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**MAY 02 2017**

Office of Administrative Law Judges  
San Francisco, Ca

**UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

Plaintiff,

v.

**ORACLE AMERICA, INC.**

Defendant.  
\_\_\_\_\_

Case No. 2017-OFC-00006

**OFCCP'S COMPENDIUM OF ADMINISTRATIVE CASES IN SUPPORT OF MOTION  
RE: TEMPORAL SCOPE OF DISCOVERY**

1. *OFCCP v. City Public Serv. of San Antonio*, Case No. 1989-OFC-5 (Jan. 18, 1995)
2. *U.S. Department of Labor v. Jacksonville Shipyards Inc.*, 89-OFC-1 (March 10, 1989)
3. *OFCCP v. JBS USA Holdings, Inc.*, ALJ No. 2015-OFC-1 (Apr. 22, 2016)
4. *OFCCP v. Enterprise RAC Co. of Baltimore LLC*, 2016-OFC-0006 (March 27, 2017)
5. *OFCCP v. Uniroyal, Inc.*, 77-OFCCP 1 at \*10 (Sec'y June 28, 1979)



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DATE: January 18, 1995  
CASE NO. 89-OFC-5

IN THE MATTER OF

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

PLAINTIFF,

v.

CITY PUBLIC SERVICE OF  
SAN ANTONIO,

DEFENDANT. 1/

BEFORE: THE ASSISTANT SECRETARY FOR  
EMPLOYMENT STANDARDS

DECISION AND REMAND ORDER

The central issue in this case is the permissible scope of an investigation based on a complaint under section 503 of the Rehabilitation Act of 1973, as amended (section 503 of the Act), 29 U.S.C. § 793 (1988). The Administrative Law Judge (ALJ) held that an investigation into all the physical standards for hiring new employees in all jobs based on a complaint by one applicant that he was denied two positions constituted an unreasonable search under the Fourth Amendment. The ALJ recommended that the complaint in this case be dismissed. I find, as discussed below,

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1/ The caption is corrected pursuant to 41 C.F.R. §§ 60-30.5(a), 60-741.29(b) (1993).

that the Office of Federal Contract Compliance Programs (OFCCP) had the authority, consonant with the Fourth Amendment, to conduct an investigation somewhat broader than the facts and circumstances of denial of employment to the complainant, though not as sweeping in scope as that sought by OFCCP.

#### BACKGROUND

Nicholas Mireles filed a complaint with the Office of Federal Contract Compliance Programs on February 11, 1985, alleging that he had been discriminated against by Defendant on January 5, 1985, when it refused to hire him as a meter reader because he had a congenital back disorder. Plaintiff's Exhibit (P)-1. Mr. Mireles also alleged that he had been denied another position by Defendant for the same reason in November 1983.<sup>2/</sup> OFCCP notified Defendant of the complaint and, in attempting to reach an agreement on a mutually convenient date for the on-site investigation, OFCCP informed Defendant on October 8, 1985, that:

[t]he onsite investigation will consist of reviewing and copying documents deemed pertinent to this investigation. Such documents will include, but not necessarily be limited to, application forms, medical questionnaires and physical examination forms, for the past 24 months, for those applicants denied employment for medical reasons. Interviews will be conducted with incumbent employees, including medical personnel involved in the employment process.

P-3.

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<sup>2/</sup> Plaintiff is not seeking relief for the refusal to hire Mr. Mireles in 1983 because the complaint here was filed more than 180 days after that alleged instance of discrimination. See 41 C.F.R. § 60-741.26(a).

Defendant objected to an investigation of this scope, stating on October 9, 1985, that:

[b]efore any investigation commences, we will need a written explanation of the reasons and authority for the requested on-site investigation and for the expansive document review and interviews envisioned by your letter. The broad investigation you have proposed far exceeds the scope of the narrow charge filed by Mr. Mireles, and we question whether OFCCP has authority to expand its investigation beyond the specific allegations contained in the charge.

P-4. OFCCP responded to Defendant's objection on October 22, 1985, explaining that "Mr. Mireles['] [complaint] states that 'I know these people are not giving me a chance nor are they giving other people like myself a chance.' The OFCCP is obligated to broaden its investigation to include [Defendant's] overall compliance with its affirmative action obligations." P-5.

In a further exchange of correspondence, Defendant took the position on August 29, 1986, that it "would have little objection to an on-site investigation" of the narrow charge filed by Mr. Mireles. Defendant objected, however, to what it characterized as a "fishing expedition" based on only one complaint. P-14. Relying on what it considered "directly controlling" case law, Defendant took the position that "under the circumstances of this case the proposed on-site investigation would be improper and clearly beyond OFCCP's authority." Id.

The parties were unable to agree on the scope of the investigation and the complaint in this case was filed on November 28, 1988. It alleges that Defendant's refusal to permit an investigation violated the Act and regulations, and seeks an

order requiring Defendant to permit OFCCP access to its premises for an investigation. A hearing was held on September 27, 1989, and the ALJ submitted a Recommended Decision and Order (R. D. and O.) on April 4, 1990.

The ALJ found that Defendant did not "expressly or impliedly" consent to the search by OFCCP by entering into contracts with the government. Those contracts include clauses requiring Defendant to comply with section 503 and its implementing regulations. Among other things, the regulations provide that:

Each prime contractor and subcontractor shall permit access during normal business hours to its places of business, books, records and accounts pertinent to compliance with the Act, and all rules and regulations promulgated pursuant thereto for the purposes of complaint investigations, and investigations of performance under the affirmative action clause . . . .

41 C.F.R. § 60-741.53 (1993). The ALJ held that consent is an exception to the warrant requirement of the Fourth Amendment only where it is voluntary. He found, however, that Defendant "did not voluntarily assume the obligations of Section 503 [because it] is statutorily required to provide utility service to all users including the government." R. D. and O. at 4.

The ALJ also held that Plaintiff did not meet each of the standards set forth in United States v. Mississippi Power and Light Co., 638 F.2d 899 (5th Cir. 1981), cert. denied New Orleans Public Service, Inc. v. U.S. 454 U.S. 892 (1981), and Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), for issuance of a warrant or its equivalent. The proposed search, the ALJ found, was not

initiated based on specific evidence of an existing violation, nor was it based on reasonable legislative or administrative standards or pursuant to an administrative plan containing specific neutral criteria. R. D. and O. at 6. The ALJ also held that the search was not properly limited in scope. Id. at 5. Plaintiff filed exceptions to each of these findings by the ALJ and Defendant filed a response. In addition, Defendant moved to strike Plaintiff's exceptions as untimely.

#### DISCUSSION

##### I. Defendant's Motion to Strike Plaintiff's Exceptions

Plaintiff's exceptions to the R. D. and O. were due under the regulations 14 days from the date Plaintiff received the R. D. and O. 41 C.F.R. 60-30.28. Plaintiff requested and was granted an extension of time to May 23, 1990, to file its exceptions. Plaintiff's exceptions were mailed to the Assistant Secretary on the evening of May 23, 1990, and they were received on May 30, 1990. Defendant argues that exceptions are not filed until actually received by the Assistant Secretary. Defendant asserts therefore that the Assistant Secretary should strike Plaintiff's exceptions and that Defendant is entitled to entry of an order affirming the R. D. and O.

There is nothing in the OFCCP Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 (Rules of Practice), 41 C.F.R. Part 60-

30, <sup>2/</sup> specifically stating when a document is considered "filed" for complying with the time limits in that regulation. The Secretary has held in another context, however, that mailing a document constitutes "filing" it. See Rex v. Ebasco Services Inc., Case No. 87-ERA-6, Sec'y. Dec. Apr. 13, 1987, slip op. at 2-3. The Rules of Practice also do not provide for specific consequences for a party failing to meet the time periods in 41 C.F.R. § 60-30.28. Even where no exceptions are filed after submission of a recommended decision by an ALJ, the recommended decision does not become final. Only the Assistant Secretary has the authority to issue a final Administrative order. 41 C.F.R. 60-30.30; see OFCCP v. Star Machinery Co., Case No 83-OFCCP-4, Sec. Decision and Order Sep. 21, 1983, Daily Lab. Rep. (BNA), No. 189, Sep. 28, 1983, page E-1. Although the time limits for filing exceptions may not be lightly disregarded, Defendant has not asserted that it has been prejudiced by Plaintiff's mailing its exceptions on May 23, 1990. Defendant received Plaintiff's exceptions on May 31, 1990, and did not request an extension of time to file its response, which was filed on June 9, 1990. <sup>3/</sup>

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<sup>2/</sup> These rules of practice have been incorporated in the regulations implementing section 503 and are applicable to administrative proceedings brought under the Act. 41 C.F.R. § 60-741.29(b).

<sup>3/</sup> In Defendant's Motion for Order Granting Stay of Proceedings and Leave to File Motion to Strike and Setting Briefing Schedule, Defendant requested that its time to file its response to Plaintiff's exceptions be extended until 14 days after the Assistant Secretary's decision on Defendant's Motion to Strike. Since Defendant has filed its exceptions, this motion is moot.

Defendant's motion to strike Plaintiff's exceptions to the ALJ's R. D. and O. is denied.

II. Consent to Search

A. The existence of consent

There is no dispute that Defendant signed a contract with the government which provided that "[Defendant] agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Rehabilitation Act of 1973, as amended." P-16, General Services Administration Areawide Public Utility Contract, Supplemental Provisions, ¶ 16(b). Those regulations, of course, include 41 C.F.R. § 60-741.53 quoted above.

The ALJ found, however, that Defendant did not voluntarily enter into the contract here because "it is statutorily required to provide utility service to all users including the government." R. D. and O at 4. The consequences of applying this rationale would be substantial, extending far beyond the OFCCP contract compliance EEO programs. Under the ALJ's construction, any provision of a Federal government contract would not be binding on the contractor, unless it was also required by local statute and/or regulation.

I reject this conclusion for the same reasons it has been rejected by the Department of Justice, Office of Legal Counsel, in analogous circumstances. Utilities which had refused to enter into formal contracts with the government argued that they were not bound by the provisions of section 8(d) of the Small Business

Act,<sup>5/</sup> because "state law compels them to serve all customers, including the federal government, and this compulsion vitiates any consent on their part to the federal contract provisions." Memorandum for Clyde C. Pearce, General Counsel, General Services Administration from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, March 27, 1987 (OLC Opinion). The Department of Justice rejected this argument because "[b]y engaging in a business which is a legally-established and regulated monopoly, utilities must be deemed to accept both the benefits and burdens attendant upon that status." OLC Opinion at 5 (footnote omitted.) For the same reasons, Defendant here must be deemed to have accepted the requirements of Section 503 and the regulations by engaging in utility service. I find that Defendant has consented to be searched by the government for the administration and enforcement of section 503.

#### B. The scope of the consent

The conclusion that Defendant did consent to be searched for enforcement of section 503, however, does not resolve the question of the nature and extent of the consent. Plaintiff apparently takes the position that Defendant has consented to any search of whatever scope OFCCP chooses to make.<sup>6/</sup> In light of

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<sup>5/</sup> Pub. L. No. 95-507, § 211, codified at 15 U.S.C. § 637(d)(2), requires that small businesses, including those owned by socially and economically disadvantaged individuals, "shall have the maximum practicable opportunity to participate in the performance of contracts let by any federal agency. . . ."

<sup>6/</sup> Indeed, Plaintiff appears to argue, in a footnote criticizing First Alabama Bank of Montgomery v. Donovan, 692 F.2d 714 (11th (continued...))

the language of the statute and regulations, I cannot agree.

The Act provides that, when a complaint is filed with the Department of Labor, "[t]he Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto." 29 U.S.C. § 793(b) (emphasis added). The regulations requiring access to contractors' premises provide for two kinds of investigations, "complaint investigations, and investigations of performance under the affirmative action clause [compliance reviews]. . . ." 41 C.F.R. § 60-741.53. It seems clear, therefore, that a complaint investigation is distinct from, and ordinarily would be more narrow than, a compliance review. In addition, the scope of a complaint investigation should be reasonably related to the violations alleged in "such complaint."

