.*

however, he has no knowledge of asbestos removal working conditions. *Id.* at 128, 133. He knows nothing about lead removal, and knows very little to nothing about demolition work. *Id.* at 129. At that time, Walsh would have applied for and accepted a job in asbestos removal, lead removal, and/or demolition. *Id.* He would have shaved off his beard, which he has had since 2008, for a job if it was required. *Id.* at 132. Walsh is certain that he never applied for demolition jobs, unless he did so indirectly by checking all of the options at a staffing agency. *Id.* at 133.

Walsh did not receive unemployment compensation from September 2011 to February 2012. *Id.* at 132–33. He was performing frack valve assembly in North Dakota during the summer of 2010 but left, because the winters are terrible. *Id.*

### LOUIS GATLING

*Hearing Testimony – July 27, 2016 (Tr. at 201–215)*

Louis Gatling “identifies” as an African-American. *Tr.* at 203. He has performed abatement and demolition work at Goel Services for approximately five-to-six years. *Id.* at 201. Prior to working at Goel Services, he worked at A-Pro performing asbestos and lead abatement and removal, as well as demolition work. *Id.* He possesses an asbestos worker certification, a supervisor certification, and a lead certification in Maryland, Virginia, and D.C. *Id.* He has held these certifications for over six years, since 2011. *Id.* at 202. He began doing abatement work with FEMA in 2006 after Hurricane Katrina and, in 2008, returned to the D.C. metropolitan area. *Id.*

In 2011, although Gatling had a job, he began looking for more abatement and demolition employment as work decreased. *Id.* at 203, 205. There were times when he was out of work for a month or two. *Id.* at 208. In his experience, abatement jobs are mostly available during the summer, and lead work is sometimes available during the winter. *Id.* Demolition jobs are available all year. *Id.* During periods of unemployment, he sometimes applied for unemployment benefits. *Id.*

Gatling works with a crew of seven of his classmates from school, who also identify as African-American. *Id.* at 202–03. He and his crew searched for jobs in Baltimore, Maryland, and D.C. *Id.* at 202. He remembers applying for jobs at several local companies, as well as a couple of companies in Baltimore.<sup>24</sup> *Id.* At each of those companies, he applied using a paper application. *Id.* at 203.

Gatling described his experience searching for jobs. *Id.* at 206–14. Gatling and his work crew are members of the local abatement labor union. *Id.* at 206. He put his name on the union’s “no work list,” so when companies were looking to hire, the union would contact him. *Id.* Upon completing a job, Gatling accepted the next available job, which was generally with a different company. *Id.* at 209. Before he finishes a job, Gatling contacts his union representative, with whom he has a good rapport, to inquire about upcoming jobs. *Id.* Companies also contacted Gatling directly after he and his crew built a relationship with them. *Id.* at 207. After receiving a call about a job, Gatling usually starts working within a week’s time. *Id.* at 210. The

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<sup>24</sup> Gatling could not recall the names of the companies he applied to in Baltimore, Maryland, except Green Jobs. *Id.* at 204.

crewmember who receives a call about a job determines who will work. *Id.* If Gatling receives the call, then he sends whomever is available, which may or may not include himself. *Id.* at 210–11. Gatling testified that this hiring process is industry practice for asbestos abatement jobs. *Id.* at 211–12. Gatling only turns down a job if he is already working at a different one. *Id.* at 214.

Most jobs only require an abatement license, although some have special requirements, such as residency. *Id.* at 212. Federal government worksites require a background check. *Id.* Gatling has no issue with a long commute. *Id.* For one job in Pennsylvania, the company provides a bus. *Id.* at 211–12. For jobs in D.C., Gatling carpools or uses public transportation. *Id.* at 213. There are no set hours of work, and shifts vary, unless they are in a residential neighborhood. *Id.* at 213.

### **BROOKE SENSENIG**

*Hearing Testimony – July 26, 2016 (Tr. at 25–65)*

Brooke Sensenig has been a compliance officer for the OFCCP since 2010. Tr. at 25–26. Prior to working for the OFCCP, which was her first job in the EEO field, Sensenig worked as a child advocate social worker for the Public Defender’s office. *Id.* at 59. The OFCCP performs complaint and compliance evaluations and investigates federal contractors to ensure compliance with EO 11246. *Id.* at 26. EO 11246 prohibits discrimination and certain employment actions by federal contractors and subcontractors and ensures that federal contractors “promote equal employment opportunity and affirmative action; prohibit[] discrimination on race, sex, religion, national origin, and [] sexual orientation and gender identity.” *Id.*

In the case of WMS, Sensenig was the lead compliance officer. *Id.* An investigation began after the Secretary of Labor “received a letter alleging discrimination, harassment, and a hostile work environment against laborers” at the GSA worksite located at 1800 F Street. Tr. 26–27. Sensenig testified that WMS provides laborers to federal and non-federal contractors and subcontractors for the completion of construction work. *Id.* at 27. WMS had various purchase orders with different contractors for laborer work. *Id.* The OFCCP reviewed WMS from February 1, 2011 through January 31, 2012. *Id.*

Sensenig’s first step in the investigation involved confirming jurisdiction and sending WMS a scheduling letter, which requested information and informed WMS that OFCCP was going to the GSA worksite. *Id.* Jurisdiction is usually determined by reviewing a company’s contracts. However, because WMS confirmed it did not have written contracts, Sensenig reviewed purchase orders that WMS had with federal subcontractors. *Id.* at 27–28. According to the purchase orders obtained from WMS, it billed ASI a total of \$2,346,995.81 for the 1800 F Street modernization project during the review period. *Id.* at 30. Sensenig also requested information about which projects were federal and non-federal to determine which jobs were within the OFCCP’s jurisdiction. *Id.* at 64.

The minimum amount of federal contract work performed by a construction contractor to trigger the requirements of EO 11246 is \$10,000. *Id.* at 30–31. There was a subcontract between

ASI<sup>25</sup> and Interior Specialists (“ISI”) for work at the 1800 F Street worksite, and a prime contract between Whiting Turner Walsh and ISI. *Id.* at 31. The main contract was between Whiting Turner Walsh and the General Services Administration, which is a federal agency. *Id.* at 32. Based on documentation provided by WMS, Sensenig determined that WMS worked on approximately \$5.8 million of federal contracts during the review period. *Id.* The \$2.3 million contract at the GSA worksite accounted for over one-third of WMS’s federal contract work. *Id.* at 33.

The OFCCP sends a scheduling letter to a contractor as notice that it will evaluate the contractor. *Id.* The letter lists the items that the OFCCP will review or needs the contractor to provide. *Id.* Pursuant to EO 11246, contractors are required to provide the OFCCP with the following:

All records of their 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 have conducted the appropriate outreach and recruitment; notified the agencies of any subcontracts that they may have in general.

*Id.* at 33–34. The OFCCP requested all of this documentation from WMS. *Id.* at 34.

WMS produced a list of some current employees and payroll information. *Id.* at 34. In response to a follow up request made by the OFCCP, WMS also provided the gender, race, and ethnicity of its employees. *Id.* at 35–36. The OFCCP did not obtain lists of unsuccessful applicants, an applicant roll log, policies, or written programs regarding the compensation process, records of employees’ experience, or records of employees’ methods of transportation to job sites. *Id.* at 34–35. The OFCCP also did not receive records on WMS’s Equal Employment Opportunity policy, documentation of employees “self-selecting to not accept certain jobs,” or records of employee complaints of harassment on the job. *Id.* at 35. Sensenig testified that she was not aware of any history of discipline imposed by WMS, and Fernandes told the OFCCP that workers did not receive promotions, so there were not any disciplinary records or promotion records. *Id.* at 63.

Sensenig testified that there were problems with the documentation provided by WMS:

In terms of, well, as I said, with the list of employees, information that we requested was missing or incomplete. We’d have to follow up to obtain that information. We did not receive documentation of hiring, just generally hiring paperwork or things of that nature. With the payroll, we had – I would say over the course of several months, we would go back and forth after we had identified, for example, a list of people who appeared in their list of workers but did not show up on payroll, so we had to get confirmation of that. We saw entries that appeared to be duplicate entries within the payroll and had to follow up to confirm

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<sup>25</sup> ASI entered into a settlement agreement with the OFCCP regarding the 1800 F Street worksite after a joint investigation by the OFCCP and the EEOC. *Id.* at 60.

that with WMS and then move them, such as various, I guess, data integrity issues.

*Id.* at 36. In Sensenig’s opinion, WMS failed to comply with the recordkeeping requirements of EO 11246. *Id.* at 37.

The OFCCP received 182 worker candidate profile sheets from WMS. *Id.* at 38. The profile sheets contained information about potential workers and their experience. *Id.* Approximately forty-nine of the profile sheets were completed and others had very limited information. *Id.* at 40–41. Based on the payroll data, during the review period, WMS had over 700 employees. *Id.* at 38.

The OFCCP conducted an onsite investigation at WMS’s Warner Street location in Baltimore, Maryland. *Id.* at 42–43. The OFCCP also visited the GSA building at 1800 F Street to interview workers. *Id.* at 43. At the Baltimore office, the OFCCP collected and requested documentation and conducted interviews with Fernandes, Ortega, and Rivera. *Id.* at 43, 65. Wesley Black was interviewed offsite via telephone. *Id.* at 43. The OFCCP also conducted interviews at Casa de Maryland in Hyattsville, Maryland, because it was clear some workers were uncomfortable speaking to the OFCCP at the worksite. *Id.* The OFCCP determined, based on its compliance evaluation, that WMS was deficient in technical requirements, as well as in their equal employment opportunity and affirmative action requirements. *Id.* at 44. The OFCCP also determined that WMS “discriminated in their hiring practices and their compensation practices and subjected their workers to a hostile work environment.” *Id.*

Sensenig learned about WMS’s hiring process through interviews with the WMS management, recruiters, and employees. *Id.* at 46. Most hires came to WMS by word-of-mouth or employee referrals. *Id.* The minimum requirement to be hired was that the applicant had to show up for work. *Id.* Ortega, a recruiter, stated that he does not turn anyone down or tell anyone that he cannot offer work. *Id.* at 47–48. Sensenig testified that even if WMS offered employment to everyone that was interested, she could not assume that WMS’s applicant flow and hire flow were coextensive without having an applicant flow for comparison. *Id.* at 61.

Ortega also told the OFCCP that his recruitment broke down into approximately 80% asbestos and 20% demolition, and in order for a laborer to perform asbestos work, he or she had to be certified. *Id.* Ortega told the OFCCP that WMS has a training school called PIT within its building where WMS laborers get their asbestos license.<sup>26</sup> *Id.* at 48–49. Sensenig did not know if WMS paid laborers while at PIT. *Id.* at 62. She also did not know how many workers actually attended PIT or whether the school operated continuously or intermittently. *Id.*

WMS did not provide Sensenig with any advertisements it placed for recruiting purposes. *Id.* at 49. WMS also did not provide applications or documentation of prior work experience of laborers it hired, except for the worker profile sheets. *Id.* WMS did not provide accurate start dates for its hires, and the OFCCP did not receive any hiring paperwork or documentation that contained the start date information. *Id.* According to Fernandes, the hire date was the first day

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<sup>26</sup> Sensenig does not speak Spanish, and a translator was not present during her interview with Ortega. Tr. at 60–61. Ortega told her that he could speak with her. *Id.* at 61.

that a worker worked and appeared in the payroll. *Id.* The OFCCP also did not receive any records of applicants not hired by WMS. *Id.* Fernandes told the OFCCP that his recruiters, Ortega and Rivera, were in charge of hiring, and that he did not participate in the hiring process. *Id.* at 50.

The recruiters assigned laborers to worksites. *Id.* at 51–52. Fernandes provided the recruiters with a list of work that needed to be completed, and the recruiters would send available laborers to the job sites. *Id.* at 52. WMS did not produce any records of this process, but it did provide records of job assignments. *Id.* at 52, 63. Black, the comptroller at WMS, told the OFCCP that WMS paid its employees weekly. *Id.* at 51. WMS set the rates of pay, which fluctuated according to the type of project and whether it was federal or non-federal. *Id.* Black also provided the OFCCP with the payroll information, and he assisted the OFCCP with trying to correct errors in the payroll. *Id.*

WMS did not have any promotion policies or work assignment policies. *Id.* at 52. It also did not have any written disciplinary policies, a written or verbal EEO policy, or a harassment policy. *Id.* at 52–53. Management did not receive training about workplace harassment. *Id.* Laborers also did not receive any training regarding workplace harassment. *Id.* at 53–54. WMS did not have a system in place to deal with workplace harassment. *Id.* at 54.

Based on interviews with WMS’s employees, the OFCCP concluded that WMS employees were being harassed. *Id.* Sensenig stated the following regarding evidence gathered from the interviews:

So through 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.

*Id.* at 54–55.

After hearing these allegations during the investigation, the OFCCP spoke with the managers at WMS, including Fernandes, to ask whether they had received any complaints of harassment, physical violence, or a hostile work environment; Fernandes said no. *Id.* at 57–58.

## **EXPERT REPORTS AND TESTIMONY**

### **DR. JANICE FANNING MADDEN**

*First Report (GX 12); Hearing Testimony – July 27, 2016 (Tr. at 215–374)*

Dr. Janice Fanning Madden<sup>27</sup> is a professor of economics at the University of Pennsylvania, and an economist for Econsult Corporation, a consulting firm. Tr. at 217; GX 12 at 33–34. She specializes in labor economics, urban economics, and statistics and econometrics as they apply to those fields, and she has published many articles on those subjects. Tr. at 218. The OFCCP retained Dr. Madden<sup>28</sup> to analyze<sup>29</sup> whether WMS’s hiring differed based on race and ethnicity, whether weekly hours worked by WMS employees differed based on gender, ethnicity, or race, and whether hourly pay rates for WMS employees differed based on gender. *Id.* at 222–23.

## FINDINGS

In her first report for OFCCP, Dr. Madden reached three basic findings. Tr. at 227–28; GX 12 at 4–5. Her first finding was that non-Hispanic persons were less likely to be hired by WMS during the review period.<sup>30</sup> *Id.* The data she used in her analysis included an Excel workbook with multiple tabs consisting of payroll data, including race and ethnicity, gender, dates of payroll, and hourly rates. Tr. at 236; GX 12 at 6. Dr. Madden received a small number of applications but did not receive any hiring records. GX 12 at 6. Dr. Madden also received a select number of paystubs. Tr. at 236. Dr. Madden determined that there were three core concerns with the data she received: (1) for a few people that WMS claimed to have hired, it failed to present any payroll data for those hires;<sup>31</sup> (2) the hours worked and the hourly pay rates were inconsistent, including situations in which overtime was reported for laborers that worked less than 40 hours; and (3) there was no data prior to January 22, 2011.<sup>32</sup> Tr. at 237–38.

## PROXY DATA: U.S. CENSUS BUREAU DATA<sup>33</sup> V. ASBESTOS LICENSURE DATA

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<sup>27</sup> Dr. Madden received a bachelor’s degree in economics and mathematics from the University of Denver. Tr. at 218. She received a master’s degree and a doctoral degree in economics from Duke University, where she specialized in labor economics, microeconomics, and econometrics. *Id.*

<sup>28</sup> I accepted Dr. Madden as an expert witness at the hearing on July 27, 2016. *Id.* at 226. She estimates that she is retained as a plaintiff expert witness 70-80% of the time and as a defense expert witness 20-25% of the time. *Id.* at 309. Dr. Madden has been retained by the Department of Labor, EEOC, and Department of Justice about a dozen times. *Id.* at 309–10.

<sup>29</sup> Dr. Madden estimates that she worked on this project for under fifty hours. *Id.* at 308.

<sup>30</sup> During the review period, 50 non-Hispanic workers were hired, while an “ethnically neutral selection process” should have led to at least 221 additional non-Hispanic hires. GX 12 at 4.

<sup>31</sup> On direct examination, Dr. Madden testified as to issues with data inaccuracy:

When defendants provide inaccurate data, it’s simply harder for plaintiffs to show a pattern that truly exists. So bad data makes it harder to show something exists. When you find something that exists, unless the data has been doctored, the random noise shouldn’t affect the patterns shown by plaintiffs, but it may make it more difficult to show a pattern that truly exists.

Tr. at 240–41.

<sup>32</sup> Dr. Madden’s initial report suggested she did not have any data prior to January 29, 2011, but at the hearing, she corrected the information to January 22, 2011, which was accepted without parties’ objections. *Id.* at 239; *id.* At 6.

<sup>33</sup> Dr. Madden testified that Defense Exhibit 6 (EX 6) is the U.S. Census Bureau’s (“U.S. Census”) national data of general construction laborers. *Id.* at 363–64.

Dr. Madden considered all employees that appeared on WMS payroll<sup>34</sup> after January 22, 2011, but not on the January 22, 2011 payroll, to be new hires<sup>35</sup> for the review period between February 1, 2011, and January 31, 2012. *Id.* at 238–44; GX 12 at 6. Because she did not receive any hiring or applicant records<sup>36</sup> to determine a pool of applicants, she used the U.S. Census Bureau’s (“U.S. Census”) data to get a representative potential applicant pool. Tr. at 243–45; 251–55. She used the data for ethnic groups in the general construction laborer category in the Washington, D.C. metropolitan area; from this data, she determined the expected proportion of construction laborer hires, by race and ethnicity. *Id.* at 244; GX 12 at 7–8. She then used a comparison method to reach her conclusions. Tr. at 244; GX 12 at 7. She compared the proportion of laborers from each race or ethnicity expected to be hired with the proportion of laborers from each race and ethnicity that WMS actually hired. Tr. at 244; GX 12 at 7. If an expected proportion exceeded an actual proportion, she found the statistics consistent with a discriminatory hiring practice. Tr. at 244–45; GX 12 at 7.

Dr. Madden elaborated on her decision to use U.S. Census data as proxy data for her analysis. Tr. at 251–57. She explained that the U.S. Census’ data is “the only data you can use that would cover the [relevant] metropolitan area” for the relevant year and occupation. *Id.* at 251. She further noted that, “U.S. Census data is generally viewed as the best data available”, “[b]ecause the norms by which the U.S. Census collects data -- and I served on the Commission for Employment and Unemployment Statistics in the Carter Administration, where we actually wrote reports on comparing what was going on around the world.” *Id.* at 251–52. Dr. Madden stated that she accounted for the U.S. Census’ margin of errors in her analyses. *Id.* at 252.

Dr. Madden “strongly disagree[d]” with WMS’s theory that the more appropriate proxy data is asbestos licensure data. *Id.* She testified that, based on the data provided and hearing testimony, there is ample evidence that WMS workers received an asbestos removal license after being hired by WMS, rather than prior to employment with WMS. *Id.* Dr. Madden found “evidence on the paystubs that WMS was financing workers to take the certification program.” *Id.* Dr. Madden testified that asbestos licensure data “simply showed who was actually hired,” and “not who wanted the jobs or who was able to do the jobs.” *Id.* at 253. The evidence clearly showed that “tuition [was] being deducted from paychecks of people after they’re originally

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<sup>34</sup> Dr. Madden testified that she did not use the data in the hire lists produced by WMS, because “[t]here were lots of people on that hire list, argued to have been hired in the same period that [she] found no pay roll data on.” Tr. at 242. According to Dr. Madden, “[p]ayroll is generally more accurate” than hire lists. *Id.* “Payroll data is generally accurate because there’s money involved, because it determines what the company is paying, and there’s also lots of federal regulations from the tax people and others that require those records to be kept.” *Id.* at 243.

<sup>35</sup> Dr. Madden testified that the term ‘rehire’ “has not expert definition. In common parlance, it means you’re hiring somebody you hired before.” *Id.* at 239. When asked how ‘rehires’ impact her opinion, Dr. Madden answered, “[w]ell, rehires are hires and had WMS provided records, I would’ve certainly been happy to look at the odds of rehires by ethnicity. I had no records to be able to do so. I could only determine hires by the records they gave me and I used the records I had.” *Id.*

<sup>36</sup> Dr. Madden was provided approximately 180 worker candidate profile forms; however, she determined they were unusable. *Id.* at 320. The forms did not state the race or ethnicity of the candidate. *Id.* Dr. Madden disagreed with WMS’s contention that the candidates’ place of birth, which was noted on the forms, was an accurate indicator of the candidates’ race/ethnicity. *Id.* at 321. Being born in Richmond, Virginia is irrelevant to determining race and ethnicity. *Id.* at 365–66. On the other hand, being born in El Salvador implies that you are Hispanic; however, “John McCain was born in Panama.” *Id.* at 366.

hired,” which was clearly “a range to get the asbestos certification as part of the hiring process. . . .” *Id.*

Dr. Madden also disagreed with using asbestos licensure data, because there was no such data available. *Id.* According to Dr. Madden,

the data that was produced by WMS supporting their expert report for Virginia is from the area -- part of the MSA [(metropolitan statistical area)] that has the most Hispanics, so by definition would overestimate Hispanic representation assuming that where Hispanics are living more, they’re also more of that labor force. WMS later produces the Maryland licenses and the Hispanic representation using their approach to analyzing Hispanic representation showed a much larger representation of non-Hispanics, 27%. And we don’t have D.C., where we think it might be particularly important. But the basic problem is that that is showing who got hired, not showing who’s interested or who’s able to do the work.

*Id.*

Dr. Madden also took issue with Dr. White’s (WMS’s expert) method for identifying the ethnicity of individuals with a Virginia asbestos license, because the list of licensees did not include ethnicities. *Id.* at 253–55. Dr. White “used U.S. Census classification of names and what people who have that name are and how they are distributed across ethnicity, to assign ethnicity to the people on the Virginia list. . . .” *Id.* at 254. Based on this method of assigning ethnicity, based on the U.S. Census list, Dr. White opined that 12% of Virginia asbestos licensees were non-Hispanics. *Id.* Dr. Madden identified three flaws in Dr. White’s approach: (1) “it’s Virginia, where we’re going to have more Hispanic representation than elsewhere in the metropolitan area”; (2) “it shows who’s hired, not who’s interested in work”; and (3) “the identification of Hispanic individuals for this population may be off and my best evidence of that was finding that 20% of people identifying as white who are hired by WMS in this dataset, using Dr. White’s test, get identified as Hispanic.” *Id.* at 254–55.

Dr. Madden opined that WMS did not require candidates to have an asbestos removal license to be eligible for employment. *Id.* at 255. First, the paystubs produced by WMS and provided to Dr. Madden showed that WMS deducted the tuition for the license after individuals were hired.<sup>37</sup> *Id.* Second, out of the 182 worker candidate profile forms, which WMS alleged were all hires, at least 82 listed the candidate as not being licensed. *Id.* “So there seems to have been lots of room for hiring of people without licenses, even though they might subsequently, and immediately upon hire, get them.” *Id.* Third, there was evidence that one of the recruiters stated that WMS “hired anybody and would send them over to the school if they needed it.” *Id.*

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<sup>37</sup> Dr. Madden agreed with WMS’s contention that “an experienced asbestos worker, [] hired by WMS, [can] receive [] refresher training and then have a deduction in their paystub.” Tr. at 333. Dr. Madden testified that “[I]f it’s somebody who’s a new hire and WMS is paying for a refresher course, it implies that they’re reactivating the license or renewing the license.” *Id.* at 334. She, however disagreed with WMS’s contention that such an individual held an asbestos license prior to beginning employment with WMS. *Id.* Dr. Madden asserts that she can deduce when an employee completes the refresher course from when the deduction appears on the paycheck. *Id.* at 334–35. She, however, did not conduct an analysis to see how many of the deductions for training appeared in employees’ first paychecks. *Id.* at 335.

## ASSUMPTIONS

Dr. Madden outlined the assumptions she made in reaching her findings. GX 12 at 15–16. She assumed it was only necessary for analyses to compare “similarly situated *groups* of men and women and Hispanics and non-Hispanics.” *Id.*; *see also* Tr. at 250–51. Characteristics that are equal in both genders or both ethnicities and races are irrelevant in an analysis of whether gender or ethnicity affected outcomes. Tr. at 250–51; GX 12 at 15–16. Dr. Madden based her analyses on a basic, implicit assumption that “among non-Hispanic general construction laborers in the Washington, D.C. area, there is no difference by group in the distribution of skills and interest in the kind of work that WMS is hiring for.” Tr. at 250–51. Dr. Madden elaborated in her testimony that:

as long as Hispanics and African Americans and white non-Hispanics and Asians and American Indian/Pacific Islanders as groups, on average, have the same interest in these kinds of work, that these data represent the appropriate way to measure differences in hiring, particularly when the employer kept no records of applicants.

Q. Okay. Now, is that type of an assumption supported by labor economics?

A. I know of no evidence that shows differences in preferences for these particular kinds of work among people that are already engaged in general labor, construction labor.

*Id.* at 251.

Dr. Madden’s analyses “are not designed to state whether a particular person should have been hired, or given a particular schedule of hours, or assigned a specific pay rate”; such a model would have to account for all the qualifications that differ among candidates. GX 12 at 16. Dr. Madden assumed that a study that considered qualifications that do not differ by gender group might render the analyses less powerful and more likely to lead to an erroneous conclusion. *Id.* Dr. Madden concluded “[o]nly a statistical analysis that uses data from several [employment] decisions, and that, for each relevant characteristic, either assumes no gender differences, on average, or controls for gender differences, can sort out the effect of gender from those of relevant characteristics in affecting solutions.” *Id.* at 16–17.

## HIRING DISCRIMINATION

The non-Hispanic number of hires at WMS during the review period was 19.36 standard deviations below the U.S. Census’ projection of non-Hispanic hires in the construction labor market. Tr. at 245; GX 12 at 9. Dr. Madden characterized the probability that the differences in hiring between Hispanics and non-Hispanics happened by chance<sup>38</sup> as “more than 1 in

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<sup>38</sup> Dr. Madden asserted the following regarding the probability that the disparities occurred by “chance”:

781,000,000,000.” GX 12 at 9. She also disaggregated the non-Hispanic racial categories into Black, non-Hispanic White, Asian, and American Indian/Pacific Islander laborers. *Id.* at 9–11. She found that 4.4% of WMS’s hires were Black in 2011 while the proportion of Black construction laborers hired in the metropolitan area was 11.1%. Tr. at 244; GX 12 at 10. This difference was 5.95 standard deviations. Tr. at 245; GX 12 at 10. Likewise, she found that non-Hispanic Whites represented a 28% proportion of construction laborers hired in the area, while the WMS rate of non-Hispanic White hires was 2.7%, a difference of 19.90 standard deviations. Tr. at 244–45. Further, 1.5% of construction laborers in the metropolitan area were Asian, and the proportion of WMS hires that were Asian was 0.5%, a difference of 2.93 standard deviations. *Id.*; GX 12 at 10–11. Lastly, American Indian/Pacific Islanders represented 0.4% of construction laborer hires in the metropolitan area, and WMS did not hire any American Indians or Pacific Islanders, a difference of 2.87 standard deviations. Tr. at 244–45; GX 12 at 11

| <b>Table 1<sup>[39]</sup></b>   |  |               |        |
|---|--|---------------|--------|
| <b>Hiring Differentials, by Race and Ethnicity, with Respect to Hispanics Hired by WMS February 2011–January 2012</b> |  |               |        |
|   | % Representation among Construction Laborers |               |        |
|   | US Census                                    | WMS Solutions | t-test |
| Non-Hispanics   | 41.1%  | 7.5%          | 19.36  |
| Blacks  | 11.1%  | 4.4%          | 5.95   |
| Whites, non-Hispanic  | 28.0%  | 2.7%          | 19.90  |
| Asians  | 1.5%   | 0.5%          | 2.93   |
| American Indians/Pacific Islanders  | 0.4%   | 0.0%          | 2.87   |

\*Based on a two sample test of proportions

When conducting her analysis for hiring discrimination, Dr. Madden did not control for a number of variables due to a lack of data provided by WMS.<sup>40</sup> Tr. at 258–61. She did not control for applicant experience, explaining that “7.5% of the hires are non-Hispanics and I have a

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If a [T]-test meets the standards of lower than a 5% probability, this could be by chance, if the value is over 1.96. And you can see that all of these have values over 1.96. For non-Hispanics, the t-test is 19.36. That’s similar to winning the lottery. The probability that this could’ve happened by chance is the probability that you would’ve won the Connecticut Powerball in the old odds. The difference for African Americans is 5.95 standard deviations and actually involved 44 fewer African Americans than we would’ve expected to see hired. For White non-Hispanics, 19.9 standard deviations -- again, Powerball odds -- and that we would’ve seen 168 more White non-Hispanics being hired. For Asians, the difference between 1.5 and 0.5 -- and remember, this is like looking at fewer flips of the coin. We’re seeing far fewer people available and hired, so it’s more difficult to find a pattern, but we still find one: 2.93 standard deviations, more than 1.96, and a shortfall in WMS hires of seven Asians.

*Id.* at 245.

<sup>39</sup> Table 1 is reproduced from Table 1 in Dr. Madden’s first report at GX 12.

<sup>40</sup> Dr. Madden disagreed with WMS’s assertions that Hispanics are more willing to work in a Tyvek suit and with known carcinogens. Tr. at 364–65. There is no literature or research that supports WMS’s theories. *Id.* “[E]ven if there were such research, the issue is looking at people who are in the same region, in the same occupational category, because a lot of things that selected them into there are no longer there when we do comparisons by race, gender, and ethnicity.” *Id.* at 365.

shortfall of 200 -- so there were hundreds and hundreds and hundreds of hires during this time period and I had 182 candidate records which were only hires. So I had no data on experience of non-hires, or people who were interested.” *Id.* at 258. Dr. Madden also did not control for rehires. She reviewed a list of hire dates, which was initially only provided to Dr. White, but she was unable to use the data; because she “didn’t have data on who else was working at the same time period who would’ve been eligible for rehire.”<sup>41</sup> *Id.* at 259.

#### HOURS-WORKED DISCRIMINATION

Dr. Madden’s second finding was that women and non-Hispanics of both genders were assigned fewer weekly hours than Hispanic males during the review period. GX 12 at 4, 12–13. She used linear regression analysis<sup>42</sup> to reach her conclusions, adjusting for pay period.<sup>43</sup> *Id.* at 12. She found that in a gender-neutral and racially-neutral hiring environment, female laborers at WMS were expected to receive 13.9% additional weekly hours and non-Hispanic laborers were expected to receive 9.6% additional weekly hours. *Id.*

Through her linear regression analysis,<sup>44</sup> Dr. Madden also computed t-test results, which are equivalent to the number of standard deviations that the outcome differs from zero.<sup>45</sup> GX 12 at 12–13. The 13.9%<sup>46</sup> less weekly hours assigned to women was equal to 7.98<sup>47</sup> standard

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<sup>41</sup> In regards to rehires, Dr. Madden stated, “I have to know the pool of people who were similarly situated and what the ethnic composition of that pool was, and that’s what I don’t have in any way. But the bottom line is, even if I assumed that all of the rehire pool was Hispanic, because virtually all of the rehires are Hispanics, and assume the pool was the same, which I do when I take those out, I still get statistical significance for each of these groups.” *Id.* at 260–61.

<sup>42</sup> Linear regression analysis is a type of statistical analysis that “measures the discrete influence [that] independent variables have on a dependent variable.” *Segar v. Smith*, 738 F.2d 1249, 1261 (D.C. Cir. 1984) [hereinafter *Segar*]. Common independent variables in a Title VII case include race, age, education, and experience. *Id.*

<sup>43</sup> Dr. Madden controlled for the pay period, because “there is some seasonality to work hours, and in the summer, when there’s more work hours, if there’s gender differences or race and ethnicity differences in who’s working, that may account for it.” Tr. at 266.

<sup>44</sup> Dr. Madden testified that the method she used in her analysis is one commonly used by other experts in the same field. *Id.* at 268.

<sup>45</sup> T-test results “measure the probability that the result obtained could have occurred by chance.” *Segar*, 738 F.2d at 1261.

<sup>46</sup> Dr. Madden explained the r-squared value:

[A]n R-squared is how much of the overall variation among individuals are you explaining with what you have in your model. So I am explaining -- and it’s something in the range of 13 or 14% of the variation on work hours across individuals, by controlling for pay period, gender, race, and ethnicity. This is a variable that is normally measured with a tremendous amount of noise and it’s quite standard that the probabilities or the explanatory power -- the variance you’re explaining is small.

I want to point out that I have published articles with R-squared much less than 10%, but the standard is what you explain relative to what the norms are to explain, not what the overall value is. In fact, most scholars would tell you, an analysis that has a very high explanatory power has probably made a mistake because it’s probably putting something that you’re trying to explain in the model to get the result.

Tr. at 268–69.

deviations beyond gender having no effect on weekly hours. *Id.* at 13. Similarly, the 9.6%<sup>48</sup> less weekly hours assigned to non-Hispanics was equal to 3.10 standard deviations beyond ethnicity having no effect on weekly hours worked. *Id.* Dr. Madden also found that when she disaggregated the non-Hispanic laborer group, non-Hispanic Blacks worked, on average, 10.1% fewer hours than Hispanics and non-Hispanic Whites worked 9.0% fewer hours than Hispanics, 2.58 standard deviations and 1.86 standard deviations,<sup>49</sup> respectfully. *Id.* Dr. Madden did not look at Asians separately, because “when [she] looked at that group relatively, there are so few of them, you can’t really test it. That’s looking at a coin toss, is it fair or not with two tosses.” *Tr.* at 267–68.

| <b>Table 2<sup>[50]</sup><br/>Percentage Differences in Weekly Hours at WMS,<br/>by Gender, Race and Ethnicity<br/>February 2011–January 2012</b> |                        |        |
|---|------------------------|--------|
| Group   | Percentage Difference* | t-test |
| Women relative to Men   | -13.9%                 | -7.98  |
| Relative to Hispanics   |                        |        |
| Non-Hispanic Blacks and Whites  | -9.6%                  | -3.10  |
| Blacks  | -10.1%                 | -2.58  |
| Whites  | -9.0%                  | -1.86  |

\*Based on a regression analysis of the natural logarithm of weekly hours on gender and race/ethnicity and on a series of dummy variables representing the pay period.

In forming her opinion, Dr. Madden assumed that “men and women who are general laborers working at WMS are equally available and interested in the hours.” *Id.* at 270. She testified that she did not have contradictory evidence. *Id.* Dr. Madden also assumed that, “non-Hispanic Blacks and Whites, relative to Hispanics that are in the same situation-- working for the same company and the same sets of jobs, have the same interest in working the same kinds of hours.” *Id.* at 271. Again, she did not have contradictory evidence. *Id.* Dr. Madden stated that, “the research literature just really doesn’t show differences in interest in working among workers in the same occupation in the same company, different hours by race and ethnicity.” *Id.*

Dr. Madden did not control<sup>51</sup> for a number of variables, due to the absence of data and lack of support in the relevant literature. *Id.* at 271–82. She did not control for applicants’ prior

<sup>47</sup> Dr. Madden testified that the probability that the statistical difference in hours assigned to women compared to men could have occurred by chance is “very, very low. It’s certainly less than one in a million, 1 in 10 million.” *Id.* at 270.

