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**Issue Date: 17 September 2013**

Case No.: 1997- OFC -16

In the Matter of

OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS, U.S.  
DEPARTMENT OF LABOR,

Plaintiff,

v.

BANK OF AMERICA,

Defendant.

**RECOMMENDED DECISION AND ORDER  
AWARDING DAMAGES**

This proceeding arises from a claim under Executive Order 11246, codified at 41 C.F.R. Chapter 60. The Office of Federal Contract Compliance Programs, United States Department of Labor (OFCCP) brought this action against Bank of America (the Bank) in 1997, alleging a violation of Executive Order 11246, Fed. Reg. 1219 (1965), *reprinted as amended* in 42 U.S.C. §2000e app. at 24-29, which prohibits, *inter alia*, employment discrimination on the basis of race by covered government contractors.

On November 24, 1993, the Regional Director of the OFCCP in Atlanta notified the President and Chief Executive Officer of NationsBank in Charlotte, North Carolina that its Charlotte facility had been selected for compliance review under Executive Order No. 11246 (30 Fed. Reg. 12319), as amended by Executive Order No. 11375 (32 Fed. Reg. 14303), and Executive Order No. 12086 (43 Fed. Reg. 46501)(hereinafter "Executive Order 11246"), Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §793 (2002), and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended, 38 U.S.C. §§4211-4212 (2000).

Shortly thereafter, the OFCCP initiated additional compliance reviews at NationsBank's offices in Tampa, Florida and Columbia, South Carolina. NationsBank objected and refused to comply with the review of those facilities. In March 1995, NationsBank filed an action in the U.S. District Court for the Western District of North Carolina, seeking injunctive relief, alleging that the OFCCP's selection of the Tampa and Columbia Facilities violated the Fourth

Amendment's protection against unreasonable searches. In February of 1997, NationsBank amended its complaint, adding an allegation that OFCCP's selection of the Charlotte facility also violated the Fourth Amendment. The District Court granted NationsBank's request for a preliminary injunction, thereby precluding OFCCP from bringing an enforcement action against NationsBank. The U.S. Court of Appeals for the Fourth Circuit subsequently granted summary judgment to OFCCP, thereby vacating the District Court's preliminary injunction, stating that NationsBank had to first exhaust its administrative remedies.

The OFCCP then filed an Administrative Complaint demanding that NationsBank comply with Executive Order 11246 or risk debarment. Newly-named Bank of America moved for summary decision, contending that OFCCP violated the Fourth Amendment when it selected and searched its Charlotte facility for compliance review. On August 25, 2000, Administrative Law Judge Richard Huddleston issued a Recommended Decision granting the Bank's motion for summary decision. Judge Huddleston concluded that OFCCP's selection of the Charlotte facility was not based on an administrative plan containing neutral criteria, and was arbitrary and unconstitutional.

The OFCCP filed exceptions to the Recommended Decision with the Administrative Review Board (hereinafter "Board"). On March 31, 2003, the Board reversed Judge Huddleston's decision and remanded to the Office of Administrative Law Judges for further proceedings, concluding that the record presented genuine issues of material fact. *OFCCP, Department of Labor v. Bank of America*, No. 00-079 (Mar. 31, 2003). The case was subsequently assigned to me.

On August 11, 2004, I issued a Recommended Decision and Order on Cross-Motions for Summary Judgment, granting the OFCCP's Motion for Partial Summary Judgment, and denying the Bank's Motion for Summary Decision. In that Decision and Order, I found that as a matter of law the Bank's decision to provide OFCCP with the requested documents and access to its Charlotte facility was unequivocal and unconditional, and was uncontaminated by duress or coercion. As a result, the Bank's consent to the compliance review was voluntary under *Schneckloth v. Bustamonte*, 412 U.S. 18 (1973). Because the Bank consented, OFCCP's actions were removed from the requirements of the Fourth Amendment. Consequently, and as the Board held in its decision, any further consideration of whether OFCCP selected the Bank based on neutral criteria—i.e., the "reasonableness" inquiry under *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) and *United States v. Mississippi Power & Light Co.*, [NOPSIS III], 638 F.2d 899 (5<sup>th</sup> Cir. 1981)—was unnecessary, and the OFCCP was entitled to partial summary judgment on the issue of the Bank's Fourth Amendment challenge to its selection for review.

The Bank filed Exceptions to my recommended order, and the OFCCP filed a motion to dismiss the interlocutory appeal. The Bank filed a response to the OFCCP's motion, as well as a motion requesting that I certify my recommended order for interlocutory appeal. On October 14, 2004, I issued an Order denying the Bank's request for certification for interlocutory appeal. On December 17, 2004, the Board rejected the Bank's interlocutory appeal, and remanded the case for adjudication.

The parties proceeded to conduct discovery, and the hearing was held on October 15 and 16, 2008, in Charlotte, North Carolina, and on March 3 and 5, 2009, in Washington, D.C.<sup>1</sup> On January 21, 2010, I issued a Recommended Decision and Order finding the Bank liable based on statistically-significant disparities between African American and Caucasian job applicants in 1993, and from 2002-2005, respectively. I retained jurisdiction of this matter for the remedy phase of the case, and on November 12, 2010, I issued a Scheduling Order based on the parties' agreement, contemplating discovery deadlines and a hearing on the remedy phase on November 14, 2011.

On March 3, 2011, I issued an Order denying the Bank's request for the issuance of 1,147 subpoenas, and its motion to compel production of unredacted survey responses from the applicants for whom the OFCCP sought a remedy. I found that the Bank's request to compel the production of approximately seventeen years of earnings and employment records from the 1,147 potential victims of its discrimination - including at least nine separate groups of documents regarding employment history and four separate groups of documents regarding tax records - made it clear that the Bank was seeking to rely on an individualized hearings approach to calculating the remedy for its discrimination, an approach that was inappropriate, impractical, and infeasible for this case. I found that the appropriate method for determining damages was formula or classwide relief.<sup>2</sup>

Courts have recognized the necessity of a class-wide approach to determine the amount of a back pay award when the case is complex, the class size is large, or the illegal practices continued over an extended period of time. See *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5<sup>th</sup> Cir. 1974); *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264 (5<sup>th</sup> Cir. 2008); *Jacksonville Shipyards, Inc.*, 1989 OFC 1 (June 10, 1997). I found that all three of these factors were present in this case.

I found that in this case, the only practical way of formulating the appropriate damages in connection with the Bank's discrimination was with a class-wide, formula driven remedy. There are more than eleven hundred potential victims of the Bank's discrimination. As was the case in *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264 (5<sup>th</sup> Cir. 2008), an exact reconstruction of each of these more than eleven hundred individuals' work histories, as if discrimination had not occurred, would be imprecise and impractical, and "would result in the 'quagmire of hypothetical judgments' that courts should avoid." *Id.* at 281, citing *Pettway*, 494 F.2d at 260.<sup>3</sup>

Under these circumstances - given the complexity and uncertainty, and in this case, the virtual impossibility, of identifying which of the 1,147 applicants would have been hired but for the Bank's discrimination (and who thus are entitled to back pay), as well as the extended time

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<sup>1</sup> At the parties' request, the hearing was bifurcated, with the issue of liability to be decided first, and then, if necessary, the appropriate remedies.