Since I have found that Defendant did consent to a search here, the cases and principles on issuance of warrants for administrative investigations, discussed at length by the parties in their briefs, are not directly controlling. However, the cases considering the appropriate scope of a warrant based on an

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§/ (...continued)

Cir. 1982), that Defendant has consented to any search, even one which is unreasonable, because "searches which are 'reasonable' under [the] Fourth Amendment . . . are . . . permissible, with or without consent." Plaintiff's Exceptions to the Recommended Decision of the Administrative Law Judge, page 24, note 9 (emphasis in original.) This appears to be inconsistent with the position taken by the government in First Alabama Bank, and with the holding in United States v. Zap, 328 U.S. 624, 628 (1946) that consent to a search granted by contract extends only to a search which is reasonable. See discussion in First Alabama Bank of Montgomery v. Donovan, 692 F.2d at 719-720.

employee complaint are instructive because, by its consent, Defendant has waived its Fourth Amendment rights which would otherwise be protected by the warrant application process.

The United States Court of Appeals for the Third Circuit considered language similar to section 503(b) in Marshall v. North American Car Co., 626 F.2d 320 (3d Cir. 1980). Under section 8(f) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(f), the Secretary investigates employee complaints alleging violation of a safety or health standard. If the Secretary determines there are reasonable grounds to believe that "such violation . . . exists," he is required to conduct a "special inspection . . . to determine if such violation . . . exists." The phrase "such violation," together with the provision for a "special inspection," which is distinct from an inspection under section 8(a) pursuant to a general administrative plan, "indicate[s] that Congress contemplated that these inspections would bear some relationship to the employee complaint." 626 F.2d at 323. The court held that "the scope of the inspection must bear an appropriate relationship to the violations alleged in the complaint." Id. at 324. Similarly here, the Act authorizes the Secretary to conduct an investigation of "such complaint," and the regulations draw a distinction between "complaint investigations" and "investigations of performance under the affirmative action clause [compliance reviews]." I conclude, therefore, that Defendant has consented to an investigation of the same scope as

would be permissible under a warrant issued on the basis of Mr. Mireles' complaint, that is, one which is reasonably related to the allegations in the complaint.

### III. The Proper Scope of the Investigation

Plaintiff sought to conduct an investigation into the application process for all applicants denied employment for any medical reason for two years before the investigation. Defendant apparently was prepared to cooperate fully with an investigation of what it viewed as the narrow complaint filed by Mr. Mireles, i.e., whether denying him a meter reader job because of his back condition violated section 503. The ALJ held that "the facts and circumstances do not warrant the broad search requested by OFCCP . . . . [T]he Mireles' [sic] complaint fails to substantiate any similar violation concerning other handicapped individuals." R.D. and O. at 5.

In a number of cases arising under OSHA, courts have considered whether probable cause existed to support a warrant, and the proper scope of the warrant, based on an employee complaint. Plaintiff argues that the investigation proposed here was properly limited and would meet the standards enunciated in those cases. I find, however, that the law developed in those cases supports an investigation somewhat narrower than that proposed by Plaintiff, but broader than that to which Defendant would have agreed.

In Burkart-Randall Division of Textron, Inc. v. Marshall, 625 F.2d 1313 (7th Cir. 1980), the court held that OSHA may

conduct an inspection of an employer's entire workplace based on a specific employee complaint. 625 F.2d at 1324. Three years later, however, the Seventh Circuit limited the breadth of that decision, holding that "[Burkart-Randall] does not mandate that employee complaints always justify issuance of a general warrant authorizing inspection of an entire facility . . . ." Donovan v. Fall River Foundry Co., Inc., 712 F.2d 1103, 1111 (7th Cir. 1983). The court in Fall River Foundry reached a conclusion on the Secretary's authority to review documents and records particularly relevant here. After noting the Supreme Court's comment in Marshall v. Barlow's, Inc., 436 U.S. 307, 324 n. 22, that "[d]elineating the scope of a search with some care is particularly important where documents are involved," the court said:

The need for appropriate specificity and limitations [in the warrant application] is greatest when the Secretary seeks documents and records of the employer. Very few, if any, reported violations would justify OSHA personnel's rummaging through the entire files of a company in order to determine what, if any, information pertinent to the employee complaints might be found. The Secretary has an obligation to limit its [sic] inspection of documents to those that bear some clear relevance to the conditions about which complaints have been received.

712 F.2d at 1111.

Another case often cited as supporting an establishment-wide inspection based on an employee complaint is Hern Iron Works, Inc. v. Donovan, 670 F.2d 838 (9th Cir. 1982), cert. denied, 459 U.S. 830 (1982). But Hern Iron Works has been distinguished because "the [alleged] violation pertained to the company's

ventilation system [so that] 'inspection of the entire . . . establishment was necessary to detect ventilation hazards.'" Donovan v. Sarasota Concrete Co., 693 F.2d 1061, 1069 (11th Cir. 1982). The employee complaint in Sarasota Concrete dealt with improper maintenance of the employer's cement mixer trucks. The court held that "the complaint represented sufficient probable cause to inspect Sarasota's trucks and any area of the workplace reasonably related to the complaint, [but] a full scope investigation of unrelated areas was not justified." Id.

In West Point-Pepperell, Inc. v. Donovan, 689 F.2d 950 (11th Cir. 1982), OSHA sought a warrant to conduct cotton dust testing in ten areas of a textile plant, including two areas where the use of respirators was not required. OSHA had received a petition signed by over 300 employees, as well as several employee letters, and had conducted 70 interviews, all indicating violations of OSHA's cotton dust and respirator standards. The court held that "the scope of the inspection authorized by the warrant bears a reasonable relationship to the employee complaints." 689 F.2d at 963. The warrant did not authorize air sampling throughout the mill, but limited it to ten specific areas. Air sampling in the two areas where respirators were not required was reasonably related to the employee complaints because those areas did generate cotton dust. Id. <sup>2/</sup>

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<sup>2/</sup> The court in West Point-Pepperell took note of the two lines of cases on "full-scope" inspections and "appropriate relationship" inspections based on employee complaints, but declined to adopt either approach because the warrant in the case  
(continued...)

Plaintiff argues that the scope of the investigation proposed here was reasonable for two reasons. First, Mr. Mireles alleged in his complaint that Defendant was not "giving other people like myself a chance," which Plaintiff asserts indicated that Defendant was rejecting job applicants for medical reasons other than back conditions. Plaintiff's Exceptions at 46. Second, Plaintiff relies on the testimony of two Equal Opportunity Specialists (EOS) who reviewed the complaint before a decision was made to conduct an on-site investigation. They both concluded, based on their training and experience, that certain facts alleged in the complaint were evidence of a broad policy of excluding applicants for medical reasons: Mr. Mireles was otherwise qualified for the job but was rejected after the pre-employment physical examination; Mr. Mireles was rejected for two different jobs at different times for the same reason; and Mr. Mireles was told he was not qualified for any field jobs. Id. at 47.

Mr. Mireles' statement that he knew Defendant was not "giving other [p]eople like My Self [sic] a chance," without more, is a slim reed on which to place the burden of justifying an investigation of this scope. To begin with, this comment could mean Mr. Mireles thought other applicants with back conditions were being rejected, rather than all applicants with

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1/ (...continued)

limited the scope of the inspection to one which bore a reasonable relationship to the employee complaints. 689 F.2d at 963.

handicaps which, under the Act, can range from epilepsy to high blood pressure. See OFCCP v. PPG Industries Inc., Case No. 86-OFC-9, Dep. Ass't. Sec. Dec., Jan. 9, 1989, slip op. at 15 n.4; OFCCP v. Washington Metro. Area Transit Auth., Case No. 84-OFC-8, Ass't. Sec. Dec., Mar. 30, 1989, slip op. at 21-23. Moreover, there is nothing in the record to show that Plaintiff made any attempt to develop further information about this allegation, even simply asking Mr. Mireles what he meant by it. See Deposition of EOS Eleazar Salazar at 56.

The knowledge and experience of the OFCCP investigators is relevant to evaluating the nature of the violation actually alleged in the complaint. The complaint here described in considerable detail Defendant's treatment of Mr. Mireles. It stated that Mr. Mireles was told by the company doctor in 1983 he "was born with a Dislocated disk that didn't joint wright to My spinalcord [sic]." P-1, attachment at 2. Complainant asserted that he had never had any problem with his back. Id. An employee in Defendant's personnel office told him in 1985 he was not qualified for any outside field work. Id. at 4. These allegations are sufficient to form the basis for an investigation of Defendant's policy on hiring individuals with back conditions for outside field work because an investigation of that scope is reasonably related to the allegations in "such complaint." But without some additional fact[s] or credible allegation[s] which could form the basis for a reasonable belief that Defendant was discriminating against individuals with other handicaps, I find

that expanding the investigation beyond discrimination on the basis of back conditions was unreasonable. Defendant cannot be deemed to have consented to an investigation of such scope in the circumstances.

IV. Reasonableness of Investigation Beyond that to which Defendant Consented.

Plaintiff argues that even if Defendant did not consent to the search sought here, the proposed investigation meets the standards in Marshall v. Barlow's, Inc. for the issuance of a "warrant or its equivalent." The Court held in Marshall v. Barlow's, Inc., that the Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. 436 U.S. at 311. An agency seeking to conduct an inspection or investigation for enforcement of federal law must obtain a "warrant or its equivalent. . . ." *Id.* at 325. To obtain a warrant, the agency need not demonstrate "probable cause in the criminal law sense. . . ." *Id.* at 320. Rather, the Court said, "for purposes of an administrative search . . . probable cause justifying the issuance of a warrant may be based . . . on specific evidence of an existing violation [or] on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Id.* at 320-321 (citation and footnote omitted). <sup>2/</sup>

<sup>2/</sup> Plaintiff, of course, did not obtain a warrant here. But, in United States v. Mississippi Power & Light Co., 638 F.2d 899, 907 (5th Cir. 1981), a case involving the same administrative

(continued...)

Plaintiff discusses at length the two avenues an agency may pursue to demonstrate probable cause for the issuance of a warrant - "specific evidence of an existing violation" or compliance with "reasonable legislative or administrative standards for conducting an . . . inspection . . ." Marshall v. Barlow's, Inc., 436 U.S. 307, 320. Under either approach, however, "the specific search [must be measured] against the broad fourth amendment test of 'reasonableness'. Camara v. Municipal Court, 1967, 387 U.S. 523 [sic] . . . . One element of the question . . . is whether [the search] is properly limited in scope. [Camara v. Municipal Court] 436 U.S. at 323 . . . ." United States v. Mississippi Power & Light Co., 638 F.2d at 907.

As a search based on specific evidence of an existing violation, the proposed investigation was too broad. For the reasons discussed above in section III, Plaintiff had little or no basis to believe that Defendant was discriminating against handicapped individuals other than those with back conditions. In other words, Plaintiff had probable cause to investigate only the treatment of Mr. Mireles and other applicants with back conditions who had applied for outside field work. "[W]hen nothing more is offered than a specific complaint relating to a localized condition, probable cause exists for a search to

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<sup>2/</sup>(...continued)

procedures applicable here, the court held that OFCCP's procedures meet the requirement of Barlow's that "a formal judicial warrant is not required in all administrative searches if the enforcement procedures contained in the . . . regulations provide . . . safeguards roughly equivalent to that contained in traditional warrants."

determine only whether the complaint is valid." Donovan v. Sarasota Concrete Co., 693 F.2d at 1069.