<sup>48</sup> The probability that the statistical difference in hours assigned to non-Hispanics compared to Hispanics could have occurred by chance is “one in a thousand.” *Id.*

<sup>49</sup> Dr. Madden noted that while the percentages for non-Hispanic Blacks and non-Hispanic Whites were comparable, the standard deviations differed more so for non-Hispanic Whites because there were significantly less non-Hispanic Whites. GX 12 at 13–14. “With fewer differences to observe, greater differences are required to yield the same degree of confidence (which is standard deviations) that the outcome differs from zero.” *Id.* at 14.

<sup>50</sup> Table 2 is reproduced from Table 2 in Dr. Madden’s first report at GX 12.

<sup>51</sup> Dr. Madden explained her process for controlling for variables when conducting a statistical analysis:

work experience, because there was only “a very small minority of the hires.” *Id.* at 271. The data that was available was inconsequential, because it lacked race and ethnicity identifiers, nor was there any evidence of differences in work experience. *Id.* She was also unable to control for client preference. *Id.* at 274. When reviewing the data based on projects, it was clear “that most of these differences are being generated by Hispanics and men being assigned to the projects that offer more hours.” *Id.* Dr. Madden was also unable to control for workload,<sup>52</sup> pay period,<sup>53</sup> asbestos abatement certification, and worker preference, because there was no data available.<sup>54</sup> *Id.* at 276–82. Dr. Madden testified that she has no knowledge of “any peer-reviewed analysis reports that included client preference as a basis for justifying client preference.” *Id.* at 282.

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When I do a statistical analysis, I’m most concerned particularly about controlling for things that might affect outcomes for the purpose of a study. So if I’m trying to explain differences by race and gender, I’m interested in anything that might be different by race and gender. And if it’s not different, it’s not going to have any effect. It’ll boost the explanatory power, but it’s not going to affect the observed race and gender differences. There has to be difference by race and gender for it to affect that. And then I go to the literature on what it shows about what affects it and most importantly, I have to have the data. I can’t make bricks without fiber. I can’t make statistical tests without the variables.

Tr. at 272.

<sup>52</sup> Dr. Madden testified:

I couldn’t have. I could control for project, but it seems to me that’s part of the issue here, that WMS is hiring workers for projects and if they’re hiring women for projects that involve lower salaries and lower hours, and whites and African Americans for projects that have lower hours, then that’s part of the way we get the disparities, but it’s still a disparity.

*Id.* at 276.

<sup>53</sup> Dr. Madden testified:

Because it’s the coin-flipping example; there’s just too few observations because you don’t -- you’d have enough -- you want to get a lot of coin flips to see if there’s a pattern. That’s taking away the pattern. It is important to control for pay period, but you don’t want to do an analysis by pay period. And the other problem is such an analysis is statistically flawed because if you’re looking at it that way, you’re assuming that it’s a different employer. The pay periods are independent of one another, which statically means there’s no relationship and obviously, that’s not true. I’ve controlled for pay period using the appropriate technique, recognizing the dependence.

*Id.* at 277.

<sup>54</sup> Dr. Madden further testified as to the relevance and impact of other “real world” factors on hours worked. *Id.* at 341–47. Dr. Madden opined that whether an “employer moved a person from one job to the next rather than release them back to WMS for reassignment” has no relevance to race, gender, or differences in hours worked. *Id.* at 341. Based on her work on transportation in the labor markets (e.g., looking “at the effect of locational differences in the labor market on wages and employment for African Americans versus whites and married women versus men”), she asserted that transportation also has no relevance. *Id.* at 341–42, 362. Dr. Madden conceded that an individual’s decision not to work would impact the number of hours worked in a week; however, she has never seen such data. *Id.* at 343–44. She further conceded that raising children also affects the number of hours worked in a week. *Id.* at 344. Dr. Madden, however, refused to make generalizations regarding general Hispanic female workers. *Id.* at 345–46. She conceded that the number of hours worked by women and non-Hispanics could be affected by their employers’ decisions; however, “in a neutral, race-neutral, gender-neutral, ethnically neutral environment, the odds of being assigned to a contractor that assigns fewer hours shouldn’t be any different by race, ethnicity, and gender.” *Id.* at 346.

Finally, Dr. Madden stated that the data showing that women were being “over-hired” but were underpaid is a “common” occurrence.<sup>55</sup> *Id.* at 279.

### COMPENSATION DISCRIMINATION

Dr. Madden’s third finding was that female laborers at WMS received lower hourly wages than male laborers during the review period. GX 12 at 5. In a gender-neutral wage environment, women were expected to receive a 14.1% higher hourly wage rate. *Id.* Dr. Madden used a linear regression analysis<sup>56</sup>, adjusting for potential gender differences<sup>57</sup> in pay periods worked, to reach her conclusions. *Id.* at 14. She found that women, on average, were paid 14.1% less per hour worked than men during the review period. *Id.* at 15. The corresponding t-test showed that 14.1% less per hour was equivalent to 18.68<sup>58</sup> standard deviations beyond gender having no effect on hourly pay rates. *Id.*

Dr. Madden based her opinion, that women were paid less per hour than men, on the assumption “[t]hat 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.” Tr. at 287.

Dr. Madden did have data regarding whether an individual was working a prevailing rate job or a regular job, and accordingly, found that it was an “important contributor.” *Id.* at 350–51. She however, did not include it in her regression analysis, because it “would over-control; that would be putting in things that the employer is controlling and could be part of the cause of the disparate hours of women, or disparate wage rates of women.” *Id.* at 351. Dr. Madden assumed that WMS was aware of the type of pay rate, because WMS assigned laborers to projects. *Id.* She conducted an analysis “early on” that controls for prevailing rate, which produced an r-squared value of approximately 13%. *Id.* at 351–52.

Dr. Madden’s analyses did not account for the following: overtime work versus non-overtime work; WMS’s process for determining pay rate; prior relevant work experience; and client preference. *Id.* at 287–89, 347–50. There was no data on overtime, because the payroll WMS produced is inaccurate.<sup>59</sup> *Id.* at 287–88. Additionally, Dr. Madden had no data on WMS’s

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<sup>55</sup> Dr. Madden opined:

Based on my 44 years of research as a labor economist analyzing discrimination and specializing in discrimination, I know it is quite common that women get preferred when there is discrimination occurring, that they get preferred for jobs that have lower wages and inferior conditions. So you could have an employer over-hiring women for some jobs, while giving -- the way the discrimination could occur is giving the prize jobs to others. So the relative hiring of women relative to men is meaningless in terms of thinking about how hours and compensation differences could occur. And I think this is well understood by labor economists who analyze discrimination generally in the research.

*Id.* at 281.

<sup>56</sup> Dr. Madden stated that “this is the standard method of looking at compensation differences.” *Id.* at 285.

<sup>57</sup> Dr. Madden also controlled for race and ethnicity. Tr. at 285. There were no women, however, who were included in this variable. *Id.* “So effectively, Hispanic women are being compared to Hispanic men.” *Id.*

<sup>58</sup> “The odds that this could’ve happened by chance is the same odds as sort of winning the Powerball.” *Id.* at 285.

<sup>59</sup> Dr. Madden took issue with the payroll data showing that WMS employees who worked less than forty hours in a workweek or no regular hour at all were being paid overtime. *Id.* at 315–17.

process for determining pay rate.<sup>60</sup> *Id.* at 288. Dr. Madden also did not have any data on prior relevant work experience, client preference, nor WMS’s clients’ preference for specific work crews. *Id.* 288–89. Consequently, she did not control for variables that had no data.

| <b>Table 3<sup>[61]</sup></b>  |                        |        |
|--|------------------------|--------|
| <b>Percentage Differences in Hourly Pay Rates at WMS, by Gender February 2011–January 2012</b> |                        |        |
| Group  | Percentage Difference* | t-test |
| Women relative to Men  | -14.1%                 | -18.68 |

\*Based on a regression analysis of the natural logarithm of hourly wage rate on gender and race/ethnicity and on a series of dummy variables representing the pay period.

| <b>Table 5<sup>[62]</sup></b>   |                     |                    |                                     |                             |                 |                     |
|---|---------------------|--------------------|-------------------------------------|-----------------------------|-----------------|---------------------|
| <b>Women’s Lost Earnings Due to Hours Shortfall at WMS February 2011-January 2012</b> |                     |                    |                                     |                             |                 |                     |
| Average WMS Hours of Women  | Shortfall WMS Hours | Average Hours Lost | Adjusted Average WMS Hours of Women | Average Lost Wages of Women | Number of Women | Total Lost Earnings |
| \$13.22   | 14.1%               | \$1.86             | 332.5                               | \$619                       | 121             | \$74,875            |

| <b>Table 6<sup>[63]</sup></b>  |                     |                    |                             |                                       |                                   |                     |  |
|--|---------------------|--------------------|-----------------------------|---------------------------------------|-----------------------------------|---------------------|--|
| <b>Lost Earnings of non-Hispanic Blacks and Whites due to Hours Shortfalls at WMS February 2011-January 2012</b> |                     |                    |                             |                                       |                                   |                     |  |
| Average WMS Hours of Blacks and Whites   | Shortfall WMS Hours | Average Lost Hours | Number of Blacks and Whites | Total Lost Hours of Blacks and Whites | Average Wage of Blacks and Whites | Total Lost Earnings |  |
| 226.8  | 9.6%                | 21.7               | 48                          | 1,042.0                               | \$13.89                           | \$14,475            |  |

| <b>Table 7<sup>[64]</sup></b>   |                     |                   |                                     |                             |                 |                     |  |
|---|---------------------|-------------------|-------------------------------------|-----------------------------|-----------------|---------------------|--|
| <b>Women’s Lost Earnings Due to Hourly Wage Shortfall at WMS February 2011-January 2012</b> |                     |                   |                                     |                             |                 |                     |  |
| Average WMS Hourly Wage of Women  | Shortfall WMS Hours | Average Lost Wage | Adjusted Average WMS Hours of Women | Average Lost Wages of Women | Number of Women | Total Lost Earnings |  |
| \$13.22   | 14.1%               | \$1.86            | 332.5                               | \$619                       | 121             | \$74,875            |  |

DAMAGES<sup>65, 66</sup>

<sup>60</sup> Dr. Madden explained that “there was a pay rate associated with projects and I don’t know that everybody on the same -- well, everybody on the same project didn’t get the same pay rate.” *Id.* at 288.

<sup>61</sup> Table 3 is reproduced from Table 3 in Dr. Madden’s first report at GX 12.

<sup>62</sup> Table 5 is reproduced from Table 5 in Dr. Madden’s first report at GX 12.

<sup>63</sup> Table 6 is reproduced from Table 6 in Dr. Madden’s first report at GX 12.

<sup>64</sup> Table 7 is reproduced from Table 7 in Dr. Madden’s first report at GX 12.

<sup>65</sup> Dr. Madden’s shortfall is based on the number of individuals that she identified as having been hired that year. *Tr.* at 335. When she computed back pay, she did not make an allowance for these individuals having any other income source during the period that they would’ve worked for WMS, if they were hired. *Id.* Dr. Madden compensated these individuals for “far less than the average time of unemployment” for unemployed workers in Washington, D.C. *Id.* at 336.

Dr. Madden determined that an ethnically neutral hiring process would have yielded at least an additional 44 non-Hispanic Blacks, 168 non-Hispanic Whites, 7 Asians, and 2 American Indians/Pacific Islanders. GX 12 at 16. To calculate lost earnings due to these shortfalls in hiring, Dr. Madden multiplied the average WMS earnings of the group by that group's hiring shortfall. Table 4 below contains Dr. Madden's calculations.

| <b>Table 4<sup>[67]</sup></b>                        |                      |                         |                     |                     |
|--|----------------------|-------------------------|---------------------|---------------------|
| <b>Lost Earnings Due to Hiring Shortfalls at WMS</b> |                      |                         |                     |                     |
| <b>by Race and Ethnicity</b>                         |                      |                         |                     |                     |
|  | Average WMS Earnings | Adjusted WMS Earnings** | Shortfall WMS Hires | Total Lost Earnings |
| Blacks   | \$4,250              | \$4,657                 | 44.0                | \$204,919           |
| Whites, non-Hispanic                                 | \$3,854              | \$4,222                 | 168.0               | \$709,371           |
| Asians   | \$602                | \$602                   | 7.0                 | \$4,216             |
| American Indians/<br>Pacific Islanders*              | \$3,896              | \$3,896                 | 2.0                 | \$7,792             |
| All  |                      |                         | 221                 | \$926,298           |

\*Because there were no American Indians or Pacific Islanders hired, the average earnings figure for all Non-Hispanics was used for American Indians or Pacific Islanders.

\*\*Adjustments to earnings for non-Hispanic Blacks and non-Hispanic Whites are increases of 9.6% reflecting the elimination of hours of discrimination against those two groups, which was reported above in Table 2. There is no need for an analogous gender adjustment because [sic] all of the non-Hispanics hired were men, and the average WMS earnings of Hispanics reflected the earnings of males only.

<sup>66</sup> Unlike Dr. White, Dr. Madden did not calculate for mitigation in her analysis:

A. I would be glad to entertain a reasonable mitigation, but I think given the amount of hours we're talking about here and the expected duration of unemployment and the testimony I heard yesterday, that all of these individuals were saying in 2011 there were no jobs out there, even for the experienced asbestos workers. But the idea that these individuals would've easily found another job is not clear within this -- within the amount we're seeking. I'm not looking for a year's worth of wages, effectively. I'm looking for four, five, seven weeks.

Q. So which experienced asbestos worker's testimony that you heard are you referring to?

A. The African American gentleman that testified yesterday. He was talking about how he could not find anything in 2011. There were a couple of people. I can get my notes and tell you who they were. We all know that the 2011 recession --

.....  
The 2011 recession was particularly hard at the bottom of the -- at the bottom of the wage pyramid and so it was particularly difficult for low-wage workers to find jobs during 2011. In fact, the durations of unemployment went through the roof in that time period.

*Id.* at 336–38. Dr. Madden, however, stated that there is no data on the number of individuals in the general labor category in the Washington MSA in 2011 who were not working full-time. *Id.* at 339. She also stated that another reason for not applying a mitigation factor is that the average period of employment at WMS is shorter than the average duration of unemployment benefits. *Id.* at 355.

<sup>67</sup> Table 4 is reproduced from Table 4 in Dr. Madden's first report at GX 12.

Based on Dr. Madden’s finding that women and non-Hispanic men were assigned fewer weekly hours during the review period, Dr. Madden determined that a gender and racially/ethnically neutral hours assignment process was expected to have yielded 13.9% additional hours weekly for women and 9.6% additional hours weekly for non-Hispanics. *Id.* at 17. Dr. Madden made the following conclusions regarding damage calculations:

My calculation of the lost earnings associated with the hours shortfall for women is displayed in Table 5.<sup>[68]</sup> Lost earnings for women are equal to the product of the actual average WMS hours of women (292.1), the percentage shortfall of hours of women (13.9%), the number of women (121), and the average WMS wage of women (\$13.22), which equals \$64,743.

My calculation of the lost earnings associated with the hours shortfall for non-Hispanics is displayed in Table 6. Lost earnings of non-Hispanics are equal to the product of the actual average WMS hours of non-Hispanic Blacks and Whites (226.8), the percentage shortfall of hours of non-Hispanic Blacks and Whites (9.6%), the number of non-Hispanic Blacks and Whites (48), and the average WMS wage of non-Hispanic Blacks and Whites (\$13.89), which equals \$14,475.

[G]ender neutrality in hourly pay rates is expected to yield 14.1% higher hourly rates for women. My calculation of the lost earnings associated with the hourly wage shortfall for women is displayed in Table 7. Lost earnings for women are equal to the product of the actual WMS hourly wage of women (\$13.22), the percentage shortfall of hourly wages of women (14.1%), the actual average WMS hours of women (292.1) plus average lost hours of women (40.5), and the number of women (121), which equals \$74,875.

*Id.* at 17–18.

Dr. Madden also calculated interest on the lost earnings through July 2016. *Id.* at 17. To do so, she used the interest rate provided by the Internal Revenue Service for the underpayment of personal income taxes and compounded the interest quarterly. *Id.* She determined that a lost earnings amount of \$1,080,392, the total interest due was \$180,989. *Id.* at 18.

| <b>Table 8<sup>[69]</sup></b>                       |                            |                                   |                                       |
|---|----------------------------|-----------------------------------|---------------------------------------|
| <b>Summary of Lost Earnings at WMS and Interest</b> |                            |                                   |                                       |
| <b>February 2011-January 2012</b>                   |                            |                                   |                                       |
|   | <b>Total Lost Earnings</b> | <b>Interest Through July 2016</b> | <b>Total Lost Earnings + Interest</b> |
| <b>Hiring</b>                                       |                            |                                   |                                       |
| <b>Blacks</b>                                       | \$204,919                  | \$34,328                          | \$239,248                             |
| <b>Whites, Non-Hispanic</b>                         | \$709,371                  | \$118,835                         | \$828,206                             |
| <b>Asians</b>                                       | \$4,216                    | \$706                             | \$4,923                               |

<sup>68</sup> Tables 5–7, GX 12 at 25.

<sup>69</sup> Table 8 is reproduced from Table 8 in Dr. Madden’s first report at GX 12.

|              |  |             |           |             |
|--------------|--|-------------|-----------|-------------|
| <b>Hours</b> | <b>American Indians/<br/>Pacific Islanders</b> | \$7,792     | \$1,305   | \$9,097     |
|              | <b>Women</b>                                   | \$64,743    | \$10,846  | \$75,589    |
| <b>Wage</b>  | <b>Blacks and Whites</b>                       | \$14,475    | \$2,425   | \$16,900    |
|              | <b>Women</b>                                   | \$74,875    | \$12,543  | \$87,418    |
| <b>All</b>   | <b>All</b>                                     | \$1,080,392 | \$180,989 | \$1,261,381 |

Finally, at the request of counsel, Dr. Madden calculated lost earnings and interest for the period of February 2012 through July 2016. *Id.* at 19. She based her calculation on “the assumption that the racial/ethnic and gender differences in compensation (hours and wages) that [she] found in the February 2011 through January 2012 period continued through July 2016.” *Id.* Dr. Madden explained her method of computing that calculation:

To make that calculation, I assumed that the hours and wages components of lost earnings (shown in Table 8) grew in proportion to the mean wage of construction laborers in the Washington-Arlington-Alexandria DC-VA-MD-WV Metropolitan Division. To obtain estimates of the 2016 value, I assume an increase equal to the average rate of increase over the 2012-2015 period, which was 2.00% (rounded).

The implied components of lost earnings and interest due for the periods February 2012 through January 2013, February 2013 through January 2014, February 2014 through January 2015, February 2015 through January 2016, and February 2016 through July 2016 are displayed in Tables 9, 10, 11, 12, and 13, respectively. The components of total lost earnings and the associated interest over the entire February 2011 through July 2016 period are displayed in Table 14. Total lost earnings are \$1,806,422, total interest due is \$233,414, and the total of lost earnings and interest due is \$2,039,836.

*Id.* (footnote omitted).<sup>70</sup>

| <b>Table 14<sup>[71]</sup><br/>Summary of Lost Earnings at WMS and Interest<br/>February 2011-July 2016</b> |                                |                                       |   |
|---|--------------------------------|---------------------------------------|---|
|   | <b>Total Lost<br/>Earnings</b> | <b>Interest Through<br/>July 2016</b> | <b>Total Lost<br/>Earnings + Interest</b> |
| <b>Hiring</b>   |                                |                                       |   |
| <b>Blacks</b>   | \$204,919                      | \$34,328                              | \$239,248                                 |
| <b>Whites, Non-Hispanic</b>   | \$709,371                      | \$118,835                             | \$828,206                                 |
| <b>Asians</b>   | \$4,216                        | \$706                                 | \$4,923                                   |

<sup>70</sup> Dr. Madden did not have data concerning wages during the periods of February 2012 through January 2013, February 2013 through January 2014, February 2014 through January 2015, February 2015 through January 2016, and February 2016 through July 2016 (displayed in Tables 9–13 of Dr. Madden’s report). Tr. at 354. She used data on general construction laborers in the Washington, D.C. metropolitan area to calculate the lost earnings and interest for the aforementioned periods. *Id.* at 355.

<sup>71</sup> Table 14 is reproduced from Table 14 in Dr. Madden’s first report at GX 12.

|              |  |             |           |             |
|--------------|--|-------------|-----------|-------------|
| <b>Hours</b> | <b>American Indians/<br/>Pacific Islanders</b> | \$7,792     | \$1,305   | \$9,097     |
| <b>Wage</b>  | <b>Women</b>                                   | \$369,789   | \$32,73   | \$402,662   |
|              | <b>Blacks and Whites</b>                       | \$82,676    | \$7,350   | \$90,026    |
|              | <b>Women</b>                                   | \$427,658   | \$38,017  | \$465,675   |
| <b>All</b>   | <b>All</b>                                     | \$1,806,422 | \$233,414 | \$2,039,836 |

DR. MADDEN’S CONCLUSION

Dr. Madden asserted that her “statistical analysis is consistent with discriminatory hiring practices at WMS,” stating that:

An ethnically neutral process would have resulted in 221 additional non-Hispanic hires, including 44.0 Blacks, 168.0 non-Hispanic Whites, 7.0 Asians, and 2.0 American Indians/Pacific Islanders. These disparities cost non-Hispanics \$1,081,473 (including interest) during the review period February 2011 through January 2012.

*Id.* at 19.

Dr. Madden further asserted that her “statistical and econometric analysis is consistent with discriminatory hours assignment practices at WMS,” stating that:

A gender neutral process would have resulted in women averaging 13.9% additional work hours each week. An ethnically neutral process would have resulted in non-Hispanic Blacks and Whites averaging 9.6% additional work hours each week. These disparities cost women \$75,589 and non-Hispanic Blacks and Whites \$16,900 (including interest).

*Id.*

Finally, Dr. Madden averred that her “statistical and econometric analysis is consistent with discriminatory hour pay rate setting practices at WMS,” stating that, “[a] gender neutral process would have resulted in women averaging 14.1% more in hourly pay rates. These disparities cost women \$87,418 (including interest).” *Id.*

**DR. PAUL F. WHITE**

*First Report – June 3, 2016 (EX 1); Deposition – June 14, 2016 (GX 26); Hearing Testimony – July 27, 2016 (Tr. at 379–469)*

Dr. Paul White<sup>72</sup> is a partner at Resolution Economics, where he performs litigation-related work as well as consulting that is unrelated to litigation. GX 26 at 7. He specializes in labor economics and statistics, and has published articles in those areas. Tr. at 380, 383. Dr. White<sup>73</sup> was retained by WMS to assess Dr. Madden’s report and findings regarding potential disparities in hiring, hours, and pay rates for jobs at WMS during the review period. EX 1 at 4; *id.* at 385.

FLAWS IN DR. MADDEN’S HIRING ANALYSIS

Dr. White first analyzed Dr. Madden’s findings with respect to hiring.<sup>74</sup> EX 1 at 5; GX 26 at 12. His first concern was that Dr. Madden’s hiring analysis did not account for rehires. EX 1 at 5; GX 26 at 16–23, 43–57. He noted that even those workers that worked during the January 22, 2011 pay period, and were off from work during the January 29, 2011 pay period, would be identified as new hires under Dr. Madden’s methodology. EX 1 at 6. He determined that Dr. Madden’s use of the January 29, 2011 pay period as a benchmark also ignored the seasonality of WMS’s business, which increases during the summer.<sup>75</sup> *Id.*; Tr. at 386. He also determined that Dr. Madden’s “new hire” count exceeded the hire counts previously reported by the OFCCP, and that her “new hire” count included rehires, based on WMS’s data. EX 1 at 7; GX 26 at 22. Dr. Madden found that there were 664 new hires during the review period, while Dr. White determined there were 510 new hires during this same period, after excluding rehires. EX 1 at 7; GX 26 at 23, 97–111. He concluded that Dr. Madden overstated the number of new hires by 154 and that the overstatement of new hires also caused Dr. Madden to overstate her shortfall numbers and new hire damage calculations. EX 1 at 8.

**Table 1 – Hire Counts from Various Sources<sup>[76]</sup>**

| <b>Race/Ethnicity</b>     | <b>Dr. Madden’s “New Hires” (From Her Backup File “data_all.dta”)</b> | <b>OFCCP Hires (From OFCCP Violation Letter to WMS January 31, 2014)</b> | <b>WMS New Hires Excluding Rehires (From WMS Data File: “DC MSA Hires 02.01.11-01.31.12 w hours.xlsx”)</b> |
|---------------------------|---|--|--|
| Asian                     | 3   | 2  | 2  |
| Black or African American | 29  | 26   | 29   |
| Hispanic or Latino        | 614   | 510  | 461  |
| White                     | 18  | 18   | 18   |
| <b>Total</b>              | <b>664</b>  | <b>556</b>   | <b>510</b>   |

<sup>72</sup> Dr. White received a bachelor’s degree in economics from James Madison University. Tr. at 380. He also received a master’s degree and a doctoral degree from North Carolina State, specializing in labor economics and health economics. *Id.*

<sup>73</sup> Dr. White was accepted as an expert witness in the area of labor economics at the hearing on July 27, 2016. *Id.* at 384.

<sup>74</sup> Dr. White disagreed with Dr. Madden’s hearing testimony regarding the accuracy of the payroll compared to the hiring data. *Id.* at 408–09. Dr. Madden believes that the payroll data is “generally more accurate.” *Id.* at 408. Dr. White believed that the hiring data is more accurate, because he found 100 individuals on the hire list who were missing from the payroll list. *Id.* at 408–09.

<sup>75</sup> Dr. White included a bar graph demonstrating that WMS had 59 laborers on its payroll during the January 29, 2011 payroll and reached a high of 270 laborers during July 2011. EX 1 at 6.

<sup>76</sup> Table 1 is reproduced from Table 1 in Dr. White’s first report at EX 1.

Dr. White's second concern with Dr. Madden's hiring analysis was that it did not consider the types of jobs that laborers were hired to perform during the review period. *Id.*; Tr. at 390–91. Asbestos jobs accounted for the largest projects during the review; of WMS's top ten projects during the review period, only one was primarily demolition work. EX 1 at 8. Across all projects, 73.1% of WMS's workforce was working on asbestos abatement projects, and 26.9% was working on demolition projects. *Id.* at 9. Asbestos abatement projects also accounted for 83.7% of total hours worked, and 86.4% of total gross wages paid during the review period. *Id.* at 9–10.

Dr. White also expressed concern with Dr. Madden's use of the U.S. Census benchmark data for "Construction Laborers" in Washington, D.C., because those benchmarks did not "account for individuals' interest or qualifications for working in asbestos abatement at WMS." *Id.* at 10; Tr. at 389–90. Because performance of asbestos removal work requires certification, Dr. White determined that Dr. Madden's reliance on the Construction Laborers U.S. Census data rendered her race and ethnicity availability rates overly broad and was an inaccurate representation of the workers that were most likely to be considered for employment at WMS. EX 1 at 10. To support this finding, Dr. White cited a listing of individuals holding a Virginia asbestos certification, received from the Virginia Department of Professional and Occupational Regulation.<sup>77, 78</sup> *Id.*; Tr. at 393. Dr. White limited his analysis of the listing to individuals that were certified prior to February 2012, and only included those persons with addresses within the Washington, D.C. metropolitan area. EX 1 at 10–11; Tr. at 393–94. With those limits, Dr. White had a pool of 261 individuals." EX 1 at 11. "To estimate the racial/ethnic composition, he matched the last names of these individuals to data from the United States Census Bureau, which

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<sup>77</sup> Dr. White did not have data regarding Maryland asbestos licenses for his first report; however, he subsequently obtained the data and included it in his rebuttal report. Tr. at 396–97.

Q. So let's talk about the Maryland data. What did the Maryland data show?

A. The Maryland data is from the Maryland Department of the Environment Air and Radiation Management Administration. It contains information on all asbestos workers who obtained a license in 2011. Of the 2,121 people in that data, 1,832, which represents 86%, took the test in Spanish. That was a field that was in the data, what language did you take the test in. 86% took the test in Spanish. And I make the observation that that percentage is somewhat consistent with the 88% that I had estimated for the state of Virginia.

*Id.* 398–99. Dr. White did not have data from D.C. *Id.* at 399.

<sup>78</sup> Dr. White disagreed with Dr. Madden's hearing testimony that the Virginia data was inappropriate because it reflects Hispanics' residences. *Id.* at 409.

No, I don't think it's inappropriate at all. I think it is more reflective of those who are qualified and interested for working in jobs like this. It was validated by the fact that the Maryland data was also pretty consistent with that. We still know that people can be holding a license in Virginia as well as holding a license in Maryland as well as holding a license in the District. So we didn't see any evidence that Virginia was overstated compared to, say, Maryland.

*Id.*

reports the percentage of people with the same last name who fall into each racial/ethnic category.”<sup>79</sup> *Id.* at 11–12.

**Table 4**<sup>[80]</sup>

| <b>Race/Ethnicity</b>       | <b>Total Hires in Dr. Madden’s Report</b> | <b>Dr. Madden’s Availability Measures Using Construction Laborers</b> | <b>WMS Employee Representation from Dr. Madden’s Report</b> | <b>Mean Percentage of VA Asbestos Worker Representation</b> | <b>Median Percentage of VA Asbestos Worker Representation</b> |
|-----------------------------|---|---|---|---|---|
| Black                       | 29  | 11.1%   | 4.4%  | 0.7%  | 0.5%  |
| Whites, non-Hispanic        | 18  | 28.0%   | 2.7%  | 7.8%  | 5.9%  |
| Asians                      | 3   | 1.5%  | 0.5%  | 2.6%  | 1.3%  |
| Am. Indian/Pacific Islander | 0   | 0.4%  | 0.0%  | 0.4%  | 0.3%  |
| Non-Hispanic                | 50  | 41.1%   | 7.5%  | 12.0%   | 8.7%  |
| Hispanic                    | 614                                       |   |   | 88.0%   | 91.3%   |

Using the data in Table 4, Dr. White found that the availability measures of those who have asbestos certifications were similar to the WMS workforce. EX 1 at 12. On average, 88% of Virginia asbestos license holders were Hispanic, while 92.5% of the WMS workforce was Hispanic. *Id.* at 12. Dr. White compared these percentages with Dr. Madden’s availability rate calculated from the the U.S. Census data, which was 58.9%. *Id.* Dr. White concluded that the statistics demonstrated that the U.S. Census data on Construction Laborers was “not a reasonable measure of the race/ethnic composition of those qualified and interested in WMS positions, and that [Dr. Madden’s] measure of shortfall hires (and thus damages) is substantially overstated.” *Id.*

Dr. White’s last concern with Dr. Madden’s hiring analysis was that it did not report whether WMS had shortfalls in female hiring. *Id.* at 13. Dr. White noted that 4.4% of hires in the Construction Laborers category were women, but of Dr. Madden’s 664 new hires, 110 or 16.6% were female, meaning WMS hired females at almost four times the rate predicted by Dr. Madden’s methodology. *Id.*

Dr. White asserted the following conclusions regarding Dr. Madden’s hiring analysis:

In sum, Dr. Madden’s “new hire” analysis does not account for rehires among her new hires at WMS, does not account for the applicants’ qualifications/certifications, and does not report the finding that females were hired by WMS at a rate greater than expected when using her methodology for estimating labor market availability. Lastly, Dr. Madden’s “new hire” analysis implicitly treats all hiring during the relevant year as the result of a single annual decision, and does not take account how the characteristics of candidates vary over time as hiring for particular projects is taking place.

<sup>79</sup> Citing to *File B: Surnames Occurring 100 or More Times*, Frequently Occurring Surnames from the Census 2000, UNITED STATES CENSUS BUREAU (last revised Sept. 15, 2014), [https://www.census.gov/topics/population/genealogy/data/2000\\_surnames.html](https://www.census.gov/topics/population/genealogy/data/2000_surnames.html).

<sup>80</sup> Table 4 is reproduced from Dr. White’s table (unnumbered) in his first report. EX 1 at 12.

*Id.*

#### DR. WHITE'S CRITIQUE OF DR. MADDEN'S HOURS WORKED ANALYSIS

Dr. White also analyzed Dr. Madden's determination that women averaged less weekly hours than men, and that non-Hispanics of both genders averaged less weekly hours than Hispanics during the review period. *Id.* His first criticism of Dr. Madden's analysis was that she did not control for factors other than "race, gender, and pay period." *Id.* Dr. White stated that "Dr. Madden does not control for prior work experience, either at WMS or other employers." *Id.* He further noted that laborers with work experience at WMS "might be expected to be willing to work longer hours on new WMS projects." *Id.* at 14. Dr. White explained that "prior experience is something WMS looks for when considering job applicants" and that "WMS recruiters ask potential applicants about their work experience[.]"<sup>81</sup> *Id.*

Dr. White criticized Dr. Madden's failure to control for clients' preferences with regard to employees' total hours worked.<sup>82</sup> *Id.*; GX 26 at 13; Tr. at 423–25. Client preferences also determined how many overtime hours were worked by employees.<sup>83</sup> EX 1 at 14. Additionally, Dr. White took issue with Dr. Madden not accounting for "differences in the work loads and resulting hours worked by WMS project." *Id.*

Dr. White questioned Dr. Madden's decision to "group all pay periods in to a single model" when conducting her hours worked analysis. *Id.* He opined that Dr. Madden did not "adequately account for the wide variation seen in workloads and staffing needs from week to week." *Id.* Dr. White asserted that "[t]his variation would have been better accounted for if she had run separate analyses for each pay period." *Id.* Dr. White's chart ("Total Hours Worked by Payroll Week End Date"), which was based on separate analyses for each pay period, showed that the total hours worked followed the seasonal pattern contained in Dr. White's "Number of WMS Employees by Payroll Week End Date." *Id.* at 15; *see also id.* at 6. Dr. White's "Average Hours Worked per WMS Employee by Payroll Week End Date" chart shows that "the average hours worked generally tend to be lower in the winter months and higher in the summer months." *Id.* at 15–16.

