SECRETARY OF LABOR
WASHINGTON, D.C. 20210

Issue date: December 23, 2022

ARB Case No.: 2020-0057

ALJ 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.

BEFORE: MARTIN J. WALSH
Secretary of Labor

FINAL AGENCY DECISION AND ORDER

On November 18, 2021, the Administrative Review Board (ARB or Board) issued a Decision and Order (DO) in the above-captioned case. Pursuant to Section 6(b)(2) of Secretary's Order 01-2020, 84 Fed. Reg. 13186 (Mar. 6, 2020), the Secretary may "[a]t any point during the first 28 calendar days after the date on which a decision was issued . . . in his or her sole discretion, direct the Board to refer such decision to the Secretary for review." On December 16, 2021, I exercised my discretionary authority to undertake further review of the ARB's Decision in the above-captioned matter pursuant to Sections 6(b)(2) and 6(c)(1) of Secretary's Order 01-2020. The ARB thereafter promptly provided the administrative record in accordance with Section 6(c)(1) of Secretary's Order 01-2020.

After a review of the record relevant to the Administrative Law Judge's (ALJ's) award of remedial relief and the ARB's adoption of this award, and as further discussed below, I now

issue this Final Agency Decision and Order reversing in part the ARB's November 18, 2021 Decision, and remanding those portions of the DO discussing damages and other affirmative remedies tied to job relief for further proceedings consistent with this decision.[1]

I. Background

This case 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. Pursuant to these laws, federal contractors are prohibited from discriminating against employees and applicants on the basis of race, color, religion, sex, sexual orientation, gender identity, and national origin. EO 11246 applies to contractors holding a federal government contract or subcontract of more than $10,000, or federal government contracts or subcontracts that have, or can reasonably expect to have, an aggregate total value exceeding $10,000 in a 12-month period. *See* 41 C.F.R. § 60-1.5(a)(1). As part of its administration of EO 11246, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) periodically conducts evaluations to assess whether federal contractors are in compliance with their equal employment opportunity obligations. *Id.* at § 60-1.20. If a compliance review discloses a violation and the parties are unable to reach a conciliated position, the OFCCP may initiate administrative enforcement proceedings. *Id.* at § 60-1.26(a)(2).

Defendant WMS Solutions, LLC (WMS) is a Baltimore, Maryland-based construction contractor that provides demolition, lead, and asbestos mitigation staffing to construction sites throughout the greater Baltimore-Washington region. DO at 2. WMS was hired to provide staff for a General Services Administration (GSA) building modernization project by Asbestos Specialists, Incorporated (ASI), a subcontractor on the project. *Id*. OFCCP received a complaint about the working conditions at the GSA modernization project site, which led to an investigation and, eventually, a compliance review of WMS. *Id*. The compliance review period lasted from February 1, 2011, to January 31, 2012. *Id*. Upon completion of the review, OFCCP engaged in a conciliation process and eventually filed an administrative complaint with the Office of Administrative Law Judges (OALJ) on June 15, 2015, alleging systematic discrimination in violation of EO 11246. *Id*.

II. Decisions Below

Following the exchange of pre-hearing motions and a pre-hearing conference, the case proceeded to trial before the ALJ on July 26, 2016. *Id*. at 5. On May 12, 2020, the ALJ issued a

[1] This Final Agency Decision and Order is limited to the narrow issue of the proper measure of damages and certain affirmative remedies, including back pay, prejudgment interest, and job relief. As described below, I concur with the ALJ and ARB's conclusions with respect to WMS's underlying liability and do not revisit those conclusions here.

Recommended Decision and Order (RDO) in which he found that WMS (1) discriminated against white, Black, Asian, and American Indian/Alaskan Native laborers in favor of hiring Hispanic laborers; (2) discriminated against female laborers based on their gender and against Black and white laborers based on their race/national origin in hours and compensation; and (3) failed to ensure and maintain a working environment free of harassment, intimidation, and coercion at construction sites where WMS employees worked. *See* RDO at 67, 74, 81.

The ALJ ordered WMS to pay $780,998 in back pay and interest to the non-hired workers who were injured by its discriminatory hiring practices, and $179,907 in back pay and interest to the female and non-Hispanic workers who were injured by its discriminatory compensation practices. *Id*. at 86. The ordered back pay covered only the review period (February 1, 2011, to January 31, 2012), and interest extended only up to the date of trial (July 2016). RDO at 84–87. The ALJ did not discuss any reasons for denying back pay beyond the review period and denying interest beyond the date of trial. *Id*. The ALJ found that, because WMS did not keep applications for non-hired workers, back wages for the hiring violations should be awarded to a class consisting of laborers seeking construction work during the review period who were registered at unemployment centers in the Washington, D.C. metropolitan area. *Id*. at 84. In addition to back pay and interest, the ALJ also ordered various forms of affirmative relief, including requiring WMS to develop a corporate-wide policy prohibiting harassment, intimidation, threats, retaliation, and coercion, and to provide annual training on equal employment opportunity and harassment based on race, color, religion, gender, national origin, disability, or veteran's status. *Id*. at 89–90. The ALJ did not award any job relief (*i.e*., offers of employment), and the RDO did not include any discussion of why this relief was not awarded.[2] *See* RDO at 83–90.