Defendant argues that the Mireles complaint was not even sufficient evidence of a violation to establish probable cause for an investigation of Defendant's denial of employment to Mr. Mireles. I reject that position. "[T]he evidence of a specific violation required to establish administrative probable cause [is] less than that needed to show a probability of a violation [but] must . . . show that the proposed search is based upon a reasonable belief that a violation has been . . . committed . . . ." West Point-Pepperell, 689 F.2d at 958. The court in West Point-Pepperell alternatively characterized the amount of evidence required as that "sufficient to support a reasonable suspicion of a violation," id., or "some plausible basis for believing that a violation is likely to be found." Id. (quoting Marshall v. Horn Seed Co., 647 F.2d 96, 102 (emphasis in original)). Thus, for example, in Sarasota Concrete, an employee complaint established probable cause to investigate the specific allegations in the complaint "and any area of the workplace reasonably related to the complaint . . . ." 693 F.2d at 1069. Cf. EEOC v. A.E. Staley Mfg. Co., 711 F.2d 780, 786 (7th Cir. 1983), cert. denied 466 U.S. 936 (1984) ("The EEOC need not demonstrate probable cause [in a subpoena enforcement proceeding] before it is entitled to information . . . . In many instances, the purpose of the EEOC investigation is to determine whether probable cause does in fact exist"). The complaint here was

detailed and specific enough for Plaintiff to form a reasonable belief that the Act had been violated. <sup>3/</sup>

Plaintiff also asserts that it had probable cause for the search here because it was initiated pursuant to reasonable administrative standards, or an administrative plan containing specific neutral criteria. <sup>10/</sup> The "administrative plan" relied on by Plaintiff is to conduct an on-site investigation of every complaint which meets the standards set forth in 41 C.F.R. § 60-741.26. See Plaintiff's Exceptions at 40-41. Those standards are that the complaint must have been filed by an employee, an applicant for employment, or an authorized representative; the complaint must be written and signed; it must identify the alleged discriminatee; it must verify that the complainant meets the definition of a handicapped individual; and it must contain a description of the acts considered to be a violation. Id.

As a plan for determining which complaints to investigate and which to close without investigation, the provisions of

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<sup>3/</sup> Defendant's argument that the merits of this case are controlled by Smith v. Olin Chemical Corp., 555 F.2d 1283 (5th Cir. 1977) should be made to the ALJ and the Assistant Secretary if a hearing on the merits is held. It is not a basis for refusing to permit an investigation. EEOC v. A.E. Staley Mfg. Co., 711 F.2d at 781.

<sup>10/</sup> Although the two phrases - "reasonable legislative or administrative standards for conducting an inspection" and "an administrative plan containing specific neutral criteria" - are often viewed as separate elements of the probable cause determination, see United States v. Mississippi Power & Light Co., 638 F.2d at 907, it appears that the Court's use of the latter phrase in Marshall v. Barlow's was simply a reformulation of the former phrase from Camara v. Municipal Court. See Marshall v. Barlow's, Inc., 436 U.S. at 320, 323.

41 C.F.R. § 60-741.26 are unexceptionable. But that regulation contains no standards for determining the appropriate scope of the investigation or criteria to guide compliance officers on when it is appropriate to broaden the investigation beyond the specific allegations of the complaint. For example, in Sarasota Concrete the court suggested that a complaint of "a specific violation plus a past pattern of violations may be probable cause for a full scope inspection." 693 F.2d at 1069. In this case, receipt of several complaints from different individuals alleging denial of employment for different handicapping conditions may have constituted probable cause for the breadth of the investigation proposed by Plaintiff. See, e.g., OFCCP v. Southern Pacific Transportation Co., Case Nos. 79-OFC-10A, 10B, 17, 19, 80-OFC-17, Sec'y. Dec. and Order of Remand on other grounds Feb. 24, 1994.

The decision to conduct an investigation covering "the past 24 months, for those applicants denied employment for [any] medical reason" was not based on an administrative plan or a regulation with explicit criteria. It was based on Mr. Mireles' statement that he knew Defendant was not "giving other people like [him] a chance," and the compliance officers' belief, grounded only on their experience with other contractors, rather than specific evidence relating to this contractor, that Defendant "most likely had [a] policy in effect that excluded qualified individuals with handicaps . . . ." Plaintiff's Exceptions at 45. Without explicit criteria to guide and

constrain it, such a decision violates the Fourth Amendment because it "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." Marshall v. Barlow's Inc., 436 U.S. at 323. Plaintiff's position would convert a significant number of complaint investigations into virtual compliance reviews, <sup>11/</sup> without the need to meet any of the standards which should be applicable to the initiation of an investigation of that scope. See discussion in United States v. New Orleans Public Service Inc., 723 F.2d 422, 429 (5th Cir. 1984), cert. denied 469 U.S. 1180 (1985); Donovan v. Wollaston Alloys Inc., 695 F.2d 1, 5 (1st Cir. 1982) (probable cause for a full-scope investigation shown by adherence to detailed, specific "Region I Targeting Alternative Project" standards for selection of employers for inspection).

Accordingly, I hold that Plaintiff demonstrated probable cause to conduct an investigation covering only the treatment of Mr. Mireles and Defendant's policy on hiring applicants with back conditions.

V. Order

The ALJ recommended that the complaint in this case be

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<sup>11/</sup> Plaintiff argues that by limiting the investigation to whether Defendant had a policy of refusing to hire applicants for medical reasons, and not extending it to Defendant's treatment of current employees, the investigation was properly limited. But Plaintiff has not shown that any standards existed which make this a logical stopping point for the investigation. The compliance officers' experience may have indicated, for example, that where an employer applies medical standards to its applicants for employment, it applies the same standards to incumbent employees for such purposes as transfer, promotion and job retention rights.

dismissed. R. D. and O. at 7. However, the record shows that Plaintiff did have the authority to conduct an investigation. The fact that it sought, and litigated its right, to conduct an investigation which exceeded its authority is not grounds for dismissal of the complaint. The ALJ and the Assistant Secretary have the responsibility to review the proposed investigation in light of the law discussed above and issue an order, "equivalent" to a warrant, that Defendant permit access to its records and place of business for a properly limited investigation. It would be a waste of resources for all concerned to require Plaintiff to give notice of a new investigation and to litigate the propriety of that proposed investigation all over again. Fourth Amendment standards are satisfied, in the absence of a formal judicial warrant "if the enforcement procedures . . . in the . . . regulations provide, in both design and practice, safeguards roughly equivalent to those contained in traditional warrants." United States v. Mississippi Power & Light Co., 638 F.2d 899, 907. The procedures followed here meet that requirement, and the record developed pursuant to those procedures supports issuance of an order for an investigation within the parameters discussed above. Id.

However, neither party addressed the question whether, if he had been hired for the job he applied for, Mr. Mireles would have been working on a government contract or subcontract. On remand the ALJ shall hold appropriate proceedings and issue a recommended decision on this issue. Any party disagreeing with the ALJ's recommended decision may file exceptions, not to exceed

20 double spaced typed pages, within 30 days of the date of the decision. The other party may file a response to the exceptions, not to exceed 10 double spaced typed pages, within 20 days of filing of the exceptions.

SO ORDERED.



Assistant Secretary for  
Employment Standards

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: OFCCP, U.S. Department of labor v. City Public Service of San Antonio

Case No. : 89-OFC-5

Document : Decision and Remand Order

A copy of the above-referenced document was sent to the following persons on JAN 18 1995.

  
\_\_\_\_\_

CERTIFIED MAIL

Jack Spruce  
General Manager  
City Public Service of  
San Antonio  
P.O. Box 1771  
San Antonio, TX 78296

George P. Parker, Jr.  
Matthews and Branscomb  
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San Antonio, TX 78205-3692

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Washington, DC 20210

REGULAR MAIL

James A. Wirz  
Office of the Solicitor  
U.S. Department of Labor  
525 South Griffin Street  
Suite 501  
Dallas, TX 75202



RECEIVED



MAR 13 3 23 PM '89

CIVIL RIGHTS  
DIVISION

.....  
In the Matter of :

U.S. DEPARTMENT OF LABOR, :  
Plaintiff :

Case No. 89-OFC-1

v. :

JACKSONVILLE SHIPYARDS, INC., :  
Defendant :

ORDER

As provided in the Order I issued in this case on February 24, 1989, I conducted a telephonic conference call with the parties on March 3, 1989 to rule on OFCCP's Motion Compelling Defendant to Answer Fully Plaintiff's First Set of Interrogatories and First Motion For Production of Documents.

It is JSI's position that it should not be required to produce documents or answer interrogatories regarding any period of time other than the year 1985. \*/ JSI notes that the compliance investigation which led to the filing of the complaint in this case covered only that year, and that likewise OFCCP's conciliation efforts only covered practices occurring in that year. OFCCP contends that it is not limited to discovery related solely to 1985 since the complaint covers the entire period since January 1, 1985. Further, it argues that §202(5) of Executive Order 11246 requires a contractor to produce any records requested by the OFCCP to determine if that contractor is complying with the Executive Order.

41 C.F.R. §60-1.20(b) states that "reasonable efforts shall be made to secure compliance through conciliation ...." I find that OFCCP made reasonable efforts at conciliation. Although it is true that its conciliation efforts concerned only 1985, this was the period for which evidence was available at that time. JSI would have OFCCP separately conciliate allegations of identical violations simply because evidence for an additional period of time had become available. Such a practice clearly would be impractical and inefficient. Moreover, since this case already is in litigation, additional conciliation efforts regarding what are nothing more than allegations of continuing unlawful conduct will have little or no purpose.

\*/ It should be noted that the parties have since reached agreement in regard to discovery covering the period March-December, 1984.

In addition, evidence of post-1985 conduct is relevant to this case because it is challenged in the complaint. No motion to strike or dismiss that part of the complaint covering the post-1985 period has been made.

Finally, the case of Uniroyal, Inc., 77-OFCCP 1 (Final Decision of the Secretary, June 28, 1979), which was cited by OFCCP, supports its position. Relying on §202(5) of Executive Order 11246, the Secretary stated that:

I note that the [Executive] Order contains no time limits on the periods that the Government can engage in discovery, so long as the discovery is related to the contractor's compliance with the Executive Order. (Id. at 26).

The post-1985 discovery sought by OFCCP clearly is related to the contractor's compliance with the Executive Order.

Accordingly, IT IS ORDERED that OFCCP's Motion to Compel is granted, and JSI shall fully comply with Interrogatories 12, 15-18, 22-24, 28 and 29 of OFCCP's First Set of Interrogatories and Requests 2, 3, 9 and 10 of OFCCP's First Request for the Production of Documents not later than March 31, 1989.

  
JEFFREY THRECK  
Administrative Law Judge

Dated: March 10, 1989  
Washington, DC

JT/jb



**U.S. Department of Labor**

Office of Administrative Law Judges  
5100 Village Walk, Suite 200  
Covington, LA 70433



(985) 809-5173  
(985) 893-7351 (Fax)

**RECEIVED**

**Issue Date: 22 April 2016**

**CASE NO. : 2015-OFC-1**

APR 28 2016

**IN THE MATTER OF:**

U.S. DEPT. OF LABOR - SOLICITOR'S OFFICE  
1244 Speer Blvd., Suite 515  
Denver, CO 80204-3516

**ENTERED**

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

**Complainant**

**v.**

**JBS USA HOLDINGS, INC., JBS USA, LLC AND  
SWIFT BEEF COMPANY d/b/a JBS AND  
f/k/a JBS SWIFT & COMPANY,  
in their own capacity and as successors-in-interest to  
Swift Foods Company and Swift & Co.,**

**Respondents**

**ORDER GRANTING OFCCP'S MOTION TO COMPEL**

This is an action brought by the Office of Federal Contract Compliance Programs of the United States Department of Labor (herein "OFCCP" or "Plaintiff") on December 7, 2014, alleging that Defendants/Respondents (hereinafter "Defendants"): (1) discriminated based upon gender, race, and/or ethnicity during various times between August 6, 2005 and June 30, 2009; (2) and failed to conduct adverse-impact analyses and in-depth analyses of the employment and selection process to determine whether impediments to equal employment opportunity existed.

Plaintiff filed its present Motion to Compel on February 28, 2016, seeking an order from the undersigned to compel Defendants to: "(1) supplement their answers to Plaintiff's First Set of Interrogatories and Plaintiff's First Request for Production of Documents and produce all responsive information and documents from June 30, 2009 to the present time; and (2)

provide information and documents relating to allegations of race and gender discrimination made between August 1, 2002 and the present, in regard to Defendants' Hyrum, Utah facility." Plaintiff alleges that it is entitled to the information and documents it requested regarding Defendants' hiring policies, procedures, and practices from June 30, 2009 to the present, because Defendants are "required by discovery rules, by the applicable regulations, and by the contractual terms of their federal contract" to provide such information. Plaintiff alleges it is also entitled to information in Defendants' possession regarding race and gender discrimination complaints asserted against Defendants from 2002 to the present and that Defendants have impermissibly limited their responses to the time period of August 6, 2005 through June 30, 2009.