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<sup>81</sup> In support of his assertion, Dr. White quoted Fernandes' interview:

**How does a recruiter know to go meet a person and give them an application?**

They could get a call from Andrew. Andrew would say, "Hey, Fred said to call you because he's worked here before." Then we'll see what their experience is, are they trained in asbestos, do they have transportation? Can you get to work? We'd need to know logistics. So, it's experience and then more logistics behind it.

EX 1 at 14.

<sup>82</sup> Dr. White cited an answer provided by Fernandes during an interview. EX 1 at 14. When asked whether contractors ask for specific work crews, he answered: "If it's someone they already have working, yes. Say job is finishing on Friday, they may say have [sic] new job Monday with the same supervisor and that happens a lot. I'm getting orders from operations managers and if they're a good crew, they'll probably like to have you just keep working." *Id.*

<sup>83</sup> *See also* GX 28 at 3.

Dr. White also criticized Dr. Madden's failure to "control for whether an employee has an asbestos abatement certification, which is required to work on particular projects." *Id.* at 16. He asserted that, "[w]orkers without necessary certifications to work on hazmat projects will be qualified to work on fewer projects, resulting in reduced work hours." *Id.*

The payroll data Dr. Madden used in her hours worked analysis ("hours assigned") is absent of the number of hours offered or assigned to WMS employees; it only contains the actual worked hours by WMS employees. EX 1 at 16; GX 26 at 34–38. Dr. White noted that Dr. Madden's analysis fails to account for worker preferences<sup>84</sup> regarding the number of hours or types of projects. EX 1 at 16. He opined that "workers may prefer working fewer hours on projects deemed less desirable, either due to the type of work on the project, the timing of the work, or the location of the project in relation to where they live. . . ." <sup>85</sup>*Id.*

Dr. White opined that, "Dr. Madden's worked regression results demonstrate the limitations of her approach, as can be seen in the regression's low explanatory power." *Id.* According to Dr. White, Dr. Madden's hours-worked regression "r-squared" measure of 0.1438, which shows a 14.38% of variation in hours worked, is evidence of the absence of important factors in determining hours worked in Dr. Madden's model. *Id.*; GX 26 at 83–84; Tr. at 412–13. Some examples of "important factors" are "project characteristics, employee prior experience at WMS or other employers, employee certifications, [and] employee preferences for work hours. . . ." EX 1 at 16; GX 26 at 84–85. Dr. White asserted that, "[i]f employee preferences and qualifications vary by race/ethnicity and gender, then Dr. Madden's race/ethnicity and gender estimates will be biased." EX 1 at 16.

Dr. White's final criticism of Dr. Madden's hours worked analysis is as follows:

Lastly, Dr. Madden's finding that female workers have fewer hours than male workers stands in contrast to the previously-discussed fact that WMS hired over 3.7 times as many female workers as predicted using Dr. Madden's labor market availability proxy of Construction Workers in the Washington, DC metropolitan area (results Dr. Madden does not report). It seems contradictory that WMS would give an advantage to females in the hiring process, yet once hired, disadvantage them in hours worked.

*Id.*

#### DR. WHITE'S CRITIQUE OF DR. MADDEN'S PAY RATE ANALYSIS

Dr. White also analyzed Dr. Madden's findings with respect to pay rates at WMS between February 1, 2011 and January 31, 2012 and her conclusion that "women have

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<sup>84</sup> During his deposition, however, Dr. White testified he had not seen, nor had knowledge of, any records reflecting worker preference. GX 26 at 80. Accordingly, he did not run an analysis of worker preference. *Id.* Dr. White admitted that he did not have data on workers' ability to drive to work. *Id.* at 81–82.

<sup>85</sup> Dr. White cited to Fernandes' answer in an interview: ". . . a lot of our workers don't have cars." EX 1 at 16; *see also* GX 28 at 1.

significantly lower average hourly pay rates than men.” *Id.* at 18. Dr. Madden’s regression analysis controlled for “race, gender, and the pay period of the paycheck.” *Id.* Dr. White noted that because “Dr. Madden’s pay rate measure contains overtime, and not just pay rates,” the “pay rate measure will be a function of employee hours worked and employee preferences for hours worked, and not simply based on a pay rate assigned to the employee by WMS.” *Id.* at 16.

His first concern was that Dr. Madden’s pay rate analysis did not account for the process by which WMS determines pay rates. *Id.* Dr. White stated that factors such as “the characteristics of the project as well as employee qualifications/certifications” and WMS’s clients’ preferences may impact employees’ overtime. *Id.* He asserted that, “Dr. Madden’s pay rate analysis implicitly assumes that the employee’s pay rate is determined only by race, gender, and the pay period.” *Id.* Her pay rate analysis is devoid of controls for prior relevant work experience at WMS or with other employers. *Id.* Dr. Madden also failed to “account for differences in the work loads and resulting hours and pay rates worked by WMS project.” *Id.* Dr. White identified a seasonal pattern in the pay rates, which is also present in hiring and hours worked. *Id.* His “Average Hourly Pay Rates by Payroll Week End Date” chart shows that pay rates are generally higher during summer months, which are the busiest months, as compared to the other seasons. *Id.* at 17–19. By grouping all pay periods into a single model rather than analyzing hours worked by pay period, Dr. Madden failed to account for “the wide variation seen in workloads, staffing needs, and the likelihood for overtime from week to week,” which would have affected her pay rate measure. *Id.* at 20.

Dr. White criticized Dr. Madden’s decision to not control “for whether an employee has an asbestos certification, which is required to work on particular jobs.” *Id.* He found that “[p]rojects requiring asbestos certification may be expected to yield higher pay rates.” *Id.* “The average pay rate on projects not involving asbestos work is \$13.35 versus \$16.45 for asbestos abatement projects, for an average difference of \$3.10 per hour (23.2%).” *Id.*

Dr. Madden’s pay rate analysis is flawed, because it does not account for individual preferences for hours worked. *Id.* Her analysis does not control or account worker preferences regarding the number of hours worked and amount of overtime worked, and “ignores WMS’s[] clients’ preferences for keeping on workers from project to project or the client’s influence on overtime hours.” *Id.* at 20–21.

Dr. Madden’s pay rate analysis contains results for gender differences but not for Hispanic ethnicity, which is present as a control in her pay rate regression. *Id.* at 21. This same regression model shows “that non-Hispanics (those she claims are disadvantaged in the hiring process) are advantaged in terms of pay rates.” *Id.* Dr. White asserts that Dr. Madden’s analysis demonstrate that “non-Hispanics have a statistically significant advantage over Hispanics in terms of pay rates.” *Id.*

Dr. White opined that, “[a]s with her hours-worked regression, Dr. Madden’s pay rate regression results demonstrate the fact that her model does not sufficiently account for WMS’s[] compensation structure (i.e.,[] as can be seen in the regression’s low explanatory power).” *Id.* He asserted that because “Dr. Madden’s pay rate regression “r-squared” measure is only 0.1322, which means that her model only explains 13.22% of the variation in pay rates,” this is evidence

of Dr. Madden's failure to account for important factors<sup>86</sup> that determine pay rates in her model. *Id.*; GX 26 at 88–89; Tr. at 414–15. Dr. White concluded that, “[i]f employee preferences and qualifications vary by race/ethnicity and gender, then Dr. Madden’s race/ethnicity and gender estimates will be biased.” EX 1 at 21.

Dr. White reiterated that, “Dr. Madden’s finding that female workers have lower pay rates than male workers stands in contrast to the fact that WMS hires over 3.7 times as many female workers as predicted using Dr. Madden’s method for measuring female availability.” *Id.* He was unable to reconcile the “contradictory” relationship between the aforementioned findings. *Id.* at 22. Dr. White asserted that it is illogical to “advantage female hires, yet once hired, disadvantage them in pay rates.” *Id.*

#### DR. WHITE’S CRITIQUE OF DR. MADDEN’S DAMAGES CALCULATIONS

Dr. White analyzed Dr. Madden’s damages calculations, which are based on Dr. Madden’s hiring, hours worked, and pay rate analyses. *Id.* He identified the following limitations:

(i) not accounting for applicants’ and employees’ prior experience, (ii) not accounting for worker qualifications/certifications, (iii) not accounting for differences from project-to-project that will affect hours worked and her pay rate measure that contains overtime, (iv) not accounting for worker preferences with respect to the type, quantity, timing, and location of work, (v) not accounting for rehires in her “new hire” analysis, and (vi) not adequately accounting for the variation in work from payroll week to payroll week.

*Id.*

Dr. Madden’s lost earnings by race/ethnicity calculation for the period of February 2011 through January 2012 is flawed. *Id.* She calculated lost earnings owed by race/ethnicity based on her “new hire” shortfalls; lost earnings for females and non-Hispanic Blacks and Whites based on her hours worked shortfalls; and lost earnings for females based on her pay rate shortfall. *Id.* “Dr. Madden’s “new hire” damage estimates (which account for the vast majority of her total damages calculations) do not account for the mitigating earnings the new hire shortfall individuals could be expected to make given that they were not hired by WMS.” *Id.* Dr. Madden’s implicit assumption, that “because the shortfall individuals were not hired by WMS, they are no longer able to find any alternative employment during this four to five year period,” is flawed. *Id.* at 22. Her calculation of damages through July 2016 is also based on the erroneous assumptions that her 2011 and 2012 shortfall estimates are applicable and “that there would have been no natural attrition of these shortfall hires during this four to five year period.” *Id.* at 23.

#### DR. WHITE’S CONCLUSION

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<sup>86</sup> Dr. White identified the following important factors: “project characteristics, employee prior experience at WMS or other employers, employee certifications, employee preferences for work hours and overtime[.]” EX 1 at 21.

Dr. Madden’s analyses are flawed, because they are based on the following assumption: Any characteristics that matter in hiring or in weekly hours[,] assignments[,] or in hourly pay rates, but that are possessed by both genders or both ethnicities or races in equivalent proportions or in equal intensity, do not matter in the analysis of whether gender or race or ethnicity affected outcomes.

*Id.* She failed to account for Dr. White’s enumerated characteristics; thus, “she cannot say whether these characteristics are possessed by both genders and various race/ethnicities in equivalent proportions, or in equal intensity.” *Id.* Accordingly, “Dr. Madden’s analyses cannot tell us whether and to what extent there may be systematic differences in hiring, hours worked, or pay rates by gender or race/ethnicity at WMS.” *Id.*

Finally, Dr. White asserted that Dr. Madden’s calculated damages are “substantially overstated” primarily due to the following three methodological issues:

1. Her counts of new hires actually include rehires which, if excluded, would reduce the number of actual new hires, and therefore the shortfall amounts, all other things being equal.
2. Her labor market availability measures do not focus on the types of candidates needed by WMS, namely those who hold an asbestos certificate. The Hispanic representation among those with an asbestos license in Virginia is quite consistent with the Hispanic representation among WMS employees. This also leads to a smaller shortfall measure and thus lower damages.
3. Her damages calculations do not contain an offset for the earnings (or potential earnings) of the shortfall candidates who were not hired. By accounting for these mitigating earnings, the damages calculations would be lower.

*Id.* at 23–24.

**DR. PAUL F. WHITE**

*Rebuttal – June 25, 2016 (EX 2); Hearing Testimony – July 27, 2016 (Tr. at 379–469)*

For his rebuttal report, Dr. White “was asked to calculate potential economic losses to the shortfall of non-Hispanic hires, using a labor force availability measure that accounts for the preference of WMS to hire and employ individuals with an asbestos certification.” EX 2 at 2.

Dr. White’s damages calculations can be differentiated from Dr. Madden’s calculations in three ways:

1. [Dr. White’s] count of total hires during the relevant time period excludes rehires<sup>87</sup>, whereas Dr. Madden’s analysis includes rehires and thus does

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<sup>87</sup> Dr. Madden raised two issues with Dr. White’s decision to exclude rehires: (1) the evidence suggests that Dr. White’s rehires are individuals who have been unemployed for a number of years, as opposed to individuals being

not focus on new hires at WMS. The below table (which is also found in [Dr. White’s] prior report) presents the counts of hires in Dr. Madden’s report (total of 664) versus [Dr. White’s] count of hires when rehires are excluded (total of 510).

**Table 1 – Hire Counts from Various Sources<sup>[88]</sup>**

| <b>Race/Ethnicity</b>     | <b>Dr. Madden’s<br/>“New Hires”<br/>(From Her<br/>Backup File<br/>“data_all.dta”</b> | <b>OFCCP Hires<br/>(From OFCCP<br/>Violation Letter to<br/>WMS January 31,<br/>2014)</b> | <b>WMS New Hires<br/>Excluding Rehires<br/>(From WMS Data<br/>File: “DC MSA Hires<br/>02.01.11-01.31.12 w<br/>hours.xlsx”</b> |
|---------------------------|--|--|---|
| Asian                     | 3  | 2  | 2   |
| Black or African American | 29   | 26   | 29  |
| Hispanic or Latino        | 614  | 510  | 461   |
| White                     | 18   | 18   | 18  |
| <b>Total</b>              | <b>664</b>   | <b>556</b>   | <b>510</b>  |

2. [Dr. White’s] proxy measure of Hispanic availability among those qualified and interested in a position at WMS accounts for the fact that WMS emphasizes the need for candidates and employees to have an asbestos abatement license. Dr. Madden’s Hispanic workforce availability measure is based upon the general Construction Laborer job category, which does not account for WMS’s preference for an asbestos abatement license. However, as mentioned in [Dr. White’s] prior report, across all projects found in the data provided by WMS, asbestos abatement projects account for 83.7% of total hours worked. However, recognizing that WMS also hires individuals who do not have an asbestos abatement license, my non-Hispanic availability measure is a weighted average of Dr. Madden’s Construction Laborer measure (41.1% non-Hispanic) and an estimate of the representation of non-Hispanics among those in the DC Metropolitan area who hold an asbestos abatement license (12%).<sup>89</sup>

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laid off by WMS during a slow period, which reflects the seasonality of the construction industry; and (2) instead of using a pool of WMS laborers eligible for rehire by race/ethnicity, Dr. White assumes that all of WMS laborers are Hispanic. Tr. at 297.

<sup>88</sup> Table 4 is reproduced from Table 1 in Dr. White’s rebuttal report. EX 2 at 4.

<sup>89</sup> As discussed in detail in [Dr. White’s] first report, data from The Virginia Department of Professional and Occupational Regulation (VA DPOR) contains a listing of all the individuals who have Virginia asbestos workers licenses. The licenses in this data have an issue date that goes as far back as 1988, and expiration dates that expire either in 2016 or 2017. The file (VA DPOR List (3301\_cml) – 20May16.xlsx) contains information on 1,439 individuals’ names, addresses, certificate numbers, license issue dates, license expiration dates, etc.

To estimate the racial/ethnic composition of these individuals, he first limited the data to individuals whose Certification Date was before February 2012 and whose addresses were in the Washington, D.C. metropolitan area according to their zip code. The cities and counties containing these zip codes are listed in the first report.

After the data was limited to the relevant time period and geographic area, there were 261 individuals listed in this file. To estimate the racial/ethnic composition, we matched the last names to data from United States Census Bureau

3. While Dr. Madden estimates the projected WMS earnings of the shortfall non-Hispanics had they been hired, her “new hire” damage estimates do not account for the mitigating earnings the new hire shortfall individuals could be expected to make given that they were not hired by WMS. She implicitly assumes that because the shortfall individuals were not hired by WMS, they have not found any alternative employment.

*Id.* at 4–5 (internal footnote included).

Dr. White’s based his calculations of potential hiring losses on the following three steps:

**Step 1:** Estimate Weighted Non-Hispanic Availability Measure

|   |   |         |               |   |
|---|---|---------|---------------|---|
| <b>Non-Hispanic Availability Measures</b>                 |   |         |               |   |
| 12.00%  | VA Asbestos License Data, Census Data                     |         |               |   |
| 41.10%  | Dr. Madden’s Construction Laborer Measure                 |         |               |   |
| <b>Weights</b>  |   |         |               |   |
| 83.70%  | % Total Hours Worked on Asbestos Projects, per report     |         |               |   |
| 16.30%  | % Total Hours Worked on Non-Asbestos Projects, per report |         |               |   |
| <b>Weighted Average Non-Hispanic Availability Measure</b> |   |         |               |   |
| 16.743%   | Weighted Non-Hispanic Availability                        | (equals | (12.0%*83.7%) | + |
|   | (41.1%*15.3%)   |         |               |   |

**Step 2:** Calculate Non-Hispanic Hire Shortfall

| (a)                | (b)                                  | (c)                                       | (d) = (a)*(b)                          | (e) = (b)-(d)                      |
|--------------------|--------------------------------------|---|--|------------------------------------|
| <b>Total Hires</b> | <b>Actual WMS Non-Hispanic Hires</b> | <b>Weighted Non-Hispanic Availability</b> | <b>Expected WMS Non-Hispanic Hires</b> | <b>Non-Hispanic Hire Shortfall</b> |
| 510                | 49                                   | 16.743%                                   | 85.39                                  | -36.39                             |

**Step 3:** Calculate Potential Economic Damages Non-Hispanic Hires

**Projected WMS Earnings if Hired**

([http://www.census.gov/1opics/population/genealogy/data/2000\\_surnames.html](http://www.census.gov/1opics/population/genealogy/data/2000_surnames.html)), which reports the percentage of people with the same last name who fall into each racial/ethnic category. Thus, for each last name in the asbestos worker data, he knew the percentage of people with the same last name who are white, Hispanic, black, etc. He also received data from the Air and Radiation Management Administration at the Maryland Department of the Environment (MOE) containing information on all asbestos workers who obtained a license from MDE in 2011 (“Maryland Asbestos Workers 2011.xis”). Of the 2,121 people in the data, 1,832 (or 86.4%) took their test in Spanish. This is consistent with the information I calculated from the Virginia data, and likely understates the Hispanic representation to the extent that Hispanics take the test in English.

|   |           |  |
|---|-----------|--|
|   | 36.39     | WMS Non-Hispanic Hire Shortfall  |
| x                                       | \$3,896   | Adjusted Average WMS Non-Hispanic Earnings (Dr. Madden's Table 4)  |
|   | \$141,799 |  |
| <b>Mitigation Factor<sup>[90]</sup></b> |           |  |
|   | \$ 7.25   | Federal Min. Wage 2011 ( <a href="http://www.dol.gov/featured/minimumwage-chart1">http://www.dol.gov/featured/minimumwage-chart1</a> ) |
|   | \$ 13.89  | Divided by Average Wage of Non-Hispanic Blacks and Whites (per Dr. Madden p. 17)   |
| <b>Mitigating Earnings</b>              |           |  |
| \$                                      | 141,779   | Projected WMS Earnings if Hired  |
| x                                       | 52.20%    | Mitigation Factor  |
| \$                                      | 74,003    | Potential Mitigating Earnings  |
| <b>Potential Hire Economic Damages</b>  |           |  |
| \$                                      | 141,779   | Projected WMS Earnings if Hired  |
| –                                       | \$ 74,003 | Mitigation Factor  |
| \$                                      | 67,776    | Potential Hire Economic Damages  |

*Id.* at 5–6.

In conclusion, Dr. White estimated “the economic damages associated with non-Hispanic shortfall hires to be \$67,776.”<sup>91</sup> *Id.* at 7. He did not calculate interest.

<sup>90</sup> Dr. Madden disagreed with Dr. White’s use of a mitigation factor:

The federal minimum wage is fine to use, but as you can see from these salaries, we’re talking about people that are basically working for WMS for periods of less than 10 weeks. I mean, this is just -- and there’s no adjustment for unemployment. He’s presuming that at the time they would’ve been hired by WMS, they would’ve immediately gotten a job someplace else at the minimum wage. This is 2011. This is in the middle of the greatest recession we’ve had since the Great Depression. People were desperate in 2011. People weren’t finding work. We saw that from the people that testified yesterday. They talked about how they were trying to find work and couldn’t find any. And that was typical. That’s what the data show us. The average duration of unemployment for people looking for work is well beyond the amount of time shown here that we’re seeking damages for or that I’m using to compute damages.

....

[H]e doesn’t do the adjustment for the hours. So that also makes these figures too low by 9.6% for the ethnic groups.

Tr. 295–96.

<sup>91</sup> Dr. Madden identified three flaws in Dr. White’s damages calculations: (1) Dr. White is using 16.7% rather than 41.1% as the non-Hispanic availability, which is based on his estimation of Hispanic individuals with an asbestos license who reside in Virginia (includes an area with a high concentration of Hispanics); (2) it reflects many individuals who obtained an asbestos license after being hired; and (3) WMS’s regularly hired individuals without an asbestos license. Tr. at 293–95. Dr. Madden noted that Dr. White did not calculate the damages for WMS’s failure to assign women the same number of hours as men and non-Hispanic blacks and whites the same number of hours as Hispanics, and did not calculate damages owed to women due to the hourly wage shortfall. *Id.* at 300–01.

## DOCUMENTARY EVIDENCE

In addition to the testimony discussed above, the parties submitted the following:  
*Plaintiff's Exhibits*

1. Summary of Purchase Orders for WMS Solutions, LLC (WMS)'s work for ASI between January 2011 and February 2012
2. Purchase Orders for WMS's work for ASI between January 2011 and February 2012
3. Worker Candidate Profile Sheets produced by WMS
4. List of federal/non-federal jobs performed by WMS during the review period
5. Police and Medical Documents regarding the assault of Luis Fonseca
6. Sample Pay Stubs provided to Plaintiff on March 16, 2012 by the Public Justice Center
7. WMS's Answer
8. WMS's Response to Plaintiff's First Set of Requests for Admissions
9. WMS's Responses to Plaintiff's First Set of Interrogatories
10. WMS's Responses to Plaintiff's First Requests for Production of Documents
11. WMS's Responses to Plaintiff's Second Set of Interrogatories
12. Report prepared by Dr. Janice Fanning Madden
13. Prime Contract No. GS-11P-10-MKC-0025
14. Subcontract between Whiting Turner/Walsh JV and Interior Specialists, Inc.
15. Subcontract between Interior Specialists, Inc. and ASI
16. List of laborers seeking employment at Washington, D.C. One-Stop Shops
17. List of laborers seeking employment at Maryland One-Stop Shops
18. List of laborers seeking employment at Virginia One-Stop Shops
19. Payroll Data
20. The computer programming back-up data for any expert reports exchanged by parties
21. Deposition Transcript – Edward Woodings
22. Deposition Transcript – Wes Black
23. Deposition Transcript – Harold Ortega
24. Deposition Transcript – Paula Fernandes
25. Deposition Transcript – Hugo Rivera
26. Deposition Transcript – Dr. Paul White
27. Interview of Wes Black
28. Interview of Paulo Fernandes
29. Interview of Harold Ortega

*Defendant's Exhibits*

1. Report prepared by Dr. Paul F. White
2. Second Report prepared by Dr. Paul F. White
3. List of Approved Asbestos Training Providers
4. Plaintiff's Response to WMS's First Set of Interrogatories
5. Plaintiff's Response to WMS's First Request for Production of Documents
6. Household Data
7. US Census Bureau 2010 Occupation Code List

8. Void Check – WMS Solutions, LLC
9. Disposition of DC Superior Court Case No. 2011CMD014949
10. Selected pages of US DOL Case No. 2015-DBA-00014
11. Complaint filed in DC Superior Court – *Fonseca v. Salminen*

### STANDARD OF REVIEW

The ALJ conducts a *de novo* review of the record. *See, e.g., OFCCP v. Bridgeport Hosp.*, 1997-OFC-00001 (ALJ Jan. 21, 2000), *aff'd. in relevant part*, ARB Case No. 00-034 (ARB Jan. 31, 2003); *OFCCP v. Beverly Enters., Inc.*, 1999-OFC-00011 (ALJ July 22, 1999), *remanded on other grounds*, ARB Case No. 01-028 (ARB Jan. 31, 2001).

### ISSUE I: WHETHER WMS IS A CONTRACTOR PURSUANT TO EO 11246.

#### APPLICABILITY OF EXECUTIVE ORDER 11246

The first issue to be addressed is whether WMS is a contractor pursuant to EO 11246.

EO 11246, as amended, and its implementing regulations at 41 C.F.R. Chapter 60, makes it unlawful for a covered government contractor to “discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin.” EO 11246 has the force and effect of law.<sup>92</sup> Furthermore, EO 11246’s implementing regulations have the force and effect of law so long as they are not unlawful or plainly unreasonable or inconsistent with the underlying authority.<sup>93</sup>

As a threshold matter, WMS argues that it is not subject to the requirements of EO 11246, because it did not hold a direct government contract; nor did it receive any contract containing language that required it to comply with the antidiscrimination provisions of EO 11246. Def. Br. at 9–11. WMS further argues that it was not a subcontractor, but rather, it was a referral source and did not have a scope of work to perform any work on a government contract. *Id.* at 10.

The OFCCP argues that WMS meets the definition of a subcontractor, as provided in the regulation at 41 C.F.R. § 60-1.3, because it provided laborers to a federally funded construction project at the headquarters of the GSA. Pl. Br. at 20–21. Further, the OFCCP argues that WMS received a total of \$2,346,995.81 as payment for its supply of laborers, which was greater than the \$10,000 threshold amount required for EO 11246 to apply. *Id.* at 21.

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<sup>92</sup> *See United States v. New Orleans Pub. Serv.*, 553 F.2d 459, 465 (5th Cir. 1977), *vacated and remanded on other grounds*, 436 U.S. 942 (1978); *OFCCP v. TNT Crust*, OALJ No. 2004-OFC-00003, at 16–17 (ALJ Sept. 10, 2007); *OFCCP v. St. Regis Corp.*, 1978-OFC-00001, at 96 (ALJ Dec. 28, 1984) [hereinafter *St. Regis Corp.*]; *OFCCP v. Univ. of Cal.*, OALJ No. 1978-OFC-00007, at 33–34 (Sec’y Sept. 4, 1980) [hereinafter *Univ. of Cal.*] (Citing *Maryland CA’s. Co. v. United States*, 251 U.S. 342 (1919) and *Commissioner v. S. Tex. Lumber Co.*, 333 U.S. 496 (1948)).

<sup>93</sup> *See OFCCP v. Prudential Ins. Co.*, OALJ No. 1980-OFC-00019, at 11 (Sec’y July 27, 1980); *St. Regis Corp.*, 1978-OFC-00001, at 96; *Univ. of Cal.*, 1978-OFC-00007 at 34.

Contractors and subcontractors who hold a federal or federally assisted contract or subcontract in excess of \$10,000 must comply with the nondiscrimination requirements of EO 11246. 41 C.F.R. § 60-4.1; *see also* 41 C.F.R. § 60-4.7. A “government contract” is an agreement entered into between a contracting agency and any person for the “purchase, sale or use of . . . non-personal services,” where “non-personal services” includes construction services. 41 C.F.R. § 60-1.3. In relevant part, the regulations define a “subcontract” as “any agreement between a contractor and any person” (where the parties do not stand in the relationship of an employer and an employee) for the use of nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts. 41 C.F.R. § 60-1.3. A subcontractor means any person holding a subcontract as defined by the regulations.<sup>94</sup> 41 C.F.R. § 60-1.3.

The regulation at 41 C.F.R. § 60-1.4(a) requires contracting agencies to include the equal opportunity clause from Section 202 of EO 11246 in each of its contracts. Further, § 60-1.4(c) provides that each nonexempt subcontract should include the equal opportunity clause. Section 60-1.4(e) provides, in relevant part:

[T]he equal opportunity clause shall be considered to be a part of every contract and subcontract required by [EO 11246] 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.

The OFCCP argues that the regulation at 41 C.F.R. § 60-1.4(e) specifically incorporates the anti-discrimination requirements of EO 11246 into “every contract and subcontract,” written or otherwise. Pl. Reply Br. at 12. The Government argues that this provision of the regulations goes further than the Court of Claims’s findings in *Christian*, because it “specifically applies the anti-discrimination requirements of EO 11246 to both contractors and subcontractors.” *Id.*

In *Christian*, a government contract existed between a prime contractor and a subcontractor for the construction of military housing at Fort Polk.<sup>95</sup> Due to the deactivation of Fort Polk at the time, the government terminated the housing contract. *Id.* at 419. The subcontractor, through the contractor, argued it had a right to recover its anticipated profits, because the government breached its contract. *Id.* at 423–24. The subcontractor’s argument was that the housing contract did not contain a provision “expressly authorizing the government to terminate the contract for its convenience.” *Id.* at 424.

The government argued that the contract was to be read as if it did contain a clause allowing the government to terminate the contract because the Armed Services Procurement Regulations provided that such a clause was required to be inserted into all fixed price construction contracts exceeding \$1,000. *Id.* The Court of Claims found that the rule requiring the insertion of the termination clause applied and that the omitted clause was incorporated into the contract at issue.

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<sup>94</sup> “Person” includes corporations and unincorporated associations, among others. 41 C.F.R. § 60-1.3.

<sup>95</sup> The relationship between the prime contractor and the subcontractor was complex, and for purposes of rule application in that case, the Court of Claims viewed the subcontractor as a prime contractor and disregarded the actual prime contractor as a nominal party. *Christian*, 312 F.2d at 422.

The *Christian* doctrine provides that a mandatory statute or regulation that expresses a significant or deeply ingrained strand of public procurement policy shall be read into a federal contract by operation of law, even if the clause is not in the contract. WMS maintains that the *Christian* doctrine, adopted by the Federal Court of Claims,<sup>96</sup> does not apply to the facts of this case. Def. Br. at 9–11. Further, WMS notes that neither the Fourth Circuit, nor the D.C. Circuit, has expressly adopted the *Christian* doctrine.<sup>97</sup>

Here, it is undisputed that the prime contract was entered into between the Government Services Administration (“GSA”) and Whiting-Turner Walsh JV. GX 13. Thereafter, Whiting-Turner Walsh JV entered into a written subcontract with Interior Specialists, Inc. GX 14. Interior Specialists, Inc. then entered into a written subcontract with ASI. GX 15. The issue before me now is whether a subcontract, subject to the requirements of EO 11246, existed between ASI and WMS.

WMS does not dispute that it provided laborers to ASI to perform work on the GSA modernization project. Fernandes testified in his deposition that ASI was a client of WMS. GX 24 at 15. In exchange for laborers, WMS billed the client an agreed upon bill rate per hour worked by each laborer. *Id.* at 42–48. The bill rates were not memorialized in a written contract, but WMS submitted weekly invoices to ASI that detailed each laborer, the number of hours, and the total amount due to WMS. *Id.* at 49, 63–64. Further, WMS was responsible for paying the laborers on a weekly basis. *Id.* at 93.

Based upon this agreement between WMS and ASI for the purchase and use of labor provided by WMS for the completion of work at the GSA modernization site, covered by the prime contract, I find that a subcontract existed between WMS and ASI. Because WMS held a subcontract, I further find that WMS is a subcontractor within the definition provided at 41 C.F.R. § 60-1.3. As a subcontractor to the prime contract for the GSA modernization project, I find that WMS falls within the scope of the antidiscrimination provisions of EO 11246.

WMS asserts that it did not receive a written government contract, but that fact is irrelevant. The regulation is clear that the anti-discrimination provisions are a part of every subcontract associated with a government contract “whether or not the contract between the agency and the contractor is written.” Based on a plain reading of the regulation at 41 C.F.R. § 60-1.4(e) and the holding in *Christian*, I find that the equal opportunity clause was a part of WMS’s subcontract with ASI.<sup>98</sup>

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<sup>96</sup> *G. L. Christian and Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963) [hereinafter *Christian*].

<sup>97</sup> As support, WMS cites to *Amfac Resorts v. U.S. Dep’t of Interior*, 282 F.3d 818 (D.C. Cir. 2002). WMS distinguished *United States v. Miss. Power & Light*, 638 F.2d 899 (5th Cir. 1981), arguing that it involved access to records rather than monetary claims. WMS also distinguished *UPMC Braddock v. Harris*, 934 F. Supp. 2d 238 (D.D.C. 2013), arguing that it was a vacated decision.

<sup>98</sup> WMS also argues that EO 11246 is unconstitutional, because it exceeds the President’s powers. Def. Br. at 24. I do not have the authority to address the constitutionality of EO 11246. “Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974)). While a congressional enactment is not at issue here, questioning the President’s powers and authority is similarly beyond my authority.

Accordingly, I find that WMS is a contractor pursuant to EO 11246.

### **EXECUTIVE ORDER 11246: LEGAL FRAMEWORK**

Issues II and III in this case involve the use of statistical evidence by OFCCP.

In a case brought under Executive Order 11246, the legal standards developed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S. Code § 2000e, are applicable and provide that it is unlawful for an employer to discriminate against any individual with respect to employment based on an individual's race, color, religion, sex, sexual orientation, gender identity, or national origin.<sup>99</sup> The plaintiff has the burden of establishing a prima facie case of discrimination.<sup>100</sup> Proof of discriminatory intent is required, but it may be based upon circumstantial evidence, including statistical evidence. An unlawful intent can be inferred from a showing of a disparity between class members and comparably qualified members who are not part of the minority group.<sup>101</sup> A prima facie case of a pattern or practice of discrimination may be entirely statistical.<sup>102</sup> A statistical disparity in the treatment of minorities may have one of three explanations: (1) it is the product of unlawful discriminatory animus; (2) there is a legitimate nondiscriminatory cause; and (3) it may be the product of chance.<sup>103</sup> If the disparity is significant enough – which shows that the probability it resulted from chance is negligible – it may be inferred that the disparity is the result of unlawful animus.<sup>104</sup>

Statistical evidence may be used to rule out chance as a likely reason for a significant racial, ethnic and gender disparity and the courts have consistently found significance in disparities exceeding two standard deviations.<sup>105</sup> Ruling out chance does not automatically demonstrate that discrimination was a motivating factor, but it does make such a reason a viable factor that can be inferred.<sup>106</sup> The more significant the statistical disparity, the less additional evidence that is needed to establish that the reason was racial, ethnic, or gender discrimination. To succeed in establishing a prima facie case of disparate treatment, a plaintiff must present evidence that is sufficient to raise an inference of intentional discrimination.<sup>107</sup> Extreme cases of statistical disparity may allow a trier of fact to find that intentional discrimination occurred without the need for additional evidence.<sup>108</sup>

If the plaintiff establishes a prima facie case, the burden shifts to the employer to rebut it by showing that the plaintiff's statistical evidence is inadequate or inaccurate.<sup>109</sup> The employer can do this by attacking the plaintiff's statistical methods or by showing that the racial, ethnic or

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<sup>99</sup> *OFCCP v. Bank of America*, ARB Case No. 13-099 (Apr. 21, 2016).

<sup>100</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

<sup>101</sup> *Hazelwood School District v. United States*, 433 U.S. 299, 307 (1977).