On May 26, 2020, OFCCP filed a Motion for Clarification, requesting that the ALJ specify that his order included "adjusting the interest to bring it forward to the date of decision using the same method of calculation adopted by the Order," "adjusting the back pay to bring it forward to the date of trial," and "requiring WMS to extend job offers to individuals on the victim list, as jobs become available, until WMS either hires 160 laborers from the injured classes or the victim

[2] In summarizing WMS's Opposition to OFCCP's Motion for Clarification, the ALJ noted WMS's argument that job relief should not be awarded because "OFCCP's proposed Findings of Fact and Conclusion of Law made two passing references to a hiring remedy on page 54 but contained no specific proposal." Supplemental RDO at 3. However, the ALJ did not explicitly adopt this argument, and, in fact, indicated that job relief was an "available remedy" that it had "considered and decided." *Id*. at 4. Furthermore, contrary to WMS's assertion, OFCCP included an unambiguous request for job relief in its briefing, and specifically defined the group it believed should receive job offers. *See* OFCCP's Findings of Fact and Conclusions of Law before the ALJ at 54 ("[B]ack wages and offers of laborer positions at WMS should be awarded to non-Hispanic individuals who were registered at unemployment centers in the Washington, D.C. metropolitan area as seeking construction laborer work during the review period."). Even if OFCCP had not included such a request, however, this would not have precluded an award of job relief. *See* Fed. R. Civ. P. 54(c) (providing that other than a default judgment, "[e]very other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings"); RDO at 3 (citations omitted) (noting that "[w]here the rules in 41 C.F.R. §§ 60-30.1 *et seq.* do not provide a rule, the Federal Rules of Civil Procedure apply").

list is exhausted, whichever comes first." OFCCP Motion for Clarification at 2–4. On July 21, 2020, the ALJ issued a Supplemental RDO denying OFCCP's requests for clarification on the basis that they "[did] not address an ambiguity or vagueness in the Recommended D&O" and were instead requests for reconsideration of remedies "the Court has already considered and decided." ALJ's Supplemental RDO Granting in Part and Denying in Part Plaintiff's Motion for Clarification (Supplemental RDO) at 4.

In exceptions filed with the ARB on September 18, 2020, OFCCP argued that the ALJ erred by failing to order offers of employment (for those affected by the hiring violations), back pay that extended to the date of the trial (for those affected by the hours and compensation violations), and interest on back pay until the date of the decision (for both groups). *See* OFCCP's Exceptions to RDO (OFCCP Exceptions) at 12–20. The difference between the amount of combined back pay and interest awarded by the ALJ ($960,905) and the amount OFCCP argued was proper ($1,805,060) was $844,155. *See id*. at 20. With respect to the portion of the ALJ's RDO addressing the award of back pay, OFCCP specifically argued that it was clear error for the ALJ to omit the factual finding that WMS's method of assigning laborers to projects and setting rates of pay—which the ALJ found resulted in unlawful discrimination—had not changed from the end of the review period to the time of trial. *Id*. at 14–16.

On November 18, 2021, the ARB upheld the ALJ's RDO, finding that the ALJ had correctly concluded that WMS violated EO 11246 when it discriminated against non-Hispanic applicants in its hiring and discriminated against women and non-Hispanic employees in assigning hours and setting pay. DO at 17–24. The ARB also upheld the remedies that the ALJ ordered. In so doing, the ARB did not directly engage with OFCCP's arguments regarding the amount of job relief, back pay, and prejudgment interest that was appropriate, other than to note that "remedies must be practical and possible," and that "the ALJ's reasoning is thorough and sensible" in light of the fact that "'exactitude' is not required in calculating the amount of back wage damages." *See* DO at 26 (citing *OFCCP v. Bank of Am*., ARB No. 2013-0099, ALJ No. 1997-OFC-00016, 2016 WL 2892921, at *14 (ARB Apr. 21, 2016)). With respect to the ALJ's order denying OFCCP's Motion for Clarification, the ARB noted that "[w]e defer to the ALJ's discretion on this matter," citing to a case for the proposition that "[o]ur function is not to exercise our own discretion, but to determine . . . whether the [] judge has abused his." *See id*. (citing *U.S. v. Brennan*, 650 F.3d 65, 138 (2d Cir. 2011)).