<sup>2</sup> I also found that this Court had the inherent authority to deny the issuance of subpoenas whose main purpose appeared to be to intimidate and harass the recipients, and otherwise greatly lengthen the resolution of a suit that was approaching twenty years old.

<sup>3</sup> I noted that the information necessary to identify "actual victims" under an individualized remedy approach was not available in this case, because the evidence necessary to re-create the Bank's actual hiring decisions that I found to be discriminatory does not exist. In other words, it was not possible to determine which of the 1,147 applicants would have been hired but for the Bank's discriminatory practices, and thus "actual" victims could not be identified.

period over which the discrimination took place – I found that a class-wide back pay remedy, calculated in a manner similar to that used in *OFCCP v. Greenwood Mills, Inc.*, 1989-OFC-39 (Feb. 24, 2000) was appropriate, and denied the Bank’s request for the issuance of 1,147 subpoenas.<sup>4</sup>

The parties subsequently engaged in discovery, as well as settlement negotiations, and jointly requested additional time to prepare for a hearing. A hearing was held on the appropriate damages remedy on March 27, 2013. The OFCCP submitted a Brief on May 28, 2013; the Bank submitted a Brief on June 25, 2013. The OFCCP submitted a Reply Brief on July 10, 2013.

I have based my analysis on the entire record, including the exhibits and representations of the parties, and given consideration to the applicable statutory provisions, regulations, and case law, and made the following findings of fact and conclusions of law.

## **BACKGROUND**

In my January 21, 2010 Recommended Decision and Order, I found the following:

1. There was a statistical disparity of 6.9 standard deviations, representing over 50 applicants, for selection rates for entry level positions in job groups 5A2 and 5F2 between African-American and Caucasian job applicants during 1993;
2. There was a statistical disparity of 4.0 standard deviations, representing nearly 25 applicants, for selection rates for entry level positions in job group 5A between African-American and Caucasian job applicants during 2002-2005;
3. Dr. Crawford calculated these statistical disparities by analysis of the hiring data controlling for job group, rather than job title;
4. Controlling for job group is likely to uncover the full breadth of discrimination because the alternative approach, controlling for job title, would allow the Bank to manipulate the results by only including applicants expressing interest in a particular job.

*See OFCCP v. Bank of Am.*, 1997-OFC-16, \*64 (ALJ Jan. 21, 2010).

As discussed above, in my March 3, 2011 Order, I concluded that a class-wide formula, using the shortfall method, to determine appropriate damages, including interim earnings and mitigation, was to be applied here. This formula includes five aspects: the shortfall between the discriminated and non-discriminated job applicants; the average earnings for hires in the relevant job group and year (identified in the analyses as “cohorts”); the average employment period for those hired applicants in the relevant cohort (identified in the analyses as “tenure”); interim

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<sup>4</sup> I also found that the Bank’s request for production of unredacted questionnaires presumed the use of individualized computations of damages, an approach that I found was not appropriate in this case. Thus, because any information contained in the questionnaires would be relevant only to an individualized approach, the identities of the rejected applicants who completed these questionnaires were also irrelevant

and/or mitigating earnings of the discriminated class members; and the prejudgment interest rate to apply on any back pay awards.

### **EXHIBITS**

The following exhibits were admitted into the record in connection with the remedy phase of this claim.<sup>5</sup>

#### *Joint Exhibits (JX)*

- JX 35 Plaintiff's Responses to Defendant's First Interrogatories in the remedy phase, July 2, 2012
- JX 36 Plaintiff's Responses to Defendant's First Request for Production of Documents in the remedy phase, July 2, 2010
- DX 37 Defendant's Responses to Plaintiff's First Interrogatories in the remedy phase, July 30, 2010
- DX 38 Defendant's Responses to Plaintiff's First Request for production of Documents in the remedy phase, July 30, 2012
- DX 39 Defendant's Supplemental Responses to Plaintiff's First Interrogatories in the remedy phase, August 16, 2010
- DX 40 Defendant's Supplemental Responses to Plaintiff's First Request for Production of Documents in the remedy phase, August 16, 2012
- DX 41 Letter from Angela Donaldson to Bruce Steen dated August 20, 2010
- JX 42 Letter from Aaron Longo to Angela Donaldson dated December 7, 2010
- JX 43 Letter form Angela Donaldson to Aaron Longo and Bruce Steen dated December 13, 2010
- JX 44 Letter from Aaron Longo to Angela Donaldson dated December 17, 2010
- JX 45 Letter from Bruce Steen to Angela Donaldson dated December 23, 2010
- JX 46 Letter from Angela Donaldson to Aaron Longo and Bruce Steen dated January 18, 2011

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<sup>5</sup> Joint Exhibits 31 to 34, Plaintiff's Exhibits 23 and 25, and Bank's Exhibits 125, 129, and 130, which were proffered at the hearing, were subsequently withdrawn. On May 20, 2013, the parties submitted a Joint Stipulation Regarding Certain Remedy Phase Hearing Exhibits, formally withdrawing these exhibits and setting out a procedure for handling the personally identifiable information contained in the exhibits. These exhibits are not part of the record in this proceeding.

- JX 47 Letter from Angela Donaldson to Aaron Longo and Bruce Steen dated April 25, 2011
- JX 48 Letter from Uche Egemonye to Bruce Steen dated May 2, 2011
- JX 49 Letter from Aaron Longo to Angela Donaldson dated May 10, 2011
- JX 50 Letter from Aaron Longo to Angela Donaldson dated May 10, 2011
- JX 51 Letter from Bruce Steen to Angela Donaldson dated June 3, 2011
- JX 52 Letter from Bruce Steen to Angela Donaldson dated June 16, 2011
- JX 53 Letter from Angela Donaldson to Bruce Steen dated August 3, 2011
- JX 54 Letter from Aaron Longo to Angela Donaldson dated August 26, 2011
- JX 55 Letter from Aaron Longo to Angela Donaldson dated September 27, 2011
- JX 56 Deposition of Dr. David L. Crawford, June 21, 2012
- JX 57 Exhibits to Dr. Crawford's June 21, 2012 deposition
- JX 58 Deposition of Dr. John H. Johnson, IV, June 27, 2012
- JX 59 Exhibits to Dr. Johnson's June 27, 2012 deposition

*Plaintiff's Exhibits (PX)*

- PX 21 Introductory Summary of Dr. David Crawford
- PX 22 Dr. Crawford's July 8, 2011 Report, corrected July 15, 2011
- PX 24 Dr. Crawford's January 23, 2012 Rebuttal Report
- PX 26 Corrected Tables for Dr. Crawford's January 23, 2012 Rebuttal Report
- PX 27 Dr. Crawford's February 27, 2013 Corrected Rebuttal Report
- PX 28 Composite Exhibit<sup>5</sup> of some requisitions showing part-time hours worked and hourly rates
- PX 29 List of Jobs in 5A2 and 5F2

Bank's Exhibits (DX)

- DX 126 Synopsis of Remedy Phase Expert Reports of Dr. John H. Johnson
- DX 127 Expert Report of Dr. John H. Johnson dated December 9, 2011
- DX 128 Rebuttal Expert Report of Dr. Johnson dated March 1, 2012
- DX 131 Redacted Questionnaires

**EXPERT REPORTS AND TESTIMONY<sup>6</sup>**

Dr. David Crawford

Dr. Crawford is president of Econsult Corporation and an adjunct professor of management at the University of Pennsylvania's Wharton School. After analyzing and reporting the statistically-significant disparities between the Bank's hiring of African-American and Caucasian job applicants in the liability phase of this claim, Dr. Crawford set out the economic remedies associated with this analysis in his July 8, 2011 initial report (corrected in light of some of Dr. Johnson's critiques on July 15, 2011), and in his January 23, 2012 rebuttal report.