<sup>102</sup> *Hazelwood, supra*; *OFCCP v. Greenwood Mills, Inc.*, ARB Case No. 1989-OFC-00039, slip op. at 21-2, 45 (Sec'y, Nov. 20, 1995).

<sup>103</sup> *Palmer v. Schulz*, 815 F.2d 84, 91 (D.C. Cir. 1987).

<sup>104</sup> *Hazelwood, supra*, at 307-308.

<sup>105</sup> *Hazelwood, supra*, at 308, n.14; *Adams v. Ameritech*, 231 F.3d 414, 424 (7th Cir. 2000).

<sup>106</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988, 994 (1988).

<sup>107</sup> *See Texas Dept. of Community Affairs v. Burdines*, 450 U.S. 248, 253 (1981).

<sup>108</sup> *Tagatz v. Marquette University*, 861 F.2d 1040, 1044 (7th Cir. 1988).

<sup>109</sup> *Greenwood Mills, supra*, slip op. at 22.

gender disparity resulted from legitimate, non-discriminatory factors.<sup>110</sup> If the employer proffers evidence that the disparity was the result of legitimate, non-discriminatory factors, the plaintiff can prevail by establishing that the factors were used as a pretext for unlawful discrimination.<sup>111</sup>

With this legal framework in mind, I now turn to Issues II and III.

**ISSUE II: WHETHER WMS VIOLATED EO 11246 WHEN IT IS ALLEGED TO HAVE DISCRIMINATED AGAINST WHITE, BLACK, ASIAN, AND AMERICAN INDIAN/ALASKAN NATIVE LABORERS IN FAVOR OF HIRING HISPANIC LABORERS.**

**OFCCP PRIMA FACIE CASE: HIRING**

Issue II is whether WMS violated EO 11246 when it was alleged to have discriminated against white, black, Asian, and American Indian/Alaskan native laborers in favor of hiring Hispanic laborers.

The OFCCP has alleged that WMS violated EO 11246 when it discriminated against non-Hispanic<sup>112</sup> applicants in its hiring for laborer positions during the review period of February 1, 2011 through January 31, 2012. Pl. Br. at 24–25. The OFCCP advances its argument on the legal theory of intentional disparate treatment and argues that WMS used race and ethnicity as main factors in its hiring process.<sup>113</sup> *Id.* at 24, 29. Accordingly, this case is analogous to a pattern or practice action prosecuted by the government under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in contrast to cases involving individual allegations of discrimination brought by employees.<sup>114</sup> Cases interpreting Title VII, while not necessarily binding authority for administrative proceedings under EO 11246, do supply guidance in analyzing allegations brought by the government.<sup>115</sup>

**STATISTICAL EVIDENCE: HIRING PRACTICES**

The OFCCP has alleged that WMS discriminated against non-Hispanic applicants for employment as asbestos removal and demolition laborers between February 1, 2011 and January 31, 2012. In order to establish a prima facie case, the OFCCP must show by a preponderance of the evidence that there was substantial disparity and that race or ethnicity was the cause. The OFCCP may satisfy this burden by presenting statistical evidence from which it can be inferred that discrimination occurred. The greater the statistical severity the less additional evidence that

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<sup>110</sup> *Palmer v. Schultz*, *supra*, at 99.

<sup>111</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1993).

<sup>112</sup> Non-Hispanic refers to Black, White, Asian, and American Indian/Pacific Islander laborers.

<sup>113</sup> Employment discrimination can be proved in a disparate treatment claim or a disparate impact claim. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 355 (1977) [hereinafter *Teamsters*]; *TNT Crust*, OALJ No. 2004-OFC-00003 (Sept. 10, 2007). Here, the OFCCP chose to pursue a claim of intentional disparate treatment. Accordingly, I will only address the OFCCP's intentional disparate treatment claim. *See OFCCP v. Bank of Am.*, ARB No. 13-099, at 20 (ARB Apr. 21, 2016) (“[T]he OFCCP unequivocally chose to pursue only a claim of intentional disparate treatment.”).

<sup>114</sup> *United States Dep’t of Treasury v. Harris Trust & Sav. Bank*, 1978-OFC-00002, at 4 (ALJ Dec. 22, 1986) [hereinafter *Harris Trust*].

<sup>115</sup> *Id.*; *OFCCP v. Burlington Indus., Inc.*, OALJ No. 1990-OFC-00010, at 15 (ALJ Nov. 2, 1991) [hereinafter *Burlington*].

is necessary for the OFCCP to meet its burden of proof. Where the statistical disparity is extreme, discrimination may be inferred without additional evidence.<sup>116</sup>

Dr. Madden asserts in her report that non-Hispanics workers were less likely to be hired by WMS between February 1, 2011 and January 31, 2012. GX 12 at 4. She explains that an ethnically and racially neutral selection process was expected to yield at least 221 more hires of non-Hispanic workers than the 50 workers WMS hired during this period. She states that these disparities are statistically significant, well beyond the levels frequently required by the courts as evidence that ethnic disparities are not due to chance or random variations.

Dr. Madden used payroll data provided by WMS which included the following: employee's race/ethnicity; gender; dates covered by payroll entry; hourly rate; overtime rates; among other information. GX 12 at 6. These data included over 13,310 different entries related to 724 unique employees. *Id.* The data allowed her to determine the duration of employment, weekly hours assigned, and hourly pay rates by race, ethnicity, and gender of WMS employees.

WMS was unable to provide any hiring records that could be used to determine WMS's applicant flow. Additionally, WMS provided other reports, like a hire list and 180 Candidate Profile Forms. These reports contained so many validation and reliability problems that both Dr. Madden and Dr. White (the WMS expert) had serious doubts about their accuracy.

Courts 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.<sup>117</sup> Furthermore, Courts have found it appropriate to use information from the relevant labor market, or the "community from which workers are drawn," as proxy data upon which to base a hiring analysis.<sup>118</sup> However, the relevant labor market parameters used must account for any special qualifications or minimum objective qualifications for the position in question.<sup>119</sup>

Lacking any reliable data on WMS's applicant flow, Dr. Madden used the U.S. Census estimates of the racial and ethnic composition of the construction laborer occupation in the Washington D.C. metropolitan area as proxy data. GX 12 at 8. Dr. Madden explained that the proxy data she used provided a reliable database that included the right year, the right occupational categories, and the racial and ethnic information required for the analysis. Tr. 251. This proxy data included breakdowns by race and ethnicity of laborers who are classified under a general construction laborer category that includes asbestos removal and demolition workers. Using this dataset, Dr. Madden was able to define the relevant labor market for WMS within the appropriate geographical area in and around Washington D.C. Dr. Madden testified that she knew of no evidence that shows differences in preferences for these particular kinds of work among people that are already engaged in general construction labor. Tr. 251.

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<sup>116</sup> See *Bank of America, supra*, at 11-13.

<sup>117</sup> *Anderson v. Douglas & Lomason, Co.*, 26 F.3d 1277, 1287 (5th Cir. 1994).

<sup>118</sup> *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 299-300 (7th Cir. 1991).

<sup>119</sup> *Mayor v. Educational Equality League*, 415 U.S. 605, 620-621 (1974); *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 767 (3rd Cir. 1989); *Segar & Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984).

Dr. Madden used this U.S. Census data for several reasons: (1) it covers data specific to the Washington D.C. metropolitan area, where WMS laborers were working during the review period; (2) it is viewed by labor economists as the best available data based on the norms by which the U.S. Census collects information; (3) it accounts for workers' interest in employment in construction; and (4) it complies with the minimum objective qualifications approach for the position of laborer at WMS. Tr. 252-253, 319.

Through her analysis, Dr. Madden found that the non-Hispanic representation of 7.5% among hires at WMS is 19.36 standard deviations below the U.S. Census projections of the labor market representation of 41%. *See Table 1 – Madden*. The probability of this happening by chance is more than 1 in 781,000,000,000. GX 12 at 9. This is an example of extreme statistical disparities from which discrimination may be inferred.<sup>120</sup>

#### TESTIMONIAL EVIDENCE: HIRING PRACTICES

The OFCCP may buttress their statistical evidence with testimony about discriminatory practices. Here, the OFCCP provided testimony from several witnesses that support the inference of intentional racial and ethnic discrimination.

##### *Hugo Rivera- Deposition*

According to the depositions of witnesses, the project managers, Harold Ortega and Hugo Rivera were, for most of the review period, responsible for all recruitment and hiring efforts. GX 25 at 17; GX 23 at 8. As described by Rivera, recruiting for WMS mainly occurred through word-of-mouth. Rivera explained that he used a few methods to recruit laborers. For projects in D.C., Rivera would find workers on the street, the stores, or cafeterias. He also placed ads on Craigslist and Facebook in Spanish that read something like “Looking for demo workers. Please contact this number.” GX 25 at 33. Rivera never used any area unemployment centers. Rivera stated that a majority of the time, applicants were referred to WMS by current employees. Rivera confirmed that he kept a list of phone numbers for applicants even if he did not have work for them at the time they were interviewed. GX 25 at 56-57.

When an applicant comes to WMS looking for employment, Rivera explained that he completes an application for that individual. GX 25 at 25. Rivera requests the applicant's name, address, and asks if they have their own transportation. However, Rivera stated that transportation is not a requirement for new hires. In fact, Rivera confirmed that WMS will try to assist workers with carpool arrangements. GX 25 at 26. According to Rivera, WMS's preference is that applicants have some experience or an asbestos license. However, as Rivera makes clear, the license is not required for employment. He stated that WMS would send applicants to asbestos training programs, including the Princeton Industrial Training (“PIT”). PIT is owned by Edward Woodings, the owner of WMS. Rivera also confirmed that WMS has no written job requirements. GX 25 at 27-28.

##### *Harold Ortega- Deposition*

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<sup>120</sup> *See Bank of America, supra*, at 11-13.

Harold Ortega speaks Spanish and only a little English. GX 23 at 8. He is a project manager whose duties include recruiting, hiring, assigning jobs, and determining the hourly pay rate for WMS workers. For recruitment, Ortega seeks referrals from friends and current workers, places ads in Spanish on Craig's List, and occasionally goes to work centers. GX 23 at 11. Like Rivera, Ortega did not use state unemployment centers to recruit new workers. GX 23 at 30. Instead, he recruited at primarily Hispanic employment placement sources, such as Casa de Maryland. GX 23 at 15.

Ortega explained that, while it is required for workers to have an asbestos license when doing asbestos removal work, there are workers who are hired without asbestos licenses who are offered asbestos training so they can get their license after they are hired. Ortega confirmed that the asbestos training was paid for by WMS at some time in the past. GX 23 at 13. According to Ortega, the PIT asbestos training program that was in the same building as WMS opened about 5-6 years before 2016.

According to Ortega, an application form is completed for each applicant who comes in for an interview. These forms are completed whether the applicant is hired or not. GX 23 at 30.<sup>121</sup> Ortega interviewed applicants in Spanish. GX 23 at 21. He also kept personal notes on all applicants, recording their names, licenses or certifications and whether they qualify or not. GX 23 at 32.

#### *Jose Gonzalez-Testimony*

Jose Gonzales ("Gonzales") testified that he worked for a community organization called Inquilinos y Trabajadores United ("Tenants and Workers United") and volunteered at a church group at Culmore Methodist United. Hector Ortiz, a recruiter for WMS, approached Gonzales at his office and explained that he heard from a WMS worker that Gonzales was involved in outreach and meetings at the church to help community members find jobs and to help them with other issues. Ortiz wanted to join some community meetings for recruitment purposes. Tr. 79. According to Gonzales, there were several meetings that he conducted in Spanish with Ortiz that were recruiting efforts for WMS. The workers who attended these meetings were 96% Hispanic. Tr. 86. Gonzales added that Hugo Rivera took over WMS recruitment efforts when Ortiz left WMS.

Gonzales testified that Ortiz primarily spoke about the opportunities and benefits of working at WMS, including growth opportunities and gender equality. According to Gonzalez, the workers at these meeting were actively seeking work and were willing to take courses to get the certification they needed for a job at WMS. Tr. 89. He further testified that Ortiz stated in the meetings that WMS offered a four-day course that workers could complete to obtain their asbestos certification. Tr. 89. Gonzalez confirmed he assisted workers in enrolling into the course. According to him, 98% of the workers he assisted were Hispanic and the course itself was taught in Spanish. Tr. 91.

#### *Porfirio Arias- Testimony*

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<sup>121</sup> When asked in his deposition if the names of two recruitment centers in Hyattsville are both called CASA, one of which Ortega confirmed was CASA Maryland. Ortega responded that he thought so, but did not know.

Porfirio Arias testified that he was hired by WMS for asbestos abatement work in 2009, even though he had no prior experience in asbestos removal. Tr. 137-138. Arias learned about the job opportunity at WMS through friends. Tr. 137. When Arias went to the WMS office in Maryland, he met with Harold Ortega. Ortega had him complete an application and told Arias that he would need to complete a one-week course to receive an asbestos license in Maryland. Tr. 138. Arias stated that there were 25 Hispanic members in the asbestos training class and the class was taught in Spanish. Tr. 140.

## CONCLUSION

I find that the OFCCP has made a prima facie case that WMS intentionally discriminated against non-Hispanic workers in its hiring practices. The statistical analysis conducted by Dr. Madden produced disparities exceeding 2.4 standard deviations. Most courts agree that statistics at two or three standard deviations are significant.<sup>122</sup> Therefore, the methodology and explanatory power of the OFCCP's statistical analyses are sufficient to raise an inference of discrimination. The testimonial evidence further supports a prima facie case of hiring discrimination.

## **WMS REBUTTAL: HIRING DISCRIMINATION**

WMS's rebuttal to the OFCCP's statistical evidence of hiring disparities is centered on three assertions: (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.

WMS asserts that Hispanic workers in the Washington D.C. area were more likely to have an asbestos license than non-Hispanic workers, because "approximately 90 percent of the licensed asbestos workers in the Washington D.C. area are Hispanic." Def. Reply Br. at 6. WMS's assertion that Hispanics make up 90% of asbestos workers in the Washington D.C. area is flawed. While Dr. White received Virginia asbestos certification lists, which he used in his initial report, and later received the Maryland asbestos certification list, WMS never received the D.C. asbestos license list. Without a full picture of workers with asbestos certification, doubt is cast on the contention that 90% of individuals with asbestos certifications are Hispanic. In his initial report, Dr. White identified 261 individuals from the Virginia list of 1,439 after limiting data to the relevant time period and geographic area. Ex. 1 at 11. In his rebuttal report, Dr. White notes that he "recently" received the Maryland licensing data which contained information on all asbestos workers who took the required test in Spanish in the year 2011 and filtered the list down to 1,832 Hispanic individuals out of 2,121. EX 2 at 5.

Further, Jose Gonzalez, a union organizer, testified that there were two local unions for demolition workers in the Washington D.C. metropolitan area. One union had predominantly

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<sup>122</sup> *Harris Trust*, Case No. 1978-OFCCP-2, at 23; see also *Hazelwood*, 433 U.S., at 309 n. 14; *Casteneda*, 430 U.S., at 496 n. 17; *Segar*, 738 F.2d at 1283.

Hispanic members, while the other local union had predominantly Black members.<sup>123</sup> Gonzalez also estimated that the percentage of Hispanic union members that work on asbestos abatement in the metropolitan area was around 50% to 55%. Tr. 106. This is far less than the 90% claimed by WMS, and more in line with the U.S. Census data used by Dr. Madden.

WMS's use of the Virginia asbestos licensing lists as a proxy for the relevant labor market is problematic. During the OFCCP review period, WMS employed over 700 workers for over 1,000 projects. GX 12 at 6. Dr. White's list of Virginia asbestos licensed workers comprised only 261 individuals. EX 1 at 11. Virginia licensing lists do not include the race/ethnicity of the individuals listed. Dr. White had to use U.S. Census data for surnames to identify the licensed individual's race or ethnicity. Dr. Madden tested this methodology against the names of WMS workers and found that 20% of the workers who WMS identified as white would have been identified as Hispanic using Dr. White's method.

Furthermore, one pillar of WMS's argument rests on the premise that an asbestos license was a requirement for employment at WMS and therefore should be accounted for in a relevant labor market determination. The statistical and testimonial evidence does not support this assertion. The most WMS can claim is that asbestos licensing was preferred, but was not a requirement. Dr. White acknowledges as much in his deposition, stating that his understanding is that an asbestos license is preferred, but not necessary and that WMS assisted new hires in obtaining their asbestos license for employment. GX 26 at 25-26. Harold Ortega also confirmed that he hired applicants with no experience. GX 23 at 33.

Other anecdotal evidence supports the contention that an asbestos license was not a requirement for employment at WMS. Many applicants and new hires received their asbestos training with the assistance from WMS. Jose Gonzalez, a community labor volunteer, testified that during a recruitment meeting with community laborers seeking work, a WMS recruiter mentioned that WMS would provide a four-day training course for workers to obtain a certificate and license for asbestos removal. *Id.* at 89.

In fact, an asbestos removal training program (Princeton Industrial Training or "PIT") was located on site at WMS and is owned by Edward Woodings, the owner of WMS. In his deposition, Woodings explained that he started the training school because he needed to train laborers in asbestos removal to work for WMS. GX 21 at 12. He stated that the goal of the school was to simply manage WMS's training programs. *Id.* According to Woodings, it would be fair to say that, by having PIT, WMS could hire people that did not necessarily have an asbestos removal certificate. *Id.*

WMS cites to *City of Richmond v. J.A. Croson Co.* to argue that asbestos certification is a necessary special qualification in determining the relevant labor market for WMS applicants.<sup>124</sup> WMS argues that Dr. Madden's failure to account for the asbestos license requirement is a significant omission because the general construction laborer does not represent the relevant labor pool due to the special qualifications. Def. Br. at 13. A special qualification is one that is

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<sup>123</sup> Gonzalez surmised that the Hispanic membership in the union located in Alexandria, Virginia was around 75% while the other union located in Washington D.C. had about 85% Black membership. Tr. 105.

<sup>124</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-502 (1989).

not possessed or readily acquired by workers in a particular labor pool.<sup>125</sup> While some WMS applicants may not possess asbestos certification, this qualification was readily acquired. The four-day course was offered at the WMS site. The tuition was either paid by WMS or was deducted from the workers' paycheck, so the workers would not need to come up with the tuition funds before getting the job. More importantly, the owner, Woodings, discussed PIT as a convenient and efficient way of training WMS workers. GX 21 at 12.

Dr. Madden relied on U.S. Census data because it is understood by labor economists to be a reliable data source. Tr. 252-253. She focused on the general construction laborer data to account for worker interest. Tr. 324.<sup>126</sup> WMS's argument that Dr. Madden's proxy data was overbroad is not supported by the facts. The critical question is not whether the data used is perfect but instead whether it is reliable and probative of discrimination. To that end, a court must examine whether any statistical assumptions made in the analysis are reasonable.<sup>127</sup>

WMS argues that Dr. Madden's methodology was flawed because some of the workers identified as new hires from the payroll data provided by WMS were actually "rehires." However, the OFCCP was informed by Fernandes that any person not on the payroll beginning on January 22, 2011 should be considered a new hire. Tr. 49; Tr. 314-315. Furthermore, WMS did not provide any guidelines for identifying a rehire. As a result, WMS may have considered a worker who has not accepted a WMS job in two years as a rehire instead of a new hire. WMS provided their expert, Dr. White, with more payroll evidence than the OFCCP received, including a data field that identified new hires and rehires. Tr. 259; GX 26 at 17-21.

WMS also objected to Dr. Madden's use of a payroll review period starting in January 2011 to identify new hires because WMS's work is seasonal and wintertime is the slow period. GX 26 at 49. However, Dr. White did not provide any compelling reason as to how new hires identified starting in the summer months changed the outcomes of hiring disparities between non-Hispanics and Hispanics. *Id.* Again, WMS identifies flaws in Dr. Madden's methodology without any evidence that curing the flaws would change the result.

Additionally, all of WMS's criticism of the hire/rehire list does not address the larger point: does the significant disparity demonstrated by the standard deviations identified in Dr. Madden's analysis (including rehires) disappear when the rehires are excluded from her analysis? All of the rehires subsequently identified by Dr. White were Hispanic workers. And while the exclusion of the rehires reduces the level of disparity between Hispanic and non-Hispanic hiring, the standard deviations would still show a statistical significance. Tr. 261.

WMS endeavors to cast doubt on the validity of Dr. Madden's statistical evidence by stating she did not consider readily available data. WMS quotes her testimony where she stated that "there is no data" on asbestos abatement certification and notes that there was licensing data from Virginia. Def. Br. at 14. WMS mischaracterizes her testimony. In her testimony, Dr. Madden was referring to the data provided by WMS to analyze workers with

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<sup>125</sup> See *Hazelwood* at 308 n. 13.

<sup>126</sup> See also Tr. 252 (emphasizing that no evidence exists to show differences in preferences for particular kinds of work among workers already engaged in general construction labor based on race or ethnicity).

<sup>127</sup> See Paetzold & Willborn, *supra*, § 4.16.

asbestos licenses at WMS, not all asbestos workers licensed in Virginia. Tr. 277. Also, both experts, Dr. White and Dr. Madden, agree that the payroll data and other documentation that WMS provided to each (Dr. White received more useful data) had several inaccuracies and missing data points. Dr. Madden had to work with the data WMS provided and use other sources of proxy data when necessary.

WMS should have provided all evidence of hiring and recruitment documentation that the OFCCP requested during discovery. Instead, WMS failed to produce any accurate documentation that would allow an applicant flow analysis. WMS did not provide the OFCCP's Brooke Sensenig with any advertisements placed for recruiting purposes. Tr. at 49. WMS also did not provide applications or documentation of prior work experience of laborers it hired, except for the worker profile sheets. *Id.* WMS did not provide accurate start dates for its hires, and the OFCCP did not receive any hiring paperwork or documentation that contained the start date information. *Id.* According to Fernandes, the hire date was the first day that a worker worked and appeared in the payroll. *Id.* The OFCCP also did not receive any records of applicants not hired by WMS. *Id.*

During his research, Dr. White did not learn much about WMS's hiring process. Tr. 420. Dr. White relied solely on interviews with Paulo Fernandes for information about the hiring process. GX 26 at 24-25. All of the information Dr. White gathered on WMS hiring and work assignment processes were from Fernandes in 2016, not from the employees who were actually responsible for managing those processes. Fernandes could only provide his understanding of the hiring process in theory.

## CONCLUSION

I find that WMS has not identified or established that any deficiencies could reasonably call into question the validity of Dr. Madden's statistical conclusions about WMS's discriminatory hiring practices.<sup>128</sup> Accordingly, I find that WMS has failed to rebut the OFCCP's prima facie case against WMS for discriminatory hiring practices.

### **ISSUE III: WHETHER WMS VIOLATED EO 11246 WHEN IT IS ALLEGED TO HAVE DISCRIMINATED AGAINST FEMALE LABORERS BASED ON THEIR SEX AND BLACK AND WHITE LABORERS BASED ON THEIR RACE, NATIONAL ORIGIN CONCERNING COMPENSATION**

#### **OFCCP PRIMA FACIE CASE: COMPENSATION**

The third issue to be addressed is whether WMS violated EO 11246 when it was alleged to have discriminated against female laborers based on their sex and black and white laborers based on their race, national origin concerning compensation.

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<sup>128</sup> Finally, WMS's claim that the OFCCP is requiring it to engage in quota-based hiring requirements, in contravention of the OFCCP's own dictates, misstates the applicable law, and reflects a misunderstanding of the rationale underlying statistical analysis as a basis for a prima facie case of discrimination. Def. Br. at 11. Nor is the OFCCP using EO 11246 to "regulate the employment of immigrant workers." *Id.* at 12.

The legal standard for proving compensation discrimination under the Executive Order is the same as the standard of proof for hiring discrimination. Executive Order 11246, 41 C.F.R. §§ 60-1.4(a)(1), 60-20.3(c). Regression analyses are widely accepted for statistical analysis that includes a continuous variable (like wages or hours assigned). Tr. 283. This methodology allowed Dr. Madden to adjust for potential gender differences in the time periods worked to reach her conclusions. GX 12 at 14. The objective of regression analyses is to compare similarly situated groups of men and women and Hispanics and non-Hispanics. GX 12 at 15. According to Dr. Madden, “[a]ny characteristics that matter in ... weekly hour assignments or in hourly pay rates, but that are possessed by both genders or both ethnicities or races in equivalent proportions, or in equal intensity, do not matter in the analysis of whether gender or race or ethnicity affected outcomes.” GX 12 at 15.

#### STATISTICAL EVIDENCE: HOURS ASSIGNED

The OFCCP has alleged that WMS intentionally assigned fewer work hours to women and non-Hispanics men between February 1, 2011 and January 31, 2012. Dr. Madden explains in her report that a “gender and racially/ethnically-neutral hours assignment process are expected to yield 13.9% additional hours each week for women and 9.6% additional weekly hours for non-Hispanics. GX 12 at 4. Dr. Madden’s statistical methodology explores whether there are any factors beyond gender or race and ethnicity that can explain the disparities in hours assigned by the WMS project managers.

Through her linear regression analysis, Dr. Madden computed t-test results, which are equivalent to the number of standard deviations by which the measurement of the variables differs from zero. GX 12 at 13. Dr. Madden found that the standard deviations by which the weekly hours worked by male entry level construction laborers at WMS differed from those of women by 7.98 standard deviations. The standard deviations in her report demonstrate that the observed differences in assigned weekly hours by gender have a low probability of happening by chance. GX 12 at 13.

Dr. Madden’s regression analysis demonstrated that non-Hispanic workers, on average, in any pay period, worked 9.6% fewer hours than Hispanics between February 2011 and January 2012.<sup>129</sup> GX 12 at 13. This 9.6% disparity in hours assigned is 3.10 standards deviations beyond ethnicity or race having no effect on weekly hours worked. GX 12 at 13. This 3.10 standard deviation is greater than the minimum number of standards deviations that courts frequently accept as evidence of intentional discrimination.

#### TESTIMONIAL EVIDENCE: HOURS ASSIGNED

##### *Hugo Rivera- Deposition*

Rivera would contact workers for available jobs. He made work assignment decisions based on his memory to determine which worker was available and willing to do the job. This could include knowing which workers would work at night, and which workers would work on

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<sup>129</sup> The 9.6% point difference in hours can be disaggregated into a 10.1% disparity for non-Hispanic Blacks relative to Hispanics and a disparity of 9% for non-Hispanic Whites relative to Hispanics.

the weekends. None of this employee information is written down or tracked in anyway. Rather, it is all in Rivera's memory, he just remembers who likes to work which kinds of hours or days. GX 25 at 67. Rivera stated that, as a project manager, one of his duties was to keep track of hours worked by the employees. The time sheets Rivera used were submitted by supervisors on the construction site. To Rivera's knowledge, contractors do not usually ask for particular laborers on their jobs. GX 25 at 71.

#### *Harold Ortega- Deposition*

Ortega stated in his deposition that when he received a work order, he would look in the WMS iCertainty reporting system or his notebooks to contact potential workers. GX 23 at 34. He maintained that when he assigned workers to a work site, he would take into account how many hours the worker could expect the job to last. He stated that the supervisors at the job site knew how many hours and what type of work the job entailed. GX 23 at 37.

Ortega also confirmed that contractors sometimes expressed a preference for male workers over female workers. GX 23 at 54. When a contractor expresses this preference, Ortega explained that it was generally because the contractor tells him the job is "too heavy, too hard" for female workers. GX 23 at 55. When this happens, Ortega claims that he sends one or two female workers to serve as cleaners. GX 23 at 55.

#### *Jose Gonzalez- Testimony*

According to Gonzalez, 50% of the attendees seeking work at the WMS recruitment meetings were women. Gonzalez stated that Ortiz would contact him when Ortiz needed workers for a contractor. Gonzalez testified that on several occasions he and Ortiz had disagreements because Ortiz would, at the request of the contractors, request more men than women for jobs. Tr. 96. Ortiz acknowledged that the companies "were not satisfied by the production of women" and did not want to give equal pay to female workers. *Id.* Specifically, Ortiz explained that contractors complained that women would go to the bathroom too often while wearing asbestos suits, resulting in a loss of time and money. *Id.* Consequently, the jobs WMS often offered to women were as drivers to the work sites for male workers. Tr. 98.

#### STATISTICAL EVIDENCE: WAGES

The OFCCP contends that WMS intentionally paid female workers lower wages on average than male workers. The OFCCP points to Dr. Madden's findings that women laborers at WMS received lower hourly wage rates from February 1, 2011 to January 31, 2012. Dr. Madden explains that gender neutral hourly pay rates should have yielded 14.1% higher wage rates for women than what they were paid by WMS. The gender disparities in hourly wage rates for male and female laborers at WMS is statistically significant. GX 12 at 5.

#### TESTIMONIAL EVIDENCE: WAGES

#### *Hugo Rivera- Deposition*

In his deposition, Rivera stated that part of the project manager's duties at WMS was to make sure that employees were paid properly. GX 25 at 39. He explained that the hourly pay rate he offered to workers depended on several factors, including: the job, the season, and workers' availability. He further explained that, if the hourly rate was subject to a prevailing wage, Paulo Fernandes would usually have this information after the job was assigned. Otherwise, Rivera would quote the "market" hourly pay rate for available jobs. GX 25 at 83.

### *Harold Ortega- Deposition*

As a project manager, Ortega also determines the hourly rates to pay workers for each job, unless the project is subject to the prevailing wage. He also assigned the work projects to some workers. Ortega has assigned men work assignments when there are contractors who express a preference for male workers because the jobs offered are "too heavy and too hard" for female workers. In these instances, Ortega fills the work order as requested and sends female laborers to work as cleaners. In these cases, Ortega admits that the work assignments are not offered equally to male and female workers.

### CONCLUSION

I find that the OFCCP has made a prima facie case that WMS intentionally discriminated against women and non-Hispanic workers in its compensation practices. The statistical analysis conducted by Dr. Madden produced disparities exceeding 2.4 standard deviations. Most courts agree that statistics at two or three standard deviations are significant.<sup>130</sup> Therefore, the methodology and explanatory power of the OFCCP's statistical analyses are sufficient to raise an inference of discrimination. The testimonial evidence further supports the finding of WMS's discriminatory compensation practices.

### **WMS REBUTTAL: COMPENSATION DISCRIMINATION**

#### HOURS ASSIGNED

WMS argues that Dr. Madden's regression analysis is flawed because she did not consider any variable other than pay period, race, ethnicity and gender.<sup>131</sup> WMS asserts that she should have considered several control factors in her analysis of job assignments, including: WMS process for determining pay rate, workers prior relevant work experience, asbestos abatement certification, workload of projects, project type, client preference, and worker preferences.

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<sup>130</sup> *Harris Trust*, Case No. 1978-OFCCP-2, at 23; see also *Hazelwood*, 433 U.S., at 309 n. 14; *Casteneda*, 430 U.S., at 496 n. 17; *Segar*, 738 F.2d at 1283.

<sup>131</sup> In arguing that the OFCCP's statistical analysis fails because no specific employment practice has been identified, WMS cites to *Wal-Mart Stores, Inc. v. Dukes, et al.*, 564 U.S. 338 (2011). However, that case involved, *inter alia*, current and former employees alleging gender discrimination against Walmart under a disparate impact claim. In a disparate-impact claim, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. See *Wards Cove Packing Co. v. Atonio, et al.*, 490 U.S. 642, 657 (1989). The OFCCP stated clearly that the matter at hand involved WMS's intentional discrimination to be proven through disparate treatment. Pl. Br. at 24. Causation in a disparate treatment case may be proven with circumstantial evidence and need not be proved by direct evidence.

However, WMS cannot rebut statistical evidence by mere conjecture or assertions, without introducing evidence to support the contention that the missing factor can explain the disparities as a product of legitimate, non-discretionary selection criteria.<sup>132</sup> WMS contends that because the OFCCP's analysis is not persuasive, WMS does not need to offer its own analysis, it only needs to attack the OFCCP's analysis. Def. Br. at 14. In *EEOC v. General Tele. Co. of Northwest*, the Court held that the district court erred in rejecting the EEOC's flawed regression analysis, because there was no showing that curing the flaws would change the result.<sup>133</sup> This also applies in this instance. WMS may not rest its rebuttal on an "unsubstantiated assertion of error."<sup>134</sup> To successfully rebut the OFCCP's prima facie case, WMS must produce credible evidence that curing the alleged flaws would also cure the statistical disparity.

Dr. White asserts that Dr. Madden should have controlled for client preferences. Fernandes, whose role includes client relations, stated that it was very rare that a contractor would request a particular worker or particular work crew. GX 24 at 54. Fernandes acknowledged that WMS did not record these rare occurrences when they did happen. *Id.* Absent an accurate, complete data source, it is difficult to ascertain how Dr. Madden would factor client preferences as a control factor in her analysis.

WMS also asserts that Dr. Madden should have controlled for worker preference. EX 1 at 16. Dr. White offers no concrete evidence that would suggest that worker preferences would differ between gender or racial/ethnic groups. Also, Dr. White does not offer any insight on how Dr. Madden would obtain this highly subjective data. Dr. White acknowledged that the payroll data only contains actual hours worked, not how many hours were offered or accepted. EX 1 at 16: GX 26 at 34-38. The only other possible source for worker preference appears to be Hugo Rivera, who stated that he had memorized all his laborers' preferences. GX 25 at 69.

WMS appears to suggest that there is some compelling evidence that the variables they list as crucial to the analysis would account for the disparities in a gender-neutral and racially and ethnically neutral way. Dr. White explained that while he identified certain categories that Dr. Madden did not include in her models, he has no idea if these categories would actually have any effect on the analysis. GX 26 at 79. Dr. White further acknowledged that he knew of no data kept by WMS that reflected the majority of the categories he identified.<sup>135</sup> *Id.* at 80-81.

According to WMS, Dr. Madden should have ruled out non-discriminatory factors that would explain the disparities found in the analysis. Dr. White confirms in his deposition that his team did not calculate their own analysis of the hours worked using the work experience criteria he states is lacking from Dr. Madden's analysis. He states that maybe they would have done the analysis "if that data is available." But he admits that he did not know if it was provided in the payroll data received from WMS. He also admits that his determinations regarding hours assigned included discussions with Paulo Fernandes and Wesley Black. These discussions did

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<sup>132</sup> See *Palmer v. Schultz*, 815 F.2d 84, 101 (D.C. Cir. 1987).

<sup>133</sup> See *EEOC v. General Tele. Co. of Northwest*, 885 F.2d 575 (9th Cir. 1989).

<sup>134</sup> *Hemmings v. Tidyman's*, 285 F.3d 1174, 1188 (9th Cir. 2004).