III. Legal Standard

In a case brought under EO 11246, the legal standards developed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C § 2000e, are applicable. *OFCCP v. Greenwood Mills, Inc*., ALJ No. 1989-OFC-0039, 2000 WL 34601379, at *1 (ALJ Feb. 24, 2000) ("Violations of Executive Order 11246 are analyzed using the same standards as Title VII of the Civil Rights Act of 1964."). In Title VII cases, reviewing courts have

generally evaluated back pay, including when the period of back pay should begin and end, prejudgment interest, and job relief awards under an abuse of discretion standard. *See, e.g.*, *Tudor v. S.E. Oklahoma State U.*, 13 F.4th 1019, 1033 (10th Cir. 2021) (stating that district court's decision to deny reinstatement is reviewed for abuse of discretion); *Pittington v. Great Smoky Mountain Lumberjack Feud, LLC*, 880 F.3d 791 (6th Cir. 2018) (reviewing prejudgment interest award under abuse of discretion standard); *United States v. City of Warren, Mich.*, 138 F.3d 1083, 1097 (6th Cir. 1998) (applying an abuse of discretion standard in reviewing the district court's designation of the beginning of the back pay period, the calculation of prejudgment interest, and the calculation of back pay and the decision not to award back pay); *Suggs v. ServiceMaster Educ. Food Mgmt.*, 72 F.3d 1228, 1233 (6th Cir. 1996) (explaining that a district court's award of back pay is reviewed for abuse of discretion); *see also Bank of Am.*, 2016 WL 2892921, at *21 (employing an abuse of discretion standard to evaluate damages ordered by the ALJ, finding that the ALJ "neither abused her discretion nor clearly erred" in calculating back pay damages).

Generally, abuse of discretion "is defined as a definite and firm conviction that the trial court committed a clear error of judgment," *City of Warren, Mich.*, 138 F.3d at 1095 (internal quotations and citation omitted), or, in other words, a court's reliance "on clearly erroneous findings of facts, or when it improperly applies the law or uses an erroneous legal standard." *Id.* (internal quotations and citation omitted); *see also E.E.O.C. v. Guardian Pools, Inc.*, 828 F.2d 1507, 1511 (11th Cir. 1987) (citations omitted) ("We review a back pay award under the abuse of discretion standard. . . . However, the district court's discretion must be 'guided by sound legal principles.'"). And courts have noted that "[a] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gamboa v. Henderson*, 240 F.3d 1074 (5th Cir. 2000) (unpublished) (internal quotations and citation omitted).

In the Title VII context, courts must craft relief that aligns with "the central statutory purpose[]" of making persons whole for injuries suffered due to discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *see also Booker v. Taylor Milk Co.*, 64 F.3d 860, 866–67 (3d Cir. 1995) (emphasizing the "make-whole" purpose underlying Title VII and explaining that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central purposes of [Title VII]") (internal quotations and citation omitted). More specifically, "make-whole" relief is relief that aims to place "the injured party in the position he or she would have been in absent the discriminatory actions." *Walters v. City of Atlanta*, 803 F.2d 1135, 1145 (11th Cir.1986) (citing *Albemarle*, 422 U.S. at 405); *see also Bank of Am.*, 2016 WL 2892921, at *14 (showing that a court will defer to the relief fashioned by an ALJ so long as the ALJ "exercised reasonable discretion," but that discretion is limited by the requirement that "'the court must, as nearly as possible, recreate the conditions and relationships that would have been had there been no unlawful discrimination'") (internal quotations and citation omitted). It is an

abuse of discretion, for example, "to set a back pay award that falls far short of [the] restorative goal" of placing a plaintiff in the position they would have been in but for the unlawful discrimination they experienced. *Pittington*, 880 F.3d at 799.

Thus, taking into account the district court's duty to craft make-whole relief, I evaluate here whether the ARB properly assessed whether the ALJ abused his discretion in awarding back pay only for the review period, in awarding prejudgment interest only until the date of trial, and in failing to award job relief.

IV. Analysis

The ALJ's conclusion that WMS violated EO 11246 when it discriminated against non-Hispanic applicants in hiring and discriminated against women and non-Hispanic employees in assigning hours and setting pay is well-supported and based on a thorough analysis of the record evidence. *See* RDO at 56–83. This liability determination was, in turn, affirmed by the ARB. *See* DO at 27. I concur with the sections of the ARB's Decision affirming the RDO on the question of WMS's liability—specifically, sections 1, 2, and 3 of the DO—and decline to review them further.