On March 7, 2016, Plaintiff sought to amend its Complaint to include an additional claim of gender discrimination from January 1, 2009 to at least July 31, 2013, based upon newly discovered evidence. Plaintiff's motion was granted by the undersigned on April 15, 2016.

On March 18, 2016, Defendants filed an Opposition to the OFCCP's Motion to Compel, contesting its responsibility to produce the requested documents and information. With regards to the documents and information from 2009 to present, Defendants allege that the requested documents and information are not relevant to the issues set forth in the complaint "about distinct periods of time." Further, Defendants contend that such a request is not proportional "considering what the Complaint properly places before this Court." Lastly, with regards to Plaintiff's requests for information and documents related to race and gender discrimination complaints from 2002 to present in regards to Defendants' Hyrum, Utah facility, Defendants assert that OFCCP's requests are overbroad and cannot survive the proportionality requirement required by amended FRCP 26(b)(1).

Plaintiff filed its Reply to Defendants' Oppositions to OFCCP's Motions to Compel and for Leave to Amend Complaint on April 7, 2016. Plaintiff argues that Defendants wholly mischaracterize the events which occurred between 2009 and 2014 and that the actual timeline of events in the present matter do not support any finding of undue delay on behalf of the OFCCP or undue prejudice on behalf of Defendants. Moreover, Plaintiff asserts that Defendants' objections to the production of documents and information due to the fact that certain "adverse impact analyses" have not been refined "ring hollow" when

Defendants refuse to produce "the very data required to make refinements."

#### DISCUSSION

The Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246, governing the Office of Federal Contract Compliance Programs (hereinafter the "OFCCP rules") provide that, after the commencement of an action, "a party may serve on any other party a request to produce and/or permit the party, [], to inspect and copy any unprivileged documents, [] which contain or may lead to relevant information and which are in the possession, custody, or control of the party upon whom the request is served." 41 C.F.R. § 60-30.10.

The OFCCP rules "provide the rules of practice for all administrative proceedings, instituted by the OFCCP including but not limited to proceedings instituted against construction contractors or subcontractors, which relate to the enforcement of equal opportunity under Executive Order 11246...." 41 C.F.R. § 60-30.1. Where the OFCCP rules are insufficient, the procedures are governed by the Federal Rules of Civil Procedure. Id.

According to the recently amended Federal Rules of Civil Procedure Rule 26(b)(1) and the Code of Federal Regulations, the scope of discovery is as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FED. R. CIV. P. 26(b)(1).

As evident by the foregoing, the revised rule serves to reinforce certain concepts and omits others. Notably, the revised rule omits the prior provision authorizing the court "for good cause, to order discovery of any matter relevant to the subject matter involved in the action." Rather, the

Committee found "[p]roportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense." FED. R. CIV. P. 26(b)(1), advisory committee's note (2015).

The 2015 advisory committee's note goes onto explain that the concept of "relevant to a claim or defense" as opposed to "relevant to the subject matter" arose in 2000. FED. R. CIV. P. 26(b)(1), advisory committee's note (2015). The advisory committee's 2000 note "offered three examples of information, that suitably focused, would be relevant to the parties' claims or defenses." Id. Such examples included: "[1] other incidents of the same type, or involving the same product; [2] information about organizational arrangements or filing systems; and [3] information that could be used to impeach a likely witness." Id. The 2015 advisory committee's note clarified that "[s]uch discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery." Id.

The amendment to FED. R. CIV. P. Rule 26(b)(1) also deleted the phrase "reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1), advisory committee's note (2015). Finding that the term "reasonably calculated" has been used incorrectly to define the scope of discovery, the committee replaced it with the "direct statement that '[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.'" Id. Such discovery of nonadmissible evidence "remains available so long as it is otherwise within the scope of discovery." Id.

Lastly, the recent amendment restored the proportionality calculation to Rule 26(b)(1), but did not necessarily establish a "new limit on discovery; rather [it] merely relocated the limitation from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). Vaigasi v. Solow Mgmt. Corp., 2016 U.S. Dist. LEXIS 18460, \*42-44 (S.D.N.Y. Feb. 16, 2016) (internal citations omitted); Williams v. United States Env'tl. Servs., LLC, 2016 U.S. Dist. LEXIS 18290, n. 2 (Feb. 16, 2016); Odeh v. City of Baton Rouge/E. Baton Rouge, 2016 U.S. Dist. LEXIS 34499, n.1 (March 17, 2016); Bounds v. Capital Area Family Violence Intervention Ctr., Inc., 2016 U.S. Dist. LEXIS 35483, n. 1 (March 18, 2016). The purpose of the change was to "reinforce[] the Rule 26(g) obligation of the parties to consider [the proportionality factors in making discovery requests, responses or objections]." FED. R. CIV. P. 26(b)(1) advisory committee's note (2015). However, it does not "place upon the party seeking discovery the burden of addressing

all proportionality requirements." Id.; Williams, supra. It seeks to exhort judges to exercise their preexisting control over discovery more exactingly." FED. R. CIV. P. 26(b)(1) advisory committee's note (2015); Vaigasi, supra at \*42-44 (citing Robertson v. People Magazine, 2015 U.S. Dist. LEXIS 168525, \*5 (S.D.N.Y. Dec. 15, 2016)).

In summation, a party may seek discovery of "any nonprivileged matter which is (1) **relevant** to a party's claim or defense and (2) proportional to the needs of the case." In so determining whether the request is proportional to the needs of the case, the Rule suggests a consideration of several factors: the importance of the issues at stake in the action; the amount in controversy; the parties' relative access to relevant information; the parties' resources; the importance of the discovery in resolving the issues; and whether the burden or expense of the proposed discovery outweighs its likely benefit." FED. R. CIV. P. Rule 26(b)(1). Thus, the scope of discovery is only limited by relevance and a consideration of the foregoing factors.

The term "relevant" as used within Rule 26(b)(1) means "within the scope of discovery" as defined within the subdivision. FED. R. CIV. P. 26(b)(1), advisory committee's note 2015). The proportionality factors direct the court to consider the "marginal utility of the discovery sought." Vaigasi, supra at \*42-44 (internal citations omitted). As such, "proportionality and relevance are 'conjoined' concepts; the greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate." Id.

**i. Information and Documents relating to Defendants' hiring policies, procedures, and practices from June 30, 2009 to the present time.**

As set forth above, Plaintiff seeks the undersigned to compel Defendants to supplement their answers to Plaintiff's First Set of Interrogatories and Plaintiff's First Request for Production of Documents and to produce all responsive information and documents from June 30, 2009 to the present. Plaintiff alleges that it is entitled to such information and documents, because Defendants are "required by discovery rules, by the applicable regulations, and by the contractual terms of their federal contract" to provide such information. Plaintiff contends that the documents and information requested are relevant and thus within the scope of discovery, because "discovery is not limited to the issues raised by the pleadings," but rather is dictated by "relevancy to the subject

matter of the suit." With regards to relevancy, Plaintiff contends that the information and documents are relevant to OFCCP's claims of continuing unlawful discrimination "as well as Defendants' hiring policies, procedures, and practices, and the efforts they took to comply with Executive Order 11246 and its implementing regulations." Lastly, Plaintiff alleges it is also entitled to such documents and information under the governing regulations and by the terms of Defendants' federal contract.

In opposition, Defendants alleged the information and documents that Plaintiff requests from 2009 to the present is irrelevant and not proportional. Defendants contend that (1) all law cited by Plaintiff in its Motion to Compel is "inapposite and distinguishable on the facts" from the present matter and thus is insufficient justification for a grant of the motion; (2) according to the "new standard for relevance under FRCP 26(b)(1)" Plaintiff's requests are not proportional "considering what the Complaint properly places before this Court;" and (3) the documents and information Plaintiff requests is not relevant to the issues set forth in the Complaint "about distinct periods of time." Defendants suggested that any documents and information relating to Defendants' post-June 30, 2009 application processes are not relevant to the claims in Plaintiff's Complaint. Moreover, Defendants argue that discovery of such information is not proportional to those Claims set forth by Plaintiff in its Complaint.

Defendants contend that such information and documents are not relevant since Plaintiff "only claimed discrimination as to the finite periods" of August 6, 2005 to September 30, 2006, and February 1, 2008 to June 30, 2009, alleged in the complaint. According to Defendants, any leeway recognized by the case law would provide Plaintiff with no more data beyond that which they have already received. Any information and data post-2009 could provide Plaintiff "no utility to claims related to 2008 to pre-June 30, 2009, let alone 2005 or 2006." Moreover, Defendants contend that its prior production of adverse impact analyses does not constitute evidence of discrimination to support further discovery on behalf of Plaintiff. Specifically Defendants suggest that, according to the OFCCP, any data set must be refined before calculating the statistical disparity in order to determine whether the data supports an allegation of discrimination. Defendants contend that Plaintiff has failed to conduct such a refinement and thus the produced evidence cannot support a finding of discrimination.

With regards to proportionality, Defendants suggest that Plaintiff's request is "not proportional considering what the Complaint properly places before this Court." According to Defendants, Plaintiff failed to seek such information from 2010 through 2014 and compelling Defendants to produce such documents and information now would only delay trial and place the "burden and cost of recovering such information" on Defendants.

As discovery matters are "committed almost exclusively to the sound discretion of the trial Judge, appellate rulings delineating the bounds of discovery under the Rules are rare." Burns v. Thiokol Chemical Corp., 483 F.2d 300, 304-305 (5<sup>th</sup> Cir. 1973). Moreover, as the scope of discovery is variable based upon the facts and circumstances of each case, the scope should be determined on an ad hoc basis. Fed. R. CIV. P. Rule 26(b)(1), Committee Notes (2000); OFCPP v. Owens-Illinois, Inc., 1977-OFC-11 (ALJ Nov. 21, 1980). Thus, true guidance on this matter is limited and the recent amendment of Rule 26(b)(1) narrows the scope of the guidance considerably. In their Opposition, Defendants attempted to rebut and contest each case cited by Plaintiff in its Motion to Compel, however, I find the task of discussing Plaintiff's cases and Defendants interpretation of those cases unnecessary. Indeed, many of the cases cited by Plaintiff are both outdated and distinguishable. The case law in this area is sparse and erratic. Thus, the court must turn to the law for guidance and the law speaks for itself.

Under revised Rule 26(b)(1), information is discoverable "if it is relevant to any party's claim or defense and is proportional to the needs of the case." FED. R. CIV. P. 26(b)(1), advisory committee's note (2015). It includes information which "may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery." Id. As mentioned above, the term "relevant" as used within Rule 26(b)(1) means "within the scope of discovery" as defined within the subdivision. Id. Relevance is neither as broad as Plaintiff suggests (relevant to the subject matter) nor as narrow as Defendants propose (to the precise time period set forth in the Complaint). Rather, relevance to a party's claims or defenses falls somewhere in the middle.

In the present matter, Plaintiff seeks to compel information and documents relating to Defendants' hiring policies, procedures, and practices from June 30, 2009 to the present time. In determining whether such a request is relevant to a party's claim or defense, we must look to the pleadings.

Plaintiff's Administrative Complaint alleges that "from at least August 6, 2005 to at least September 30, 2006," Defendants "utilized hiring processes and selection procedures which discriminated against female applicants." See First Amended Administrative Complaint ¶ 17. Moreover, Plaintiff has alleged that Defendants utilized hiring processes and selection procedures which discriminated against white, African-American, and Native-American applicants from at least February 1, 2008 to at least June 30, 2009. See First Amended Administrative Complaint ¶ 19. Plaintiff's newly amended Administrative Complaint also alleges discriminatory hiring processes and selection procedures against female applicants from at least January 1, 2009 to at least July 31, 2013. See First Amended Administrative Complaint ¶ 18.

As noted in my "Order Granting Motion for Leave to Amend Complaint," I have already determined that the amendment regards the **same** subject matter and does not raise any **significant new factual issues**. Plaintiff requests information and documents relating to the same factual issues, potential discrimination by Defendants in violation of Executive Order 11246, as asserted in the complaint. Moreover, as expressed in my prior order, I found the language "to at least" is an allegation that violations of the Executive Order 11246 are ongoing and not confined to those dates expressed in the Complaint. Thus, information and documents regarding Defendants' hiring policies, procedures, and practices from June 30, 2009 to present time is not only relevant to those claims alleged in Plaintiff's Amended Complaint but is also relevant in that it may support further amendment of the pleadings to add new claims regarding further violations of Executive Order 11246. Thus, I find and conclude that the requested information is relevant to Plaintiff's "claims or defenses."