<sup>135</sup> Dr. White stated that no records existed for the following: worker preference, work experience, transportation issues.

not include any interviews with the projects managers who were responsible for work assignments.<sup>136</sup> GX 26 at 34-35.

In employment discrimination claims, a plaintiff's statistical analysis must only account for *objective* qualifications. It is entirely proper for the statistical evidence to exclude subjective requirements, such as variables like client or worker preferences.<sup>137</sup> The reason for exclusion is clear. Such subjective criteria may well serve as a veil of seeming legitimacy behind which illegal discrimination is operating.<sup>138</sup> As Dr. Madden noted in her report, the “analyses are not designed to state whether a particular person should have been hired, or given a particular schedule of hours, or assigned a specific pay rate.” GX 12 at 16. She explained that it is only necessary in the analysis to compare similarly situated groups of men and women and Hispanics and non-Hispanics. *Id.* at 15.

WMS offers no countering evidence supporting the assertion that a particular factor not worked into Dr. Madden's regression analysis would indeed provide a more substantial non-discriminatory explanation or at least that calls into question the validity of Dr. Madden's statistical methodology. Further, common sense holds that no statistical analysis of the type presented here can ever rule out every non-discriminatory factor as explanation for a demonstrated disparate effect, or establish beyond question that only discriminatory factors are its cause.<sup>139</sup>

WMS questions the reliability of Dr. Madden's statistical model for pay disparities. According to WMS, Dr. Madden's methodology is flawed because, even with its narrow, results-oriented focus, her analysis only accounted for 13-14% of the assigned work disparities. WMS asserts that this percentage is far from a preponderance of the evidence and reflects the weakness of the analysis. Def. Br. at 21. Dr. Madden explained that the 13 to 14% disparity found in the R-squared value was within the norms of academic literature and represents a standard deviation of 7.98. Tr. 267. WMS counters that the case is not an “academic exercise,” and the analysis needs to be viewed in a legal context. Def. Br. at 21. However, the OFCCP has established a prima facie case for wage discrimination because these percentages, however low, represent a standard deviation well above the legal standard of two or three deviations. WMS's argument that the percentage is far from a preponderance of the evidence is without merit.

Finally, WMS argues that Dr. Madden's report is flawed because she grouped all the pay periods into a single model and therefore the report does not adequately account for the wide variations in workloads and staffing needs from week to week. Def. Br. at 21. However, Dr. Madden testified that she did control for pay periods by “measuring the gender effect or race or ethnicity effect within the same pay period and then averaged out the effect.”<sup>140</sup> Tr. 266.

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<sup>136</sup> Dr. White acknowledged that he was “not familiar with the role” of the two project managers. GX 26 at 35.

<sup>137</sup> See *Segar v. Smith*, *supra*, 738 F.2d 1249 at 1276; see also *Davis v. Califano*, *supra*, 613 F.2d at 964.

<sup>138</sup> *Id.* at 1276.

<sup>139</sup> *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 576 (1985).

<sup>140</sup> WMS also argues that the OFCCP failed to prove discrimination in assignment of work hours because the statistical analysis is not attributable to any specific employment practice. Def. Br. at 19. WMS notes that the OFCCP has not identified how any decision-making on the part of WMS produced the claimed disparity. *Id.* WMS states that there was no decision-making process because it had no control over worker's hours because the contractors controlled the days and hours worked. Also, WMS notes that workers also had control over their hours on any project. *Id.*

## WAGE DISPARITIES

According to WMS, Dr. Madden's regression analysis of wage disparities between female and male workers suffers from the same flaws as her analysis of assigned work hour disparities. Def. Br. at 21.<sup>141</sup> First, Dr. Madden does not take asbestos licensing into account. Second, her computations included overtime hours, which resulted in "double counting" the claimed differential hours worked. *Id.* Third, WMS contends that Dr. Madden's statistical analysis failed to account for other variables that could affect compensation including prior experience and transportation issues. *Id.* at 22. As already noted, *Segar* confirms that a defendant cannot successfully rebut a plaintiff's prima facie case by only insisting that the statistical analysis is invalid if it does not include certain variables that are subjective.<sup>142</sup> A defendant must at least make a clear and reasonably specific showing based on admissible evidence that the alleged nondiscriminatory explanation explains the disparity. *Id.* WMS challenges the OFCCP's statistical methodology by insisting that Dr. Madden's analysis excluded subjective variables such as worker preference and client preference. But none of the variables identified by WMS as omitted from Dr. Madden's analysis are reflected in available objective data; both experts agreed that the data just did not exist for most of the variables.

Testimonial evidence supports the statistical evidence of wage disparities between WMS female workers and male workers. Jose Gonzalez testified that Hector Ortiz, the WMS recruiter, would call Gonzalez when contractors needed workers. Tr. 95. Gonzalez recalled that women made up about 50% of the workers who came to the meeting looking for job opportunities. *Id.* The recruitment discussions led by Ortiz presented both men and women with the opportunity to work in demolition, asbestos removal or lead removal. *Id.* According to Gonzalez, there were several occasions when Ortiz would call for workers and would ask for more men than women per the contractor's request. When Gonzalez protested, Ortiz explained that the contractors were not satisfied with the work production of women and did not want to pay women the same hourly wage as men. The contractors also complained that women would waste time and materials because they would go to the bathroom too often. Tr. 96. Ortiz would offer women a job driving the male workers to the job sites, but this meant these women made less money and worked fewer hours per day. *Id.* at 98.

Harold Ortega stated that he sometimes had contractors who expressed a preference for male workers. GX 23 at 54. The contractors would explain that the project required heavy, hard work and they did not want women to work on the project. *Id.* When he got these requests from contractors, he would send more male workers for the heavy labor and would send one or two women to do cleaning tasks. *Id.* at 55. In his expert report, Dr. White noted his surprise that WMS would hire more women than expected, only to give them fewer hours and less pay. EX 1 at 22. Drawing on her 44 years of expertise researching labor economics, Dr. Madden testified that she was not surprised by this dynamic. Tr. 281. She explained that it was quite common for working women to be over-hired, but underpaid with fewer hours assigned. *Id.* at 279. She reasoned that when contractors, who are offering higher pay and more hours, request male

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<sup>141</sup> WMS relies again on *Wal-Mart*, arguing that the OFCCP failed to show any causal connection between any decision making on the part of WMS and the alleged disparity.

<sup>142</sup> See *Segar v. Smith*, *supra*, 738 F.2d 1249 at 1276.

workers from WMS, then WMS may hire women for jobs that no one else wants to do because the pay is low and the hours are undesirable. *Id.* Dr. Madden maintained that this was one way that gender discrimination occurred, by denying women better jobs and pay. *Id.* at 281.

## CONCLUSION

I find that WMS has not identified or established that any deficiencies could reasonably call into question the validity of Dr. Madden's statistical conclusions about WMS's discriminatory compensation practices.<sup>143</sup> Accordingly, I find that WMS has failed to rebut the OFCCP's prima facie case against WMS for discriminatory compensation practices.

### **ISSUE IV: WHETHER WMS VIOLATED EO 11246 WHEN IT IS ALLEGED TO HAVE FAILED TO ENSURE AND MAINTAIN A WORKING ENVIRONMENT FREE OF HARASSMENT, INTIMIDATION, AND COERCION AT CONSTRUCTION SITES WHERE WMS EMPLOYEES WORKED**

#### HOSTILE WORK ENVIRONMENT

The fourth issue to be addressed is whether WMS violated EO 11246 when it was alleged to have failed to ensure and maintain a working environment free of harassment, intimidation, and coercion at construction sites where WMS's employees worked.

The OFCCP has alleged that WMS employees were subjected to a discriminatory and retaliatory workplace while performing work at the GSA worksite. Pl. Br. at 46. The OFCCP contends that although required by EO 11246 to maintain a harassment-free working environment, WMS "recruited a racially segregated and vulnerable workforce, which it then knowingly exposed to abusive working conditions." *Id.* at 47. Further, the OFCCP argues that even though employees complained about physical abuse and threats at the worksite, WMS failed to address them. *Id.*

WMS argues that the OFCCP's claim of harassment is focused on incidents that occurred with one supervisor for one contractor, and that the evidence as a whole does not support a pattern or practice of subjecting employees to harassment. Def. Br. at 24. Further, WMS argues that it "has never been opposed to taking action to ensure that its workers have the ability to complain about harassment on the [job]." *Id.* WMS further maintains that it is not opposed to issuing an anti-harassment policy and complaint procedure. Def. Reply Br. at 19.

The regulations at 41 C.F.R. § 60-4 provide the affirmative action requirements for construction contractors. Specifically, the requirements "apply to all contractors and subcontractors which hold any Federal or federally assisted construction contract in excess of \$10,000." 41 C.F.R. § 60-4.1. Respondent does not dispute that these requirements apply.

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<sup>143</sup> Finally, WMS's claim that the OFCCP is requiring it to engage in quota-based hiring requirements, in contravention of the OFCCP's own dictates, misstates the applicable law, and reflects a misunderstanding of the rationale underlying statistical analysis as a basis for a prima facie case of discrimination. Def. Br. at 11. Additionally, I am not persuaded that the OFCCP is using Executive Order 11246 to "regulate the employment of immigrant workers." *Id.* at 12.

The regulation at 41 C.F.R. § 60-4.3(a) provides the “Standard Federal Equal Employment Opportunity Construction Contract Specifications,” which must be included in “all Federal and federally assisted construction contracts in excess of \$10,000 . . . .” Section 60-4.3(a)7.a states:

1. The contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor’s compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor’s employees are assigned to work. . . . The Contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Contractor’s obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

41 C.F.R. § 60-4.3(a)7.a.

Although a claim of “hostile work environment” is not explicitly mentioned in Title VII, it is well established that a victim of a racially hostile or abusive work environment may bring a cause of action pursuant to 42 U.S.C. § 2000e–2(a)(1).<sup>144</sup> Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–2(a)(1). This language “is not limited to ‘economic’ or ‘tangible’ discrimination.”<sup>145</sup> The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment,” which includes requiring people to work in a discriminatorily hostile or abusive environment.<sup>146</sup> When the workplace is permeated with “discriminatory intimidation, ridicule, and insult,” that is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,” Title VII is violated.<sup>147</sup>

This standard takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.<sup>148</sup> The “mere utterance of an . . . epithet which engenders offensive feelings in an employee” does not

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<sup>144</sup> See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64–67 (1986) [hereinafter *Vinson*] (describing development of hostile work environment claims based on race).

<sup>145</sup> *Id.* at 91.

<sup>146</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) [hereinafter *Harris*] (quoting *Vinson*, 477 U.S. at 64); see also *Vance v. Ball State Univ.*, 570 U.S. 421, 426 (2013) [hereinafter *Vance*].

<sup>147</sup> *Vance*, 477 U.S., at 65.

<sup>148</sup> *Harris*, 510 U.S. at 21.

sufficiently affect the conditions of employment to implicate Title VII.<sup>149</sup> “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment is beyond Title VII’s purview.”<sup>150</sup> Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.<sup>151</sup>

It should be noted that protections of Title VII are triggered prior to the victim experiencing a nervous breakdown caused by the harassing conduct.<sup>152</sup> A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.<sup>153</sup> Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.<sup>154</sup>

Whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances.<sup>155</sup> “These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”<sup>156</sup> The effect on the employee’s psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Racial harassment, like harassment based on sex, religion, or national origin, is actionable under Title VII if the harassment creates a hostile work environment. The Supreme Court has stated that the environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so.<sup>157</sup>

It is clear that the objective element of this test, namely reasonableness, requires the plaintiff to establish that the harassment was pervasive or severe enough to alter the terms, conditions, or privileges of employment. To sustain a claim against an employer for a racially hostile work environment, the plaintiff must establish that under the totality of the circumstances<sup>158</sup>: (1) he or she is a member of a protected group, (2) he or she was subjected to unwelcome harassment, (3) the harassment was based upon race, (4) the harassment was

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<sup>149</sup> *Id.* (citing *Vance*, 477 U.S. at 67) (quoting *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971)).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 21–22.

<sup>152</sup> *Id.* at 22.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

<sup>158</sup> Application of the severe or pervasiveness test “requires careful consideration of the social context in which particular behavior occurs and is experienced by the target.” *Barbour v. Browner*, 181 F.3d 1342, 1348 (D.C. Cir. 1999) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) [hereinafter *Oncale*]).

pervasive or severe enough to alter<sup>159</sup> the terms, conditions, or privilege of employment, and (5) the employer knew or should have known of the racially discriminatory harassment and failed to take prompt and effective remedial measures to end the harassment.<sup>160</sup>

Pervasiveness and severity are independent and equal grounds on which to support violations of Title VII.<sup>161</sup> To fulfill the burden under the pervasiveness standard, the plaintiff must show more than a few isolated incidents of racial enmity.<sup>162</sup> So instead of sporadic<sup>163</sup> racial slurs, there must be a steady barrage of opprobrious racial comments.<sup>164</sup> Accordingly, a single or isolated racial slur or epithet (unless extremely serious)<sup>165</sup> is unlikely to sustain a finding of a

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<sup>159</sup> See, e.g., *Gooden v. I.R.S.*, 679 Fed. App'x 958 (11th Cir. 2017) (finding that supervisor's alleged comments, belittling female black employee's undergraduate education at historically black college, telling her that her employer IRS did not have money for "people like you" to attend training, and purportedly pushing her and knocking her down, were not so severe and pervasive as to alter terms or conditions of her employment; accordingly, employee failed to establish prima facie case of hostile work environment based on race, gender, and disability in violation of Title VII and Rehabilitation Act); *Park v. Sec'y U.S. Dep't of Veterans Affairs*, 594 Fed. App'x 747 (3d Cir. 2014) (finding that plaintiff failed to show that alleged harassment was sufficiently severe or pervasive that it effectively altered terms and conditions of her employment; most incidents stemmed from plaintiff's limited fluency in English, but accounting for such language barrier could not amount to unlawful discrimination, and incident in which supervisor asked employee whether all Korean people were infected by a particular fungus represented a classic stray comment insufficient to establish a hostile work environment); *Davis v. City of Newark*, 285 Fed. App'x 899 (3d Cir. 2008) (holding that even if alleged incidents were racially motivated, the frequency and severity of the conduct was not sufficient to sustain police officer's hostile work environment claim under Title VII; the frequency of the conduct was minimal, as the events alleged to have occurred took place over a period of more than ten years, and police officer had not alleged that any of the alleged events involved physical threats or humiliations, or unreasonably interfered with her work performance).

<sup>160</sup> See *Vance*, 477 U.S. at 67; *Oncale*, 523 U.S. 75 (1998); *Willis v. Henderson*, 262 F.3d 801, 808 (8th Cir. 2001) (citing *Ross v. Nebraska*, 234 F.3d 391, 395–96 (8th Cir. 2000)).

<sup>161</sup> See, e.g., *Castleberry v. STI Grp.*, 863 F.3d 259 (3d Cir. 2017) (finding that African-American employees' allegations about supervisor's harassment described conduct that was sufficiently severe or pervasive to satisfy prima facie elements a hostile work environment claim; supervisor allegedly used racially charged slur in front of employees and non-African-American coworkers, and in same breath made threats of termination, on several occasions employees' sign-in sheets allegedly bore racially discriminatory comments, and employees allegedly were required to do menial tasks while white colleagues who were less experienced were instructed to perform more complex work).; See also *Vance*, 477 U.S. at 66–68.

<sup>162</sup> *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 579 (D.C. Cir. 2013) [hereinafter *Ayissi-Etoh*] (Kavanaugh, J., concurring) ("The test set forth by the Supreme Court is whether the alleged conduct is 'sufficiently severe or pervasive'—written in the disjunctive—not whether the conduct is 'sufficiently severe and pervasive.'").

<sup>163</sup> See *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir. 1987) ("Because the claimed incidents in the instant case were few in number and occurred over a short period of time, they fail to allege a racially hostile working environment."). Compare to *Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1256 (6th Cir. 1985) (plaintiff subjected to racial slurs for five years) and *E.E.O.C. v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 384 (D. Minn. 1980) ("vicious, frequent, and reprehensible instances of racial harassment, which occurred in several guises").

<sup>164</sup> See, e.g., *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903 (8th Cir. 2006) (finding that eight alleged instances of being called "monkey" in a three-month time frame created sufficient severity and pervasiveness of harassment for plaintiff's claim to be actionable); see also *Snell v. Suffolk Cty.*, 782 F.2d 1094 (2d Cir. 1986) (finding that "the proliferation of demeaning literature and epithets was sufficiently continuous and pervasive to establish a 'concerted pattern of harassment' in violation of Title VII") (internal citations omitted).

<sup>165</sup> Where an African American employee, however, finds a dummy with a black head hanging from a doorway and later discovers the initials "KKK" and the slogan "All n[ ]rs must die" scrawled onto the bathroom walls, a court will find pervasive and severe harassment. *Daniels v. Essex Grp., Inc.*, 937 F.2d 1264 (7th Cir. 1991); *Ayissi-Etoh*, 712 F.3d 572, 577 (D.C. Cir. 2013) (opining that the single incident of "the use of an unambiguously racial epithet such

hostile work environment. Furthermore, the severity<sup>166</sup> of the alleged harassment must amount to more than “ordinary tribulations of the workplace,”<sup>167</sup> or a series of “petty insults vindictive behavior, and angry recriminations” that are not actionable under Title VII.<sup>168</sup>

Applying the Title VII standards to the regulatory requirement that federal contractors “ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor’s employees are assigned to work,” a plaintiff would need to show that the alleged harassment, intimidation, or coercion were sufficiently severe or pervasive. Alleged conduct that is a single physical act can be sufficiently severe to create a hostile workplace. Alleged conduct can also be pervasive if it occurs on several occasions such that working conditions are altered. The regulations further require federal contractors to maintain such a working environment with specific attention to minority or female individuals working at such sites or in such facilities.

The laborers that WMS provided to ASI to work at the GSA worksite were almost exclusively Hispanic, primarily Guatemalans. Tr. at 145. As a federal subcontractor, WMS had an obligation to this minority group of workers to maintain a working environment free from harassment, intimidation, and coercion.

The OFCCP presented the testimony of two former WMS employees, Luis Fonseca and Porfirio Arias, who testified about a hostile work environment at the GSA worksite at 1800 F Street in Washington D.C. While working for WMS, both men were assigned to work on the GSA project for ASI. WMS laborers on the project were supervised by ASI employees, including the Senior Supervisor, Eric Salminen. Most of the WMS laborers on the GSA project

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as ‘n[r]’ by a supervisor” “may have been sufficient to establish a hostile working environment”) (internal citation and quotation omitted).

<sup>166</sup> See *Credeur v. La. Through Office of Att’y Gen.*, 860 F.3d 785 (5th Cir. 2017) (finding that criticism of an employee’s work performance and even threats of termination do not satisfy the standard for a harassment claim supporting action for hostile work environment). *But see Porter v. Erie Foods Intern., Inc.*, 576 F.3d 629 (7th Cir. 2009) (finding that presence of multiple nooses in workplace and veiled threats by coworkers, which caused employee to fear for his own safety, rose to level of hostile work environment based on race under Title VII).

<sup>167</sup> See *Faragher*, 524 U.S. at 788; see generally *Barbour v. Browner*, 181 F.3d 1342, 1348 (D.C. Cir. 1999) (holding that agency contractor’s alleged misconduct was not sufficiently severe or pervasive to alter conditions of employee’s employment, thus defeating Title VII claim); see also *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1366 (10th Cir.1997) (five mild incidents of harassment over 16 month period did not create hostile working environment); see also *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526, 534 (7th Cir. 1993) (same with two incidents over three week period). *But see Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (sexual assault sufficiently severe to create hostile work environment).

<sup>168</sup> See *Brooks v. Grundman*, 748 F.3d 1273, 1278 (D.C. Cir. 2014) [hereinafter *Brooks*] (finding that considered in the aggregate, the episodes cited by the plaintiff, such as selective enforcement of a time and attendance policy, negative performance reviews, and constructive criticisms in letters of counseling and reprimand, do not sufficiently demonstrate the sort of severity or pervasiveness needed to prove a hostile work environment; rather, they constitute the “ordinary tribulations of the workplace,” a series of “petty insults, vindictive behavior, and angry recriminations” that are not actionable under Title VII) (footnote omitted). *But see Gowski v. Peake*, 682 F.3d 1299, 1313 (11th Cir. 2012) [hereinafter *Gowski*] (finding that supervisors of a hospital facility who (1) revoked the privileges necessary for working in critical-care units, (2) imposed a 2-week suspension based on a dubiously substantiated allegation of unprofessional behavior with a nurse, (3) rescinded employee’s medical committee membership, and (4) imposed a 2-year suspension from participating in research programs, created “workplace filled with intimidation and ridicule that was sufficiently severe and pervasive to alter ... working conditions”); see also *Bhatti v. Trustees of Boston Univ.*, 659 F.3d 64, 74 (1st Cir. 2011).

spoke very little English and it appeared to Arias and Fonseca that Salminen spoke no Spanish. Tr. 175-176.

Porfirio Arias, a Hispanic laborer, started working for WMS in 2009. Tr. 137. He testified that in 2009, WMS assigned Arias to work at the GSA project. Between 2009 and 2013, Arias was harassed by Salminen and witnessed other Hispanic laborers subjected to harassment by Salminen. Tr. 140. Arias testified that the harassment occurred “[d]uring the day, very often he would treat us, from the moment we started working to until we left.” Tr. at 143. Salminen called Arias insulting names and was physically aggressive towards Arias and the other workers. Tr. 142. Salminen threw extension cords at Arias and others; grabbed Arias’ shirt to pull him down from a ladder; and grabbed other workers by the shirts to drag them across the jobsite. Tr. 142-144. Arias further testified that he complained to WMS project manager, Harold Ortega approximately eight times in person and ten times by phone about the abusive conditions created by Salminen. Tr.146. According to Arias, Ortega’s only response was to advise Arias to not pay any attention to Salminen and keep working. Tr. 147.

Luis Fonseca, a Hispanic laborer, was employed by WMS to work at the GSA project. Tr. 174-175. He was also supervised by Salminen. Fonseca testified that he witnessed Salminen physically grab another Hispanic worker to push him against the walls; drag another Hispanic worker along a hallway by a cord wrapped around the worker’s arms; and verbally insult workers by calling them “stupid” and telling them that he would “send them all home like dogs in the street.” Tr. 176-177. One night on the jobsite, Salminen struck Fonseca in the eye, causing intense pain. Salminen also struck another worker in the chest that same night. Tr. 178. Fonseca did call the police to have Salminen arrested for the assault. Tr. 181. Fonseca testified that he went to the hospital for the injury and ended up needing nine months of treatment. Tr. 182. Fonseca lost about 35 to 45% of the sight in his left eye as a result of the assault. Tr. 183.

Fonseca further testified that he was humiliated by the physical assault because the other ASI supervisors (who were Hispanic) said not to say anything, not to do anything, and that Eric was just going to sign off on his timesheet and then Fonseca could go home. Tr. at 180. The Hispanic supervisors advised him not call the police and not to make a scene. *Id.* According to Fonseca, his humiliation stemmed from the Hispanic supervisors who “sided with Salminen, because he’s American and because he’s the boss.” *Id.*

I find that both witness testimonies are credible and that the actions of Salminen towards the Hispanic laborers at the GSA project created a hostile work environment as defined by 41 C.F.R. § 60-4.3(a)7.a The Hispanic laborers were subjected to physical, humiliating harassment that was severe and pervasive. The test set forth by the Supreme Court is whether the alleged conduct is “sufficiently severe or pervasive.”<sup>169</sup> A single, sufficiently severe incident, like a physical assault, may suffice to create a hostile work environment.<sup>170</sup>

#### EMPLOYER LIABILITY

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<sup>169</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>170</sup> *See id.*

Under Title VII, an entity can be held liable for discrimination if it is an “employer” of the plaintiff. 42 U.S.C. § 2000e-2(a). It is now well-settled that an individual can have more than one employer for Title VII purposes.<sup>171</sup> The law recognizes that two entities may simultaneously share control over the terms and conditions of employment, such that both should be liable for discrimination relating to those terms and conditions.<sup>172</sup> The two entities in such circumstances are deemed to be joint employers of the employees in question.

An employer’s liability turns on whether the employee has alleged an adverse employment consequence, such as firing or demotion, or a hostile work environment. If a supervisor takes an adverse employment action because of race, causing the employee a tangible job detriment, the employer is vicariously liable for resulting damages.<sup>173</sup> This is because such actions are company acts that can be performed only by the exercise of specific authority granted by the employer, and thus the supervisor acts as the employer. *Id.* If, on the other hand, the employee alleges a racially hostile work environment, the employer is liable only for negligence: that is, only if the employer knew, or in the exercise of reasonable care should have known, about the harassment and failed to take remedial action.<sup>174</sup> Liability has thus been imposed only if the employer is blameworthy in some way.<sup>175</sup>

The EEOC Enforcement Guide provides guidance on determining liability when one of the employers is a temporary staffing firm. Under the relevant guidelines, a staffing agency is liable for discriminatory actions if it knows or should have known about the client’s discrimination and failed to undertake prompt corrective measures within its control.<sup>176</sup>

The OFCCP asserts that WMS is liable for Salminen’s harassment of WMS laborers at the GSA Building Project (the 1800 F Street modernization project), despite Salminen not being a WMS employee, but an employee of ASI, WMS’s client. Pl. Br. at 52–53.

WMS, as discussed *supra*, argues that it is not liable because the OFCCP has failed to prove a “general pattern of harassment against WMS workers.” Def. Br. at 24; Def. Reply Br. at 16–17. WMS further contends that the OFCCP is exaggerating the claim of alleged harassment. Def. Reply Br. at 16. According to WMS, the harassment allegation is primarily based on incidents involving one supervisor, Eric Salminen, employed by one contractor, ASI. Def. Br. at 24; Def. Reply Br. at 16–17. WMS notes that it has provided workers to approximately 1,000 projects during the review period and that out of 700 workers, only two testified about alleged

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<sup>171</sup> See, e.g., *Frey v. Hotel Coleman*, 903 F.3d 671, 676–77 (7th Cir. 2018); *Al-Saffy v. Vilsack*, 827 F.3d 85, 96 (D.C. Cir. 2016); *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 215 (3d Cir. 2015); *Butler v. Drive Automotive Industries of America, Inc.*, 793 F.3d 404, 408–10 (4th Cir. 2015).

<sup>172</sup> See *Butler*, 793 F.3d at 408–10.

<sup>173</sup> *Burlington*, 524 U.S. at 768–69.

<sup>174</sup> See, e.g., *Robinson v. Valmont Indus.*, 238 F.3d 1045, 1047–48 (8th Cir. 2001) (holding that because employer’s response to racial incidents was prompt and adequate, it precluded employer from being liable for hostile work environment); *Dennis v. Cty. of Fairfax*, 55 F.3d 151, 153 (4th Cir. 1995); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) [hereinafter *Davis*].

<sup>175</sup> See, e.g., *Davis*, 858 F.2d at 349; *Snell v. Suffolk Cty.*, 782 F.2d 1094, 1104 (2d Cir. 1986); *DeGrace v. Rumsfeld*, 614 F.2d 796, 805 (1st Cir. 1980).

<sup>176</sup> See *Whitaker v. Milwaukee County*, 772 F.3d 802, 812 (7th Cir. 2014); E.E.O.C., Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, 1997 WL 33159161 (1997).

harassment. *Id.* WMS does not disagree that project managers at WMS knew of the verbal and physical abuse at the GSA building project. WMS states that it has never objected to implementing reasonable anti-harassment policies and instituting a complaint procedure. *Id.*

Arias and Fonseca both testified that they complained to Ortega about the harassment that was occurring at the GSA job site. Arias stated that he told Ortega in person about eight times and by phone about ten times that the ASI supervisor, Salminen, was verbally and physically abusive to many of the WMS workers. According to Arias, Ortega consistently instructed him to ignore Salminen and continue to work. Tr. 147. Fonseca also testified that on the night that Salminen assaulted him and injured his eye, he contacted Ortega to let him know what had happened. Tr. 185. Ortega just responded that they could resolve it later. *Id.* Ortega told Fonseca that he should “let it be” and that they could resolve it “some other way” because ASI was a client and they did not want to lose their business. Tr. 185. The responses that Arias and Fonseca received from Ortega supports the conclusion that WMS was unwilling to take appropriate steps to protect their workers from abusive working conditions.

## CONCLUSION

Accordingly, I find that WMS violated EO 11246 when it failed to ensure and maintain a working environment free of harassment, intimidation, and coercion at construction sites where WMS’s employees worked.

### **ISSUE V: WHETHER WMS FAILED TO PRESERVE AND MAINTAIN ALL PERSONNEL AND EMPLOYMENT RECORDS FOR A PERIOD OF TWO YEARS FROM THE DATE OF CREATING THE RECORD OR THE RELEVANT PERSONNEL ACTION**

#### REQUIREMENT TO PRESERVE AND MAINTAIN RECORDS

The fifth issue to be addressed is whether WMS failed to preserve and maintain all personnel and employment records for a period of two years from the date of creating the record or the relevant personnel action as required by EO 11246.

Contractors that are subject to the requirements of EO 11246 are required to preserve and maintain personnel and employment records for a minimum of two years from the date the record or personnel action was created. 41 C.F.R. § 60-1.12(a).

Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later. . . . Such records include . . . records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes, and

any and all expression of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as online resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position . . . regardless of whether the individual qualifies as an Internet Applicant under 41 C.F.R. § 60-1.3, tests and test results, and interview notes. . . . Where a compliance evaluation has been initiated, all personnel and employment records described above are relevant until the OFCCP make a final disposition of the evaluation.

*Id.*

Further, covered contractors that retain records pursuant to subsection (a) are required to be able to identify the “gender, race, and ethnicity” of each employee and each applicant, and the information must be provided to the OFCCP upon request. 41 C.F.R. § 60-1.12 (c)(1)-(2). If a contractor fails to “preserve complete and accurate records,” it has failed to comply with its obligations under EO 11246. 41 C.F.R. § 60-1.12(e). A failure to preserve records may also give rise to a presumption that the information not preserved “would have been unfavorable to the contractor.” *Id.*

The OFCCP argues that WMS failed to maintain and preserve “applications for the majority of its hired applicants, and kept no applicant flow data.” Pl. Br. at 22. Further, the OFCCP argues that WMS “failed to keep any records of employee experience, promotions, demotions, and had no written compensation policies or methods for determining rates of pay.” *Id.* The OFCCP also argues that WMS did not preserve any records pertaining to worker hours or assignment requests, nor did WMS preserve documentation of requests from client contractors for specific laborers. *Id.* The OFCCP argues that these failures to preserve “complete and accurate records” is a failure to comply with EO 11246, and therefore, gives rise to a presumption that the records WMS has failed to produce would have been unfavorable. *Id.* (citing 41 C.F.R. § 60-1.12(e)).

At the hearing, Brooke Sensenig, the OFCCP’s officer, testified that in order for a contractor to comply with EO 11246, it is required to keep a record of applicants and to trace the race and gender of its applicants and employees. Tr. at 37. With respect to the records received from WMS, she testified that race and gender information pertaining to its employees was received as well as 182 candidate profiles; however, she testified that the OFCCP did not receive any documentation of hiring; only 49 of the candidate profiles were complete and the 182 candidate profiles did not represent all of WMS’s employees, which exceeded 700. *Id.* at 36, 38.

In response, WMS argues that the OFCCP’s arguments fail for three reasons. First, WMS argues that it does not have a record of unsuccessful applicants because its “applicant flow and hiring flow were coextensive.” Def. Reply Br. at 5. Further, WMS argues that it cannot produce records pertaining to promotions and demotions because there are not any records to produce, and similarly, it cannot produce a compensation policy because wages were set based on market conditions and prevailing wage determinations. *Id.*

Second, WMS argues that the regulation at 41 C.F.R. § 60-1.12(a) requires record preservation, but does not require record creation. *Id.* WMS opines that the list of examples in

the regulation represents the types of records that must be preserved if they are created, but the regulation does not mandate creation of those records. *Id.*

Third, WMS argues that an adverse inference “must be tailored to a specific fact or question on which the party seeking the inference was unable to obtain evidence,” and that the OFCCP did not propose any specific fact to be established by an adverse reference. *Id.* at 6.

The regulation at 41 C.F.R. § 60-1.12(a) imposes an obligation on a covered contractor to preserve personnel and employment records that are “made or kept.” The regulation does not impose an affirmative obligation on covered contractors to “create” personnel and employment records. The purpose of § 60-1.12(a) was to “prescribe a record retention period.”<sup>177</sup> Further, § 60-1.12 was intended to assist the OFCCP in its compliance monitoring and enforcement efforts, in accordance with the Uniform Guidelines on Employee Selection Procedures (“UGESP”).<sup>178</sup>

## CONCLUSION

Accordingly, I find that WMS did not fail to preserve and maintain all personnel and employment records for a period of two years from the date of creating the record or the relevant personnel action.

## ISSUE VI: DAMAGES

### TITLE VII: INDIVIDUAL / CLASS-WIDE “MAKE-WHOLE” RELIEF

The legal standards developed under Title VII of the Civil Rights Act of 1964 apply to employment discrimination cases brought under EO 11246.<sup>179</sup> Damages are appropriate in such cases to make persons whole for injuries suffered due to unlawful employment discrimination.<sup>180</sup> Back pay is one element of the “make whole” relief that can be provided to victims of discriminatory employment practices. Injured workers need not have filed a complaint as a prerequisite to the OFCCP seeking such relief on their behalf.

A class-wide formula can be used to calculate back pay awards rather than attempting to assess damages for each victim individually.<sup>181</sup> Such a class-wide approach may be necessary in

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<sup>177</sup> *Government Contractors, Affirmative Action Requirements, Executive Order 11246*, 62 Fed. Reg. 44174, 44177 (Aug. 19, 1997).

<sup>178</sup> *Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes*, 70 F.R. 58946 (Oct. 7, 2005); see generally 41 C.F.R. § 60-3 (UGESP). The U.S. Department of Labor is a signatory to UGESP, together with the Equal Opportunity Commission, the U.S. Department of Justice, and the predecessor of the Office of Personnel Management (collectively known as the “UGESP agencies”). The UGESP is codified at 41 C.F.R. § 60-3, and “requires employers to keep certain kinds of information and details methods for validating tests and selection procedures that are found to have a disparate impact.” 70 Fed. Reg. 58946.