Dr. Crawford and Dr. Johnson rely on the shortfall data calculated during the liability phase for both the 1993 and 2002-2005 cohorts. Using this shortfall data, Dr. Crawford calculated the estimates of lost earnings by using the average earnings for hires in the relevant job group and year. Dr. Crawford and Dr. Johnson used similar information for this calculation, the W-2 data provided from the Bank (Tr. 24). Unfortunately, the use of this W-2 data was problematic, because there were gaps in the W-2 information provided by the Bank.<sup>7</sup>

While Dr. Johnson accepted the W-2's provided by the Bank at face value, that is, he assumed that any gaps in the data reflected periods when the individual was not working, Dr. Crawford found many reasons to conclude that the W-2 information was not complete:

1. There were no W-2s for 15 people hired by the Bank in 1993, and in 2002-2005;
2. There were 10 people for whom the W-2s ended before the year of their single recorded termination date;
3. There were 42 people for whom the single year of the recorded termination date precedes the year of the last W-2;
4. There were 18 people for whom the W-2s end in the single recorded termination year, but there are no W-2s for one or more intervening years;

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<sup>6</sup> The reports of both experts are considered their direct testimony. At the remedy hearing, the experts testified on cross and redirect examination.

<sup>7</sup> The Bank also provided data from its e-Workplace database which was created in January 1999.

5. There are 25 people with more than one recorded termination date;
6. There are no recorded termination dates for 334 people;
7. Among the persons with no termination date, 51 have no W-2s for one or more years between the years of the first and last W-2 form;
8. The Bank twice represented that all W-2s had been provided, and then provided additional W-2s.

(PX 27; Tr. 32, 59-60, 81).

Dr. Crawford concluded that there was no clear best way to resolve the missing and/or contradictory data without additional information. Dr. Crawford's analysis relied on two models to calculate the lost earnings for the unsuccessful applicants, with one method overestimating, and one underestimating, the true values. In the first analysis, "Method 1," Dr. Crawford "filled in" gaps in missing W-2 data with estimates from other available data. As Dr. Crawford noted in his testimony, what this "other" data is depended on whether the gaps were in between non-missing values or at the end of the series (Tr. 25). If the gap was due to intermittent W-2's, for Method 1, Dr. Crawford filled in the missing information with the average of the W-2 incomes on each side of the missing year, or assumed earnings equal to the last reported earnings (Tr. 25). With "Method 2," Dr. Crawford did not fill in these gaps, but assumed that there were zero earnings in years for which there were no W-2's.

If the W-2's continued beyond the year of a person's reported termination as recorded in the Bank's eWorkplace database, for Method 1 Dr. Crawford assumed that the reported termination date was incorrect, and the individual continued working for the Bank up to the year of the last W-2. For Method 2, Dr. Crawford assumed that the termination date was correct, and he did not calculate average earnings beyond this date.

For those cases where there was a gap between the W-2's and the Bank's reported year of termination, Dr. Crawford assumed for both Method 1 and Method 2 that the person continued to be employed up to the year of termination. For Method 1, he assumed earnings up to the date of termination equal to the reported earnings in the last available W-2, and for Method 1, he assumed zero earnings after the last W-2, up to the termination date.

While Dr. Crawford stated that Method 1 was likely to overestimate in some situations, and Method 2 to underestimate in some situations, he found no gaps or inconsistencies in the overwhelming majority of cases, and thus Methods 1 and 2 produced the same correct values in the majority of cases.<sup>8</sup>

Dr. Crawford stated that he did not have any reason to believe that the W-2's were complete; he did not intend to impute any bad-faith to the Bank, but it still appeared that there were some missing W-2s (Tr. 60). Dr. Crawford noted that he received the W-2s "in waves" from the Bank, despite previous assurances that the Bank had submitted all of the data (Tr. 60).

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<sup>8</sup> Dr. Johnson acknowledged that Dr. Crawford's use of these two methods, compared with his use of the W-2 information taken at face value, resulted in a difference of only four percentage points one way and three percentage points the other.

On cross-examination, the Bank questioned Dr. Crawford's assumptions, pointing to a member of the cohort, Dione LaVoie, who had W-2s for 1993-1995, and 2004-2009. The Bank noted that she worked for another employer between 1995 and 2004 (Tr. 27-29). Dr. Crawford stated that Method 1 overstated Ms. Lavoie's tenure, and Method 2 understated it. With respect to his calculation of earnings for the successful applicants under Method 2, using zeroes for the gaps in the W-2 information with respect to Ms. LaVoie would understate the average of the whole group, which was his intention. By using Method 2, he was trying to err on the low side, if at all (Tr. 61).<sup>9</sup>

Dr. Crawford noted that his totals for the 2002-2005 group were very close together; there were fewer job titles, and less of an issue of missing data. With respect to the 1993 cohort, the range was bigger. He did not have an opinion as to which of the totals should be given more weight. He stated that in some sense, they were both incorrect, so the question was which one was closer to the right number. He did not have any basis for making that judgment (Tr. 57).

Dr. Crawford also used W-2 data to calculate "survival rates," or the percentages of African-Americans who would have been expected to continue working for the Bank if they had been hired into the 5A2 and 5F2 positions in 1993, or in the 2002-2005 time period (Tr. 35). Dr. Crawford based the percentages on the numbers of persons who were actually hired into these positions and continued working for the Bank. He assumed that the unsuccessful applicants would have survived at the same rate as the successful applicants.

Neither Dr. Crawford nor Dr. Johnson had actual survival data for the 1993 group of successful applicants after 2009. Dr. Crawford concluded that the best resolution would be to identify where the turnover rates leveled off for the 1993 cohort, and extrapolate that for 2010-forward, for both the 1993 and 2002-2005 cohorts. PX 27 ¶ 19. Dr. Crawford explained his approach in detail:

The general method was the same in that I took the W-2 data, as adjusted in the ways that I talked about with Method 1 and Method 2, and then computed starting from the number of people who were hired into the job group. That was the value for 1993. Then I counted and said, 'well, how many of them are still there in '94, and how many of them are still there in '95,' and so on. That allowed me to construct actual survival rates from, for the '93 cohort, from '93 through 2009. And then I also developed an algorithm for estimating survival based on those data, and I actually used that approach to estimate the surviving percentages beyond 2009 for which we had no data. And I also used it for smoothing of the actual data for, through 2009. With regard to the later cohorts, it's the same sort of thing. I took the number of people that started and looked to see how many were there in each successive year.

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<sup>9</sup> Of the gaps identified by Dr. Crawford in the W-2 data provided by the Bank, the Bank provided an explanation only for Ms. Lavoie.