Having found such a request to be relevant, Plaintiff's request may only be limited by proportionality. As mentioned above, the amended rule suggests a consideration of several factors in determining proportionality: "the importance of the issues at stake in the action; the amount in controversy; the parties' relative access to relevant information; the parties' resources; the importance of the discovery in resolving the issues; and whether the burden or expense of the proposed discovery outweighs its likely benefit." FED. R. CIV. P. Rule 26(b)(1). The 2015 committee notes explain that "[t]he direction to consider the parties' relative access to relevant information" revolves around a concept present in some cases called "information asymmetry." FED. R. CIV. P. Rule 26(b)(1),

advisory committee's note (2015). Information asymmetry occurs where "[o]ne party—often an individual plaintiff—may have very little discoverable information. Id. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve." Id. In such a situation, "the burden of responding to discovery lies heavier on the party who has more information, and properly so." Id. Moreover, the committee stressed that "monetary stakes are only one factor, to be balanced against other factors." Id. This is so, because "many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Id.

In considering the proportionality factors, I find that Plaintiff's request is proportional to the needs of the case. The issues at stake are great indeed. The present litigation is founded upon Executive Order 11246 which was enacted for the express purpose of prohibiting "discriminat[ion] against any employee or applicant for employment because of race, color, religion, sex, or national origin" by Government contractors. Executive Order 11246 § 202. There is a strong public interest in preventing employment discrimination, and the OFCCP (like the EEOC) acts as enforcer to vindicate that interest. DeNovellis v. Shalala, 135 F.3d 58, 72 (1st Cir. 1998); EEOC v. Thomas Dodge Corp., 524 F. Supp. 2d 227, 235 (E.D. NY. 2007); see also Board of Dirs. Of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, (1987). The very matter of whether a government contract holder is discriminating against employees and applicants based on race and/or gender is at stake, thus the issues in this matter are of high importance.

Moreover, it is evident by the advisory committee note, that employment practices were specifically considered when directing the court to evaluate the proportionality of a discovery request. The public policy consideration at stake in the current matter heightens the importance of the case and weighs this factor in favor of disclosure. Moreover, though the public policy consideration is substantial, the monetary stakes here are also high. By virtue of their federal contract, Defendants have benefitted in the amount of "over \$40,000,000.00" and stand to benefit even more if ultimately found to not be in violation of Executive Order 11246.

With regards to the parties' relative access to the requested information, Defendants are the sole possessors and sole possible source of their own hiring policies, procedures, and practices from June 30, 2009 to present. Indeed, Defendants

are almost entirely the sole source of all information required for Plaintiff's allegations of discrimination. As such, information asymmetry, as contemplated in the advisory notes, exists here and weighs in favor of disclosure.

Defendants' argument that the scope of discovery should not be broadened on the basis of its previously produced adverse impact analyses is circuitous and unpersuasive. According to Defendants, Plaintiff "refine[] any data set before calculating the statistical disparity as part of any determination as to whether it can support an allegation of discrimination." However, Defendants refuse to provide the very data (which may very well be found insufficient to support an allegation of discrimination) required for any further refinement. The information is not only important to the proper vetting and refinement of the adverse impact analyses which Defendants have already produced, but is also relevant in that it may tend to prove or disprove the existence of discriminatory hiring procedures on behalf of Defendants. As such, this factor too weighs in favor of disclosure.

As recognized in my previous order, Defendants' concerns regarding the possible burden and cost of producing such information are valid and convincing. However, Defendants themselves are almost wholly responsible for the breadth of Plaintiff's request. In the Opposition, Defendants continuously admonished Plaintiff for its delay and its failures to request certain information in a timely manner. However, Defendants have grossly mischaracterized the facts of this case and deceptively represented them to the undersigned. Plaintiff's Reply to Defendants' Opposition revealed an agreement between the parties to halt litigation in pursuit of global settlement. Defendants knowingly sought to halt the adjudication of the Hyrum, Utah facility pending the completion of OFCCP's Lufkin and Mt. Pleasant, Texas audits. When Defendants agreed to halt the litigation process with respect to the Hyrum, Utah facility, Defendants understood that the remaining audits were in the initial stages. Defendants were aware that such a request and agreement would cause substantial delay (having undergone about three years of investigation at the Hyrum facility by this stage) and thus cannot now use it as a defense against production.

Thus, though there may be a burden placed upon Defendants in production of such information and documents, I find the burden outweighed by the benefit the information will have in the journey to the truth. The information will either support or negate Plaintiff's allegations of discrimination, but will

certainly assist in its mission of rooting out the presence of discriminatory hiring by a federal contract holder. The benefit here is great and the burden is outweighed by the foregoing considerations. Thus, the Defendants shall supplement their answers to Plaintiff's First Set of Interrogatories and Request for Production of Documents and produce all responsive information and documents from June 30, 2009 to the present.

**ii. Information and Documents related to race and gender discrimination complaints asserted against Defendants from 2002 to present.**

As set forth above, Plaintiff seeks information and documents regarding any charges or complaints related to race and gender discrimination asserted against defendants from 2002 to present. Plaintiff seeks such information because it believes that similar complaints of discrimination are relevant to the allegations set forth in their complaint. Specifically, Plaintiff cites Davis v. Precoat Metals, a Div. of Sequa Corp., which found evidence of other employee's complaints of discrimination four years preceding the discovery dispute were relevant to establish pretext. See Davis v. Precoat Metals, a Div. of Sequa Corp., 2002 U.S. Dist. LEXIS 13851 (N.D. Ill. July 26, 2002). In Davis, where the request was tailored to the same, specific claims of discrimination that Plaintiffs asserted, the court found such a request to be "narrowly tailored" and thus, not overbroad. Id. Accordingly, Plaintiffs in this matter assert that its request is narrowly tailored, because it is limited (1) to the same types of discrimination alleged in this case; (2) to Defendants' Hyrum, Utah facility; and (3) to a three-year period preceding the first date of alleged discrimination in accordance with the case law and continues to present due to Plaintiff's allegations of ongoing discrimination.

Defendants objected to Plaintiff's request for the production of complaints or charges of discrimination and alleged that such a request was "overbroad." According to Defendants, Plaintiff's request cannot survive the proportionality requirement set forth in the newly amended FRCP 26(b)(1). In so contending, Defendants cite Torcasio v. New Canaan Bd. Of Education for the contention that a request for "any and all documents pertaining to any lawsuit or other court or administrative proceedings based on discrimination to which defendant was a party," is overbroad, of minimal importance, and would cause too great a burden upon defendants. The court was

especially convinced that the burden would be too great upon defendants when considering the fact that many "previously-filed court cases were equally accessible to the plaintiff through public information sources available to the plaintiff." Torcasio v. New Canaan Bd. Of Education, 2016 U.S. Dist LEXIS 8103 (D. Conn. Jan. 25, 2016).

In Torcasio, the plaintiff sought recovery from defendants: the Town of New Canaan, the New Canaan Board of Education (BOE) and, Bruce Gluck. Torcasio v. New Canaan Bd. Of Ed., 2016 U.S. Dist. LEXIS 8103 (D.C. Conn Jan. 25, 2016). Plaintiff was a former food services employee of the Board of Education and Mr. Gluck was the Director of Food Services for the Board of Education. Id., at \*1-3. The plaintiff's alleged she was subjected to adverse employment actions (disparate treatment) and a hostile work environment due to her gender. Id. The plaintiff also made allegations of intentional infliction of emotional distress and negligent supervision against the town and the board of education. Id. The court considered three motions to compel, filed by plaintiff, one for each defendant, under the recently amended Rule 26(b)(1). Id.

In two interrogatories against the Town of New Canaan, plaintiff asked defendant to "describe every lawsuit filed in federal or state court against [defendant] involving claims of discrimination in employment or infliction of emotional distress since 1995, including the nature of the claims, the names of parties, the date of complaint and the nature of its disposition." Id., at \*22-25. The parties agreed amongst themselves to limit the request to the period of 2003 to 2013. The court found plaintiff's request to be "overbroad to the extent that it seeks information regarding any and all lawsuits filed against the Town for claims of infliction of emotional distress." Id. Nevertheless, the court compelled defendant to answer the interrogatories "limited to claims of discrimination on the basis of gender and/or hostile work environment on the basis of sexual harassment, and claims for intentional infliction of emotion distress arising out of the same..." Id.

The court refused however to compel the Town to produce "all documents or other tangible evidence relating to any law suit or any other court or administrative proceeding based on discrimination and infliction of emotional distress to which TOWN has been a party, other than this lawsuit..." Id., at \*25-28. Based upon the recently amended FRCP Rule 26(b)(1), the court found such evidence to be of "minimal importance in resolving the issues" of the case. Id. Moreover, the court found that such materials "filed in previously filed court cases

are likely accessible through public information sources to the plaintiff." Id. And the burden upon the defendant in "obtaining, reviewing, redacting, and most likely sealing some of the materials sought, such as third-party depositions in unrelated cases, would be substantial." Id.

However, despite denying such a request of the Town, the Court did go on to compel the Board of Education to produce similar documents. Id., at \*43-47. Plaintiff sought "all documents or other tangible evidence relating to any lawsuit or any other court or administrative proceeding based on discrimination and infliction of emotional distress to which BOE has been a party, other than this lawsuit" and "documents or other tangible evidence relating to any charge or allegation of discrimination filed against BOE with the EEOC or any other organization or government agency responsible for the enforcement of laws prohibiting discrimination in employment or otherwise, or which you have been a party to..." Id. Unlike the prior request for production, the Court ordered the Board of Education to produce "any non-privilege documents relating to any lawsuits or charges filed against the BOE claiming discrimination on the basis of gender, and/or hostile work environment on the basis of sexual harassment, for the time period agreed to by counsel." Id. The Court however, refused to compel production of depositions transcripts of third parties which may implicate confidential information. Id.

Why the Court refused to compel a request for the production of complaints and charges against the Town but chose to compel a response from the Board of Education is unclear. By the undersigned's postulation, this was due to a request from Plaintiff's immediate employer to be a more "narrow" request and more relevant to the case at hand. In any case, findings regarding the scope of discovery are particular to every case and are "committed almost exclusively to the discretion of the trial Judge..." and generally decided on an *ad hoc* basis. Burns, supra. As such, prior holdings may provide a guideline for the undersigned's decision but shall not be applied formulaically.

Generally, courts have found "other complaints of discrimination against an employer" relevant where the request is limited to "'the (a) same form of alleged discrimination, (b) the same department or agency where plaintiff worked, and (c) a reasonable time before and after the discrimination occurred' usually 3 to 5 years." Williams, supra at \*19 (internal citations omitted); Odeh, supra at \*4-5 (internal citations

omitted). Moreover, evidence of other complaints of similar discrimination are relevant according to the advisory committee's note to Rule 26(b)(1). The committee noted that "other incidents of the same type" would still be relevant to a parties' claims or defenses under the revised rule. FED. R. CIV. P. Rule 26(b)(1), advisory committee's note (2015). In some cases, courts have permitted a wide temporal scope in discovery where a party was seeking to show a pattern or practice of discrimination or seeking to show pretext, so long as the request was limited to the "relevant corporate department, similarly situated employees, time period, and decisionmakers," such discovery was permissible. Balderston v. Fairbanks Morse Engine Div. of Coltect Indus., 328 F.3d 209, 320 (7th Cir. 2003); Davis v. Precoat Metals, No. 01 C 5689, 202 U.S. Dist. LEXIS 13851, \*2-3 (July 26, 2002). In other cases, courts have limited the temporal scope in cases of individual discrimination, because in such cases a broader scope is often irrelevant to an individual's claims or defenses. Brady v. Ltd. Parts, Inc., 2009 U.S. Dist. LEXIS 92554, \*5-11 (M.D. Tenn. Oct. 5, 2009).