However, for the reasons described below, I find that the ARB improperly applied the abuse of discretion standard to the ALJ's decisions. The ARB affirmed the ALJ's award of remedial relief despite the fact that the ALJ ignored established precedent for what constitutes adequate make-whole relief and (1) failed to provide sufficient reasoning for his decision not to order back pay at least through the date of trial for individuals affected by WMS's discriminatory compensation practices; (2) denied interest on back pay through the date of the decision for those affected by either WMS's discriminatory compensation or hiring practices; and (3) denied job relief for individuals affected by WMS's discriminatory hiring practices. Moreover, because the ARB failed itself to identify any reason from the evidence in the record to support these ALJ conclusions, the ARB should have concluded that the ALJ abused his discretion.

A. Back Pay

The ARB failed to properly review the ALJ's decision on back pay for abuse of discretion. Extensive precedent indicates that back pay in discrimination cases should presumptively extend to the date of judgment unless the court (or ALJ in this case) provides a reason for a shorter back pay period, with some courts emphasizing that the reason must be "compelling." Before both the ALJ and the ARB, OFCCP requested back pay through the date of trial. OFCCP Motion for Clarification at 3; OFCCP Exceptions at 14–18. The ALJ's decisions provided no reason or explanation for refusing to extend back pay at least through the date of trial for those affected by WMS's discriminatory compensation practices, and the ARB affirmed the ALJ's order on back pay without itself identifying a reason to support the ALJ's determination.

The majority view in the Title VII context is that back pay liability presumptively extends until the date of final judgment.[3] *See, e.g.*, *Fogg v. Gonzales,* 492 F.3d 447, 454 (D.C. Cir. 2007) (affirming a district court's grant of back pay to the date of judgment and citing cases approving similar awards, noting that the government could not "muster a single case holding an award of back pay to the date of final judgment was an abuse of discretion"); *E.E.O.C. v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus*., 164 F.3d 89, 100 (2d Cir. 1998) (back pay typically extends through the date of judgment); *Saulpaugh v. Monroe Cmty. Hosp*., 4 F.3d 134, 144–45 (2d Cir. 1993) (same); *Kraszewski v. State Farm Gen. Ins. Co.*, 912 F.2d 1182, 1184 (9th Cir. 1990) ("Since *Albemarle,* the Supreme Court and lower courts have, as a matter of course, awarded back pay relief to plaintiffs, and, also as a matter of course, have granted that back pay until the date of judgment. Such relief has uniformly been viewed as necessary to put the victim in the place he would have been—to make him whole."); *Shore v. Fed. Exp. Corp*., 777 F.2d 1155, 1159–60 (6th Cir. 1985) (explaining that under Title VII's "make whole" rationale, "victorious Title VII plaintiffs are presumptively entitled to back pay until the date judgment is entered in the case"); *see also U.S. Dep't of Labor v. Texas Util. Generating Co.*, 85-OFC-13, 1988 WL 1517024 at *1 (ALJ Mar. 2, 1988) ("The [back pay] cut-off date is generally . . . the date that judicial relief is awarded . . . .")[4]; 1 Susan M. Omilian & Jean P. Kamp, *Sex-Based Employment Discrimination* § 14:4 (2022) ("The ending date for the back-pay period is usually the date of the court order granting the back pay . . . .").

Unsurprisingly, given the long line of cases affirming that back pay should generally be extended to the date of final judgment, appellate courts have found that district courts erred or abused their discretion in cutting off back pay at a variety of points before final judgment. *See, e.g.*, *Nord v. U.S. Steel Corp*., 758 F.2d 1462, 1472–73 (11th Cir. 1985) (finding that the district court erred in calculating back pay only up until the date of the court's oral findings, as opposed to the final judgment); *Sands v. Runyon*, 28 F.3d 1323, 1328 (2d Cir. 1994) (finding that the court was not justified in ending the back pay period a few months before the final judgment was issued where "[n]othing evident in the record . . . justifi[ed] the curtailment of back pay and interest").[5]

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[3] "The presumption that back pay will extend through the date of judgment derives from the related presumption that the employer will then rectify the discrimination . . . ." *Barbour v. Merrill*, 48 F.3d 1270, 1279 (D.C. Cir. 1995); *see also Parsen v. Kaiser Aluminum & Chemical Corp*., 727 F.2d 473 (5th Cir.), *cert. denied*, 104 S.Ct. 3516 (1984) (affirming district court judgment awarding back pay to cover the period until discrimination has been remedied).

[4] This case was brought under Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (1988), which tracks Title VII and EO 11246 principles with regard to remedy. *See, e.g.*, *Commonwealth Aluminum*, 1994 WL 1753787, at *4, *10 (deciding that plaintiffs under Section 503 were entitled to back pay and noting that "back pay may be ordered under the parallel contract compliance program, Executive Order No. 11,246, although there is no explicit reference to back pay in the Executive order").