(Tr. 61.) Dr. Crawford's model assumes that unsuccessful African-American job applicants would have identical turnover as the successful applicants (Tr. 37). After examining the survival data, Dr. Crawford found that the survival rate was much lower in 1993-1999 than in 1999-2009, and thus it was inappropriate to assume a constant survival rate over the entire time period.<sup>10</sup> Because the survival rate was much lower in the years 1993-1999 than in the years 1999-2009, see PX 27 ¶ 18, Dr. Crawford used the constant survival rate of 1999-2009 to extrapolate for 2010 and beyond.

For the 2002-2005 cohorts, Dr. Crawford applied the survival rates for the 1993 5A2 cohort to estimate survival for 2010 and beyond. He used actual survival data for the years 2003-2009, as he had discovered from the 1993 cohort data that it was not appropriate to assume a constant survival rate until the seventh year, which was 1999 for the 1993 group, when the survival rates slowed and became more constant. For the 2002-2005 cohorts, Dr. Crawford was not able to use the constant survival rate from the seventh year and beyond, because actual data did not exist beyond the seventh year. He selected the 5A2 rate from 1993 because the teller positions were most comparable to the 5A positions in later years.

For the calculation of interim and mitigating earnings, both Dr. Crawford and Dr. Johnson used available Social Security data to estimate the actual earnings of unsuccessful applicants. PX 27 ¶ 23. This data included taxed Social Security earnings, taxed Medicare earnings, and various forms of income, such as salaries, wages, and self-employment (Tr. 90).

Dr. Crawford and Dr. Johnson had different approaches to the use of the Social Security data in two respects: the calculation of mitigating earnings for those years in which class members had "zero" earnings reported on their Social Security earning reports; and the determination of what data should be used to estimate mitigating earnings in 2005 when Social Security data was missing.

For the years in which class members had "zero" earnings reported, Dr. Crawford treated such zeroes as "real" – meaning that the class member in question earned literally no interim income (Tr. 41).<sup>11</sup> On cross-examination, Dr. Crawford was asked why he made no effort to try and rule out other possibilities to explain the lack of Social Security earnings, to which he responded that "as the case developed, there wasn't any useful information that would allow me to identify those, to determine the reasons for the zeros" (Tr. 41). He nevertheless assumed implicitly that such individuals were attempting to earn income. Dr. Crawford was asked whether such years of "zero" reported earnings should count toward mitigation. He declined to provide a general answer, stating that the question turned on the basis behind the "zero." "It may well be," testified Dr. Crawford, "that the best long-run mitigation strategy for an individual would be to go back to school, so I can't answer in general" (Tr. 43). He stated that a voluntary exit from the workforce should be excluded if there were reliable data that reflected a basis to exclude such a time period. *Id.*

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<sup>10</sup> For the survival rate after 2009, Dr. Johnson included the survival rate from the earlier years, where the turnover was much higher.

<sup>11</sup> Dr. Johnson excluded those periods from his calculations of interim earnings, which resulted in increasing the calculations of interim earnings and decreasing the overall remedy.

Both Dr. Crawford and Dr. Johnson used the average earnings of each year's cohort to estimate the interim earnings for the 2002, 2003, and 2004 cohorts. For the 2005 cohort, Dr. Crawford averaged the available 2002-2010 earnings data from the 2002, 2003, and 2004 groups of applicants in order to estimate 2005 earnings. PX 27 ¶ 24. Dr. Crawford based this approach on the fact that he had no reason to think the 2005 earnings would be markedly different from the immediately preceding years (Tr. 64), and he did not want to risk overestimating earnings by using Occupational Employment Statistics Survey (OES) data (Tr. 66). Dr. Crawford acknowledged that there was not a problem with OES data in general, but the category of jobs in the OES was broad enough to include substantially higher-skilled people, so that the average salary was too high for this group (Tr. 130). According to Dr. Crawford, the OES data was systematically higher than the Social Security averages for all but the years 2007, 2008, and 2009. Although Dr. Johnson emphasized that the OES data and the Social Security data were highly correlated, that did not mean that one was a good predictor of the other. Dr. Crawford thought that the OES data systematically over-predicted mitigating income; if mitigating income were overestimated, that would underestimate damages. He did not feel that the OES data series was the correct method to use in this case (Tr. 65-66).

With respect to the applicable pre-judgment interest rate, Dr. Crawford based his calculations on the historic average annual mortgage interest rates from 1993-mid-2012, as published by the Federal Reserve Board of Governors. PX 27 ¶ 28. At the remedy hearing, Dr. Crawford testified that his "general principle," which he said is "virtually universal," is to select an interest rate at which a person can borrow or lend, and which is risk free (Tr. 66). Dr. Crawford explained that the mortgage rate's long-term feature best represents the lengthy litigation period experienced by the class members here (Tr. 67).

Dr. Crawford also made prejudgment interest calculations using the IRS rate for the underpayment of taxes. PX 27 ¶ 31. Dr. Crawford concluded that, ultimately, the empirical impact of the choice between the mortgage rate and the IRS rate was very small (Tr. 55). Nevertheless, Dr. Crawford thought that the IRS rate was too short term, given the nearly 20-year period covered by this litigation, and thus inappropriate (Tr. 52). Dr. Crawford was opposed to the use of a three-month Treasury bill interest rate based on its short term nature.

For the 1993 cohort, Dr. Crawford's estimates of earnings and benefits, controlling for job group, through mid-2012, is a range of \$770,245 to \$976,040 based on mortgage interest rates, and a range of \$762,684 to \$964,033 based on IRS interest rates.

For the 2002-2005 cohort, Dr. Crawford's estimates of earnings and benefits, controlling for job group, through mid-2012, is a range of \$1,190,093 to \$1,232,490 based on mortgage interest rates, and a range of \$1,176,040 to \$1,217,560 based on IRS interest rates.

Dr. Paul Johnson

Dr. Johnson is president and CEO of Edgeworth Economics and an affiliated professor at Georgetown Public Policy Institute. Dr. Johnson prepared an expert report dated December 9, 2011, and testified during the March 27, 2013 hearing.

The first area of disagreement between Dr. Johnson and Dr. Crawford is over the use of the W-2 data to calculate missing “but-for” earnings and tenure information. Dr. Johnson disputes Dr. Crawford’s use of the Bank’s eWorkplace data to “fill in” gaps in the W-2 history as “clearly factually incorrect.” DX 127 ¶ 30. He noted that the eWorkplace database did not exist before 1999, and thus provides no record by which to measure the 1993 cohort (Tr. 79-80). According to Dr. Johnson, Dr. Crawford’s methodology ends up counting employees as working for the Bank in a year or time period when they were not actually doing so (Tr. 34). Dr. Johnson pointed to Dione LaVoie, who left the Bank in 1995 to work for another employer but was re-hired in 2004. DX 127 ¶ 30. Dr. Johnson acknowledged that his own calculations do not include eWorkplace data even for the 2002-2005 cohort, which is based on information after the eWorkplace database was begun in 1999 (Tr. 79-80).

Dr. Johnson’s only assumption in calculating tenure with the W-2 data was that individuals were working for the Bank during the years for which there are W-2’s, and they were not working for the Bank during the years when there are no W-2’s. DX 127 ¶ 30; DX 128 ¶ 11. Dr. Johnson took the W-2 data from the Bank at its face value (Tr. 78).

