



Issue Date: 21 February 2017

CASE NO. 2017-OFC-00004

*In the Matter of*

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

v.

**GOOGLE INC.,**  
Defendant.

**ORDER TO APPLY EXPEDITED HEARING PROCEDURES;  
ORDER GRANTING IN PART GOOGLE'S REQUEST  
FOR LIMITED DISCOVERY DEPOSITION**

OFCCP brings this action to require government contractor Google to produce certain information in connection with an OFCCP compliance review. Google agreed in the government contract that, on OFCCP's request, it would provide OFCCP with books, records, accounts, and other materials so that OFCCP could determine whether Google was complying with various non-discrimination requirements, such as those in Executive Order 11246.<sup>1</sup> OFCCP alleges that it and Google reached an impasse when Google failed and refused to supply information falling into three specified categories that concern employee compensation.

The procedural regulations for OFCCP actions to enforce equal opportunity under Executive Order 11246 permit an expedited hearing process when the contractor allegedly "has refused to give access to or to supply records or other information as required by the equal opportunity clause." 41 C.F.R. §§ 60-30.31, *et seq.* OFCCP requests that the expedited hearing process be applied here.

Google objects. It argues that it needs discovery into whether OFCCP complied with its own regulations concerning conciliation and with the Fourth Amendment when it requested the information in dispute. Google expects that the discovery will be extensive and cannot be accomplished within the limits of the expedited procedures.

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<sup>1</sup> OFCCP also relies on the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act, and Federal Acquisition Regulations 52.222-26.

I find Google's arguments without merit and will apply the regulatory procedures for expedited hearings. I will, however, allow Google a deposition to obtain some limited discovery. See 41 C.F.R. § 60.30-33(c).

### Background

As the U.S. District Court for the District of Columbia observed in a recent similar case:

Despite the vigor with which [Defendant] has litigated it, there is surprisingly little at stake in this case. The Department of Labor has not accused [Defendant] of employment discrimination. It has not ordered [Defendant] to permit agency investigators onto company premises. The Department has merely required [Defendant] to submit data about its employee compensation. The Court understands that [Defendant] and the entire community of federal contractors are keenly interested in how OFCCP decides whether to request additional data on a contractor's compensation practices, but that interest does not allow those companies or this Court to interfere with the agency's investigatory practices. Submission to such lawful investigations is the price of working as a federal contractor.

*United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 99 (D. D.C. 2011) (Lamberth, C.J.).

The expedited hearing procedure limits discovery to requests for admission, a mandatory pre-hearing exchange of witness lists and hearing exhibits, and on motion showing good cause, depositions may be taken. 41 C.F.R. § 60-30.33. If a defendant wishes a hearing, it must state as much within 20 days after service of the complaint, and the hearing must be set within 45 days after the defendant requests a hearing. 41 C.F.R. § 60-30.32(c), (d).

Two district courts have held that the expedited hearing process complies with due process. *United Space Alliance*, 824 F. Supp. 2d at 95-97, citing *Beverly Enterprises v. Herman*, 130 F. Supp. 2d 1 (D. D.C. 2000). I am aware of no holdings to the contrary. As those courts held, a government contractor has rights in the privacy of its records (although the records are only commercial, not personal), but those rights are addressed by the expedited hearing procedure here. This is because the procedure allows the contractor "rights to counsel, to a neutral arbitrator, to present evidence and witnesses, and to rebut and cross-examine the evidence and witnesses put forward by the government." *United Space Alliance*, 824 F. Supp. 2d at 96, citing *Beverly Enterprises*, 130 F. Supp. 2d at 18-20. Essentially, with the limited interests at stake, discovery is sufficient even if it is less than in an ordinary federal civil case.<sup>2</sup>

I infer from the Secretary's regulation and the courts' holdings that the expedited hearing process comports with due process that, in cases of the kind pending here, the expedited procedure with

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<sup>2</sup> Even in routine federal civil litigation, discovery must be limited to keep it efficient and proportional to the interests at stake. See FED. R. CIV. P. 26(b)(1).

limited disclosure is appropriate for an ordinary case and may be applied absent a showing of unusual circumstances.