<sup>179</sup> See *OFCCP v. Greenwood Mills, Inc.*, Case No.1989-OFC-39, slip op. at 5 (ALJ, Feb 24, 2000); *OFCCP v. Cleveland Clinic Foundation*, 1991-OFC-00020, slip op. at 3 (ARB July 17, 1996); *U.S. Dep’t of Labor v. Honeywell, Inc.*, 1977-OFC-00003, slip op. at 10 (Sec’y June 2, 1993).

<sup>180</sup> See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

<sup>181</sup> See *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 280-281 (5th Cir. 2008); *Segar, supra*, 738 F. 2d at 1289-1291; *Greenwood Mills, supra*, slip op. at 5-6.

cases that are complex, where the class is large and difficult to identify, or where the illegal discrimination extended over a long period of time.<sup>182</sup>

Interest on back pay is calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the under-payment of taxes. 41 C.F.R. § 601.26(a)(2).

#### HIRING DISCRIMINATION BACK PAY

WMS's lack of objective hiring criteria and use of word-of-mouth recruitment makes it difficult to identify non-Hispanic laborers who would have been given jobs absent discrimination, but it is clear that those. In such a situation, class-wide relief is appropriate. A quagmire of hypothetical judgments can occur when the class size of potential discrimination victims is unmanageable or the illegal discriminatory practices continued over an extended period of time.<sup>183</sup> In such cases, a class-wide approach to the measure of back-pay is necessitated.<sup>184</sup>

Because WMS failed to keep applications for non-hired workers, back wages should be awarded to non-Hispanic laborers who were seeking construction work during the 2011-2012 review period and who were registered at unemployment centers in the Washington, D.C. metropolitan area.<sup>185</sup> This is consistent with the case law recognizing that it is appropriate to rely on general population or labor force statistics in fashioning remedies of discrimination where actual applicant flow data is insufficient.<sup>186</sup>

In order to calculate the back pay owed to non-hired workers, Dr. Madden used the average WMS earnings for people hired during the review period, within each of the racial and ethnic categories. Tr. 290. These calculations included the number of hours worked each year. Tr. 291. She then determined that as a result of WMS's discriminatory hiring practices, there was a shortfall of: 44 Blacks; 268 non-Hispanic whites; 7 Asians; and 2 American Indians/Pacific Islanders. GX 12 at 17-18, 24, 26; Tr. 291-293.

Dr. Madden's analysis includes rehires and thus does not focus solely on new hires at WMS. However, Dr. White's count of total hires during the relevant period excludes rehires.<sup>187</sup> I agree with WMS's argument that rehired workers are a separate category from hires in that

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<sup>182</sup> See *McClain, supra*, 519 F.3d at 280-81; see also *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115 (1979).

<sup>183</sup> *Pettway, supra*, 494 F.2d at 261.

<sup>184</sup> *Id.*

<sup>185</sup> The OFCCP has included a listing from unemployment centers known as "One-Stop Shops" for Washington D.C., Virginia, and Maryland. These lists include the types of occupation sought as well as the race or ethnicity of the unemployed workers and so can be used to identify non-Hispanic construction laborers who were likely victims of WMS hiring discrimination. GX 16; GX 17; GX 18.

<sup>186</sup> See *Catlett v. Missouri Highway & Transp. Com.*, 828 F.2d 1260, 1268 (8<sup>th</sup> Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988); (allowing the use of proxy data for back wage calculation).

<sup>187</sup> The payroll data provided by WMS to the OFCCP did not include data on which workers were new hires or rehires, so Dr. Madden was unable to make a determination of new hire and rehire. And the OFCCP employees asserted that any worker on the payroll after January 29, 2011 should be identified as a new hire. The WMS payroll data that was provided to Dr. White included a column of data that identified new hires and rehires.

WMS would have a racially- and ethnically-neutral preference for rehires because this group of workers had previous work experience with WMS. Therefore, I will follow Dr. Madden's method for calculating back pay, with the caveat that her shortfall numbers be recalculated to exclude the 154 rehires identified by Dr. White.

As discussed above, the non-Hispanic workers identified in the OFCCP's exhibits GX 16, GX 17, and GX 18, the One-Stop Shop listings, represent a reasonable grouping of potential class members. Use of this defined group of unemployed construction workers as proxies for "actual" injured workers may be imperfect and imprecise. However, in a case like this, where the specific victims of discrimination are not identifiable, identification of claimants will necessarily be based on an artificial construct.<sup>188</sup> Courts have allowed plaintiff's in a disparate treatment claim to name similarly situated class members without identifying each specific person in the class. The "EEOC can seek relief for individuals situated similarly to the charging party and is not required to identify every potential class member."<sup>189</sup> Courts have further held, while the plaintiff in a Title VII claim is not required to disclose the identities of each and every member of the potential class, the plaintiff must at least provide the defendant with the outline of the class members.<sup>190</sup>

While these cases were not focused on the appropriate distribution of damages, they address the challenge of identifying potential class members in wide ranging discrimination cases, where not all victims of discrimination can be accurately and timely identified. Use of a discrete group of "similarly situated" class members alleviates the need to expend resources on identification of laborers who were unemployed during the period of January 2011 to February 2012, while also serving the purpose of providing class-wide relief.

The initial burden will be on the individual claimant to establish that they are a member of the class discriminated against and are therefore entitled to recover back wages.<sup>191</sup> There should not be an unrealistic burden put on claimants in determining whether they applied for a job or could not reasonably have discovered any job opportunities at WMS.

In order to be eligible for back pay, claimants need only prove they applied for a position or would have applied if not for WMS's discriminatory practices. They may be required to show what their qualifications were, but do not have the burden of proving they were qualified for the position sought. Because class-wide discrimination has already been shown, the employer has the burden of proving that the applicant was unqualified or showing some other valid reason why

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<sup>188</sup> See *EEOC v. Chicago Miniature Lamps*, 668 F.Supp.1150, 1152, n.5. (N.D. Ill.1987).

<sup>189</sup> *United States Equal Opportunity Comm'n v. Dillard's Inc.*, No. 08-CV-1780-IEG (PCL), 2011 U.S. Dist. LEXIS 76206 \*21, (S.D. Cal. July 14, 2011)(where the Court was deciding whether the nature and scope of the EEOC's pre-litigation efforts were sufficient to put Dillard's on notice that it potentially faced claims arising from a nationwide class of current and former employees. The EEOC had only focused on one of Employer's stores and not a company-wide class.)

<sup>190</sup> See *EEOC v. Bass Pro Outdoor World, LLC*, 1 F. Supp. 3d 647, 664-665 (S.D. Tex. 2014) (where the Court rejected the notion that the EEOC must undertake individualized conciliation efforts regarding each and every potential class member); see also *EEOC v. Rock-Tenn Servs. Co., Inc.*, 901 F. Supp. 2d 810, 819 (N.D. Tex. 2012) (citing *EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260 (D. Minn. 2009); *EEOC v. Paramount Staffing, Inc.*, 601 F. Supp. 2d 986 (W.D. Tenn. 2009); *EEOC v. Cone Solvents, Inc.*, No. 3:04-0841, 2006 U.S. Dist. LEXIS 29866 (M.D. Tenn. Apr. 21, 2006).

<sup>191</sup> See *Johnson v. Goodyear*, 491 F.2d 1364, 1374-1375 (5th Cir. 1974).

the claimant was not, or would not have been, acceptable.<sup>192</sup> Because WMS lacked formal application procedures, it is nearly impossible to identify with any certainty the specific victims of the discriminatory conduct. Therefore, all uncertainties should be resolved against the employer.<sup>193</sup>

Accordingly, relying on Dr. Madden's calculations with the revised shortfall numbers, I award \$780,998<sup>194</sup> in back pay to the non-hired workers who were subjected to WMS's hiring discrimination during the review period. The monetary calculations for the hiring back pay award is an estimate based on an understanding of the calculations. This award will be distributed equally among all claimants from the defined "One-Stop Shop" group who can establish that they were a member of the injured class.

#### COMPENSATION DISCRIMINATION BACK PAY

As the OFCCP has presented sufficient evidence of both hiring and compensation discrimination by WMS, there is a presumption in favor of the class members' entitlement to back pay.<sup>195</sup>

In order to calculate the back pay amount owed to injured female laborers, Dr. Madden multiplied average wages by the number of hours these women should have worked but for WMS's discriminatory conduct in job assignments. Tr. 299. Dr. Madden determined that female laborers lost \$64,743 in wages and \$10,846 in interest for a total of \$75,985. GX 12 at 17-18, 26; Tr. 299. Additionally, Dr. Madden determined that because WMS assigned non-Hispanic Black laborers and non-Hispanic White laborers fewer hours of work than Hispanic laborers, these non-Hispanic laborers lost \$14,475 in wages and \$2,425 in interest, for a total of \$16,900. GX 12 at 26.

Next, Dr. Madden calculated the back pay owed women laborers due to WMS's decision to pay them a lower hourly rate than men by multiplying the average hourly wage lost by the number of hours female laborers would have worked but for the hours of work assigned discrimination. Tr. 301-302. Dr. Madden determined that because WMS paid female laborers a lower hourly pay rate than male laborers, female laborers lost \$74,875 in wages and \$12,543 in interest, for a total of \$87,418 during the review period. GX 12 at 17-18, 26.

Accordingly, I award \$179,907 in back pay to the laborers who were subjected to WMS's discriminatory compensation practices during the review period. GX 12 p. 26.

Below is summary of the earnings and interest owed by WMS as a result of its unlawful discrimination from February 2011 to January 2012.

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<sup>192</sup> See *International Brotherhood of Teamsters*, *supra*, 431 U.S. at 362; *Pettway*, *supra*, 681 F.2d at 1266.

<sup>193</sup> See *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976); *see also Pettway*, *supra*, 494 F.2d at 261.

<sup>194</sup> This award amount is subject to revision pending verification from the Administrator.

<sup>195</sup> See *Pettway*, *supra*, 494 F.2d, at 259 (proof of a pattern of discrimination establishes a presumption in favor of class members' entitlement to back or front pay.)

| <b>Earnings owed as a result of discriminatory hiring practices:</b> | <b>Shortfall WMS Hires</b> | <b>Total Lost Earnings</b> | <b>Interest through July 2016</b> | <b>Total Lost Earnings plus interest</b> |
|--|----------------------------|----------------------------|-----------------------------------|--|
| Black workers  | 28                         | \$130,396                  | \$21,841                          | \$152,237                                |
| Non-Hispanic white workers   | 125                        | \$527,750                  | \$88,399                          | \$616,149                                |
| Asians workers   | 5                          | \$3,010                    | \$505                             | \$3,515                                  |
| American Indian/Pacific Islanders                                    | 2                          | \$7,792                    | \$1,305                           | \$9,097                                  |
| <b>Total</b>   | <b>160</b>                 | <b>\$668,948</b>           | <b>\$112,050</b>                  | <b>\$780,998</b>                         |

| <b>Earnings owed as a result of discriminatory compensation practices:</b> | <b>Total Lost Earnings</b> | <b>Interest through July 2016</b> | <b>Total Lost Earnings + Interest</b> |
|--|----------------------------|-----------------------------------|---------------------------------------|
| Assignment of hours to Women   | \$64,743                   | \$10,846                          | \$75,589                              |
| Assignment of hours to Non-Hispanic whites and Non-Hispanic blacks         | \$14,475                   | \$2,425                           | \$16,900                              |
| Rates of pay for women   | \$74,875                   | \$12,543                          | \$87,418                              |
| <b>Total</b>   |                            |                                   | <b>\$179,907</b>                      |

**TITLE VII: AFFIRMATIVE RELIEF**

Back pay is but one element of the “make whole” relief that can be provided to a victim of discrimination, and the regulation clearly states that affirmative relief is not limited to back pay. Indeed, the Court noted that where a violation of Title VII is found,

“A court has the power, and indeed the obligation, to award any equitable remedies necessary to advance the dual statutory goals of eliminating the effects of past discrimination and preventing future discrimination.”<sup>196</sup>

Affirmative relief, in contrast to individual and class-wide relief, serves "not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future."<sup>197</sup> Affirmative relief is uniquely designed to address ongoing, discriminatory conduct. While it is not mandatory, relief is necessary where there are persistent effects or a substantial risk of ongoing violations.

Having reviewed the depositions of WMS employees (which were taken in 2016), it is clear that no measures were implemented by WMS to prevent workplace harassment at job sites. GX 23 at 40-43; GX 24 at 58-62; GX 25 at 73-80. On the other hand, WMS made it clear that they had no objections to developing and issuing an anti-harassment policy and complaint procedure, or training its managers and supervisors to implement those policies and procedures. Def. Reply Br. at 19.

### **RECOMMENDED ORDER**

It is recommended that the Secretary enter the following order:

#### **FINDINGS**

- 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.

#### **DAMAGES**

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<sup>196</sup> *Spencer v. General Electric Co.*, 703 F. Supp. 466, 468-469 (E.D. Va. 1989), citing *Pitre v. Western Elec. Co., Inc.*, 843 F.2d 1262, 1274 (10th Cir. 1988), citing *Albemarle Paper Co.*, *supra* 422 U.S. at 418.

<sup>197</sup> *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (plurality).

Further, WMS Solutions, LLC will pay the following damages:

- 1) An award of \$780,998 in back pay damages and interest will be paid to the non-hired workers who were injured by WMS Solutions, LLC's discriminatory hiring practices.<sup>198</sup>
- 2) An award of \$179,907 in back pay damages and interest will be paid to the female laborers and non-Hispanic workers who were injured by WMS Solutions, LLC's discriminatory compensation practices.<sup>199</sup>

#### AFFIRMATIVE RELIEF

Finally, within the next 90 days, WMS will take the following affirmative actions to ensure and maintain a work environment free from harassment, intimidation and coercion:

- 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 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

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<sup>198</sup> See summary of earnings owed as a result of discriminatory hiring practices on page 85-86 for details.

<sup>199</sup> See summary of earnings owed as a result of discriminatory compensation practices on page 86 for details.

- 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.
- 5) All computations of damages are subject to verification by the Administrator.

LARRY S. MERCK  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file Exceptions (“Exception”) with the Administrative Review Board (“Board”) within **fourteen (14) days** of the date of issuance of the administrative law judge’s recommended decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than **three (3) days** before the Exception is due. *See* 41 C.F.R. § 60-30.28.

On the same date you file the Exception with the Board, a copy of the Exception must be served on each party to the proceeding. Within **fourteen (14) days** of the date of receipt of the Exception by a party, the party may submit a response to the Exception with the Board. Any request for an extension of time to file a response to the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than **three (3) days** before the response is due. *See* 41 C.F.R. § 60-30.28.

Even if no Exception is timely filed, the administrative law judge’s recommended decision, along with the record, is automatically forwarded to the Board for a final administrative order. *See* 41 C.F.R. § 60-30.27.

# EXHIBIT 2

**FILED**  
**SAN MATEO COUNTY**  
**APR 30 2020**

~~Clerk of the Superior Court~~  
By \_\_\_\_\_  
DEPUTY CLERK

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**COUNTY OF SAN MATEO**

RONG JEWETT, SOPHY WANG, and XIAN  
MURRAY, on behalf of themselves, and  
ELIZABETH SUE PETERSEN, MARILYN  
CLARK, and MANJARI KANT, on behalf of  
themselves and all others similarly situated,  
  
Plaintiffs,  
  
v.  
  
ORACLE AMERICA, INC.,  
  
Defendant.

) Case No.: 17CIV02669  
)  
) **ORDER GRANTING**  
) **REPRESENTATIVE PLAINTIFFS'**  
) **MOTION FOR CLASS**  
) **CERTIFICATION**  
)  
) Assigned for all purposes to the  
) Honorable V. Raymond Swope  
)  
) Complaint Filed: June 16, 2017  
)  
) Trial Date: No date set  
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1 On February 7, 2020, in Department 23, the Court heard argument on the Motion for  
2 Class Certification of proposed Representative Plaintiffs Elizabeth Sue Peterson, Marilyn Clark,  
3 and Manjari Kant (“Representative Plaintiffs”), with all parties appearing through their counsel  
4 of record. Having considered the memoranda and evidence filed by all parties, the complete  
5 record, oral argument of counsel, and the relevant law, and for the reasons set forth below, the  
6 Court finds this case should be certified to proceed as a class action pursuant to California Code  
7 of Civil Procedure section 382 and California Rule of Court 3.765. .

### 8 INTRODUCTION

9 The Representative Plaintiffs are three women employed by Defendant Oracle America,  
10 Inc. (“Oracle”) in California. Oracle is “a global company that offers technology products and  
11 services.” Oracle Opp. Mem. at 2. Plaintiffs contend that Oracle pays women employees in  
12 California less than men performing substantially similar or equal work, and thus violates  
13 California law. Plaintiffs allege that Oracle has violated California’s Equal Pay Act, Labor Code  
14 §1197.5 (“EPA”), as well as California’s Unfair Competition Law, Business & Professions Code  
15 §17200 (“UCL”). They seek to proceed as a class action, representing over 4,100 women  
16 employed by Oracle in California in its Information Technology, Product Development, and  
17 Support Job Functions since June 16, 2013. Plaintiffs contend that these women were paid on  
18 average over \$13,000 less per year than similarly-situated men. Plaintiffs also contend that much  
19 of this pay disparity arose from Oracle’s use of prior salary at jobs before Oracle to set starting  
20 salaries for its workers, a practice the California Legislature has found perpetuates historical pay  
21 discrimination. *See* AB 1676 (2016) at §1(b) (which was attached as Exhibit I to Plaintiffs’  
22 Request for Judicial Notice (“RJN”)).

23 The California Equal Pay Act prohibits employers from paying women and men unequal  
24 amounts for substantially similar work: “[a]n employer shall not pay any of its employees at  
25 wage rates less than the rates paid to employees of the opposite sex for substantially similar  
26 work, when viewed as a composite of skill, effort, and responsibility, and performed under  
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1 similar working conditions....” Labor Code §1197.5.<sup>1</sup> This is a strict liability statute: proving a  
2 violation of the EPA (like the federal EPA), does not required proving intent, discriminatory  
3 animus, or the cause or motive for the identified pay disparity. *Id.*

4 The California Unfair Competition Law prohibits businesses from engaging in “any  
5 unlawful, unfair or fraudulent business act or practice.” Bus. & Prof. Code §17200. The UCL  
6 “borrows violations of other laws” and makes them “independently actionable.” *Cel-Tech*  
7 *Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 180 (quotations  
8 omitted). Here, Plaintiffs allege that Oracle violated the UCL both by violating the EPA and also  
9 by violating the Fair Employment & Housing Act (“FEHA”), Cal. Gov. Code §12940.

10 Plaintiffs ask the Court to certify the following class: “all women employed by Oracle in  
11 California in its Product Development, Information Technology, and Support job functions,  
12 excluding campus hires, at any time during the time period beginning June 16, 2013, through the  
13 day of the trial.” The proposed class includes employees from three of Oracle’s fifteen different  
14 job functions. *See* Declaration of James M. Finberg in Support of Plaintiffs’ Motion for Class  
15 Certification (“Finberg Decl.”), Ex. B (Waggoner) at 83:2-84:25, Ex. M at 00000653. Employees  
16 in Product Development work to develop the products Oracle sells; Information Technology  
17 employees support Oracle employees on Oracle’s internal IT systems; and Support employees  
18 provide services to Oracles customers. *Id.* at 45:18-46:13.

19 In support of their motion, Plaintiffs have submitted substantial common evidence  
20 regarding all of the elements of their EPA and UCL claims and Oracle’s affirmative defenses to  
21 those claims.  
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24 <sup>1</sup> Prior to 2016, the EPA prohibited employers from paying men and women unequal  
25 amounts for substantially “equal” work. *See* SB 358, §1(b) (amending Labor Code §1197.5 in  
26 light of the “gender wage gap in California” and “the persistent disparity in earnings [that] still  
27 ha[ve] a significant impact on the economic security and welfare of millions of working women  
28 and their families.”); Plfs’ RJN, Ex. D (Labor Code §1197.5 text through December 31, 2015).  
The prior substantially equal standard paralleled the standard under the 1963 federal Equal Pay  
Act, 29 U.S.C. §§206(d)(1)(iv). *See generally* *Rizo v. Yovino*, \_\_\_ F.3d \_\_\_, 2020 WL 946053 (9th  
Cir. Feb. 27, 2020) (en banc); *see Hall v. City of Los Angeles* (2007) 148 Cal. App. 4th 318; 323-  
24; *Green v. Par Pools, Inc.* (2003)111 Cal. App. 4th 620, 623; *see also Negley v. Judicial*  
*Council of California*, 458 Fed. Appx. 682 (9th Cir. 2011).

1 With respect to their EPA claim, Plaintiffs submitted evidence regarding the centralized  
2 and systematized manner in which Oracle classifies employees and determines employee pay  
3 through the use of a detailed company-wide system of job codes, in which Oracle groups  
4 employees by job function, job specialty, job family and responsibility level, and assigns each  
5 job code a specific salary range. *E.g.*, Oracle’s “Global Job Table,” Finberg Decl., Ex. Z<sup>2</sup>, and  
6 “Global Compensation PowerPoint Presentation,” Finberg Decl., Ex. M, Ex. B (Waggoner) at  
7 66:1-77:12. Plaintiffs’ common evidence includes deposition testimony from Oracle’s PMQ  
8 designees that individuals within job code share “basic skills, knowledge, and abilities,” and  
9 “similar” “levels of responsibility and impact.” Finberg Decl., Ex. B (Waggoner) at 225:11-19,  
10 229:7-9.

11 Plaintiffs’ common evidence also includes detailed reports and expert analyses and  
12 opinions from two experts – Professor David Neumark, Ph.D., a Labor Economist, and Leaetta  
13 Hough, Ph.D., an Industrial Organization Psychologist.<sup>3</sup> Industrial Organizational Psychologist  
14 Hough analyzed Oracle’s job classification system and concluded that “At Oracle women in the  
15 same job codes as men perform the same or substantially similar work.” Hough Report at ¶48;  
16 *see also* ¶18.a. *See also* Neumark January 2019 Report at ¶8.b. Plaintiffs’ experts concluded that  
17 work within Oracle’s specific job codes should be considered substantially equal with respect to  
18 skills, effort, and responsibilities.

19 Professor Neumark analyzed Oracle’s pay records and found disparities in pay between  
20 men and women within job code. Neumark January 2019 and April 2019 Reports. He found that  
21 women working in the same job codes as men receive less base pay, fewer bonuses, and less  
22 stock. Neumark January 2019 Report at ¶8.b. He found that the compensation discrepancies are  
23 large and statistically significant. *Id.*

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27 <sup>2</sup> There are approximately 200 specific job codes within the three job functions that  
comprise the proposed class. Finberg Decl., Ex. Z.

28 <sup>3</sup> Oracle moved to strike the Neumark and Hough Reports. By separate orders, the Court  
denied those motions and found that the reports contain admissible evidence.

1 With respect to their UCL claim, Plaintiffs submitted documents from Oracle and  
2 testimony from Oracle’s corporate designees demonstrating Oracle’s use of prior pay to set  
3 salary levels for incoming employees, including both those brought on-board by acquiring other  
4 businesses and lateral hires. *E.g.*, Finberg Decl., Ex. B (Waggoner) at 166:25-168:24, 352:5-25,  
5 359:15- 364:8; *id.* Ex. D (Kidder) at 29:25-30:6; *id.* Ex. FF at 6675; *id.* Ex. N at 0000170; *id.* Ex.  
6 X; *id.* Ex. GG; Holman-Harries Dec., Ex. A at 8; Subramanian Decl. at ¶¶2-3; Finberg Reply  
7 Decl., Ex. D (Subramanian) at 82:8-85:3. Professor Neumark found that “this initial gender gap  
8 in starting pay drives the gender gap in base pay that I observed during the Class Period; the  
9 magnitude of the gender gap in base pay is similar during the Class Period and in the data on  
10 starting pay.” Neumark January 2019 Report at ¶8.d.

11 Oracle opposes class certification. Oracle does not contest ascertainability or numerosity;  
12 instead, Oracle primarily focuses on what it contends is a lack of predominance of common  
13 issues. Oracle argues that variations in job duties within the job code system it employs preclude  
14 comparing the pay of people within those codes for purposes of the EPA. Oracle also contends  
15 that its affirmative defense that certain “bona fide” factors justified any pay disparities between  
16 women and men performing substantially similar work – which would be Oracle’s statutory  
17 burden to prove – would require individualized inquiry and proof. Oracle asserts that the  
18 Representative Plaintiffs’ claims are not typical of the class and that they are not adequate  
19 representatives. As to Plaintiffs’ UCL claim, Oracle makes the merits argument that Plaintiffs  
20 cannot challenge the use of prior pay in setting initial salaries as unlawful on a classwide basis  
21 because, Oracle asserts, Plaintiffs have not adequately pled that claim.

22 In support of its arguments, Oracle submitted common evidence – declarations from  
23 managers and employees describing their work, as well as an expert report from an economics  
24 litigation consultant, critiquing the statistical analysis performed by Plaintiffs’ expert labor  
25 economist.

26 The Court has considered all of the arguments and complete record presented on this  
27 motion, and discusses below each of the relevant factors in turn, and explains why class  
28 certification is appropriate in this case.

1 DISCUSSION

2 I. Standard for Class Certification

3 California has “a public policy which encourages the use of the class action device.”  
4 *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326; *see also Linder v.*  
5 *Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 434 (the California Supreme Court has “long...  
6 acknowledged the importance of class actions as a means to prevent a failure of justice in our  
7 judicial system”). Class certification is appropriate when “the question is one of a common or  
8 general interest, of many persons, or when the parties are numerous, and it is impracticable to  
9 bring them all before the court.” Code Civ. Pro. §382. A class should be certified where there is  
10 an ascertainable class, and a well-defined “community of interest among class members.” *Sav-*  
11 *On*, 34 Cal. 4th at 326. The “community of interest requirement [] embodies three factors: (1)  
12 predominant common questions of law or fact; (2) class representatives with claims or defenses  
13 typical of the class; and (3) class representatives who can adequately represent the class.”  
14 *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal. 4th 1096, 1104 (citation omitted). This  
15 Court must also consider whether “the class action proceeding is superior to alternate means for  
16 a fair and efficient adjudication of the litigation.” *Sav-On*, 34 Cal. 4th at 332.

17 A ruling on class certification “is ‘essentially a procedural one that does not ask whether  
18 an action is legally or factually meritorious.’” *Sav-On*, 34 Cal.4th at 326 (quoting *Linder*, 23  
19 Cal.4th at 439-40). The relevant focus is on the plaintiffs’ “theory of recovery.” *Sav-On*, 34  
20 Cal.4th at 327 (“[I]n determining whether there is substantial evidence to support [certification],  
21 we consider whether the theory of recovery advanced by the proponents of certification is, as an  
22 analytical matter, likely to prove amenable to class treatment.”). Thus, the Court asks whether  
23 “the issues which may be jointly tried, when compared to those requiring separate adjudication,  
24 are so numerous or substantial that the maintenance of a class action would be advantageous to  
25 the judicial process and to the litigants.” *Id.* at 326 (quoting *Collins v. Rocha* (1972) 7 Cal.3d  
26 232, 238).

1 **II. Ascertainability of the Proposed Class**

2 Oracle does not contest ascertainability, which the Court concludes is met. Whether a  
3 class is ascertainable is determined by examining: “(1) the class definition, (2) the size of the  
4 class, and (3) the means available for identifying class members.” *Reyes v. San Diego Cty. Bd. of*  
5 *Supervisors* (1987) 196 Cal. App. 3d 1263, 1271; *ABM Indus. Overtime Cases* (2018) 19 Cal.  
6 App. 5th 277, 302. The proposed Class, “all women employed by Oracle in California in its  
7 Product Development, Information Technology, and Support job functions, excluding campus  
8 hires, at any time during the time period beginning June 16, 2013, through the day of the trial,” is  
9 ascertainable from Oracle’s records.

10 **III. Numerosity of the Proposed Class**

11 The Proposed Class has over 4,100 members. *See* Neumark April 2019 Report at ¶11. It  
12 would be impracticable to bring all class members before the Court. Oracle does not contest  
13 numerosity. The numerosity requirement is satisfied.

14 **IV. Well-Defined Community of Interest**

15 **A. Predominance of Common Questions of Law or Fact**

16 As discussed above, the California Supreme Court in *Sav-On* and subsequent cases have  
17 instructed that in assessing whether common or individualized issues predominate, this Court’s  
18 inquiry should focus on the plaintiffs’ theory of recovery, and whether plaintiffs’ theory is  
19 amenable to being tried on a class basis. 34 Cal. 4th at 326-27. As explained in *Linder*, the  
20 Court’s role is to “scrutiniz[e] a proposed class cause of action to determine whether, *assuming*  
21 *its merit*, it is suitable for resolution on a class-wide basis.” 23 Cal. 4th at 443 (emphasis added).  
22 The “ultimate question” is whether “the issues which may be jointly tried, when compared with  
23 those requiring separate adjudication, are so numerous or substantial that the maintenance of a  
24 class action would be advantageous to the judicial process and to the litigants.” *Brinker Rest.*  
25 *Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1021. For purposes of assessing predominance,  
26 common questions are those in which “the issue is susceptible to generalized class-wide proof.”  
27 *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1051 (2016) (Roberts, J., concurring) (quoting  
28 2 W. Rubenstein, *Newberg on Class Actions* §4:50 pp.196-97 (5th ed. 2012).

1 The Court finds that Plaintiffs' EPA and UCL claims in this case can be resolved through  
2 generalized class-wide proof. Plaintiffs' theories of liability raise a number of common issues of  
3 fact and law that predominate over any individual issues.

4 Plaintiffs' theory of recovery for their EPA claim is straightforward: 1) Oracle  
5 employees assigned by Oracle to a particular job code perform substantially similar work (and  
6 substantially equal work prior to 2016), as such similar work is defined by the EPA, *i.e.*, with  
7 respect to skill, effort and responsibility, and 2) women were paid less than their male  
8 counterparts within the same job code, and therefore were paid less in violation of the EPA.  
9 Plaintiffs have calculated the differential to be on average \$13,000 per year. Neumark January  
10 2019 Report at ¶77. Under the EPA, Plaintiffs need not prove the reason for the wage disparities:  
11 the fact of gender-based pay disparities violates the statute (absent any valid affirmative  
12 defenses, discussed below). Labor Code §1197.5.

13 Plaintiffs' theory of recovery for their UCL claim is based on Oracle having violated both  
14 the EPA and the FEHA. Plaintiffs contend that the gender pay disparities within job code at  
15 Oracle resulted in large part from Oracle's policy or practice of using prior pay to set starting pay  
16 at Oracle before October 2017. Under Plaintiffs' theory, that policy and practice had a disparate  
17 impact on women, *see* Neumark January 2019 Report at ¶8.d., and thus violated the UCL as an  
18 unlawful business practice under FEHA.

19 **1. Plaintiffs' EPA Claim**

20 **a. The Elements of Plaintiffs' EPA Claim Under Plaintiffs' Theory of**  
21 **Liability**

22 Under Plaintiffs' theory of the case, they can prove the elements of their EPA claim by  
23 establishing that (1) persons employed in the same job codes at Oracle were performing  
24 substantially similar work after January 1, 2016, and substantially equal work prior to that date;  
25 and (2) that women were compensated less than men employed in the same job codes.

26 Plaintiffs' theory here is *not* that the class members within job codes at Oracle worked in  
27 identical jobs, or even jobs with the same duties, because the law does not require them to show  
28 that. Labor Code §1197.5 sets the proper comparison as: "substantially similar work, when  
viewed as a composite of skill, effort, and responsibility, and performed under similar working

1 conditions....”<sup>4</sup> For work to be substantially similar under this standard, or even substantially  
2 equal under the pre-2016 standard (which is comparable to the test under the federal Equal Pay  
3 Act), jobs do not need to be identical or require exactly the same duties. For example in *Cooke v.*  
4 *United States*, 85 Fed. Cl. 325, 344-45 (2008), the court found that work performed by the  
5 female Director of the Office of Marine Safety for the NTSB was substantially equal to the work  
6 performed by male Directors of the Offices of Highway Safety, Railroad Safety, and Pipeline  
7 and Hazardous Materials Safety, even though each specialized in investigation of a different type  
8 of accident (maritime v. highway, railway, and pipeline) and thus required technical expertise in  
9 a different transportation mode. *See also Ewald v. Royal Norwegian Embassy*, 82 F.Supp.3d 871,  
10 941-44 (D. Minn. 2014) (“Innovation and Business Officer” and “Higher Education and  
11 Research Officer” substantially equal though one focused on business and the other on  
12 education). Similarly, professors in different departments perform substantially equal work under  
13 the federal EPA. *Lavin-McEleney v. Marist College*, 239 F.3d 476, 480-81 (2d Cir. 2001)  
14 (psychology department and criminal justice department). *See also Brock v. Georgia*  
15 *Southwestern College*, 765 F.2d 1026, 1033 (11th Cir. 1985) (different courses); *Garner v.*  
16 *Motorola*, 95 F.Supp.2d 1069, 1075 (D. Ariz. 2000) (“different software functions”); *EEOC v.*  
17 *Central Kansas Medical Ctr.*, 705 F.2d 1270, 1273 (10th Cir. 1983) (“performed with different  
18 equipment or machines”).<sup>5</sup>

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21 <sup>4</sup> Prior to 2016, the statutory comparison was: “jobs the performance of which requires  
22 equal skill, effort, and responsibility, and which are performed under similar working  
conditions.” Plfs’ RJN Ex. D (Labor Code §1197.5 prior to December 31, 2015).

23 <sup>5</sup> California courts can look to decisions regarding the federal EPA, where appropriate, as  
24 persuasive authority, given the lack of developed case law under California’s EPA, particularly  
25 for the time period prior to 2016 when certain statutory language was consistent, but also for the  
26 purpose and prohibitions that continue to overlap, even as California has strengthened its law.  
*E.g., Hall*, 148 Cal. App. 4th at 323 n.4 (as of 2007: “Because Labor Code section 1197.5 is  
27 substantively indistinguishable from its federal counterpart, California’s courts rely on federal  
authorities construing the federal statute”); *Green*, 111 Cal. App. 4th at 623 (as of 2003: “The  
28 California statute is nearly identical to the federal Equal Pay Act of 1963 [citation].  
Accordingly, in the absence of California authority, it is appropriate to rely on federal authorities  
construing the federal statute”).

1 Whether the jobs at issue in this case are substantially equal or similar is a question of  
2 fact for a jury. *Beck-Wilson v. Principi*; 441 F.3d 353; *Tomka v. Seiler Corp.*, 66 F.3d 1295;  
3 1311 (2d.Cir. 1995) (“[I]t is for the trier of fact to decide if [there] is a significant enough  
4 difference in responsibility to make the jobs unequal”).