[5] This case was decided under Section 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a(a)(1), which tracks Title VII and Executive Order 11246 principles with regard to remedy. *See id.*, 28 F.3d at 1325 ("Applying the same remedies available to a plaintiff under Title VII of the Civil Rights Act of 1964, we affirm in part . . . .").

Certainly, there are factors which, if present, may limit the accrual of back pay.[6] Crucially, however, a court must explain its reasons for curtailing back pay. *See, e.g.*, *Sellers v. Delgado Coll*., 781 F.2d 503, 505 (5th Cir. 1986) ("There [were] two other flaws in the magistrate's back pay award, which should be avoided on remand. . . . Back pay . . . may extend to the date of judgment. . . . [T]he magistrate failed to explain why the back pay period ended when Sellers resigned on February 15, 1978."); *see also* DO at 26 (quoting *Brennan*, 650 F.3d at 138) (noting that, in fashioning a remedy, "the district court should explain why it exercised its discretion in the way that it did, so that a reviewing court can determine whether that discretion has been abused"). Indeed, courts almost always explicitly discuss their reasons for cutting off back pay prior to the date of trial or judgment. *See, e.g.*, *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982) (explaining that accrual of back pay liability tolled by employer's unconditional offer of reinstatement); *Walker v. Ford Motor Co*., 684 F.2d 1355, 1363 (11th Cir. 1982) (noting that back pay period would be limited because employment would have terminated prior to the judgment date and plaintiff failed to introduce evidence that he would have continued employment past the fixed-term contract at issue); *E.E.O.C. v. Yellow Freight Sys., Inc*., 2002 WL 31011859, at *28 (S.D.N.Y. Sept. 9, 2002) (explaining that back pay period cut short where the plaintiff's disability would have prevented him from working).[7]

Additionally, a number of courts have found that, in order to justify the premature severing of back pay, a factor must be "compelling." *See, e.g*., *Kraszewski*, 912 F.2d at 1185 (finding that "unless there is a compelling reason for deviating from the general rule here [that back pay should extend to the date of the final judgment], the district court's order must be affirmed"); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1136 (9th Cir. 1986) (explaining that where discrimination is shown, back pay presumptively extends through the date of final judgment "[a]bsent compelling circumstances"); *E.E.O.C. v. Monarch Mach. Tool Co.*, 737 F.2d 1444, 1453 (6th Cir. 1980) (citations omitted) ("In the absence of the type of compelling considerations present in [other cases], we hold that the limitation on the recovery of backpay which the district court imposed in this case frustrates the purposes of Title VII"); *see also Gallo v. John Powell Chevrolet, Inc.*, 779 F. Supp. 804, 811 (M.D. Pa. 1991) ("Although not mandatory, back pay is routinely awarded to successful Title VII plaintiffs absent a compelling reason to deny it, consistent with the Act's objective of placing the plaintiff in the position she would have enjoyed had there been no discrimination.").

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[6] Relatedly, when calculating back pay in Title VII cases, courts deduct "[i]nterim earnings or amounts earnable with reasonable diligence." 42 U.S.C. §2000e-5(g)(1). The defendant has the burden of asserting and proving that the plaintiff failed to mitigate damages by showing that "(1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence." *Hutchison v. Amateur Electronic Supply, Inc*., 42 F.3d 1037, 1044 (7th Cir. 1994); *see also Broadnax v. City of New Haven*, 415 F.3d 265 (2d Cir. 2005). Given the ALJ's lack of explanation, there is no way to know whether mitigation factored into his decision to limit back pay, and the ARB did not address this point. *See* RDO at 40 n. 66, 50–54 (discussing mitigation and how it was accounted for in the expert models presented by OFCCP and WMS); *Id*. at 83–89 (accepting, without addressing WMS's mitigation-related arguments, the damages calculations put forth by OFCCP's expert, with certain unrelated adjustments); DO at 24–27 (endorsing, without discussion, the ALJ's conclusions with respect to damages).

[7] This case was decided under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq*., which tracks Title VII and Executive Order 11246 principles with regard to remedy. *See, e.g.*, *Natofsky v. City of New York*, 921 F.3d 337, 357 (2d Cir. 2019) (citing 136 Cong. Rec. H2615 (daily ed. May 22, 1990)) ("When Congress enacted the ADA, it intended for the ADA's remedies to 'parallel' Title VII's remedies because '[t]he remedies should remain the same, for minorities, for women, and for persons with disabilities. No more. No less.'").