### Discussion

Google asserts two reasons that it needs discovery beyond what would be allowed under the expedited hearing procedure. First, it wants written discovery and depositions related to a potential Fourth Amendment defense. Second, it wants to know if OFCCP complied with its regulatory obligation to conciliate before filing an action such as the present one.

*Fourth Amendment.* Google faces a significant obstacle on any Fourth Amendment defense because it consented to Government intrusion when it agreed to the government contract. Included in the contract terms was Google's agreement not to engage in certain kinds of employment discrimination, such as those prohibited in Executive Order 11246. Also included was Google's consent to furnish the Secretary of Labor with all information and reports that the Executive Order or its implementing regulations require. It further agreed to permit the Secretary of Labor access to its books, records, and accounts to determine its compliance with this requirement of non-discrimination.

The regulations to which Google agreed include that: "Each contractor shall permit the inspecting and copying of such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to compliance with [EO 11246]." 41 C.F.R. § 60-1.43. "Where a compliance evaluation has been initiated, all personnel and employment records described above are relevant until OFCCP makes a final disposition of the evaluation." 41 C.F.R. § 60-1.12. Those records include, "but are not necessarily limited to, records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes, and any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position . . . ." *Id.*<sup>3</sup>

Thus, so long as OFCCP's search request is reasonable, Google consented at the least to any search of records concerning promotion, demotion, transfer, lay off, termination, rates of pay or other terms of compensation. *See OFCCP v. Bank of America*, ARB Case No. 00-079 (Mar. 31, 2003).<sup>4</sup> For this purpose, reasonableness has been held to require that the data sought is "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."<sup>5</sup> *United Space Alliance*, 824 F. Supp. 2d at 93, citing

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<sup>3</sup> The regulations require that "Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of not less than two years . . . ." 41 C.F.R. § 60-1.12.

<sup>4</sup> Indeed, some courts have held that consent of this kind in a government contract waives any Fourth Amendment protection so long as the information sought falls within the materials covered in the waiver; the government need not meet a test of reasonableness. *Id.*

<sup>5</sup> The parties here agree that OFCCP's current request for information is akin to an administrative subpoena. OFCCP is not demanding an intrusion into Google's offices or access to its personnel, a demand that could be

*Lone Steer*, 464 U.S. at 415. In an aging case, the Department’s Administrative Review Board considered the then-existing law and concluded the OFCCP demands such as those at issue here were reasonable unless the contractor was selected for review in a manner that was arbitrary and without an administrative plan containing neutral criteria. *Bank of America, supra*.

Assuming that OFCCP needs to show that its disclosure demands are reasonable, if the district court’s analysis in *United Space Alliance* is correct, no discovery would be necessary. The material sought can be evaluated on its face to determine if it is “sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” If reasonableness is tested as in *Bank of America*, Google could accomplish this in a short deposition, in which it asked the most knowledgeable person how Google was selected for a compliance review.

Of course, Google might prefer to inquire further through far more discovery (such as to test, for example, whether the deponent lied), but in my view, without some evidence of arbitrary conduct, such a discovery demand would be disproportionate to what is at stake in this litigation.<sup>6</sup> Otherwise, every defendant in an action of this kind could evade the expedited hearing process on the same argument.

Nothing about this suggests that I have found or will find OFCCP’s demands reasonable on the merits. Google has outlined in its brief the data it has voluntarily produced, the substantial extent of the additional information sought, Google’s efforts to agree with OFCCP on ways to narrow the scope of the additional data sought without compromising OFCCP’s legitimate regulatory function, and OFCCP’s unwillingness to disclose its rationale for refusing to compromise the extent of the additional data sought. The reasonableness test in *United Space Alliance* has bite; it is not a concession to approve all government intrusions regardless of the burden on the contractor. OFCCP will have to make out its case at a hearing, and Google may cross-examine OFCCP’s witnesses at that hearing. I am finding here only that Google can prepare for the hearing under the expedited hearing procedures that the Secretary has made generally available for claims of this kind.<sup>7</sup>

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viewed more as an administrative warrant. (Indeed, OFCCP completed a two-day onsite review to which Google consented). That is why the current demand is more akin to an administrative subpoena than an administrative warrant. For an administrative subpoena, the government meets Fourth Amendment demands by showing only reasonableness; it need not show probable cause. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984); *United Space Alliance*, 824 F. Supp. 2d at 92.