In the present matter, it is clear that charges and/or complaints of discrimination of a similar kind to that alleged in the complaint (race and gender discrimination), limited to the specific facility where the alleged discrimination occurred (the Hyrum, Utah facility), limited in scope (2002 to present) are relevant. As expressed by the advisory committee "other incidents of the same type" are relevant. As such, other incidents of discrimination based upon race or gender as alleged in the complaint are relevant to the present matter. Moreover, nothing in the amended Rule 26(b)(1) indicates that discovery is limited to particular time periods alleged in the complaint. Rather, discovery is only limited by relevance and proportionality. As enunciated above, in determining whether a request is proportional to the needs of the case, the court must consider the following factors: the importance of the issues at stake in the action; the amount in controversy; the parties' relative access to relevant information; the parties' resources; the importance of the discovery in resolving the issues; and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Here, as discussed at length above, the issue at stake is extraordinary. The very matter of whether a government contract holder is discriminating against employees and applicants based on race and/or gender is at stake, thus the importance of the issues in this matter is high. Moreover, the instant requested

information is just as important as the evidence of Defendants' hiring practices, policies, and procedure.

I do not find that the request is either substantively or temporally overbroad. The request in this matter is akin to Plaintiff's request of charges and complaints against the Board of Education. Plaintiff's request is limited to the particular Hyrum, Utah facility and to the particular types of discrimination alleged in its complaint. It does not seek evidence of all charges and complaints against Defendants with respect to all facilities and all forms of discrimination. The request is limited to the direct employer/facility (the Hyrum, Utah facility) like the request made of the Board of Education, not a global request of all of Defendants' facilities, like the request to the Town of Canaan. And thus, is not overtly, substantively broad. Moreover, though some charges and complaints may be available through the public records, many charges or complaints may be solely within the possession of Defendants. Thus, just as discussed above, Defendants relative access to the information is greater than Plaintiff's.

Though the temporal scope of discovery which Plaintiff requests is broad, I do not find it overbroad. The request is proportional to issues of the case, alleged employment discrimination by a federal contract holder. Moreover, as discussed above, any such overbreadth resulted from an agreement between the parties to halt litigation in pursuit of global settlement. In fact, if the request could be seen as overbroad, any such overbreadth would be a result of Defendants' own actions in agreeing to postpone litigation until investigations into Defendants' other facilities were completed. Defendants seek to leverage a gap in time for which they were, in part, at fault in order to foreclose and narrow the scope of discovery. The undersigned refuses to provide such a platform for Defendants' actions. Thus, the Defendants shall produce any non-privileged documents and information relating to allegations/complaints of race or gender discrimination made between August 1, 2002 and the present, in regard to Defendants' Hyrum, Utah facility.

CONCLUSION AND ORDER

IT IS HEREBY ORDERED based on the foregoing that Plaintiff's Motion to Compel is hereby GRANTED.

ORDERED this 22<sup>nd</sup> day of April, 2016, at Covington, Louisiana.



Digitally signed by LEE J. ROMERO JR  
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Judges, L=Covington, S=LA, C=US  
Location: Covington LA

LEE J. ROMERO, JR.  
Administrative Law Judge

**SERVICE SHEET**

Case Name: In\_re\_JBS\_USA\_HOLDINGS\_INC\_

Case Number: 2015OFC00001

Document Title: **Order Granting OFCCP'S Motion to Compel**

I hereby certify that a copy of the above-referenced document was sent to the following this 22nd day of April, 2016:



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Issue Date: 08 August 2016

Case Number: 2016-OFC-00006

*In the Matter of:*

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

*Plaintiff*

v.

**ENTERPRISE RAC COMPANY OF BALTIMORE, LLC,**

*Defendant.*

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

This case arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, and regulations pursuant to 41 C.F.R. Chapter 60. Jurisdiction over this action exists under Sections 208 and 209 of Executive Order 11246, and 41 C.F.R. § 60.

**Background**

On June 13, 2016, the Office of Administrative Law Judges ("Office") issued a *Notice of Docketing* ("Notice") after receiving an Administrative Complaint from the Regional Solicitor, Philadelphia office, U.S. Department of Labor, on behalf of the Office of Federal Contract Compliance Programs ("Plaintiff"), for alleged violations of the above Executive Order by Enterprise RAC Company of Baltimore, LLC ("Defendant").<sup>1</sup> On June 30, 2016, Defendant filed (i) *Defendant's Motion to Dismiss Plaintiff's Administrative Complaint* ("Motion to Dismiss"); *Memorandum of Points and Authorities in Support Thereof* ("Memo in Support"), and (ii) *Defendant's Request for Judicial Notice in Support of Defendant's Motion to Dismiss* ("Request for Judicial Notice"). Defendant filed its response to the Notice on July 13, 2016. Plaintiff filed *Opposition to Defendant's Motion to Dismiss Plaintiff's Administrative Complaint*

<sup>1</sup> Plaintiff alleges that from August 1, 2006 through at least July 31, 2008, Defendant "discriminated against black applicants to be management trainees"; "failed to maintain all relevant applications for the management trainee position"; "failed to conduct an adverse impact analysis of its total selection process for all positions"; and "failed to develop an auditing system to periodically measure the success of its affirmative action program." Plaintiff seeks to have Defendant (i) enjoined from refusing to comply with the above Executive Order; (ii) required "to provide complete relief to the affected black applicants, including, but not limited to, a position, back pay, interest, front pay, retroactive seniority, and all other benefits of employment"; and (iii) debarred from future government contracts until it satisfies Plaintiff that it has come into compliance, as well as cancellation of current government contracts.

ATA

("Opposition") on July 14, 2016. On July 20, 2016, I granted Defendant leave to file a reply to Plaintiff's Opposition. On August 4, 2016, Defendant filed *Defendant's Reply in Support of Defendant's Motion to Dismiss Plaintiff's Administrative Complaint* ("Reply").

### Positions of the Parties

#### Defendant

Defendant argues that the Administrative Complaint should be dismissed for failure to state a claim as required by 41 C.F.R. § 60-30.5(b). Defendant states that Federal Rule of Civil Procedure ("FRCP") 12(b)(6) applies because the regulations found at 41 C.F.R. Part 60-30 are silent regarding whether defendants may bring a motion to dismiss. (Memo in Support at 4.) Defendant contends that the plausibility standard of FRCP Rule 8, as articulated by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) are applicable to these proceedings, and that Plaintiff has failed "to state a plausible claim once all conclusory statements in the Complaint are disregarded." (Memo in Support at 5.) Defendant cites an order issued in *OFCCP v. JBS USA Holdings, Inc.*, 2015-OFC-001 (ALJ Mar. 17, 2015), which denies a defendant's motion to dismiss for failure to state a claim, but appears to apply the heightened pleading standard of *Iqbal* and *Twombly*. (Reply at 2.)

Defendant makes four main arguments why Plaintiff has failed to satisfy the plausibility standard. First, Defendant contends that Plaintiff has not accounted "for factors that may influence statistics to establish the plausibility that its calculations are reasonable, including at the pleading stage," as required. (Memo in Support at 6.) Second, Defendant asserts that "pattern or practice discrimination claims generally are proven through evidence of a concrete policy and/or statistical evidence, combined with anecdotal evidence of specific instances of discrimination." (Memo in Support at 6-7.) Defendant states that the Administrative Complaint "fails to specify who participated in the alleged practice of discrimination, what specific practice caused discrimination to occur, or even what facts may establish the existence of a claim of unlawful employment discrimination." Defendant further states that the Administrative Complaint does not:

provide any facts establishing Plaintiff's basis for contending that Defendant failed to maintain personnel and employment records or conduct "adverse impact" analyses, as Plaintiff also alleged without sufficient facts and foundation to sufficiently put Defendant on notice of Plaintiff's claims. Rather, Defendant is left to speculate as to what facts Plaintiff's conclusory assertions rest upon, and on what basis Plaintiff discounts Defendant's arguments during the audit as to why there was no violation of law.

(Memo in Support at 7.) Third, Defendant asserts that "Plaintiff fails even the minimal threshold requirement to recite the at-issue statistical disparities which led Plaintiff to believe a violation exists." Defendant argues that Plaintiff does not provide any "factual allegation[s]" that applicants were discriminated against, and that "Plaintiff cites not even one instance of unlawfully discriminatory practice, policy, or decision, nor even one individual who was the source of the allegedly unlawful discrimination." Defendant cites decisions involving

discrimination claims under the Equal Protection Clause and 42 U.S.C. § 1981 to argue that “alleging a claim of pattern and practice discrimination requires factual allegations.” (Memo in Support at 10.) Defendant also cites written responses made to the House Committee on Education and the Workforce by the Secretary of Labor. (Memo in Support at 13-14.)<sup>2</sup> Fourth, Defendant contends that Plaintiff has not been specific enough to allow Defendant “to adequately know the basis of Plaintiff’s cause of action,” (Memo in Support at 17), because Plaintiff (i) has not identified the specific documents Defendant failed to maintain, (Memo in Support at 16); (ii) gives only conclusory statements that Defendant “failed to conduct adverse impact analyses,” (Memo in Support at 17-18); and (iii) “makes no reference to any facts or information related to Defendant’s development, or lack thereof, of an “auditing system.” (Memo in Support at 19.)<sup>3</sup>

Defendant requests that judicial notice be taken of four documents. (Request for Judicial Notice at 1-2.) Defendant also requests an oral hearing on its Motion to Dismiss. (Motion to Dismiss at 2.)

### Plaintiff

Plaintiff contends that Defendant erroneously “attempts to require OFCCP to prove its case before it has even begun discovery.” (Opposition at 14.) Plaintiff contends that the pleading requirements are those established under 41 C.F.R. § 60-30.5(b), which requires the complaint to contain “a clear and concise statement sufficient to put the defendant on notice of the acts or practices it is alleged to have committed in violation of the order, the regulations, or its contractual obligations.” (Opposition at 2.) Plaintiff states that the *Twombly* plausibility standard is not applicable to this matter since the implementing regulations “include a specific provision” that governs complaints. (Opposition at 5.)

Plaintiff states that its Administrative Complaint “provides more than sufficient notice to withstand the pending Motion to Dismiss.” Plaintiff points out that its Complaint “identifies the type of discrimination”; when and where it occurred; the job position involved; the “stage of the hiring process it occurred” at; “that the discrimination is supported by statistical evidence”; and “recordkeeping and auditing failures,” along with “the particular regulations that [Defendant] violated.” (Opposition at 1.) Plaintiff explains that “[i]t is unclear what additional facts [Defendant] believes are required in order for it to plead that [Defendant] failed to do something required by regulations. (Opposition at 15.) Plaintiff points out that “[a]fter years of reviewing OFCCP’s data and discussing the violations, Enterprise cannot plausibly claim to be confused about the allegations in the case.” (Opposition at 12.)

Plaintiff contends that its Administrative Complaint would also satisfy the *Twombly* standard if that were applied, and that even under that standard, statistical data is not required at the pleading stage. (Opposition at 8-10.) Plaintiff explains that Equal Protection or § 1981 cases

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<sup>2</sup> Defendant also points out that Plaintiff has not “investigated beyond July 31, 2008,” and consequently is unable to satisfy the plausibility standard because its allegations are merely “uninformed and rank speculation.” (Motion to Dismiss at 16.)

<sup>3</sup> Defendant contends that Plaintiff has failed to satisfy even a notice pleading standard. (Reply at 2-4.)

have a heightened pleading standard requiring discriminatory intent that is not required in this case. (Opposition at 10.)

Plaintiff contends that it “properly pleaded ongoing violations based on information and belief” because “[a]t no point did [Defendant] indicate that it had corrected its racially discriminatory hiring practices to prevent future violations.” (Opposition at 13.) Plaintiff argues that “[e]ven under *Twombly*, a plaintiff can plead violations on information and belief” if the defendant is in control of the facts or if the belief is “based on factual information that makes the inference of culpability plausible.” (Opposition at 14.)

Plaintiff objects to judicial notice being taken of legislative materials submitted by Defendant because they are not relevant to the Motion to Dismiss. (Opposition at 13.)

### The Administrative Complaint

Plaintiff's Administrative Complaint includes the following provisions:

10. During the period of August 1, 2006 through July 31, 2008, Enterprise discriminated against black applicants to be management trainees, in favor of hiring white management trainees. Upon information and belief, OFCCP alleges that this discrimination continues to the present.