Dr. Johnson also disagreed with Dr. Crawford on the use of W-2 data to calculate survival rates after 2009. As discussed above, Dr. Crawford determined a period of years for which the turnover rate was stable, and extrapolated that for both the 1993 and 2002-2005 cohorts after 2009. PX 27 ¶ 18. Dr. Johnson did not think that Dr. Crawford had a principled basis for making the determination of when to cut off the survival data (Tr. 83). According to Dr. Johnson, applying the latter part of the 1993 survival rates to the 2002-2005 cohort, while not applying the earlier part of the 1993 survival rate, when there was high turnover, deliberately avoids including the high turnover that would be reasonably expected for those applicants beginning their tenure in 2002 (Tr. 84).<sup>12</sup>

Dr. Johnson’s approach uses all of the survival data from the 1993 and 2002-2005 cohorts to estimate the post-2009 survival rate (Tr. 82-83, 104-05). Dr. Johnson explained his rationale during his testimony:

The reason why I use all the data is because we know what the pattern of a survival rate looks like. It's going to start and go down year by year. It's going to be higher upfront, because you have more people, and obviously the most people leave the first year, and then more people leave the second year, and so it'll go down.

(Tr. 83.)

On the issue of estimating interim earnings and mitigation earnings, Dr. Johnson did not share Dr. Crawford’s skepticism on the use of OES data in conjunction with Social Security earnings statements. While he agreed with Dr. Crawford that Social Security earnings are the

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<sup>12</sup> I note that Dr. Crawford did not use constant survival rates until the seventh year for both cohorts. For the 2002-2005 cohort, he used actual survival data for the 2003 to 2009 years; as actual data was not available as of the seventh year, he used the rate he calculated for the 5A2 group from 1993, as these positions were most comparable to the 5A positions in later years.

best data, Dr. Johnson treated the “zeroes” of Social Security earnings in certain years as a failure to mitigate damages in an economic environment that OES data suggests was favorable. DX 127 ¶ 22. Dr. Johnson argued that resorting to such data was essential to ameliorate the lack of Social Security data for the 2005 class members. He thus used OES data to estimate that class year’s mitigating earnings (Tr. 114-15; DX 127 ¶ 26).

Dr. Johnson’s analysis, by his own admission, has the effect of excluding any years of “zero” earnings in the Social Security reports as an attempt at mitigation earnings (Tr. 90-91). He explained that the difference between his calculations and Dr. Crawford’s calculations was not that he chose to exclude the zeros; the difference was that they used the Social Security data for two different purposes. Dr. Johnson stated that by including the zeros, Dr. Crawford was only capturing interim earnings; Dr. Johnson wanted to capture both interim and mitigation earnings. Dr. Johnson used the OES data for this purpose (Tr. 90-91).

On the final area of disagreement, prejudgment interest, Dr. Johnson disputed the use of both the IRS rate and the mortgage interest rate applied by Dr. Crawford’s models. Dr. Johnson stated that prejudgment interest should be evaluated based on the ability to reimburse class members for lost funds from the date of loss incursion to favorable judgment. As the three-month Treasury bill yield is often risk-free, Dr. Johnson used that rate (Tr. 115-18; DX 127 ¶¶ 37-38). Dr. Johnson rejected use of the mortgage interest rate as inconsistent with economic theory, stating that losses vary over time, in turn varying the impact of the interest rate (Tr. 128-30). Dr. Johnson disputed the use of the IRS rate, based on the Bank’s theory that an interest rate with a punitive component is inappropriate for “make whole” damage relief. DX 128 ¶ 9.

The Bank concludes from Dr. Johnson’s calculations that a total of \$1,396,206 in back pay damages is the more appropriate remedy.

## **JURISDICTION AND SCOPE OF REVIEW**

The OFCCP brought this action under Executive Order 11246, which employs the legal standards of Title VII of the Civil Rights Act of 1964 to afford relief. *See U.S. Dept. of Labor v. Honeywell*, 77 OFCCP-03 (Sec’y June 2, 1993). Accordingly, a remedy “to make persons whole for injuries suffered on account of unlawful employment discrimination” is appropriate here. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 318 (1975) (noting “make whole” relief as a goal of Title VII damage awards). Back pay is one aspect of the “make whole” relief within my discretion. *See* 41 C.F.R. § 60-1.26(a)(2).

Courts have held that once the plaintiff in a Title VII case has established a *prima facie* case, and the damages resulting from the discriminatory acts, the burden of producing further evidence to establish the amount of interim earnings or lack of diligence properly falls on the employer. *Marks v. Prattco, Inc.*, 633 F.2d 1122 (5<sup>th</sup> Cir. 1981).

In this case, I directed the parties to use a class-wide relief formula to calculate the back pay owed to class victims. I found that individualized determinations of remedy in this case were not only impractical and time consuming, they were not possible, and I approved the use of the shortfall/pro rata formula approach for calculating a remedy.

I furthered directed that such calculations be based on controlling for job group, rather than job title, as controlling for job title allows an employer – who considered an employee for more than one job title – to manipulate damage awards by choosing the job title requiring the least damage pay out, rather than the most representative.

As the Board noted in *OFCCP v. Greenwood Mills, Inc.*, *supra*, while the theory behind an award of back pay is simple, its application is not. *OFCCP v. Greenwood Mills, Inc.* at 5-6. In fashioning a remedy, I must as nearly as possible recreate the conditions and relationships that would have been but for the unlawful discrimination. *Id.* But the process of recreating the past necessarily involves a degree of approximation and imprecision. *International Bhd. Of Teamsters v. U.S.*, 341 U.S. 324, 372 (1977), and courts have recognized that any method of calculating damages is a process of conjectures, *see Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974). But “given a choice between no compensation for those who have been illegally denied jobs and an approximate measure of damages, courts have chosen the latter.” *OFCCP v. Greenwood Mills, Inc.*, *supra*, at 6.

Courts have acknowledged three general rules in determining the appropriate back pay figure: unrealistic exactitude is not required; ambiguities in what an employee or group of employees would have earned but for discrimination should be resolved against the discriminating employer; and the trier of fact must be granted wide discretion in resolving ambiguities. *OFCCP v. Greenwood Mills, Inc.*, *Id.*, citing *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7<sup>th</sup> Cir. 1976); *Wells v. Meyer’s Bakery*, 561 F.2d 1268, 1273 (8<sup>th</sup> Cir. 1977).

Nevertheless, the “make whole” purpose of Title VII should not be used as “windfall” for employees at the employer’s expense. *See Ingram v. Madison Square Garden, Inc.*, 709 F.2d 807, 812 (2d Cir. 1983).

I note at the outset that the Bank’s back pay figure is based on calculations that are in direct contradiction to my findings during the liability phase, and my explicit directions with regard to the remedy phase. In my Recommended Decision and Order, I explicitly rejected the use of calculations controlling for “job title” rather than “job group” because “the Bank . . . ignores the fact that the recruiters routinely considered and rejected applicants for jobs for which they expressed no interest.” *See OFCCP v. Bank of Am.*, 1997-OFC-16, \*54 (ALJ Jan. 21, 2010). As I made clear, the effect of such an analysis is to circumvent a finding of disparate treatment in hiring, as “controlling for job title cannot detect bias in the job title assignment.” *See id.* Despite my clear finding that controlling for job title is a manipulative method of analysis, the Bank considers any other method “erroneous[.]” *see* Bank’s Brief at 2 n.1, and its proffered damage award is based on a methodology controlling for job title, not job group. *See* DX 128 ¶ 17 (demonstrating the “[i]mpact of corrections on Dr. Crawford’s updated model”).