Here, OFCCP was successful in proving its substantive claims. In a lengthy decision in which the ALJ carefully considered a variety of statistical and testimonial evidence, the ALJ found that WMS discriminated against women and non-Hispanic employees in assigning hours and against women in setting pay. *See* RDO at 79, 87–88. The ARB affirmed the ALJ's substantive findings and, as noted above, these findings are amply supported by the record evidence. *See generally* DO. On the question of back pay, in affirming the ALJ's decision to award back pay covering only the review period, the ARB explained that a basic principle of back pay awards is that the "[trier of fact] . . . must be granted wide discretion in resolving ambiguities." DO at 25 (quoting *OFCCP v. Greenwood Mills, Inc.* ARB Nos. 2000-0044, 2001-0089, ALJ No. 1989-OFC-00039, 2002 WL 31932547 at *4 (ARB Dec. 20, 2002)).

However, the workers who were injured by WMS's discriminatory compensation practices were presumptively entitled to backpay calculated at least through the date of trial absent an express, if not compelling, explanation. *See, e.g*., *Thorne*, 802 F.2d at 1136. In his RDO, the ALJ did not articulate a compelling reason—or, indeed, any reason—for his decision to award back pay covering only the review period. *See* RDO at 84–86 (omitting any discussion of the factors considered in curtailing back pay period); Supplemental RDO at 4 (declining to clarify that back pay would extend through the date of trial because "this is a request to the Court to reconsider the amount of back pay awarded that the Court has already considered and decided"). In reviewing the ALJ's decision, and despite its observation that "the district court should explain why it exercised its discretion in the way that it did," the ARB simply accepted the ALJ's bare, unexplained conclusions with respect to the duration of the back pay period. *See* DO at 26, n. 108 (citing *Brennan*, 650 F.3d at 138).

Both the ARB and ALJ also entirely ignored evidence that WMS admitted that its methods for assigning laborers to projects and setting rates of pay—the very practices which the ALJ determined resulted in unlawful discrimination during the review period—remained the same through the date of trial. *See* Official Report of Proceedings before the OALJ (July 28, 2016) at 532–33 (hearing testimony of chief operating officer Paulo Fernandes); Plaintiff's Exhibit 23, p. 35 (deposition testimony of project manager Harold Ortega); Plaintiff's Exhibit 25, pp. 71–72 (deposition testimony of project manager Hugo Rivera) (all showing that WMS's project managers continued to intentionally assign fewer work hours to female employees and non-Hispanic employees and continued to intentionally pay women a lower hourly rate through July 2016). Such evidence would, at a minimum, weigh in favor of awarding back pay until the date of trial for those workers who experienced discriminatory hours and compensation practices. Where a defendant admits that it has not changed the precise practices that the court has found discriminatory, the court must award back pay to the victims of that continuing discrimination up to the date necessary to make those individuals whole. *See Albemarle*, 422 U.S. at 421–22 (once unlawful discrimination has been found, a district court may not deny back pay if its reasons for

doing so would "frustrate [Title VII's] central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination").[8]

Ultimately, by accepting the ALJ's decision to limit back pay to the review period without providing a reason for not extending back pay at least through the date of trial, and by itself failing to identify a reason, the ARB failed to adequately apply the abuse of discretion standard to the ALJ's decision.

B. Prejudgment Interest

The ARB improperly applied the abuse of discretion standard in evaluating the ALJ's award of prejudgment interest. Precedent generally requires courts to extend prejudgment interest in discrimination cases like the one at issue at least until the date of judgment. The ALJ provided no reason for why workers in this case should not receive prejudgment interest through the date of judgment, and the ARB failed to identify such a reason itself.

The ARB has repeatedly recognized that, in cases arising under EO 11246, "[i]nterest is paid on back pay awards to compensate the discriminatees for the loss of the use of their money." *Bank of Am*., 2016 WL 2892921, at *20 (citing OFCCP Compliance Manual § 7F07(e) (1998)); *Greenwood Mills*, 2002 WL 31932547, at *9 (same); *see also* OFCCP, Federal Contract Compliance Manual § 7C06(f)(1), https://www.dol.gov/agencies/ofccp/manual/fccm/7c-types-remedies/7c06-back-pay (2020) ("The purpose of applying interest on back pay awards is to compensate the victim(s) for the loss of the use and purchasing power of their income."). Accordingly, prejudgment interest is normally calculated at least through the date of the ALJ's decision. *See, e.g.*, *Bank of Am*., 2016 WL 2892921, at *21 (ordering the contractor to pay interest on the back pay award up to the date on which the contractor fully paid the monetary judgment); *Greenwood Mills*, 2002 WL 31932547, at *10 (ordering the contractor to pay interest on the back pay award up to and including the date of the Board's order).