11. Management trainee is an entry-level, salaried position paying approximately \$35,000 per year. Successful management trainees had the opportunity to be promoted up the corporate ranks to positions of greater responsibility and higher compensation, and many of Enterprise's high-level managers began their careers as management trainees. The hiring process included an initial screening of written applications by a recruiting manager employed by Enterprise who had discretion to conduct a follow-up telephone screening. Applicants who were not rejected by the recruiting manager were interviewed in person by a recruiter. Those who were not rejected by the recruiter were then interviewed by a branch manager. Those who were not rejected by the branch manager were interviewed by a group rental manager, who extended job offers to the selected applicants. Black applicants were substantially more likely than white applicants to be rejected during the initial screening and after the first in-person interview.

12. Since at least August 1, 2006, Enterprise failed to identify and provide complete relief including, but not limited to, a position, lost wages, interest, retroactive seniority, and all other benefits of employment resulting from its discriminatory failure to hire black applicants to be management trainees. Upon information and belief, OFCCP alleges that this failure continues to the present.

14. During the period of August 1, 2006 to July 31, 2008, Enterprise failed to preserve and maintain all personnel and employment records for a period of two years from the date of the making of the record or personnel action involved.

Specifically, Enterprise failed to maintain all relevant applications for the management trainee position in violation of 41 C.F.R. 6-1.12(a). Enterprise also failed to conduct an adverse impact analysis of its total selection process for all positions, a violation of 41 C.F.R. 60-3.4 and 3.15(A)(2)(a). Further, Enterprise failed to develop an auditing system to periodically measure the success of its affirmative action program, in violation of 41 C.F.R. 60-2.17(d).

17. All of the procedural requirements prior to the filing of this Complaint have been met. On March 13, 2013, OFCCP issued to Enterprise the Notice of Violations based upon its findings of violations of the Executive Order. Following the issuance of the Notice of Violations, between April 2013 and May 2014, OFCCP held six conciliation meetings with Enterprise representatives in an attempt to secure voluntary compliance. On May 13, 2014, OFCCP issued to Enterprise a Notice to Show Cause why enforcement proceedings should not be initiated based upon its findings of violations of the Executive Order. Enterprise responded to the Notice to Show Cause with a voluminous production questioning OFCCP's statistical evidence and requesting that OFCCP conduct a tedious review of hundreds of applications. After performing this review, OFCCP provided its refined statistical analysis to Enterprise's counsel in June and July 2015. OFCCP's statistic showed that during the period of August 1, 2006 through July 31, 2008, black applicants for management trainee positions were being discriminated against because of their race. Enterprise's counsel responded on August 10, 2015, refusing to conciliate further unless OFCCP changed its conciliation methods. OFCCP's conciliation efforts were ultimately unsuccessful.

### Applicable Law and Analysis

#### Standard of Review for a Motion to Dismiss for Failure to State a Claim

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 C.F.R. Part 18 are applicable to the extent that the statute or implementing regulations are silent on a procedural issue. When 29 C.F.R. Part 18 is also silent on an issue, the Federal Rules of Civil Procedure ("Federal Rules") apply.

In this case, the regulations at 41 C.F.R. § 60-30 are controlling with respect to the specificity of the pleading required to survive a motion to dismiss for failure to state a claim. As stated in my order in *JBS USA Holdings, Inc.*, "[t]he initial pleading requirements for OFC complaints are relatively minimal." *JBS USA Holdings, Inc.* at 6.

The complaint shall contain a concise jurisdictional statement, and a clear and concise statement sufficient to put the defendant on notice of the acts or practices it is alleged to have committed in violation of the order, the regulations, or its contractual obligations. The complaint shall also contain a prayer regarding the relief being sought, a statement of whatever sanctions the Government will seek to impose and the name and address of the attorney who will represent the Government.

41 C.F.R. § 60-30.5(b).

The main requirement is that the complaint is sufficient to “put the defendant on notice” of the allegations. Although the pleading requirements of *Iqbal* and *Twombly* are instructive, the regulations above are controlling.<sup>4</sup>

I find that Plaintiff’s Administrative Complaint has satisfied the pleading requirements of § 60-30.5(b) by adequately putting Defendant on notice of the allegations. As Plaintiff correctly points out, its Complaint specifies the kind of discrimination; when and where it occurred; the job position involved; where in the hiring process it was alleged to have happened; “that the discrimination is supported by statistical evidence”; as well as “recordkeeping and auditing failures.” Nothing more is required at this stage of the administrative proceedings.<sup>5</sup>

#### Official Notice

This Office may “[t]ake official notice of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice.” 41 C.F.R. § 60-30.15. The Rules of Practice and Procedure before the Office of Administrative Law Judges further clarifies that official notice may be taken of facts “not subject to reasonable dispute” because it is either “[g]enerally known within the local area”; “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”; or “[d]erived from a not reasonably questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency’s specialized field of knowledge.” 29 C.F.R. §§ 18.201, 18.84.

Defendant requests that judicial notice be taken of the following documents: (i) Plaintiff’s Audit Scheduling Letter dated July 20, 2007; (ii) Plaintiff’s Notice of Violations dated September 17, 2013; (iii) Plaintiff’s Notice to Show Cause dated September 22, 2014; and (iv) a written statement by the Secretary of Labor made to the House Committee on Education and the Workforce. (Request for Judicial Notice at 1-2.)

I hereby take official notice of documents (i), (ii), and (iii).<sup>6</sup> Plaintiff has not objected, and the existence of these documents is not subject to reasonable dispute. I decline to take judicial notice of the Secretary of Labor’s written statement to the House Committee on Education and the Workforce.

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<sup>4</sup> Although the order in *JBS USA Holdings, Inc.* discusses *Iqbal* and *Twombly*, it is mainly for the purpose of explaining that a court should not make credibility determinations or weigh evidence at this stage of the proceedings. *JBS USA Holdings, Inc.* at 6. The order applies *Iqbal* and *Twombly* in the context of administrative proceedings where the OFCCP files a complaint as a result of a review and investigation in which the defendant participated. It does not apply *Iqbal* and *Twombly* to require a heightened pleading. *See id.* at 10.

<sup>5</sup> Defendant’s request for an oral hearing on its Motion to Dismiss is DENIED. *See* 29 C.F.R. § 18.3 (“no oral argument will be heard prior to hearing” on a written motion, “[u]nless the judge directs otherwise”).

<sup>6</sup> I note that official notice of these documents extends only to their existence, and not to the accuracy of the contents of the documents.

Order

Defendant's Motion to Dismiss is hereby DENIED. As the prehearing information has been filed and exchanged, this matter will be assigned to a presiding administrative law judge forthwith and set for hearing in due course.

**SO ORDERED:**



Digitally signed by STEPHEN R.  
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Location: Washington DC

**STEPHEN R. HENLEY**  
Chief Administrative Law Judge

**SERVICE SHEET**

Case Name: OFCCP\_- WASHINGTON\_D\_v\_ENTERPRISE\_RAC\_COMPA\_

Case Number: **2016OFC00006**

Document Title: **ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

I hereby certify that a copy of the above-referenced document was sent to the following this 8th day of August, 2016:



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3/23/2017

OFCCP v. Uniroyal, Inc., 1977-1 (Sec'y June 28, 1979)

DOL Home > OALJ > OFCCP > OFCCP v. Uniroyal, Inc., 1977-1 (Sec'y June 28, 1979)

USDOL/OALJ Reporter

OFCCP v. Uniroyal, Inc., 1977-1 (Sec'y June 28, 1979)

U.S. DEPARTMENT OF LABOR

Case No. OFCCP 1977-1

In the Matter of

U.S. Department of Labor  
Office of Federal Contract  
Compliance Programs  
Complainant

and

Uniroyal, Incorporated  
Respondent

DECISION AND ADMINISTRATIVE ORDER OF THE SECRETARY OF LABOR

Preliminary Statement

This matter arises under Executive Order 11246, as amended (hereinafter referred to as the Order), which prohibits employment discrimination based on race, color, religion, sex, or national origin by Government contractors. The order also imposes affirmative action obligations on Government contractors to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. The Secretary of Labor and Director of the Office of Federal Contract Compliance Programs are responsible for issuance and enforcement of regulations under the Order, found at 41 CFR Chapter 60.

This is an action brought by the United States Department of Labor, Office of Federal Contract Compliance Programs (hereinafter referred to as the OFCCP) against Uniroyal, Incorporated (hereinafter referred to as Uniroyal), to cause the termination of Uniroyal's existing contracts and sub-contracts and to have Uniroyal declared ineligible for all future Government contracts and subcontracts under section 209 (a) (5) and (6) of the Order, until such time as its Mishawaka Indiana facility is brought into full compliance with the Order and regulations issued pursuant thereto.

The Notice of Intent to Debar, dated July 28, 1976, issued by the OFCCP Director, enumerated numerous deficiencies found during compliance reviews of Uniroyal's Mishawaka, Indiana facility in September 1972, and February, 1976.

Generally, the Notice of Intent to Debar alleged that Uniroyal utilized discriminatory employment practices against its production and white collar female employees and

[Page 2]

applicants for employment and that Uniroyal discriminated against minority group persons and that Uniroyal failed to take the required affirmative action in violation of the Order and the regulations issued pursuant thereto.

After issuance of the Notice of Intent to Debar on July 28, 1976 and Uniroyal's subsequent request for a hearing, formal prehearing discovery was commenced by the OFCCP in November 1976. Thereafter, Uniroyal and the OFCCP each filed various requests for production of documents and interrogatories. On May 10, 1977, Uniroyal advised the OFCCP and the Administrative Law Judge (hereinafter referred to as the Judge) that it would no longer cooperate with prehearing discovery because it had determined that the prehearing discovery regulations, 41 CFR 60-30, were invalid. Thereupon, Uniroyal moved to vacate the March 10, 1977 order of the Judge compelling compliance with discovery. In four separate motions, the OFCCP moved for Executive Order sanctions based on Uniroyal's refusal to cooperate with discovery requirements. A hearing was held in South Bend, Indiana on November 1, 2, 3, and 4 and November 14 and 15, 1977 on motions seeking an order recommending termination of Uniroyal's current Government contracts and subcontracts and its debarment from future Government contracts and subcontracts.

All parties were represented by counsel at the hearing and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved. Upon the entire record, including observation of the witnesses and their demeanor, and briefs submitted on behalf of Uniroyal and the OFCCP, regarding the four motions for sanctions, the Judge found that Uniroyal is not in compliance with section 202(6) of the Order and the implementing rules, regulations and orders, and recommended that Uniroyal's present Government contracts be cancelled, terminated or suspended and that Uniroyal be declared ineligible from further contracts until such time that it can satisfy the Director of OFCCP that it is in compliance with the Order and the regulations issued pursuant thereto.

Summary of the Facts

Uniroyal is a New Jersey Corporation in the business of manufacturing and storing plastics and rubber products at its Mishawaka, Indiana facility and throughout the United States. A substantial part of Uniroyal's business is comprised of contracts and subcontracts with the United States Government and its agencies, and has been at all times material herein, a Government contractor subject to the Order and the implementing regulations, 41 CFR Chapter 60.

The Notice of Intent to Debar dated July 28, 1976, issued by the OFCCP Director, enumerated numerous deficiencies found on compliance reviews of Respondent's Mishawaka, Indiana facility in September 1972, and February 1976. In general, it alleged that Uniroyal is a Government contractor subject to the Order and that Uniroyal has utilized employment practices which: (1) discriminate against its production and white collar female employees and applicants for employment by assigning and restricting

them to lower level jobs than those held by males of comparable ability and seniority; (2) discriminates against minority group persons, in violation of the Order. Further, it was alleged that Uniroyal failed to take the required affirmative action and to provide appropriate relief for compliance with the Order and the implementing regulations.

After issuance of the Notice of Intent to Debar on July 28, 1976, and

[Page 3]

Uniroyal's subsequent request for a hearing, formal prehearing discovery was commenced in November 1976. On January 18, 1977, Uniroyal filed Requests for Production of Documents and on February 7, 1977, Uniroyal served interrogatories on the OFCCP. The OFCCP responded to Uniroyal's discovery requests.