For this reason alone, I find that it is reasonable to rely on the calculations by Dr. Crawford, who made those calculations controlling for job group rather than job title, over those proffered by the Bank, based on controlling for job title. In addition, as discussed below, in those areas where Dr. Crawford and Dr. Johnson disagree on methodology, I rely on Dr. Crawford’s conclusions over those of Dr. Johnson.

### The Use of W-2 Data and Calculating Lost Earnings

By Dr. Crawford's admission, both Methods 1 and 2 are somewhat inaccurate, with Method 1 overestimating lost earnings in some cases, and Method 2 underestimating them in some cases. Nevertheless, as the OFCCP notes, in the overwhelming majority of cases, Methods 1 and 2 predict the correct, identical values. OFCCP's Brief at 21-22. The OFCCP argues that unrealistic exactitude is not required in back pay damage calculations, and deference should be accorded to its methods. Indeed, as the OFCCP pointed out, Dr. Johnson also recognized that the W-2 data was incomplete, and Dr. Crawford's use of Method 1 and Method 2, compared with Dr. Johnson's use of the W-2 data at face value, reflected a difference of only four percentage points one way, and three percentage points the other way between their results.

The Bank noted that when there was a gap between the last year for which a W-2 was provided and the termination date in the eWorkplace database, Dr. Crawford relied on the termination date in the eWorkplace database, thus assuming that the person continued to work at the Bank despite the absence of W-2s (Method 1); and in other cases Dr. Crawford assumed that the person was not working for the Bank despite the existence of W-2s; in other words, he relied on the eWorkplace termination date (Method 2). The Bank argued that these assumptions are illogical on their face, and even more so because the eWorkplace database was not created until January 1999, and it was "never intended to and does not contain a complete record of historical employment information before the date on which the database was created." Bank's Brief at 5.

The Bank criticizes Method 2 because it fails to account for the reasons an individual might not be able to produce W-2s, namely that the individual no longer worked for the Bank during the time reflected by the missing W-2s. The Bank pointed to Ms. LaVoie, who left the Bank in 1995 to work for another employer but was re-hired in 2004. I note that, of the very small number of instances in which there was missing W-2 information, the Bank provided specific information only for one person, Ms. Lavoie.

Dr. Johnson and Dr. Crawford agree that the W-2 data is the most accurate and reliable data available. In determining how to address the gaps in that data as provided by the Bank, Dr. Johnson's analysis does not incorporate any eWorkplace data, even for the 2002-2005 cohort, which was after the eWorkplace database was implemented. In other words, even though he acknowledged that there were gaps in the W-2s provided by the Bank, Dr. Johnson made no attempt to use other information provided by the Bank, namely its own eWorkplace database, to try to reconstruct the earnings to fill those gaps. Indeed, Dr. Johnson's claim that Dr. Crawford's use of W-2s to fill in these gaps was "factually incorrect" reflects a focus on individualized determinations, an approach that I have repeatedly rejected, given the complexity and uncertainty, and in this case, the virtual impossibility, of identifying which of the 1,147 applicants would have been hired but for the Bank's discrimination (and who thus are entitled to back pay), as well as the extended time period over which the discrimination took place. I specifically rejected such an individualized approach as inappropriate in this case, with its very large number of potential victims of discrimination, and the ambiguous and subjective employment practices in which the Bank engaged over an extended period of time.

It is inherent in the use of a class-wide approach to calculate damages that the determinations will not be “factually correct,” because there is no practical way to reconstruct all of the individual “facts” that would make up those calculations. That is the very point of using a class-wide approach. I note that Dr. Johnson did not suggest any method to fill in those gaps that would be “factually correct,” or that would reasonably estimate the data to fill in those gaps. He just ignored them.

I find that the use of the W-2 data, which is the most reliable data, is appropriate for analysis of each cohort. However, I also find that it is reasonable for Dr. Crawford to supplement that W-2 data with the Bank’s own eWorkplace data for both cohorts. While Dr. Johnson took the W-2 data provided by the Bank at face value, and assumed that he was working with the full universe of W-2 data, Dr. Crawford stated that, for numerous reasons, he had no reason to believe that this information was complete. I find it reasonable for Dr. Crawford to assume that he was not working with the full universe of W-2 data, and to supplement that data with the Bank’s eWorkplace data.

The Bank argues that, given Dr. Crawford’s acknowledgement that both Method 1 and Method 2 are incorrect, the OFCCP has made no “reasoned” argument for choosing the Method 1 estimate over the Method 2 estimate. According to the Bank, “Dr. Crawford’s use of dueling assumptions in order to use e-Workplace data was a misadventure that created complexity and ambiguity without any meaningful value.” Bank’s Brief at 6. But I find that any “complexity” or “ambiguity” is the result of the failure of the Bank to provide complete W-2 information, and the need for Dr. Crawford to use the Bank’s own eWorkplace data to attempt to reconstruct the missing information.

As the OFCCP has argued, it was the Bank’s failure to maintain and produce complete W-2 histories for the hired applicants that led to the necessity for Dr. Crawford’s methodology, which he has stated is a scientifically accepted way to account for the gaps in the W-2s. Dr. Crawford stated that these W-2 forms, which the Bank was supposed to maintain, were inexplicably incomplete. Except for one instance, Ms. Lavoie, the Bank was unable to explain its failure to produce W-2s for intervening years, or for the gaps between W-2s in earlier years, and W-2s in later years. The Bank’s own eWorkplace database also conflicted with the W-2s produced by the Bank. Under these circumstances, I find that Dr. Crawford used a reasonable methodology to address the inconsistencies in the earnings data.

I agree with the OFCCP that, given the Bank’s inconsistent information, and its failure to maintain and/or produce all W-2s for the hired applicants, it is disingenuous for the Bank to criticize Dr. Crawford’s methodology for addressing the inconsistencies in the earnings data, and “the Bank should not benefit from its own record-keeping failures to the detriment of victims of its discrimination.” OFCCP’s Reply at 3.

Accordingly, for back pay calculations, I find Dr. Crawford’s “Method 1” model for the 1993 cohort, and the 2002-2005 cohort, to be appropriate. Dr. Crawford’s model uses a reasonable method to supplement missing W-2 data with other reliable data. Such an approach relies on the data that both parties consider most reliable: the W-2 data, while accommodating

the reality that W-2's could be missing. As such ambiguities are resolved against the non-discriminating party, I rely on Dr. Crawford's Method 1 model for both cohorts.<sup>13</sup>

### Determining the Appropriate "Survival Rate"

Both Dr. Crawford and Dr. Johnson agree that reliance upon W-2 data is appropriate to determine the number of people still working for the bank after 2009, when the litigation was still pending but where no data is available; this number is referred to as the "survival rate." They disagree as to how that W-2 data should be used to calculate this rate.