5 Plaintiffs have provided this Court with substantial common evidence from which a jury  
6 could conclude that Plaintiffs have established the first element of their EPA claim, that women  
7 and men at Oracle in the same job code perform substantially similar or equal work. As an initial  
8 matter, Oracle documents and testimony of Oracle witnesses demonstrate that the company’s  
9 hiring and compensation policies and practices are highly centralized:

- 10 a) Throughout the United States (and therefore California) and the class period,  
11 Oracle’s policies and guidelines for making compensation decisions were set forth  
12 in one uniform document: the Global Compensation PowerPoint Presentation.  
13 Finberg Decl., Ex. B (Waggoner) at 66:1-77:12. Individual offices did not  
14 develop compensation training separate and apart from these uniform corporate  
15 instructions. *Id.* at 77:14-19.
- 16 b) New hire decisions and initial pay setting are approved up through Oracle’s  
17 corporate hierarchy all the way to Oracle Executive Chairman of the Board and  
18 Chief Technology Officer Lawrence Ellison’s office for approval and possible  
19 modification. Holman-Harries Decl., Ex. A at 6 (“Final approv[al] would be up  
20 through the management chain, and finally the approv[al] at the CEO office for a  
21 new hire.”);<sup>6</sup> Finberg Decl., Ex. B (Waggoner) at 105:1-107:4; 107:19-108:21;  
22 112:2- 17, Ex. O (Pltfs.’ Ex. 28) at 114, Ex. N (Pltfs.’ Ex. 27) at 174.
- 23 c) Pay increases, bonuses, and stock awards are also determined as part of a budget  
24 process that begins at the top of the hierarchy, and is “pushed down” to lower-  
25 level managers who can make recommendations – but not final decisions –  
26

27 \_\_\_\_\_  
28 <sup>6</sup> Oracle objected to the admissibility of this declaration from Oracle’s former Director of  
Compensation, filed in support of Plaintiffs’ motion. The Court overrules those objections, *see*  
Cal. Evid. Code §§ 1220, 1221, 1222, 1280.

1 regarding the allocation of their budget; the recommendations go back up to the  
2 chain of command to the very top for approval at each step. Finberg Decl., Ex. B  
3 (Waggoner) 122:22-124:21, 125:4-22, 148:21-149:13, 182:4-200:8; Finberg  
4 Decl., Exs. Q, R, S, T, U, V, W (Pltfs.' Exs. 31, 32, 33, 34, 35, 36, 37).

5 This substantial common evidence supporting a top-down, centralized system makes  
6 Plaintiffs' pay claims particularly appropriate for classwide resolution. Plaintiffs can also  
7 establish through this common evidence of a centralized system that Oracle's facilities  
8 throughout California functioned as one establishment for compensation purposes through the  
9 relevant time period.<sup>7</sup>

10 Next, Plaintiffs have presented substantial common evidence to establish that Oracle  
11 categorizes its employees into a granular, uniform, and company-wide system of job codes.  
12 Substantial common evidence demonstrates that Oracle's uniform, company-wide job code  
13 system already sorts jobs by the skills, responsibilities, and effort that constitute substantially  
14 equal or similar work required for comparisons under the EPA. That evidence includes the  
15 following:

- 16 a) Deposition testimony from Kate Waggoner, Oracle's Person Most Qualified  
17 (PMQ) designee about Oracle's compensation and job classification systems,  
18 including the following: "People in each of these job codes share certain basic  
19 skills, knowledge, and abilities," (Finberg Dec Ex. B (Waggoner) at 225:11-19);  
20 Persons in job codes share "similar" "levels of responsibility and impact," (*id.* at  
21 229:7-9);  
22  
23

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24 <sup>7</sup> Prior to January 1, 2016, the EPA prohibited disparate pay by gender for employees  
25 working "in the same establishment." Plfs' RJN, Ex. D (Labor Code §1197.5 prior to December  
26 31, 2015). The law was amended as of that date to eliminate that requirement. Labor Code  
27 §1197.5. The cases interpreting similar language in the federal EPA make clear that multiple  
28 locations constitute a single "establishment" where a company has "central control and  
administration of disparate job sites." *Mulhall v. Advance Sec. Inc.*, 19 F.3d 586, 591 (11th Cir.  
1994). "The hallmarks of this standard are centralized control of job descriptions, salary  
administration, and job assignments or functions." *Id.* Here, Plaintiffs' common evidence would  
support the conclusion that Oracle's facilities in California functioned as one establishment  
under this standard.

- 1           b) Oracle’s Global Job Table, which groups Oracle employees by job functions, job  
2 specialty, job family, and responsibility level into job codes, each of which has a  
3 specific salary range and identified education and experience requirements. *See*  
4 Finberg Decl., Ex. Z;
- 5           c) Oracle’s Global Compensation Training Power Point. Finberg Decl., Ex. M  
6 (explaining uniform use and importance of job codes and salary ranges);
- 7           d) Oracle’s documents establishing that Oracle has determined that persons with the  
8 same job code share the same specific functional competencies, or skills. *See, e.g.*  
9 Finberg Reply Decl., Ex. G at 00004918, Ex. P at 00005282 (“Functional  
10 competencies are specific to job and represent the most important capabilities or  
11 skills needed to perform successfully in each job.”);
- 12           e) Oracle’s documents describing responsibility levels for Oracle employees by  
13 career level, which is incorporated into job code. *See, e.g.* Finberg Decl. AA;
- 14           f) Oracle’s documents establishing that how an employee is compensated within a  
15 job code salary range should be determined by Oracle tenure and performance.  
16 *See, e.g.* Finberg Decl., Ex. M at 00000392, Ex. BB at 17;
- 17           g) Deposition testimony from Anje Dodson, Oracle’s PMQ on Training and  
18 Performance Evaluations, including testimony that if an employee transfers from  
19 one product team to another product team in the same job code, there is no  
20 required additional training. Finberg Dec Ex. C (Dodson) at 126:14-128:1;
- 21           h) The Report and testimony of Plaintiffs’ expert Industrial Organizational (IO)  
22 Psychologist Laetta M. Hough, Ph.D., including her opinion that “At Oracle  
23 women in the same job codes as men perform the same or substantially similar  
24 work....” Hough Report at ¶48; *see also id.* at ¶18.c; Finberg Reply Decl., Ex. A  
25 (Hough) at 132:21-133:21 (Oracle has “specified that within this job code, these  
26 are similar jobs in terms of the abilities, the skills, the effort, the responsibility  
27 that’s required to perform those jobs. The working conditions, they’re similar,  
28 according to Oracle’s work.”).

1 i) The conclusion of Labor Economist Professor David Neumark, who “treat[s]  
2 persons in the same job code and grade as performing substantially equal or  
3 similar work, which is how Oracle treats such persons; that treatment is consistent  
4 with the practice of studying labor market discrimination in labor economics.”  
5 Neumark January 2019 Report at ¶8.b.

6 With respect to the second element of their EPA claim, Plaintiffs can prove to the jury  
7 that women at Oracle were paid less than men in the same job code through Oracle’s own pay  
8 and compensation data. Plaintiffs’ expert labor economist, Professor Neumark, ran statistical  
9 analyses of the data Oracle produced in discovery, and concluded “[t]here are statistically  
10 significant gender disparities in compensation. Looking across base pay, Medicare wages, total  
11 compensation, bonuses, and stock grants, women received statistically significantly lower  
12 compensation than men who were, based on the data available, performing substantially equal  
13 work in jobs the performance of which required substantially equal skill, effort, and  
14 responsibility, performed under similar working conditions.” Neumark January 2019 Report  
15 ¶8.b.

16 The EPA does not require that each and every plaintiff identify one specific individual as  
17 a comparator. *Cf. Beck-Wilson*, 441 F.3d at 363. It is sufficient to prove that men and women in  
18 the same job code are performing equal or similar work, and some of these men were paid more  
19 than women in the same job code. *See Hall*, 148 Cal.App.4th at 325 (appropriate comparison is  
20 comparison of persons in same job category). But here Oracle’s data would contain the identities  
21 of the men who were paid more than the women within each job codes.

22 Oracle argues, contrary to this common evidence proffered by Plaintiffs, that  
23 individualized issues predominate, because, it contends, people within the same job code do not  
24 perform substantially equal or similar work. In Oracle’s view, the evidence establishes the fact  
25 that there are variations within job code with respect to the specific duties of each employee that  
26 render comparison at the job code-level improper. Oracle Opp. Mem. at 9-15. Oracle’s  
27 arguments are not persuasive to the Court for several reasons.  
28

1 First, Oracle’s contentions do not appear to be consistent with Oracle’s own documents  
2 and PMQ testimony, described above. Plaintiffs have submitted more than sufficient common  
3 evidence to demonstrate that they could prove, using this common evidence, that job codes at  
4 Oracle already sort jobs by the requisite levels of skill, effort, and responsibility.

5 Second, to the extent Oracle is relying on what it contends are differences in job *duties*  
6 within job code, this is not the law: The EPA does not require equal job duties, but rather that  
7 jobs be compared with respect to “a composite of skill, effort, and responsibility, and performed  
8 under similar working conditions....” Labor Code §1197.5; *see also* supra n.2 (statutory  
9 language prior to 2016). Accordingly, purported differences in job duties do not defeat class  
10 certification.

11 Third, in order to conclude that Oracle is correct that throughout the company, the skills,  
12 effort and responsibilities vary within each of Oracle’s job codes to such an extent that  
13 individualized inquiries are necessary to determine the nature of each person’s work, the Court  
14 would be required to rule now in Oracle’s favor on a merits question that is properly for the jury.  
15 That is not appropriate at this stage of the proceedings, which serve to test whether *plaintiffs’*  
16 theory is susceptible to common proof (not whether plaintiffs will eventually prevail on the  
17 merits). *See, e.g., Sav-On*, 34 Cal. 4th at 338 (class proponent not required to prove merits for all  
18 class members to establish predominance); *Jaimez v. Daijhs USA, Inc.* (2010) 181 Cal.App.4th  
19 1286, 1301 (court erred in denying class certification by evaluating the merits of defendants’  
20 declarations, “rather than considering whether they rebutted plaintiff’s substantial evidence that  
21 predominant factual issues” rendered the case amenable to class treatment). The question before  
22 the Court now is not whether Oracle’s job codes categorize jobs on the basis of substantially  
23 similar or equal skills, effort, and responsibility, but whether Plaintiffs have offered substantial  
24 common evidence that they do so. Here, Plaintiffs and Oracle have proffered contrary, but  
25 common evidence – Oracle documents, Oracle witness testimony, and expert opinion – upon  
26 which they base their respective arguments regarding how Oracle actually operates. A jury can  
27 resolve this factual dispute to decide whether or not job code is the proper category of  
28

1 comparison under the EPA. Common questions therefore predominate with respect to Plaintiffs’  
2 prima facie case under the EPA.<sup>8</sup>

3 **b. Oracle’s Affirmative Defenses to Plaintiffs’ EPA Claim**

4 Oracle’s asserted affirmative defenses also do not raise individualized issues that  
5 predominate over the many common issues of law and fact raised by Plaintiffs’ EPA claims.  
6 Once a plaintiff establishes a gender pay disparity, the EPA provides an affirmative defense if  
7 the employer can prove that disparity is the result of a seniority system, a merit system, a system  
8 that measures earning by quantity or quality of production, or a “bona fide factor other than sex,  
9 such as education, training, or experience.” Labor Code §1197.5(a)(1).<sup>9</sup> Oracle relies here only  
10 on section (1)(D), the “bona fide” factor defense, and does not assert any of the other affirmative  
11 defenses (for example, a merit system). Oracle Opp. Mem. at 15-18. To establish its affirmative  
12 defense, Oracle will have the burden of proving that:

13 1) the alleged bona fide factor is “not based on or derived from a sex-based differential in  
14 compensation, is job related with respect to the position in question, and is consistent with a  
15 business necessity,” §1197.5(a)(1)(D)(1);

16 2) “Each factor relied upon is applied reasonably, §1197.5(a)(1)(D)(2);

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18 <sup>8</sup> Under Plaintiffs’ theory of the case, Oracle’s willfulness (which is relevant to the statute  
19 of limitations for the EPA Claim) can also be established with common evidence. *See* Hough  
20 Report at 2, 18-19, 24 (Oracle’s policies for addressing pay inequities fell well short of accepted  
21 standards); Finberg Decl., Ex. B (Waggoner) at 186:16-200:8 (At Oracle, all compensation  
22 decisions were approved by high level management), Ex. I (Murray) at 58:16-18 (Oracle  
23 managers discussed that “women are paid less [at] Oracle.”).

22 <sup>9</sup> With respect to the bona fide factor defense, the statute provides in full:

23 (D) A bona fide factor other than sex, such as education, training, or experience. This  
24 factor shall apply only if the employer demonstrates that the factor is not based on or  
25 derived from a sex-based differential in compensation, is job related with respect to the  
26 position in question, and is consistent with a business necessity. For purposes of this  
27 subparagraph, “business necessity” means an overriding legitimate business purpose such  
28 that the factor relied upon effectively fulfills the business purpose it is supposed to serve.  
This defense shall not apply if the employee demonstrates that an alternative business  
practice exists that would serve the same business purpose without producing the wage  
differential.

Labor Code §1197.5(a)(1)(D).

1           3) “The one or more factors relied upon account for the entire wage differential,”  
2 §1197.5(a)(1)(D)(3); and

3           4) “Prior salary shall not justify any disparity in compensation.” §1197.5(a)(1)(D)(4).<sup>10</sup>

4           Notably, Oracle makes only vague references to the bona fide factors that it contends it  
5 used to set its employees’ compensation. Oracle Opp. Mem. at 16 (“Proof of affirmative  
6 defenses will vary for each class member and will require looking at any number of  
7 considerations”). Oracle does not contend that it can prove its affirmative defenses through  
8 company policies that explicitly assign pay based on job-related factors such as education,  
9 experience, or performance (“merit” in the parlance of the EPA). *Id.* at 15-18. Such company  
10 policies, if they existed, would of course be subject to common proof. Rather, Oracle argues it  
11 is “entitled” to present individualized evidence with respect to each and every class member to  
12 attempt to establish that some “bona fide” factor is responsible for that woman’s lower pay as  
13 compared to every man in her same job code who is paid more. *Id.*

14           Oracle’s argument misconstrues the law, for several reasons.

15           First, proof of Oracle’s affirmative defenses are, in large part, susceptible to expert  
16 statistical analysis of Oracle’s data, which is common evidence. Although it is Oracle’s burden to  
17 prove its defenses, Plaintiffs’ labor economist expert, Professor Neumark, performed standard  
18 statistical regression analyses and found that “[j]ob definition, tenure at Oracle, tenure in  
19 position, job performance, years of job experience, and location of work site do not explain these  
20 statistically significant gender compensation disparities.” Neumark January 2019 Report at ¶8.c.  
21 Similarly, Professor Neumark found that level of education does not explain the compensation  
22

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23           <sup>10</sup> The California Legislature amended the EPA in 2017 and 2019 to conform the  
24 statutory language to then-existing law, which already prohibited use of prior pay as an  
25 affirmative defense. *See* Legislative Digest for AB 2282 (effective January 1, 2019) (“This bill  
26 makes clarifying changes to the existing provisions regarding the use of a job applicant’s prior  
27 salary to prohibit use of prior salary to justify any disparity in compensation....”) (Ex. C to Plfs’  
28 Reply RJN); (“This bill makes clear that prior salary simply cannot be used to justify a wage  
differential, whether used on its own or in combination with a lawful factor under the Equal Pay  
Act”) (Ex. D. to Plfs’ Reply RJN); Legislative Finding for AB 1676 (effective January 1, 2017)  
 (“[t]his act will codify existing law with respect to the provision stating that prior salary cannot,  
by itself, justify a wage differential under Section 1197.5 of the Labor Code.”) (Ex. E to Plfs’  
Reply RJN). *See Rizo*, \_\_ F.3d \_\_, 2020 WL 946053 at \*7-12 (rejecting use of prior pay as bona  
fide factor for purposes of affirmative defense to violation of federal EPA).

1 disparity adverse to women. *Id.* at ¶¶9, 73-75. Instead, Professor Neumark found that a “person’s  
2 prior pay is highly predictive of that person’s initial salary at Oracle” and “this initial gender gap  
3 in starting pay drives the gender gap in base pay that I observed through the Class Period.” *Id.* at  
4 ¶8.d. Oracle’s expert, Ali Saad, disagreed with and critiqued Professor Neumark’s conclusions  
5 and the use of particular data to represent certain of these variables (*i.e.*, the use of age and job  
6 tenure as proxies for experience and training). These competing analyses are common evidence  
7 that a jury can evaluate, along with other evidence of Oracle’s actual pay practices, to determine  
8 whether bona fide factors account for any gender pay disparities within job code, *and* whether  
9 those factors caused the entire pay disparity as required by the EPA (§1197.5(a)(1)(D)(3)), or  
10 whether, as Plaintiffs contend, the pay disparity is caused by an impermissible factor, such as  
11 prior pay.

12         The California Supreme Court, in *Duran v. U.S. Bank Nat’l Assn.* (2014) 59 Cal. 4th 1,  
13 explained how statistical evidence can help manage the proof of defenses, explaining that: “[i]f  
14 trial proceeds with a statistical model of proof, a defendant... must be given a chance to impeach  
15 that model....” *Id.* at 38. Oracle will be given such a chance here. As the Court made clear in  
16 *Duran*, a defendant does not have “an unfettered right to present individualized evidence in  
17 support of a defense.” *Id.* at 34. No case holds that a defendant “has a due process right to  
18 litigate an affirmative defense as to each individual class member.” *Id.* at 38. Instead, the Court  
19 has emphasized that trial courts can and should attempt to manage the factual issues raised by  
20 affirmative defenses, even where those defenses raise individual issues, through techniques such  
21 as “representative testimony, sampling, or other procedures employing statistical methodology.”  
22 *Id.* at 33. A jury can ultimately decide using common evidence from the opposing experts which  
23 expert is more persuasive, and whether Oracle has established that bona fide, job-related factors  
24 account for the entire gender pay gap.

25         Second, as explained above, gender pay disparities are permitted only if they are fully  
26 explained by “bona fide” job-related factors that are applied “reasonably.” §1197.5(a)(1)(D)(1)  
27 and (D)(2). To be “bona fide” and applied “reasonably,” any job-related factor that Oracle can  
28 point to as actually having been used to set pay, must have been applied by Oracle *consistently*

1 with respect to employees performing the same work that provides the relevant comparison  
2 under the EPA (job code, according to Plaintiffs here). *See* Plfs’ Reply RJN Ex. A, “California  
3 Pay Equity Task Force” (2018) at 3, 7 (“Such a qualification would not justify higher  
4 compensation if the employer was not aware of it when it set the compensation, or if the  
5 employer does not consistently rely on such a qualification”); Plfs’ Reply RJN Ex. B, Equal  
6 Employment Opportunity Commission Compliance Manual at 10-IV, § F.2 (“the employer must  
7 establish that a gender-neutral factor, applied consistently, in fact explains the compensation  
8 disparity”); *Cooke*, 85 Fed. Cl. at 350 (employer must show “that the gender-neutral reason it  
9 alleges caused the pay differential was, in fact, actually the factor that created the differential”);  
10 *Garner*, 95 F.Supp.2d at 1077 (employer could not prove its affirmative defense as matter of law  
11 where there was evidence, inter alia, that the alleged bona fide factors relied upon were not  
12 consistently applied); *Lambrecht v. Real Estate Index, Inc.*, 1997 WL 17794 at \*3 (N.D. Ill. Jan.  
13 15, 1997) (employer could not rely on differences in education where it did not produce “any  
14 evidence that it uniformly pays higher wages to employees with graduate degrees than those  
15 without.”).

16 In other words, it is not reasonable or consistent with the purposes of the EPA to permit  
17 an employer to pick and choose factors inconsistently and idiosyncratically to justify disparate  
18 pay decisions for employees performing substantially similar work. For example, if two women  
19 and two men are performing substantially similar work, and both men are paid more, the  
20 employer cannot justify a higher wage rate for Man 1 as compared to Woman 1 based on  
21 education, while refusing to provide higher wages to Woman 2 with equally impressive  
22 educational credentials, but for whom the employer invokes some other factor, such as  
23 experience, to justify paying a lower wage. If the factors are not used consistently to determine  
24 pay, they are not “bona fide.” To be bona fide, a factor must be the actual reason for the observed  
25 wage disparities – not a post-hoc, individualized explanation of what might have explained the  
26 disparity. *See Cooke*, 85 Fed. Cl. at 350.<sup>11</sup>

27 \_\_\_\_\_  
28 <sup>11</sup> At argument Oracle suggested that the EPA does not require a large company to use  
the same bona fide factors to set compensation across different jobs, but Plaintiffs are not

1 This is where Plaintiffs’ expert’s statistical analysis comes into play once again, because  
2 a statistical analysis can control for particular factors and determine whether or not they are  
3 being applied consistently across employees performing substantially similar work. If controlling  
4 for, for example, experience, education, or performance (or a combination thereof) does not  
5 explain the pay disparities between men and women in the same job code, Plaintiffs have  
6 presented common statistical evidence that defeats Oracle’s contention that bona fide factors,  
7 reasonably applied, explain the gender compensation disparity.

8 This legal requirement—that the job-related factors be bona fide and reasonably and  
9 therefore consistently applied, eliminates Oracle’s argument that its defenses are necessarily  
10 *individualized*: either Oracle applied its bona fide factors consistently within its job codes -- and  
11 it can prove the impact on pay of these factors through statistical analyses of average pay  
12 differentials without resorting to individualized proof—or it did not apply them consistently and  
13 lacks an affirmative defense. Similarly, if Plaintiffs can prove that the actual factor causing the  
14 gendered pay differential was prior pay (a prohibited factor under the EPA), after controlling for  
15 other factors, that likewise would defeat Oracle’s proffered bona fide factors. As discussed  
16 below with respect to Plaintiffs’ UCL claim, the use of prior pay to set salaries is susceptible to  
17 common proof.

18 **2. Plaintiffs’ UCL Claim**

19 Plaintiffs also assert a claim under the UCL, for which they have two theories of liability.  
20 First, a violation of the EPA would also constitute an “unlawful” act in violation of the UCL.  
21 *Cel-Tech*, 20 Cal. 4th at 180. As discussed above, Plaintiffs have identified common evidence  
22 that can be used to prove their EPA claim, and therefore their UCL claim. Common issues  
23 predominate.

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27 attempting to impose such a requirement. The Cal. EPA does require, *for substantially similar*  
28 jobs (which Plaintiffs contend are cabined by job code at Oracle), that the factor(s) relied upon  
be applied reasonably, and, thus, consistently. Plaintiffs’ statistical analyses all control for job  
code, meaning that they compare persons within the same job code. *See* Neumark January 2019  
Report at ¶8.b.

1 Plaintiffs' second UCL theory is predicated on Oracle's violation of FEHA, which,  
2 among other things, prohibits employers from using policies and practices that have disparate  
3 impact on a protected class. Cal. Gov. Code §12940. *See, e.g., Stender v. Lucky Stores, Inc.*, 803  
4 F.Supp. 259, 325 (N.D. Cal. 1992). Plaintiffs contend that Oracle had a policy or practice of  
5 using prior pay to set starting salary at Oracle, and that this policy or practice had a disparate  
6 impact on women, in violation of FEHA.<sup>12</sup> Plaintiffs further contend that Oracle knew that  
7 women were paid less than men as a result, but failed to correct that gender gap in compensation.

8 Plaintiffs have presented substantial common evidence that could be used to prove that  
9 Oracle had a policy or practice of using prior pay to set starting pay at Oracle, including the  
10 following:

- 11 a) Oracle documents announcing the decision in October 2017 to stop asking for  
12 prior pay information (in compliance with a new California law banning such  
13 inquiries) with an FAQ asking "*how will I know what to offer a candidate without*  
14 *the prior salary data?*" Finberg Decl., Ex. FF at 6675.
- 15 b) Deposition testimony from Oracle PMQ on compensation and job classification  
16 systems Kate Waggoner, that when Oracle acquired new companies and retained  
17 their employees, it usually kept the salaries of the retained employees the same.  
18 Finberg Decl., Ex. B (Waggoner) at 166:25-168:24, and, that any attempt to  
19 change the salary of an employee who came over in an acquisition was "non-  
20 standard." *Id.* at 359:15- 364:8.

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24 <sup>12</sup> Oracle claims that Plaintiffs failed to plead this theory, but Plaintiffs alleged this theory  
25 in the Fourth Amended Complaint (Fourth Amended Complaint at ¶¶10, 11, 12, 19, 39). *See,*  
26 *e.g., McKell v. Washington Mutual, Inc.*, 142 Cal.App.4th 1457, 1470 (2006) (pleading adequate  
27 if it provides "factual basis" for claim). Oracle was also on notice of this claim from Plaintiffs'  
28 discovery responses. Finberg Reply Decl., Ex. M, Response to Special Interrogatory no. 4.  
Oracle also contends that this theory is barred because Representative Plaintiffs failed to exhaust  
administrative remedies with the DFEH. It is far from clear that is true as a matter of law, *see*  
*Rojo v. Kilger*, 52 Cal. 3d 65, 82-88 (1990), but that is a common merits dispute that this Court  
need not decide now. Moreover, Representative Plaintiff Sue Petersen did exhaust administrative  
remedies with the DFEH. Finberg Reply Decl., Ex. L. The Court therefore rejects Oracle's  
argument that Plaintiffs are barred from proceeding on this theory of UCL liability.

- 1 c) The statement of then Head of Compensation, Lisa Gordon, that “we try to match  
2 what they made at the previous company,” Holman-Harries Dec., Ex. A at 8; and  
3 that prior pay was “a factor” in setting starting salary for lateral hires. *Id.* .
- 4 d) Oracle documents establishing that “a new employee may be hired by Oracle as a  
5 result of an acquisition in which case the ‘acquisition hire’ comes to Oracle  
6 usually in their same job and salary,” Finberg Decl., Ex. X, and that giving an  
7 employee from an acquired company anything other than the same salary was a  
8 “non-standard” offer requiring “a strong business justification” and CEO  
9 approval, *id.*, Ex. GG at 00004856.
- 10 e) Oracle documents showing that, as to lateral hires, prior to October 2017, a  
11 question about current salary was part of Oracle’s mandatory hiring form. *See Id.*,  
12 Ex. N at 0000170 “Candidates’ Previous Employer and Compensation  
13 Information (Mandatory).”
- 14 f) Deposition testimony from Oracle compensation PMQ Waggoner that, prior to  
15 October 31, 2017, Oracle Hiring Managers were required to ask applicants about  
16 their salary with their current employer. *Id.*, Ex. B (Waggoner) at 352:5-25.
- 17 g) Deposition Testimony from Chad Kidder, Oracle recruiting PMQ., that prior pay  
18 information was collected because it is relevant to budget. *Id.*, Ex. D (Kidder) at  
19 29:25-30:6.
- 20 i) The Declaration of former Oracle Director and Senior Director Srividya  
21 Subramanian, that “[t]he primary factor I used for setting starting pay for new  
22 employees was prior salary... I instructed the managers reporting to me to use  
23 prior pay when setting initial pay for persons they hired, and, per my instructions,  
24 they did so,” Subramanian Decl. at ¶¶2-3, and Senior Director Subramanian’s  
25 testimony that she was instructed to use prior pay to set starting pay up to a cap of  
26 110% of prior pay. Finberg Reply Decl., Ex. D (Subramanian) at 82:18-85:3.
- 27 j) Expert statistical analysis finding that “[a] person’s prior pay is highly predictive  
28 of that person’s initial salary at Oracle,” Neumark January 2019 Report at ¶8.d,

1 and that the gender gap in starting salary at Oracle is very similar to the gap in  
2 prior pay, and very similar to the gender gap adverse to women in base pay  
3 through the class period, even when controlling for education and experience. *Id.*  
4 at ¶¶40, 71, Exs. 3, 41. Professor Neumark concludes that “this initial gender gap  
5 in starting pay drives the gender gap in base pay that I observed during the Class  
6 Period.” *Id.* at ¶8.d.

7 Oracle disputes the conclusions that Plaintiffs contend a jury could reach here, but that  
8 does not counter the common questions of law and fact raised by this evidence. For example,  
9 Oracle presents common evidence of its own from its expert, Dr. Saad, to dispute that Oracle  
10 used prior pay to set starting salaries. A jury can weigh this contrary common evidence and  
11 determine whether or not Oracle had a policy of using prior pay to set salaries at Oracle, and  
12 whether or not that policy had a disparate impact on women. *See, e.g., Jones v. Farmers Ins.*  
13 *Exch.*, 221 Cal.App.4th 986, 996 (2013) (whether or not company had and followed specific  
14 policy was common issue warranting class certification); *accord Jimenez v. Allstate*, 765 F.3d  
15 1161 (9th Cir. 2014). No individualized issues interfere with class treatment of these UCL  
16 claims.

17 The Court finds that Plaintiffs’ EPA and UCL claims and Defendant’s affirmative  
18 defenses to those claims can be resolved through the presentation of common evidence. Because  
19 Plaintiffs’ claims can be resolved through common evidence, and for the reasons stated above,  
20 on the facts and law of this case, the Court concludes, after careful review of the parties’  
21 arguments and the complete record, that common issues predominate over any individualized  
22 issues with respect to Plaintiffs’ claims under the EPA and UCL.<sup>13</sup>

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28 <sup>13</sup> Plaintiffs’ other claims are derivative of the EPA and UCL claims, such that common  
issues predominate with respect to those claims as well.

1           **B.     Typicality of Representative Plaintiffs’ Claims**

2           “Typicality refers to the nature of the claim or defense of the class representative, and not  
3 to the specific facts from which it arose or the relief sought. ... The test of typicality is whether  
4 other members have the same or similar injury, whether the action is based on conduct which is  
5 not unique to the named plaintiffs, and whether other class members have been injured by the  
6 same course of conduct.” *Martinez v. Joe’s Crab Shack Holdings* (2014) 231 Cal.App.4th 362,  
7 375, *as modified on denial of reh’g* (quotation marks and citations omitted). The claims of the  
8 Representative Plaintiffs are typical of the class claims here because they allege the same injury  
9 – unequal pay relative to men in the same job code – based on the same conduct – Oracle’s  
10 failure to pay them equally to men in the same job code, with respect to the EPA claim, and  
11 Oracle’s use of prior pay to set starting salary, with respect to the UCL claim.

12           Oracle’s arguments do not defeat typicality. Oracle argues that the Representative  
13 Plaintiffs came from only one acquired company, and worked in one location on only a few  
14 products and within “only a few job codes.” Oracle Opp. at 23. These are distinctions without a  
15 difference for purposes of typicality, because they do not undermine the common injury and  
16 nature of the claim.

17           **C.     Adequacy of Representation**

18           The Representative Plaintiffs can adequately represent the class if they have the same  
19 interests as other putative class members, have no conflicts with the proposed class, and are  
20 represented by well-qualified class counsel. *See Brinker*. 53 Cal.4th at 1021; *Capitol People*  
21 *First v. State Dep’t of Dev. Servs.* (2014) 155 Cal.App.4th 676, 696-97. All of these factors are  
22 met here.

23           The Representative Plaintiffs suffered the same injury and have the same interest in  
24 pursuing these claims against Oracle as the rest of the class because each was paid less than men  
25 in the same job code (which Plaintiffs contend means performing substantially equal or similar  
26 work) and because Plaintiffs and Class Members were all injured by Oracle’s common policy  
27 and practice of using prior pay to set starting pay, both with respect to employees hired laterally  
28 and employees coming to Oracle through an acquisition. Neumark January 2019 Report at

1 ¶¶8.b.,8.e. Class Counsel have the necessary experience to adequately represent the proposed  
2 Class and there are no conflicts between Class Counsel and the proposed Class (which Oracle  
3 does not contest). Finberg Decl. ¶¶4-27, Ex. A; Mullan Decl. ¶¶3-27.

4 Oracle correctly argues there is a conflict between the Representative Plaintiffs and the  
5 class pertaining to those who were or are managers, as the Representative Plaintiffs were not  
6 managers. See Saad Rep. ¶ 20. Although intent to discriminate is not an element of Plaintiffs'  
7 EPA claims, resolution of these claims necessarily involves determining whether “bona fide  
8 factor[s] other than sex” explain pay differences, and whether Oracle applied such factors  
9 “reasonably.” Cal. Lab. Code §§ 1197.5(a)(1)(D), (a)(2). Putative class members who are  
10 managers would be called upon to explain and justify their pay decisions, and thus have an  
11 intractable conflict with non-managers (like Plaintiffs) challenging their pay as unlawful.  
12 *Moussouris*, 2018 WL 3328418, at \*29 (describing conflict as “insurmountable”).

#### 13 14 **IV. Superiority of the Class Action Mechanism**

15 “A class action also must be the superior means of resolving the litigation, for both the  
16 parties and the court.” *Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 974.

17 Generally, a class suit is appropriate when numerous parties suffer injury of insufficient  
18 size to warrant individual action and when denial of class relief would result in unjust  
19 advantage to the wrongdoer. ... [R]elevant considerations include the probability that  
20 each class member will come forward ultimately to prove his or her separate claim to a  
portion of the total recovery and whether the class approach would actually serve to deter  
and redress the alleged wrongdoing.

21 *Id.* (citations and quotation marks omitted).

22 Class proceedings are the far superior method of adjudicating the claims of these class  
23 members than requiring 4,100 individuals to pursue individual actions. While the potential  
24 recovery per class member is not as small as in some cases, the cost of litigating through trial  
25 even one of these claims against a well-funded defendant like Oracle would easily dwarf any  
26 recovery. Moreover, trying seriatim even a small percentage of the over 4,100 class members  
27 claims would waste important judicial resources.

1 In addition, denying Plaintiffs the ability to proceed on a class basis would in reality  
2 likely mean that many class members would not in fact pursue their claims, and assuming  
3 Plaintiffs' theory of the case is correct, Oracle would escape liability by virtue of claims never  
4 pursued. Class actions are particularly important in cases such as this one, where Class Members  
5 are unlikely to learn that they have been paid less than similarly situated men, may not have the  
6 means to pursue costly litigation, and thus would likely be unable to vindicate their rights in the  
7 absence of a class action lawsuit.

8 One trial of this case using common evidence would be far superior to 4,100 individual  
9 trials, which would be duplicative and waste the time and resources of both the Parties and the  
10 Court. Class treatment will permit any remedy to match the full scope of whatever liability is  
11 proven, and will best serve the underlying purposes of the EPA, UCL, and FEHA.