<sup>6</sup> *See* Fed. R. Civ. P. 26(b)(1); 29 C.F.R. § 18.51 (b)(4) (administrative law judge must limit discovery when the burden or expense outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues, and the importance of the discovery in resolving the issues).

<sup>7</sup> Google argues that data sought for a static depiction of the facility (“snapshot”) as of September 1, 2014, is beyond the scope into which OFCCP may inquire. It appears, however, that Google entered into the government contract on June 2, 2014. That puts September 1, 2014, into the contract performance period (and thus the period for compliance with the Executive Order.) It also could be that OFCCP needs a comparison point to evaluate whether the employees for whom Google has supplied data as of September 1, 2015, were promoted, demoted, or had pay raises or cuts; that would point to a need for earlier comparable data, such as for September 1, 2014. It will require further explanation to show why data related to September 1, 2014, is inappropriate.

The second area about which Google seeks discovery concerns the duty OFCCP has to conciliate in good faith. Again, given that courts have approved the Secretary's expedited procedure for cases of this kind, Google can present its case at the hearing to show that Google did not conciliate in good faith. Google is fully aware of the communications between it and OFCCP related to conciliation. It can present that evidence at the hearing and can cross-examine OFCCP's witnesses called to show compliance with any conciliation requirement. A requirement to conciliate does not open a door into OFCCP's internal evaluation process.

### Order

I therefore do not find persuasive Google's arguments to remove this matter from the expedited hearing procedure.<sup>8</sup> Its motion in that regard is denied.

I will, however, allow Google limited discovery. Google described the discovery it seeks. I do not see in the materials described information regarding how OFCCP selected Google for a compliance review. But, as that could be relevant to a Fourth Amendment defense, I will allow limited discovery into that question if Google wants it.

Within five business days of the date this Order issues, OFCCP must identify to Google by name and title its employee most knowledgeable about how OFCCP selected Google for a compliance review. OFCCP must make that person available for deposition. The deposition may be taken by telephone if the parties agree to it. The deposition is not to exceed three hours unless the deponent or OFCCP engages in delay or dilatory practices.<sup>9</sup> The deposition is to be completed on or before March 3, 2017, at a date and time agreeable to the parties, counsel, and the deponent. The scope of the deposition is limited to routine background (such as the deponent's name, title, job duties, and the like) and questions related to the manner in which OFCCP selected Google for a compliance review.

Google may offer as evidence at the hearing a transcript of the deposition (or any part of it) even if the deponent is not present. The transcript will not be excluded on hearsay grounds. If Google will be offering the transcript, it must notify OFCCP when it provides an exhibit list. No later than the time of hearing, OFCCP may submit any objections to the deposition testimony that were preserved and not made on the transcript.

If Google does not want to go forward with a deposition, it must notify OFCCP within five

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<sup>8</sup> I am aware that in *OFCCP v. Boeing*, OALJ No. 1999-OFC-00014, Judge Levin granted Boeing's motion to remove the matter from the expedited hearing procedures. In that case, Boeing contended that OFCCP improperly targeted one of its facilities to increase its leverage in settlement negotiations on a nationwide series of audits. In the present case, however, Google presents no collateral circumstances that raise suspicion of improper government motive.

<sup>9</sup> No speaking objections are permitted. Objections other than as to privilege and form are preserved and should not be stated at the deposition. If the parties cannot resolve a dispute at the deposition, they should contact this Office by telephone and request an immediate ruling from the administrative law judge.

business days of the date this Order issues.

This Order will be served on the Solicitor and on counsel for Google by facsimile or email. All other service is by U.S. mail.

SO ORDERED.

STEVEN B. BERLIN  
Administrative Law Judge