The OFCCP argues that the rate applied by Dr. Johnson includes the early years of employment with much higher turnover rates than those of the later years, while Dr. Crawford identified the time period at which the turnover leveled and, thus, the survival rate became more constant. OFCCP Brief at 22. Dr. Crawford stated that such an approach better recreates the past, because "the survival rate was much lower in the years 1993-1999 than in the years 1999-2009," PX 27 ¶ 18. According to Dr. Crawford, applying that rate to post-2009 calculations is the most representative of expected reality. The OFCCP notes that the estimated survival rate was not applied to early years of employment, when the turnover rate was high, but to the later years of employment. OFCCP's Brief at 23.

In estimating survival rates for the 2002-2005 cohorts, Dr. Crawford used the survival rates for the 1993 5A2 cohort, to estimate survival rates for 2010 and beyond; he used actual survival data for the years 2003 to 2009, because he had learned in his analysis of the 1993 cohort data that it was not appropriate to assume a constant survival rate until the seventh year. Because there was not actual data for these cohorts beyond the seventh year, Dr. Crawford used the 5A2 rate from the 1993 cohort, because these positions were most similar to the 5A positions.

The Bank's claim that "Dr. Crawford erroneously used **only** the lower turnover rates of only the later years of the 1993 cohort for both the 1993 and the 2002-2005 cohort (emphasis added)" is a misrepresentation of the evidence. Bank's Brief at 7, fn. 4. As discussed above, Dr. Crawford used an estimated survival rate, **not** for earlier years of employment, when the turnover rate was high, but for the later years of employment, which was the time period where turnover leveled and the survival rate became much more constant.

I find that Dr. Crawford's conclusions with regard to the survival rates are reasonable, and I accept them in calculating the remedy in this claim.

### Interim and Mitigation Earnings

Once the OFCCP has established the appropriate amount of damages, the burden of producing further evidence to establish the amount of interim earnings or lack of diligence properly falls on the Bank. *See, Marks v. Prattco, Inc.*, 633 F.2d 1122 (5<sup>th</sup> Cir. 1981). Thus, as

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<sup>13</sup> The Bank is technically correct that Dr. Crawford has offered no "reasoned argument" for choosing Method 1 over Method 2 – he has offered no argument at all, as he stated that he had no opinion on which Method was preferable, and that in some sense, they were both correct. Resolving ambiguities created by the Bank's failure to keep accurate records against the Bank, I choose Method 1.

stated in the OFCCP Manual, the burden to prove “the amount of actual interim earnings or the failure of the victim to take reasonable steps to mitigate back pay loss” belongs to the Bank. *See* Fed. Contract Compliance Man. 7F07(c)(3).

That burden drives both analyses, despite the Bank’s protestation that it does not have a burden to demonstrate a failure to mitigate. Bank’s Brief at 8. Thus, while the “economic theory of damages likewise requires that interim and mitigating earnings be deducted from but-for earnings in calculating a back pay award,” Bank’s Brief at 7, it is the Bank’s burden to prove the amount of these interim earnings, or the failure of its victims to take reasonable steps to mitigate their back pay loss.

Both Dr. Crawford and Dr. Johnson agree that, when it comes to determining interim and mitigation earnings, the use of a class member’s Social Security (SSA) data is most appropriate. The parties disagree on how to calculate the data for the 2005 cohort, where the SSA data is missing. Dr. Crawford used the Social Security earnings statements from the 2002-2004 applicant groups for the years from 2005 through 2010 to estimate the missing data from the 2005 cohort. Dr. Johnson used occupational employment statistics (OES) data to estimate the mitigating earnings for the 2005 cohort. However, as pointed out by the OFCCP, Dr. Crawford determined that the OES data exceeded the average Social Security data with respect to earnings for the 2002-2004 cohort, and did not do a good job of predicting the actual earnings information in the Social Security data. Plaintiff’s Brief at 11, Reply at 6.

The Bank’s claim that, because there was no Social Security data for 2005, Dr. Johnson had “no choice” but to rely on “other sources” to “assess the opportunity for class members to mitigate their damages” is overblown. Dr. Johnson was not compelled to use the OES data. Dr. Crawford extrapolated from existing Social Security earnings data specific to the applicants in this case, while Dr. Johnson used an external source that was not specific to any group of applicants. As Dr. Crawford pointed out, the OES data included jobs at much higher skill levels than the positions at issue here. Nor does the assumption that, given a favorable labor market, an individual had the “opportunity” to obtain employment translate to the conclusion that the specific group of applicants in this case in fact earned or could have earned wages in 2005 consistent with those statistics, as opposed to their demonstrated earnings in other years.

The Bank cites to cases in support of Dr. Johnson’s use of the OES data to estimate the victims’ mitigating damages. In the first case, *EEOC v. O & G Spring and Wire Forms Specialty Co.*, 7790 F.Supp. 776 (N.D.Ill. 1992), *aff’d* 38 F.3d 872 (7<sup>th</sup> Cir. 1994), the Court found that the EEOC did not account for interim earnings or amounts earnable with reasonable diligence. The Court found that the EEOC apparently assumed that **none** of the victims would have been able to obtain work elsewhere, and thus used the average black unemployment rate for the relevant labor market during the relevant period as a proxy for interim earnings. In contrast, the OFCCP in this case did not assume that **no one** in the class of victims would have ever worked, and Dr. Crawford extrapolated and incorporated their earnings data from available Social Security information to account for their interim earnings.

Nor is there any requirement that labor market data be used to calculate interim or mitigations earnings, and the cases cited by the Bank do not stand for such a proposition.

As the OFCCP has noted, the Bank's claim that Dr. Crawford failed to account in any way for the duty to mitigate or what the class members could have earned with reasonable diligence, besides being demonstrably incorrect, is an improper attempt to foist its burden on the OFCCP. OFCCP's Brief at 4. Dr. Crawford did account for the duty to mitigate, and calculated what the class members could have earned with reasonable diligence, using the available Social Security data specific to persons in the positions sought by the unsuccessful applicants, to estimate the actual earnings of these unsuccessful applicants.

Particularly egregious is the Bank's argument that Dr. Johnson had to rely on "proxies" for information about the individual class members' efforts to mitigate, because the OFCCP denied the Bank access to this information. Bank's Brief at 8. As the OFCCP pointed out, the Bank did not specify how the OFCCP prevented it from obtaining this information. It appears that the Bank is referring to my Order denying its request for the issuance of 1,147 subpoenas to the class members, and its motion to compel the production of unredacted copies of survey responses. As I stated in my Order denying this request, it was clear that, despite my previous order that the appropriate method for determining damages was formula or classwide relief, the Bank was seeking to rely on an individualized hearings approach to calculating the remedy for its discrimination.

Dr. Crawford and Dr. Johnson used the available Social Security data to estimate the actual earnings of unsuccessful applicants. In approximately 3 percent of the person-year entries that showed annual earnings, there were zeroes. Dr. Crawford testified that there was no useful information to allow him to determine why some unsuccessful applicants had zero earnings. Where he found zero earnings in the Social Security records, Dr. Crawford treated them as valid cases of zero earnings. Dr. Johnson, however, excluded years in which unsuccessful applicants had zero earnings, which increased the calculations of interim earnings, and decreased the overall remedy. His exclusion of those years assumes that these unsuccessful applicants were not making reasonable efforts to secure employment.<sup>14</sup>

Based on the foregoing, I find that Dr. Crawford's assumptions were reasonable, and an appropriate way to resolve the ambiguities created by the failure of the Bank to keep and provide complete and accurate job data for its employees.