Courts in Title VII cases have similarly held that prejudgment interest should normally extend at least through the date of judgment. *See, e.g*., *Small v. New York State Dep't of Corr. & Cmty. Supervision*, 2019 WL 1593923, at *21 (W.D.N.Y. Apr. 15, 2019) (citation omitted) (explaining

[8] OFCCP's expert, Dr. Janice Fanning Madden, calculated the back wages owed to employees affected by the discriminatory practices from the beginning of the review period up to July 2016, extrapolating from the review period data and using the same methods of calculation that she used—and that ALJ Merck ultimately adopted—for the review period. *See* OFCCP Exceptions at 18. This method of calculating back pay was explicitly endorsed by in *In the Matter of the United States Dep't of Lab. v. Harris Trust*, 78-OFC-2, 1988 WL 1109172, at *3 (Mar. 4, 1988). There, the defendant had argued that the statistics OFCCP used for the proposed remedy formula covered only up to 1977 and that extrapolation of the formula beyond that year would be improper. *Id.* at *1. However, citing evidence that the contractor's discriminatory practices were continuing, the Chief Judge ruled that it would be possible to award back pay up to the date in 1986 when the liability decision was issued. *Id.*

that "[f]or federal claims under Title VII, courts award pre-judgment interest on back pay at the federal rate . . . compounded annually from the date the claim arises through the date of judgment"); *E.E.O.C. v. United Health Programs of Am., Inc*., 350 F. Supp. 3d 199, 230 (E.D.N.Y. 2018) (holding that "[p]rejudgment interest should be calculated from the time the claim arises through the date of judgment"); *Brooks v. Fonda-Fultonville Cent. Sch. Dist*., 938 F. Supp. 1094, 1108 (N.D.N.Y. 1996) (noting, in a Title VII case, that "[u]pon a finding of liability, plaintiffs are entitled to back pay from the date of termination until the date of judgment, including prejudgment interest on the back pay award"); *Evans v. State of Conn*., 967 F. Supp. 673, 679 (D. Conn. 1997) (same); *see also Cement Div., Nat'l Gypsum Co. v. City of Milwaukee*, 144 F.3d 1111, 1117 (7th Cir. 1998) ("In fact, the very name 'prejudgment' interest strongly suggests that the relevant [cutoff] date is a judgment date.").

In the minority of decisions where courts have found denial of prejudgment interest to be appropriate, they have typically articulated clear reasons for doing so. *See, e.g*., *E.E.O.C. v. Delight Wholesale Co*., 973 F.2d 664 (8th Cir. 1992) (denial of prejudgment interest was not abuse of discretion due to, among other things, plaintiff's unstable employment history and employer's change in ownership); *Scales v. J.C. Bradford & Co*., 925 F.2d 901 (6th Cir. 1991) (denial of prejudgment interest was not an abuse of discretion where plaintiff employee did not request any prejudgment interest in her damages calculation).

As with the back pay award, the ALJ did not articulate any reason for terminating prejudgment interest at the date of trial, rather than the date of judgment. *See generally* RDO at 83–87; *see also* Supplemental RDO at 4 (declining to clarify that the "order to verify the back pay calculations includes adjusting the prejudgment interest to bring it forward from July 2016 to the date of the decision in May, 2020" because "this is a request to the Court to reconsider the amount of a damage award that the Court has already considered and decided"). Nevertheless, the ARB deferred to the ALJ's discretion regarding the prejudgment interest award without discussion. *See* DO at 26. The ARB's acceptance of the ALJ's unexplained denial of post-trial prejudgment interest, and the ARB's failure to itself identify a reason for limiting the prejudgment interest in this case, provide a sufficient basis to find that the ARB failed to properly review the ALJ's decision for abuse of discretion.

C. Job Relief

As the ALJ correctly observed, "[b]ack pay is but one element of the 'make whole' relief that can be provided to a victim of discrimination," and a court is obligated "'to award any equitable remedies necessary'" to advance the statutory goals for relief. RDO at 87–88 (citing *Spencer v. Gen. Elec. Co.*, 703 F. Supp. 466, 468–69 (E.D. Va. 1989)). Both the ARB and various courts