### 12 13 CONCLUSION

14 Accordingly, for all the foregoing reasons, it is hereby ORDERED, that:

- 15 1) Plaintiffs' Motion for Class Certification is GRANTED;  
16 2) The following class is hereby CERTIFIED pursuant to Code of Civil Procedure §382:

17 All women employed by Oracle in California in its Information Technology,  
18 Product Development, or Support job functions, excluding campus hires and  
19 managerial positions, at any time during the time period beginning June 16, 2013  
through the date of trial in this action;

- 20 3) Sue Peterson, Marilyn Clark, and Manjari Kant are appointed as Class  
21 Representatives.

- 22 4) The law firms of Altshuler Berzon LLP and Rudy, Exelrod, Zieff & Lowe, LLP  
23 are appointed as Class Counsel.  
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1 5) The parties are ORDERED to meet and confer about the format and procedures  
2 for notifying the class. A [Proposed] Order regarding notice procedures, and a  
3 [Proposed] Notice shall be submitted to the Court within two weeks of the date of  
4 this Order.

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6 IT IS SO ORDERED.

7  
8 Dated: APR 29 2020



V. RAYMOND SWOPE  
JUDGE OF THE SUPERIOR COURT

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# EXHIBIT 3

CCASE\_NAME:  
OFCCP\_V. DISPOSABLE SAFETY WEAR, INC.  
CCASE\_NO:  
92-OFC-11  
DDATE\_ISSUED:  
19920820  
TTITLE:  
RECOMMENDED DECISION AND ORDER  
TTEXT:

~i  
U.S. Department of Labor

Office of Administrative Law Judges  
101 N.E. Third Avenue, Suite 500  
Ft. Lauderdale, FL 33301

August 20, 1992

EMORANDUM FOR: LYNN MARTIN  
Secretary of Labor  
U.S. Department of Labor  
Room S-2018  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

FROM: Robert M. Glennon  
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF LABOR, OFFICE OF FEDERAL  
CONTRACT COMPLIANCE PROGRAMS v. DISPOSABLE  
SAFETY WEAR, INC. and PUERTO RICO SAFETY  
EQUIPMENT CORPORATION  
Case No.: 92-OFC-11

I certify and transmit herewith the RECOMMENDED DECISION AND ORDER,  
dated August 20, 1992, in accordance with 41 C.F.R. 60-30.35  
(1991), together with the record herein.

Enclosures:

~1  
U.S. Department of Labor      Office of Administrative Law Judges  
101 N.E. Third Avenue, Suite 500  
Ft. Lauderdale, FL 33301

DATE: August 20, 1992

CASE NO: 92-OFC-11

In the Matter of

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

Plaintiff,

v.

DISPOSABLE SAFETY WEAR, INC.  
and PUERTO RICO SAFETY  
EQUIPMENT CORPORATION,

Defendants

Kathleen H. Hooke, Esq.  
Diane A. Heim, Esq.  
For the Plaintiff

Israel Roldan Gonzalez, Esq.  
For the Defendants

BEFORE: ROBERT M. GLENNON  
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

By an administrative complaint filed June 5, 1992, the Office  
of Federal Contract Compliance Programs, United States Department  
of Labor ("OFCCP"), here seeks to impose certain sanctions against  
the defendants, Disposable Safety Wear, Inc., and Puerto Rico  
Safety Equipment Corporation, for violation of a formal  
Conciliation Agreement entered December 19, 1988.

The December 19, 1988 Conciliation Agreement specifically  
required defendants to undertake and perform a number of  
affirmative actions as part of their compliance with the equal  
employment opportunity provisions of Executive Order No. 11246 (30  
FR 12319), as amended by Executive Order No. 11375 (32 FR 14303)  
and Executive Order No. 12086 (43 FR 46501) (the "Executive  
Order"); Section 503 of the Rehabilitation Act of 1973, as amended,  
29 U.S.C. 793 ("Section 503"); and Section 4212 of the Vietnam Era  
Veterans' Readjustment Assistance Act, 38 U.S.C. 4212 ("VEVRA"). As  
pertinent here, the regulations implementing the Executive Order,  
Section 503 and VEVRA are stated at 41 CFR Chapter 60.

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The complaint was the subject of a formal hearing on August 6  
and 7, 1992 at San Juan, Puerto Rico, at which time the parties  
were given the opportunity to present evidence and argument in

support of their positions. In the following discussion, reference to the hearing transcript, to plaintiff's exhibits, and to defendants' exhibits will be made by such abbreviations as TR, PX, and DX. Post trial briefs were filed by the parties on August 17, 1992.

#### 1. The General Background.

The purpose of the pertinent Executive Order is to secure equal opportunity for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with government contractors. Section 503 of the Rehabilitation Act requires government contractors to take affirmative action to employ and advance in employment qualified handicapped individuals. VEVRA requires government contractors to take affirmative action to employ and advance in employment qualified veterans of the Vietnam era.

The two defendant corporations are wholly owned subsidiaries of Eastco Industrial Safety Corp., a New York corporation ("Eastco"). Through the defendant corporations and certain other corporate subsidiaries, Eastco engages in two types of operations, (1) the manufacture and sale of disposable clothing, industrial protective clothing and protective products; and (2) the distribution and sale of such products made by other companies. The defendant corporations perform the manufacturing operations at facilities leased from the Puerto Rico Industrial Development Company at Aguadilla, located on the western coast of Puerto Rico.  
PX 28

Defendant Disposable Safety Wear, Inc. ("DSW"), manufactures disposable clothing, such as coveralls, shirts, hats, hoods, aprons, shoe covers, etc. Such items generally are intended to be disposed of after one use, although they sometimes are reused. They are used for protection from a wide range of hazardous substances. Defendant Puerto Rico Safety Equipment Corporation ("PRSEC") manufactures industrial protective clothing and protective screening devices, such as gloves, mitts, leggings, vests, welding blankets, etc. PX 28 The two defendant companies ("DSW/PRSEC") appear to function as a single entity for many purposes relevant to the issues involved in this enforcement proceeding.

Each of the two defendants currently employs more than 50 persons and conducts operations as a government contractor or subcontractor subject to the contractual obligations, including provisions for equal employment opportunity, imposed under the Executive Order, Section 503, VEVRA, and the regulations stated at 41 CFR Chapter 60. In each of the years 1988 through 1991,  
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each of the defendants had government contracts in excess of \$50,000.

The defendants entered into the Conciliation Agreement concerning equal employment opportunities with the OFCCP in December 1988, after an on-site compliance review of the defendants' operations identified a number of deficiencies in compliance with equal employment opportunity obligations imposed by the Executive Order, Section 503, and VEVRA. The Conciliation Agreement identified numerous "problem areas," and described an agreed remedy for each problem area to be implemented by defendants. Among other things, the Conciliation Agreement required defendants to submit a series of progress reports to OFCCP giving evidence of their compliance with the terms of the Conciliation Agreement.

In substance, as OFCCP here contends, defendants failed to abide by the terms of the Conciliation Agreement on equal employment opportunity, despite continuous, persistent efforts by the OFCCP's field staff to secure compliance with that agreement. Accordingly, OFCCP argues that, since its efforts to secure defendants' voluntary compliance with the law through conciliation and persuasion have been unsuccessful, strict administrative sanctions should be imposed.

OFCCP therefore requests imposition of an order in this proceeding:

1. Permanently enjoining defendants from violating the Executive Order, Section 503 and VEVRA.
2. Debarring defendants from entering into future government contracts, until such time as they satisfy the Director of OFCCP that they are in compliance with those laws.
3. Canceling any Federal government contract which defendants may have been awarded, or may be awarded, between the date of filing of this administrative complaint, June 5, 1992, and the date debarment becomes effective.
4. Requiring defendants to enter a specific, formal compliance program, with a prescribed schedule for progress reports, prior to any removal of the debarment.

#### 2. The 1988 Equal Employment Compliance Survey.

On May 23, 1988, OFCCP field staff undertook a review of the equal employment practices of the defendants, and found a wide range of deficiencies. Eighteen separate "problem areas" were

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identified, ranging from failure to conduct positive recruitment of handicapped workers and Vietnam veterans, to failure to maintain relevant personnel records, to failure to develop the required written affirmative action compliance programs. The text of OFCCP's notation of those deficiencies, as stated in the December 1988 Conciliation Agreement, is attached as an Appendix to this Recommended Decision and Order. As can be seen by reference to that Appendix, defendants agreed in December 1988 to file with the OFCCP a series of specific progress reports showing its compliance with the equal employment opportunity laws.

By its terms, the December 1988 Conciliation Agreement was to remain in effect until defendants complied with all of the requirements of the agreement, or for 3 years following its execution, whichever came first.

### 3. Defendants' Performance Under the 1988 Agreement

Defendants concede that they did not comply with the terms of the 1988 Conciliation Agreement. OFCCP has presented voluminous documentary evidence of its sustained but unsuccessful effort, beginning in early 1989 and extending into early 1991, to secure compliance by defendants with the agreement.

Bonnie Ayala is a senior compliance officer with the Puerto Rico office of the Department of Labor's OFCCP. The 1988 Compliance Agreement was effected following a compliance auditing process she conducted between May and December 1988. When Ms. Ayala first contacted the defendants, DSW/PRSEC, she learned that they had not developed an affirmative action plan ("AAP") as required by the governing regulations for government contractors such as DSW/PRSEC. TR 32 Thereafter, she spent a substantial amount of time assisting defendants' personnel officer, Margaret Misonave, in drawing up a basic affirmative action plan, and advising her about the types of personnel data that should be gathered and evaluated in operating the program. TR 33

The Compliance Agreement, with its specific identification of problem areas and required remedies, was based on the findings of Ms. Ayala's evaluation of the DSW/PRSEC operations. Among other things, her evaluation was based on a 3-day on-site survey of those operations at DSW/PRSEC's Aguadilla plant facilities.

The following sub-headings relate to the "problem areas" itemized in the Appendix to this Decision and Order

a. Problem Area 15. Defendant failed to submit the very first "progress report" required by the Conciliation Agreement, a report due March 30, 1989. TR 43 This report was required to show that DSW/PRSEC had put in place and implemented a system for capturing personnel data needed for monitoring and measuring performance under the affirmative action plan. Appendix, Problem

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Area 15. OFCCP notified DSW/PRSEC of that failure by letters dated April 5, 1989 and May 3, 1989. PX 2, 3; TR 43 The second letter provided a 15-day period for DSW/PRSEC to effect compliance. DSW/PRSEC responded with a letter dated May 18, 1989, purporting to comply with the requirement, but actually only attaching blank copies of forms on which personnel data could be logged, with no description of the system that had been implemented to capture and report the needed data. PX 4; TR 44 Ms. Ayala really had anticipated that the March 30 progress report would show actual implementation by DSW/PRSEC in capturing the personnel data, TR 46, but OFCCP accepted the filing, apparently expecting that the data would show up on the later progress reports to be filed. PX 5; TR 46

b. Problem Area 11. Defendants also failed to comply with the second progress report requirement imposed by the Conciliation Agreement. DSW/PRSEC had agreed to develop a schedule for reviewing all mental and physical job qualification requirements by June 15, 1989, to provide a copy of that schedule to OFCCP by June 30, 1989, and to report the results of review by December 30, 1989. Appendix, Problem Area 11; TR 47 When the first of those reports was not filed on time, OFCCP's letter of July 26, 1989 demanded compliance within 15 days. PX 8 On August 22, 1989, DSW/PRSEC responded with a copy of the heading of a blank form, a form containing no company reporting data. PX 9 A second demand letter was sent to DSW/PRSEC by OFCCP on August 28, 1989. PX 10 DSW/PRSEC responded with a completed form on September 1, 1989, showing a listing of job positions and dates in September 1989 for starting and completing the job qualifications review. PX 11

DSW/PRSEC did not conduct the required job qualification review or file the required report by the December 30, 1989 due date. PX 16; TR 56 DSW/PRSEC's Misonave did file a report on January 30, 1990 summarizing the job functions of several type of defendant's workers. PX 17

During the time the August 1989 correspondence concerning Problem Area 11 was taking place, OFCCP's Ayala discussed the matter by telephone with DSW/PRSEC personnel. Ms. Ayala testified:

Since the progress reports had not been received, I called to the contractor. I originally started talking with Mr. Bumbarger, and he transferred my call to Margaret [Misonave], and Margaret told me that she

knew that the progress reports were past due; that she had a lot of work and she was taking work home to try to get her work done; that she was in the process of trying to type up the things and would try to have them to me by Friday.

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I told her that the reports had to be received because enforcements were already going to be started by our office in terms of preparing the case for enforcement.

She told me she was not receiving any cooperation from anyone within the company to help her fulfill the obligations that she had with us. TR 48

When asked why OFCCP did not follow through on initiating an enforcement proceeding at this time, Ms. Ayala stated:

We continuously tried to work with this contractor to bring them into compliance with the hopes that they would voluntarily agree to perform all of the things that they had to perform in accordance with the conciliation agreement and in accordance with their contractual obligations. We had hoped that we would be able to resolve the matter amicably. TR 49

c. Problem Area 5. Defendants also failed to file an accurate report summarizing, by pertinent job groups, employee placements and personnel actions, such as hires, applications, transfers, training, promotions, etc. TR 51 The 1988 Conciliation Agreement required the filing of such a report semi-annually for a period of two years, beginning July 15, 1989. Appendix, Problem Area 5, Report Category 5. OFCCP on August 28, 1989 accepted an August 22, 1989 filing by DSW/PRSEC as compliance with the July 15 filing requirement, but pointed out that the filing contained apparent discrepancies, stating:

Your report for this area is accepted. However, please assure that all future reports do not contain errors and are submitted on the date as agreed in the Conciliation Agreement. The next report for this area is due on January 15, 1990. PX 13

DSW/PRSEC did file the January 15, 1990 report on time. PX 18 On its face, the report contained the required job group analysis and personnel "flow" data, but the data was consolidated, rather than presented separately for each corporation, as it should have been. TR 51 On February 12, 1990, DSW/PRSEC's Maisonave filed a corrected report showing the data separately for each of the companies as required. PX 19; TR 52

On July 16, 1990, DSW/PRSEC filed its progress report showing relevant personnel data for the 6-month period ending June 30, 1990. PX 23 Robert Newland, then a compliance officer with the Puerto Rico office of OFCCP reviewed that filing, and found that the data was not correctly reported. For example, the job group "clerical work" was shown as having 8 workers at the start of the reporting period, then 11 workers at the end of the

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period, a net gain of 3 workers, but the personnel transaction "flow" data recorded in the report -- for hires, transfers, promotions, etc. -- did not record any transactions. TR 121 Other comparable errors were made in the report. After Newland discussed the problem with Maisonave by telephone, DSW/PRSEC submitted a corrected report on July 19, 1990. PX 24 That report also contained comparable discrepancies, however. TR 126

d. Problem Area 14. Although required to do so, and to report its findings by October 31, 1989, DSW/PRSEC did not initiate a study of its personnel procedures to determine whether its policies and procedures automatically screened out Vietnam Era veterans or handicapped workers. TR 58; PX 14, 15

e. Problem Areas 3 and 4. Although required to do so, and to report to OFCCP on its efforts and progress in doing so, with filings starting January 15, 1990, DSW/PRSEC did not conduct an "outreach" and positive recruitment for Vietnam Era veterans and handicapped workers. TR 61; PX 20

In a February 8, 1990 letter, OFCCP's Caribbean District Director asked DSW/PRSEC's vice president for manufacturing in Puerto Rico, Tom Bumbarger, for a personal explanation for these violations of the Conciliation Agreement, stating:

Therefore, it is requested that a written explanation from you be submitted to this office immediately upon your receipt of this letter. It must set forth your reasons for your lack of good faith in complying with Problem Areas 3 and 4 of the Conciliation Agreement. It must also include the immediate corrective actions you will take to correct these areas of noncompliance. PX 21 [Emphasis in original.]

OFCCP's Compliance Officer Ayala then had further correspondence with Bumbarger who eventually agreed to take corrective action, as prescribed in detail in a letter dated April 17, 1990, and to report the results of that action by October 5, 1990. TR 63; PX 22 Ayala testified that DSW/PRSEC did not comply with that April 17, 1990 agreement. TR 63

In general, OFCCP's Ayala, whose experience includes numerous government contractor compliance surveys, regarded the compliance problem she encountered with DSW/PRSEC as not a common case. She stated:

[T]his is the first case where I had as much difficulty as I did with the vice president of the company, blatantly disregarding his contractual obligations, his affirmative action obligations, the treatment that I received as a government employee trying to enforce the

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laws that we enforce, over which we have jurisdiction, trying to make him see the light, as you can say, in terms of why he had to abide by the agreement, also by his contractual obligations.... TR 65

OFCCP's Ayala experienced an "irate" and "very unprofessional" response from Bumbarger from the outset. She stated:

For the first time in my career I had to go to my director and tell him that I could not deal with this individual on the phone, and that I was a public servant but not a garbage pail. Also, for the first time I was scared to actually go on site to visit a contractor in all my career. TR 36

Ayala did eventually go to the Aguadilla plant for her compliance survey, met with Bumbarger there, and conducted her survey without incident. TR 37, 38

A second on-site compliance survey later was done by OFCCP's compliance officer Newland on July 26, 1990. That survey was done to follow up on Newland's July 1990 review of DSW/PRSEC's personnel "flow" report of July 15, 1990. PX 25 He found evidence that, although the companies reported hiring 18 workers during the January - June 1990 reporting period, they were not observing the required "outreach" and positive recruitment procedure prescribed in the Conciliation Agreement. He also found that DSW/PRSEC had not developed an affirmative action plan for 1989 and 1990, and that, contrary to the obligation accepted in the Conciliation Agreement, the companies had not allotted its personnel staff adequate time, training and support needed to comply with that agreement. PX 25; TR 137

#### 4. Defendants' Responsive Evidence.

Defendants do not contest the accuracy of the evidence presented by OFCCP in this proceeding. At the hearing before me, however, DSW/PRSEC did present evidence from two witnesses, Ms. Maisonave and Francisco Martinez, the current plant manager for defendants' Aguadilla operations.

Ms. Maisonave had been employed by DSW/PRSEC in clerical personnel and payroll work for some time when she took over supervisory duties for that work in 1989. TR 179 One of the responsibilities she succeeded to at that time was for staff coordination of the equal employment opportunity matters. She had no formal training in personnel work, but rather was essentially self-taught in on-the-job experience. The extent of her training in EEO matters has been her own on-the-job experience since 1989, particularly the guidance and technical assistance given her by OFCCP's compliance officer Ayala, largely

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through telephone discussions and correspondence about DSW/PRSEC violations of the Compliance Agreement. TR 177, 221, 183

It is undisputed that Ms. Maisonave was not given time or staff support in handling the EEO matters during 1989, 1990, and 1991. Tom Bumbarger was manager of the plant during that period, up to May 1991 when he left the company. TR 189 It is clear that Ms. Maisonave took her EEO responsibilities seriously during that time, but that DSW/PRSEC vice-president Bumbarger did not. Maisonave gave the following summary of her situation at that time, and I credit her account:

Well, when Tom Bumbarger was there, I would try to explain to him the importance of affirmative action, but he just would not understand. He would say that that was a waste of time doing paper work for nothing. The government was always asking for paperwork. And due to the fact that whenever a letter arrived -- that is when I would have to work with him and I would have to do that in my house because during the day I would not have the time -- he would say that that was a waste of time. So in order for me to try to comply with them, I would do that in my house. And I would tell him, "Well, look, some of the work is done just fine." If there was something for him to sign -- I would put in my time but I did not take time away from the job, but we would have to do it. He would just say, "No, I think we don't. It is just a waste of time." TR 178

When Bumbarger left the company in May 1991, Maisonave reported to an interim plant manager, Lavelle Ward, who had been the plant's engineering manager. Ward also did not give Maisonave the time or support needed for her EEO work. TR 190 During this time, the Aguadilla operations were being cut back, and Maisonave was limited

to a 4-day week. TR 189 - 191 Shortly after Francisco Martinez became the new plant manager in late 1991, he told Maisonave he would support her EEO efforts to obtain compliance. TR 193 In January 1992, he directed her to prepare an affirmative action plan for 1992. TR 193

Although Maisonave continued to have supervisory responsibilities for personnel and payroll work in 1992, she appears to have spent a substantial amount of time preparing an affirmative action plan for the Aguadilla operations, together with various reports of personnel data purporting to reflect implementation of the plan. An 87-page document she had put together by July 1992 was presented at the hearing. DX 1 In preparing this document, Maisonave read the governing regulations and the materials she had previously been given by OFCCP's Ayala, and she obtained a sample AAP from a government agency in Washington. She did not call upon Ayala for help at this time. Maisonave concedes that much of the plan she put together in 1992

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consists of copies of sections from a sample form AAP, without changes specifically designed to deal with the particular situation of the Aguadilla plant. Asked about the plan she had prepared, and whether it was finished -- following Ayala's testimony at the hearing that it was seriously flawed -- Maisonave stated:

Well, I kept on. It is not finished. Asked if I had any quarrel, [Ayala] says it is not finished, there are a lot of things to be put into it. I am trying to read and see what is missing, what else I have to do, how I have to do it, and trying to do it correctly because it is not that I am not complying. I am complying, but I am not complying correctly. Something is wrong. So I have got to read and try to figure out how she wants it, how it should be done.... TR 198

During close examination by the plaintiff, Maisonave conceded that she did not have a working understanding of terms -- such as work force analysis, job group analysis, availability analysis, utilization analysis, etc. -- used in the design and implementation of affirmative action plans prescribed by the governing regulations. She was not familiar with the mechanics of comparing a firm's current-year data against a prior year's data, as a means of measuring affirmative action performance by the firm. TR 208

When Francisco Martinez was hired as plant manager for Aguadilla in November 1991, he was told that Bumbarger was fired because he did not cope with a number of "problems" at Aguadilla, including the EEO problem with the Department of Labor. Bumbarger's successor at the plant from May to November 1991, Lavell Ward, also failed to resolve the problems and was fired, Martinez was told. TR 225, 227 He stated that, because of economic conditions as well as the "problems" at Aguadilla, the plant had been cut back to about 140 workers in late 1991, down from 318 employees in 1989 and 214 employees in 1990. By mid-1992, a total of 168 workers were employed at the Aguadilla facilities. TR 227

At the hearing, Martinez stated that he was now "very aware" that Ms. Maisonave needs training in EEO matters and that he will "take care of that" by making available to her the time, training and support needed to do the job. TR 231 For not having focused on the EEO problem more effectively thus far in 1992, Martinez explained that, in his first months at Aguadilla, he had to concentrate on other serious problems, "problems in almost every corner," including problems securing extensions of existing production contracts. When he was hired in November 1991 to take over the Aguadilla plant, Martinez testified, he was told at corporate headquarters in New York:

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You go in there to face the problems and to fix them and put the factory to work again and to run it the proper way or we are just going to close it. TR 225

He said that he now has specific support of corporate management in New York to resolve EEO compliance issues with OFCCP. TR 233 Asked whether DSW/PRSEC would give the EEO officer enough time for this work, Martinez stated:

Oh, yes. As a matter of fact, I was telling this to Ms. Maisonave that as soon as we do a few things that I am doing, I am preparing an office just for her. In that way, what is going to be done in that office [is] affirmative action: that is it. TR 232

Martinez stated his concern that a debarment of DSW/PRSEC from future federal contracts, as proposed by OFCCP in this proceeding, could cause closing of the Aguadilla operations, even if its current federal contracts were not canceled. TR 234 He stated that he was bidding on several new federal contracts, including one for 2 million pairs of gloves, for example, and that he feared being excluded from consideration for those contract awards. TR 234, 242 He believes that the Aguadilla plant makes a high quality glove product, with special, highly skilled workers who would be difficult to replace if he lost the federal contracts for any period of time. TR 235

On cross examination, Martinez conceded that he was not

familiar with the amount of net sales made by DSW/PRSEC, nor by implication the federal contract portion of those sales, nor familiar with the assertion in Eastco's fiscal year Form 10-K report to the Securities and Exchange Commission, PX 28, that the DSW/PRSEC segment of Eastco's operations was not dependent upon any single customer or any few customers, the loss of whom would have an adverse effect on the business of the company. TR 25; PX 28, p. 6,7

#### 5. Positions of the Parties.

OFCCP contends that DSW/PRSEC has been in flagrant violation of the Executive Order, Section 503, and VEVRA for more than 4 years, and that its conduct over that period of time warrants the sanctions proposed by OFCCP in this proceeding, most particularly debarment from federal contracts until such time as defendants persuade OFCCP, by compliance, that the debarment should be removed. OFCCP emphasizes that the evidence shows a consistent pattern of refusal to abide by agreements DSW/PRSEC made in the 1988 Conciliation Agreement and in numerous subsequent interactions with OFCCP staff.

OFCCP contends that DSW/PRSEC's past conduct demonstrates that defendants ignored the governing equal employment

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opportunity law and breached the clear provisions of the 1988 Conciliation Agreement, thereby breaching significant provisions of their government contracts. Plaintiff argues, accordingly, that there is no valid basis for providing DSW/PRSEC "another chance," and that these companies should be placed on the federal contract ineligibility list, as proposed.

With respect to the argument of defendants that debarment would endanger the economic viability of the Aguadilla plant and threaten the loss of needed jobs in a rural part of Puerto Rico, OFCCP contends that the argument is merely speculative, not proven fact. Plaintiff points out that it is not here seeking the cancellation of DSW/PRSEC's existing contract, under which the company is producing \$500,000 worth of goods for the federal government. Plaintiff contends that the time for more "assurances" from DSW/PRSEC has gone by, and that the time for action, and sanctions, has come.

Defendants take the position that all of the compliance problems cited by OFCCP are attributable to the attitude and actions of one person, the former plant manager of the Aguadilla facilities, Tom Bumbarger, and that the new plant manager, Francisco Martinez, has the personal interest and the corporate management support needed to achieve the needed compliance with equal employment opportunity requirements. Defendants do not oppose imposition in this proceeding of sanctions designed to force documentation of prompt compliance, but they do oppose the debarment requested by OFCCP. Not only will the new Aguadilla management do everything needed to achieve prompt compliance, they assert, but also their record does not show any actual complaints about discrimination against minorities. They point out in this context that all or nearly all of the Aguadilla workers are of hispanic origin, members of a minority group. They argue further that debarment and loss of opportunity now to bid on future government contracts could cause a closing of the Aguadilla plant and loss of the present 168 jobs there at a time of high unemployment and economic crisis. Loss of these jobs, they assert, would be catastrophic to the economy of the Aguadilla region.

#### 6. Discussion and Conclusions.

The defendants do not contest the jurisdiction invoked by OFCCP to seek enforcement in this proceeding of the equal employment opportunity obligations imposed by defendants' federal contracts and by Executive Order 11246, Section 503 of the Rehabilitation Act, and by the Vietnam Era Veterans Readjustment Assistance Act. Similarly, defendants do not contest the assertion of jurisdiction to impose the specific sanctions requested by OFCCP in this proceeding, including that of debarment from participation in future federal government contracts.

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Also, as far as the evidence of noncompliance is concerned, defendants do not contest any specific factual allegations advanced by OFCCP in this proceeding. The documentary evidence of record and the testimony of witnesses at the hearing before me have sustained the OFCCP allegations. The record here establishes that DSW/PRSEC did not adopt or implement an affirmative action plan for required equal employment opportunity at the Aguadilla plant prior to execution of the December 1988 Conciliation Agreement, and that those companies also failed to adopt or implement such a plan during the 3-year existence of the Conciliation Agreement, even though persistently admonished to do so by OFCCP. Indeed, it was express DSW/PRSEC company policy, as stated by the vice president in charge of the Aguadilla plant, to ignore the EEO obligation and to avoid any serious effort to comply, because the EEO requirements were meaningless paperwork.

Defendants' failure to comply with the specific requirements of the December 1988 Compliance Agreement was not merely a failure to comply with "paperwork" rules, nor merely a failure to file routine reports on time, but rather a deliberate, complete violation of that agreement and of substantive equal employment opportunity law. The personnel data compiled and correlated in an AAP is not mere paperwork, but a practical necessity. Such data is

needed for self-evaluation by an employer, as stated by OFCCP on brief:

...so that the contractor itself can analyze its workforce and applicant pool and determine whether those disadvantaged groups can and do obtain full equal employment opportunities. Without this self-evaluation, neither the contractor, nor OFCCP as the compliance agency, knows for example whether women are excluded from non-traditional jobs, whether handicapped employees can be promoted to jobs for which accommodations can be made, or whether the company needs to begin to recruit Vietnam era veterans because the applicant pool does not contain such individuals. Post Trial Brief, p. 20

In this light, it is clear that DSW/PRSEC's violation of the Conciliation Agreement would warrant debarment and cancellation of existing federal contracts, but for special factors evident here. Here, the plant manager, a corporate vice president, who exhibited contempt for the EEO process and who deliberately caused violation of the Conciliation Agreement, has been dismissed. There is a new plant manager who promises, persuasively and credibly, to put things right, and to do so promptly. His explanation for not having done so in the first 6 months of his assignment to Aguadilla is believable. Although there is no documented, objective evidence of record to support defendants' assertion that debarment could cause closing the Aguadilla plant, Mr. Martinez' concern for loss of jobs in rural

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Puerto Rico in the current economic climate is a factor to be considered. Since there is persuasive evidence of clear resolve on the part of Aguadilla management to achieve compliance, the jobs of 168 minority group workers should not yet be placed at risk in this case. Ms. Maisonave already has gathered a substantial amount of pertinent personnel data, as is evident from DX 1, and she appears eager to learn how to implement an affirmative action plan. Assuming she gets the help promised by DSW/PRSEC, there seems no reason why acceptable compliance could not be achieved within 90 days. I conclude that such a last opportunity should be provided in this proceeding, with the clear understanding that OFCCP may seek a speedy debarment and cancellation of existing federal contracts, in another expedited proceeding pursuant to Section 60-30.31, if acceptable compliance is not achieved within 90 days. The proposed order will so provide.

Beginning with the effective date of the proposed order, DSW/PRSEC must undertake an effective, good faith implementation of an affirmative action program, as prescribed in the proposed order, maintaining full documentation of its progress in doing so.

#### RECOMMENDED ORDER

##### IT IS ORDERED:

1. Disposable Safety Wear, Inc. and Puerto Rico Safety Equipment Corporation ("DSW/PRSEC"), their officers, agents, servants, employees, successors, divisions and subsidiaries, and those persons in active concert or participation with them, shall cease and desist and shall permanently thereafter refrain and abstain from violating Executive Order No. 11246, as amended ("Executive order"), Section 503 of the Rehabilitation of 1973, as amended ("Section 503"), or Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRA").

2. Beginning on the effective date of this Order, and continuing thereafter for a period of fifteen (15) months, DSW/PRSEC shall:

a. Develop, maintain and update affirmative action programs in accordance with the Executive Order, Section 503 and VEVRA, and their implementing regulations.

b. Undertake appropriate outreach and positive recruitment activities in an effort to employ qualified disabled veterans, veterans of the Vietnam era and handicapped individuals, by notifying (1) the Centro Rehabilitacion Vocacional in Aguadilla, and (2) the Service Representative for Veterans, Department of

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Labor, SES, in Aguadilla, in a timely manner, for all job vacancies.

c. Design and implement a system for accurately capturing data concerning applicants, hires, promotions, trainings, transfers, layoffs, recalls and terminations, by minority group status and sex.

d. Record and maintain accurate data concerning applicants, hires, promotions, trainings, transfers, layoffs, recalls and terminations by minority group status and sex.

e. Post on all of the companies' bulletin boards and in the companies' reception areas notices inviting all applicants and employees to self-identify themselves as veterans or as handicapped individuals and notices informing applicants and employees that the companies'

affirmative action programs are available for inspection during regular working hours.

f. Ensure that time is allotted for fulfillment of the companies' affirmative action obligations and that the person(s) responsible for the affirmative action programs and other equal employment opportunity obligations is provided the necessary training, time and support to carry out those responsibilities.

g. Submit to OFCCP Progress Reports, beginning forty-five (45) days from the effective date of the Final Decision and Order in this case, documenting Defendants' compliance with the terms of the Order and Defendants' performance of the measures specified in paragraphs (a) through (b), above.

1. The first Progress Report shall be due forty-five (45) days from the effective date of the Final Decision and Order in this case. The report shall contain a copy of Defendants' current affirmative action programs and shall describe Defendants' procedures for ensuring that accurate data is maintained regarding applicants, hires, promotions, trainings, transfers, layoffs, recalls and terminations by minority group status and sex.

2. The second Progress Report shall be due ninety (90) days, and third Progress Report shall be due six (6) months from the effective date of the Final Decision and Order in this case. Both reports shall

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contain, by minority group status and sex, a numerical summary of current employees by job groups and shall include a numerical summary of applicants, hires, promotions, trainings, transfers, layoffs, recalls and terminations. In addition, both reports shall indicate the number of vacancies that each of the Defendants filled during the prior six (6) months and shall document that Defendants notified the Centro Rehabilitacion Vocacional and the Service Representative for Veterans, Department of Labor, SES, of all job vacancies which occurred during the prior six (6) months. Finally, both reports shall indicate the number of applicants which those agencies referred to Defendants for employment, shall indicate the number of referred applicants which Defendants hired, and shall explain the reasons why Defendants failed to hire any of the referred applicants.

3. The forth Progress Report shall be due one (1) year and sixty (60) days from the effective date of the Final Decision and Order in this case. The report shall contain a copy of Defendants' current affirmative action programs.

h. Defendants will provide access to OFCCP, upon notice from OFCCP, to conduct a partial or complete compliance review at any time this Order is in effect, to determine whether Defendants are in compliance with the Order in this case, the Executive Order, Section 503, VEVRA, and their implementing regulations.

3. At any time following the due date for the second Progress Report required by subparagraph 2(g)(2) of this Order, OFCCP may seek an order, pursuant to the expedited hearing procedures specified by 41 CFR 60-30.31, canceling forthwith any existing Federal contracts held by DSW/PRSEC and debarring DSW/PRSEC from entering future Federal contracts, pursuant to the provisions of 41 CFR Chapter 60.

Robert M. Glennon  
Administrative Law Judge

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SERVICE SHEET

CASE NAME: U.S. DEPARTMENT OF LABOR, OFCCP v. DISPOSABLE SAFETY WEAR, INC. and PUERTO RICO SAFETY EQUIPMENT CORPORATION

CASE NO.: 92-OFC-11

TITLE OF DOCUMENT: RECOMMENDED DECISION AND ORDER

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