#### *Prejudgment Interest Rate on the Back Pay Award*

The controlling regulation is straightforward: "Interest on back pay shall be 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 [the IRS rate]." 41 C.F.R. § 60.126(a)(2). Despite the fact that both experts disagree with the use of the IRS rate, neither party has produced any evidence suggesting that it should not be applied here. It is included in the OWCP compliance manual, and was adopted without dispute in *OFCCP v. Greenwood Mills*. Whatever its methodological deficiencies, it is the rate specified in the regulations, and will accordingly apply to both the 1993 and 2002-2005 back pay calculations.

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<sup>14</sup> It is reasonable to assume that, for at least some of these unsuccessful applicants, the assumption that they were not making reasonable efforts to secure employment is "factually incorrect."

## BACK PAY CALCULATION TOTALS

In determining the appropriate back pay in a discrimination case, I have wide discretion to resolve ambiguities. *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7<sup>th</sup> Cir. 1976). The result must be approximate but rational. *Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1178 (2<sup>nd</sup> Cir. 1988). I find that the assumptions made by Dr. Crawford were reasonable, and were the best way to resolve the ambiguities created by the Bank's failure to provide complete data. I have adopted the methods proposed by the OFCCP, and as set out thoroughly and persuasively by Dr. Crawford. In addition, resolving ambiguities against the Bank, I find that it is a just and reasonable inference to adopt the higher figure in the ranges calculated by Dr. Crawford for each cohort.

## OTHER REMEDIES

The OFCCP also seeks an award of job offers, with an appropriate level of seniority, to the members of the affected classes, and a requirement that the Bank report on the progress of job offers. The Bank argues that the OFCCP presented no evidence and made no arguments about these proposed remedies during the hearing or in its brief, and it would be "improper" for it to do so for the first time in its Reply Brief. As the OFCCP noted, contrary to the Bank's claim, it identified jobs with seniority, monitoring, and injunctive relief among the remedies it sought in its First Amended Administrative Complaint, and explicitly reaffirmed that it was seeking job offers, or alternatively front pay, at the March 27, 2013 hearing on remedies. There is nothing to suggest that the OFCCP has abandoned these remedies.

The Bank also argues that the passage of a significant amount of time between the hiring decisions and the absence of any current and ongoing potential violations militates against awarding any remedy other than back pay. As the OFCCP argues, the passage of time alone is not a reason to deny remedial relief.<sup>15</sup> The Bank points to Dr. Crawford's analysis that only 9-10 class members would still be employed by the Bank if they were hired during the relevant period, to argue that requiring it to hire more than 9-10 class members would exceed any make-whole remedy, and that the OFCCP has not presented any evidence that any of the class members are still interested in an entry-level position.<sup>16</sup>

The OFCCP argues that the 9-10 number used by the Bank is based on the survival rate of the persons who were actually hired, and has no relationship to the number of people that the Bank should have hired but for its discrimination. Dr. Crawford calculated this shortfall as 50.7 applicants for the 5A2 and 5F2 job groups in the 1993 time period, and 24.7 for the 2002-2005 time period. The OFCCP correctly notes that there is no legal requirement that it present evidence that class members are interested in these positions before such relief can be ordered.

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<sup>15</sup> Indeed, as I noted in my Recommended Decision and Order, the hearing and ultimate disposition of this case were delayed for a number of years while the Bank pursued its unsuccessful Fourth Amendment challenge to the OFCCP's on-site review, a challenge that the Bank continued to pursue without success in a more recent audit.

<sup>16</sup> The OFCCP requests that the Bank offer jobs with an appropriate level of seniority, not entry-level jobs.

The OFCCP also seeks an injunction preventing the Bank, its successors, officers, agents, servants, employees, and all persons in active concert or participation with it from 1) failing and refusing to comply with the requirements of Executive Order 11246 and the rules and regulations issued pursuant thereto; 2) discriminating against minorities, specifically African-Americans, based upon their race; and 3) failing to identify minority applicants, specifically African-American applicants, who were discriminatorily denied employment on account of their race and who have suffered economic loss as a result of the Bank's discrimination.

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, in the case cited by the Bank, 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."

*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 (10<sup>th</sup> Cir. 1988), citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). In that case, which involved an allegation of sexual harassment by an individual plaintiff, the Court noted that specific actions had already been taken to alleviate the effects of the past harassment, including transferring the plaintiff and demoting and terminating the harassing employee. The Court noted that those actions remedied, to the extent legally practicable, the effects of the proven sexual harassment.

In this case, Dr. Crawford calculated that but for the Bank's illegal discrimination, 50.7 of the African-American job applicants in the 5A2 and 5F2 job groups should have been hired in 1993, and 24.7 should have been hired during the 2002-2005 time period. Money damages account for the wages that would have been earned by this group, but for the Bank's illegal discrimination. Dr. Crawford has calculated that of those 75.4 persons, 9-10 would still be employed by the Bank. Thus, all but 9-10 of the persons represented by Dr. Crawford's shortfall calculations will have been made whole by way of the monetary damage remedy. In order to remedy the effects of the Bank's proven discrimination, it is appropriate to require the Bank to extend offers to the number of people represented by Dr. Crawford's calculation of the survival rates for the discriminated applicants.

The Court in *Spencer* also recognized that the second goal of Title VII is to prevent future illegal discrimination. Injunctive relief, uniquely designed to prevent illegal conduct, is not mandatory, but is necessary only where there are lingering effects or a not insubstantial risk of recurring violations. In *Spencer*, the Court was satisfied that the employer had in good faith taken sufficient action to prevent future illegal behavior, to ensure that any alleged harassment was promptly investigated, and if necessary, halted and punished. The Court found no "cognizable danger of recurrent violation," and concluded that injunctive relief was not warranted.

In this case, there is not a scintilla of evidence to suggest that the Bank has taken any action in good faith to prevent future illegal behavior, and to ensure that any such behavior is promptly investigated, and if necessary, halted and punished. Conversely, however, there is no evidence to suggest that the Bank is persisting in illegal discriminatory hiring, or otherwise failing to comply with Executive Order 11246. I find that there is no “cognizable danger of recurrent violation,” and thus injunctive relief that essentially requires the Bank to obey the law is not warranted.

### **CONCLUSION**

Accordingly, I find that the appropriate remedy is \$964,033 for the 1993 group of unsuccessful applicants, and \$1,217,560 for the 2002-2005 group of unsuccessful applicants, plus amounts accrued to the date of this Order. The total remedy amount is \$2,181,593, with amounts accrued to the date of this Order.

### **RECOMMENDED ORDER**

Based on the foregoing, it is **RECOMMENDED** that the Bank be **ORDERED** to pay \$2,181,593, together with amounts accrued to the date of this Order, representing back pay and interest to the affected classes. In addition, it is **RECOMMENDED** that the Bank be **ORDERED** to extend offers of jobs, with appropriate seniority, to 10 persons in the affected classes, and to report on the progress of these job offers to the OFCCP.

**SO ORDERED.**

**LINDA S. CHAPMAN**  
**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 receipt of the administrative law judge’s recommended decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 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.