have found that job relief is a preferred remedy in cases involving hiring discrimination.[9] *See, e.g.*, *Julian v. City of Houston, Tex*., 314 F.3d 721, 728–29 (5th Cir. 2002) ("Our preference for instatement . . . has led us to require district courts to adequately articulate their reasons for finding instatement to be infeasible and for considering an award of front pay instead. Thus, the district court should have considered, as a threshold matter, whether instatement was feasible."); *Prudencio v. Runyon*, 3 F. Supp. 2d 703, 705 (W.D. Va. 1998) ("Successful plaintiffs in a discriminatory failure to hire case are entitled to instatement in the next available position . . . ."); *League of United Latin Am. Citizens (LULAC), Monterey Chapter 2055 v. City of Salinas Fire Department*, 654 F.2d 557, 558 (9th Cir. 1981) (finding that, once intentional discrimination is shown, an applicant should be awarded the position retroactively unless employer shows by clear and convincing evidence that even in the absence of discrimination, the applicant would not have been hired); *E.E.O.C. v. Safeway Stores, Inc.,* 634 F.2d 1273 (10th Cir. 1980), *cert. denied,* 451 U.S. 986 (1981) ("The proper remedy is instatement in the next available position in 'failure to hire' cases."). Significantly, courts have ordered job relief in individual cases as well as cases involving multiple affected employees. *See Bank of Am.*, 2016 WL 2892921, at *5 (noting that ALJ awarded offers of employment to several affected individuals); *OFCCP v. Commonwealth Aluminum*, 82-OFC-6, Acting Assistant Sec'y of Labor Final Decision & Order, 1994 WL 1753787, at *12 (Feb. 10, 1994) (awarding offers of employment to five victims of discrimination)[10]; *United States v. Pennsylvania*, 2021 WL 6197382, at *4 (M.D. Pa. Dec. 31, 2021) (approving settlement agreement that provided for priority hiring relief for up to 65 individuals because "hiring relief achieves [the make-whole purposes of Title VII] most directly by helping to eliminate the effects of discrimination in the workforce and by placing claimants in the same position they would have been but for the discrimination"); *United States v. City of New York*, 681 F. Supp. 2d 274, 278 (E.D.N.Y. 2010) (ordering priority hiring relief for 293 victims of discrimination).

As with back pay, the ALJ did not discuss his reasons for failing to award job relief. *See* RDO at 87–88. There is no indication that the ALJ considered whether instatement was "infeasible" or "unavailable," as reviewing courts have often required lower courts to do when ruling out job relief. *See Julian*, 314 F.3d at 728–29 (explaining that district courts must "adequately articulate their reasons for finding instatement to be infeasible . . . .").

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[9] Relatedly, courts have consistently found that successful claimants in discrimination cases involving job loss (rather than hiring discrimination) are presumptively entitled to *re*instatement and/or hiring preference. *See, e.g.*, *Shore v. Fed. Exp. Corp*., 777 F.2d 1155, 1159 (6th Cir. 1985) (noting that under Title VII's "make whole" rationale, "successful Title VII claimants are . . . presumptively entitled to reinstatement"); *Julian*, 314 F.3d at 728–29 (suggesting that the only difference between the instatement and reinstatement is "a slight change in our terminology" and finding that "[i]n a failure to promote case, the preferred remedy is *instatement* to an illegally denied position, not *reinstatement*") (emphasis in original).

[10] *Commonwealth Aluminum* was brought under Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (1988), which tracks Title VII and Executive Order 11246 principles with regard to remedy. *See supra* note 5.

Nor is the ALJ's decision (and by extension the ARB's affirmance of the decision) saved by the fact that the ALJ ordered certain other affirmative relief. *See* RDO at 89–90 (ordering WMS to develop and issue an anti-harassment policy and complaint procedure, and train its managers and supervisors accordingly); DO at 26. Courts have confirmed that job relief is to be granted in "all but the unusual cases," and the fact that an employer changes its procedures to eliminate future discrimination is not such an unusual circumstance. *See, e.g.*, *Garza v. Brownsville Independent School District,* 700 F.2d 253, 255 (5th Cir. 1983).

As described above, the ALJ correctly found that WMS engaged in discriminatory hiring practices in violation of EO 11246 during the review period of February 2011 through January 2012, resulting in a shortfall of 160 non-Hispanic workers. *See* RDO at 87.
The affected individuals were presumptively entitled to offers of employment in order to "recreate the . . . relationships that would have been had there been no unlawful discrimination." *Teamsters*, 431 U.S. at 372 (internal quotations and citation omitted). In accepting the ALJ's refusal to require job relief without articulating a reason for the refusal, and in neglecting to identify a reason itself, the ARB failed to adequately review the ALJ's decisions for abuse of discretion.

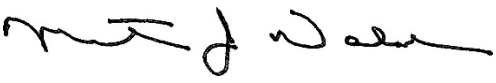
V. Conclusion

For the reasons stated above, I reverse and remand those portions of the ARB's November 18, 2021 Decision and Order denying back pay at least through the date of trial or judgment for individuals affected by WMS's discriminatory compensation practices; denying interest on back pay through the date of the decision for those affected by either WMS's discriminatory compensation or hiring practices; and denying job relief for individuals affected by WMS's discriminatory hiring practices.

ORDER

The ARB's Decision and Order is REVERSED in part. This case is REMANDED to the ARB for further consideration of back pay, prejudgment interest, and job relief in accordance with this opinion.

Signed in Washington, D.C., this 23rd day of December 2022,



MARTIN J. WALSH