The OFCCP on November 5, 1976 served its First Set of Interrogatories and its First Set of Requests for Production of Documents on Uniroyal. The Judge found that these discovery requests sought relevant information concerning Uniroyal's employment practices at its Mishawaka, Indiana facility. By orders of November 30, 1976 and January 26, 1977, Uniroyal was granted an extension of time to February 25, 1977, to answer the OFCCP's interrogatories and requests for production of documents. Uniroyal's notion to excuse itself from answering the OFCCP's interrogatories was denied by an order dated January 3, 1977. In its February 25, 1977 Answer and objections to Complainant's Interrogatories and First Set of Requests for Production of Documents, Uniroyal objected to certain interrogatories and requests, failed to answer twenty-five interrogatories in their entirety, and refused to supply information regarding twenty-eight other interrogatories and fourteen request items for time periods predating January 1, 1975.

Between February 25 and March 1, 1977, OFCCP representatives scheduled interviews of sixteen white collar employees held from March 3 through March 5, 1977. These interviews were arranged for the stated purpose of discussing and seeking information as to the interviewee's knowledge of Uniroyal's employment practices as part of the OFCCP's administrative enforcement proceeding against Uniroyal.

Upon learning of the scheduled interviews, John Sellers, Factory Manager of Uniroyal's Mishawaka facility, and Donald L. Frey, Manager of Industrial Relations and Equal Opportunity Administrator at Uniroyal's Mishawaka facility, called a staff meeting to determine what should be done regarding the scheduled interviews. It was determined that a uniform approach throughout the plant was needed.

It was also decided that it should be suggested to prospective interviewees that they attend the OFCCP interviews in the presence of an attorney; that the company would pay for such legal services; that Uniroyal management or supervisory personnel should recommend legal counsel to them; and that the legal counsel to be recommended was Timothy Woods.

The law firm with which Mr. Woods is employed has served as Uniroyal's local counsel since at least 1967. The firm has represented the company for a number of years and has entered an appearance in an action brought against Uniroyal pursuant to Title VII of the Civil Rights Act of 1964, Chrapliwy v. Uniroyal, Inc., 458 F.Supp. 252 (N.D. Ind. 1978). Mr. Frey was aware of this fact. The firm subsequently entered an appearance in Uniroyal Inc. v. Marshall, 579 F.2d 106 (7th Cir. 1978).

Timothy Woods was advised by Mr. Frey that the OFCCP would be conducting interviews with certain Uniroyal employees between March 3 and 5, 1977, and he had referred several to him and Mr. Blackmond, who is also employed by the law firm. With Uniroyal's attorneys present, it was alleged by the OFCCP that 11 of the 12 interviews conducted were curtailed or not pursued as to details of Uniroyal's employment practices. At the conclusion

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of the March 3, 1977 interviews, Woods went to Uniroyal's Mishawaka facility and discussed with Mr. Frey some of the events that had taken place while interviewing.

At a prehearing conference on March 10, 1977, the Judge established that the period for which Uniroyal would be required to provide information and documents requested in interrogatories and requests for production of documents would be October 14, 1968<sup>1</sup> until the present time. This was clarified by orders dated April 14, 1977, and April 21, 1977.

Uniroyal's Supplemental Answers and Objections to the OFCCP's First Set of Interrogatories and First Set of Requests for Production of Documents were filed on April 11, 1977, and failed to provide any information regarding twenty of the interrogatories. At the May 3, 1977 prehearing conference, the Judge ordered Uniroyal to supply information postdating October 14, 1968, sought in the OFCCP's First Set of Interrogatories and Requests for Production of Documents. The Judge also ordered Uniroyal to allow the OFCCP access to its records within 15 days.

On May 10, 1977, Uniroyal requested a stay in discovery proceedings so it could file a motion challenging the OFCCP's prehearing discovery regulations. On May 17, 1977 it filed a Motion to Stay Discovery, challenging the OFCCP's discovery regulations and enforcement thereof. Uniroyal's request for a stay of discovery was denied on May 23, 1977, on the ground that Uniroyal had contractually agreed to provide the requested information.

On May 25, 1977, the Judge entered a notice enlarging the scope of the appeal to determine whether there was sufficient basis for a recommendation to cancel and suspend all of Uniroyal's Government contracts because of its refusal to comply with discovery requirements of its contracts, the Order, and regulations.

On May 26, 1977, OFCCP filed its Motion for an Order Recommending Cancellation, Termination and Suspension of All Contracts Between Uniroyal and the Government as a result of Uniroyal's interference with the development and presentation of OFCCP's case. The Judge thereupon directed OFCCP representatives to return to Mishawaka to complete its investigation and to interview other female white collar Uniroyal employees. Of nine females contacted none agreed to a personal interview although one did consent to be interviewed by phone. The Judge concluded that Uniroyal's actions resulted in interviewees and potential interviewees not responding favorably to subsequent OFCCP requests.

The OFCCP, between May 25 through May 28, 1977, sought on three occasions to obtain information to its First Set of Interrogatories and Requests for Production of Documents and to gain entry to the Mishawaka facility for the purpose of inspecting and photographing documents and job descriptions and information. The requested

discovery was refused on advice of counsel. In addition, the OFCCP noticed Uniroyal and five of its officers, agents or employees to appear at depositions beginning May 25, 1977, pursuant to 41 CFR 60-30.11. Uniroyal conceded its officers, agents or employees had been served notice, but failed and refused to produce its officers, agents or employees who were properly noticed. On June 10, 1977, the OFCCP filed a Motion for an Order Recommending the Cancellation, Termination and Suspension of All Contracts Between Uniroyal and the Government for Uniroyal's failure to produce its personnel at the OFCCP's depositions.

On June 11, 1977, the OFCCP filed a Motion for an Order

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Recommending Cancellation, Termination and Suspension of All Contracts and Subcontracts Between Uniroyal and the Government because of Uniroyal's failure to comply with the court's orders directing it to admit or deny the OFCCP's requests. This was followed by a motion by the OFCCP on September 29, 1977, to have requests for admission 7, and 9 through 15 admitted and by an order dated October 21, 1977, declaring requests for admission 7 and 9 through 15 admitted. Uniroyal obtained a temporary restraining order from the United States District Court for the Northern District of Indiana, on June 22, 1978, on the basis of its challenge to the prehearing discovery regulations. However, the District Court denied Uniroyal's Motion for a Preliminary Injunction on August 15, 1977.<sup>2</sup> Thereafter, the OFCCP contacted Uniroyal to determine if the Company would now permit entry and discovery to take place before a hearing was rescheduled. Uniroyal refused to permit such discovery and a hearing was subsequently noticed and held in South Bend, Indiana on November 1, 2, 3, and 4 and November 14 and 15, 1977 on the OFCCP's four separate motions seeking an order recommending termination of Uniroyal's current Government contracts and subcontracts and its debarment from future Government contract activity. The four OFCCP sanction motions were:

Motion No. 1

This motion filed on May 19, 1977 sought to cancel, terminate and/or suspend all of Uniroyal's Government contracts because of its failure to provide full and complete responses to the OFCCP's First Set of Interrogatories and First Set of Requests for Production of Documents.

Motion No. 2

This motion filed on June 10, 1977, sought the cancellation, termination and/or suspension of Uniroyal's current Government contracts and subcontracts and debarment from future Government contracts and subcontracts for Uniroyal's failure to present its officers, agents, and employees for the OFCCP's properly noted depositions.

Motion No. 3

This motion filed on June 11, 1977 sought the cancellation, termination and/or suspension of Uniroyal's current Government contracts and subcontracts and debarment from future Government contracts and subcontracts for Uniroyal's failure to comply with the Judge's orders of May 12, and 19, 1977, directing it to answer the OFCCP's requests for admission 7 and 9 and their accompanying interrogatories.

Motion No. 4

This motion filed May 26, 1977 sought the cancellation, termination and/or suspension of all of Uniroyal's Government contracts for Uniroyal's interference with the OFCCP's development of its case by interjecting Uniroyal's attorneys in the OFCCP's interviews of potential witnesses.

In the course of the hearing, Uniroyal stipulated or the Judge found that Uniroyal admitted that it:

failed and refused to provide the information requested in 20 of the OFCCP's First Set of Interrogatories and that there was no acceptable justification for its failure; failed and refused to provide documents for inspection and copying requested in five of the OFCCP's First Set of Requests for Production of Documents and that there was no acceptable justification for this failure;

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blocked out information relating to active employee histories in violation of the Judge's prior instructions and failed to furnish supplemental information when the violation was called to Uniroyal's attention;

failed to provide what the Judge found to be important portions of "white collar" employee personnel file and information;

prevented OFCCP representatives from returning to its Mishawaka facility to inspect and copy documents which Uniroyal previously failed to make available, even after the Judge's order of May 3 to do so and the decision of the District Court on August 15, 1977.

In addition, the judge found that contrary to Uniroyal's assertion in its initial and supplemental answer to interrogatories 26 through 33 of the OFCCP's First Set of Interrogatories that it has not maintained since October 14, 1968, a policy or practice whereby it restricted and/or designated any jobs as male only or female only or male (female) jobs, the evidence overwhelmingly established this response was untrue. The Judge found that Uniroyal segregated employee folders and individually tabulated seniority lists on the basis of sex, until at least November 1970 and that it utilized a system of classifying male employees as Class A and females as Class B for selection, hiring, placement and recall of production and maintenance employees.

Discussion

Uniroyal, a Government Contractor, has been charged by the OFCCP with substantive violations of its contractual equal employment opportunity obligations under the Order. Uniroyal has requested and been granted an administrative hearing on these substantive violations. Having itself invoked this administrative remedy, and having itself served prehearing discovery requests on the OFCCP, Uniroyal nevertheless has refused to comply with the OFCCP's discovery requests primarily on the ground that the

regulations providing for discovery are invalid because not specifically authorized. The OFCCP, in an effort to enforce these regulations, has moved for sanctions against Uniroyal for its refusal to comply.

Section 201 of the Order provides that the Secretary of Labor shall be responsible for the administration of Part II of the Order which deals with "Nondiscrimination in Employment by Government Contractors and Subcontractors," and it authorizes him to adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes of the Executive Order.

Section 202 sets forth the Equal Employment Opportunity (EEO) clause, which is to be included in all non-exempt Government contracts. The EEO clause prohibits discriminatory practices, requires affirmative action to provide equal employment opportunities, and requires compliance with the implementing regulations and orders of the Secretary of Labor; see sections 202(1) and (4). Section 202(5) requires government contractors to furnish all information regarding compliance which the enforcing authority may require.

According to section 206(a), the Secretary is empowered to "investigate the employment practices of any Government contractor or subcontractor ... to determine whether or not the contractual provisions specified in section 202 of this Order have been violated."

Section 208 of the order authorizes the Secretary of Labor to provide for hearings prior to imposing sanctions, and specifically prohibits any order for debarment of any contractor from further Government contracts "without affording the contractor an

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opportunity for a hearing." Indeed, even prior to the commencement of formal enforcement proceedings, the contracting agency is required to make reasonable efforts to eliminate the problems through informal methods and conference, conciliation, mediation and persuasion; see section 209 (b) .

Pursuant to the power granted him in section 201, the Secretary of Labor has issued regulations implementing the Executive Order (see, 41 CFR 60-1, et seq.) and except for his regulation-making power, the Secretary of Labor has assigned responsibility for enforcement of Executive Order 11246 to the OFCCP; see 41 CFR 60-1.2.

The regulations provide that no order of debarment from further contracts or subcontracts shall be issued without the opportunity for a formal hearing before an administrative law judge, with rights to counsel, to present evidence and to cross-examination; see 41 CFR 60-30. In order that the administrative hearing may be fair and meaningful, the regulations also provide for prehearing discovery by both sides; see 41 CFR 60-30.

Uniroyal argues that these discovery regulations are outside the scope of the Order. In support of this proposition Uniroyal does not cite any provision of the Order with which the regulations conflict or which narrow the scope of the Order so as to exclude such regulations, but merely argues that they are unauthorized. However, it has been held by the courts that the Executive Order program has the force and effect of law. Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971); Farkas v. Texas Instrument, Inc., 375 F.2d 62 9 (5th Cir. 1967); Farmer v. Philadelphia Electric Co., 329 P.2d 3 (3rd Cir. 1964); United States v. New Orleans Public Service, Inc. (NOPSI) 553 F.2d 459 (5th Cir. 1977), United States v. Local 189, Papermakers, 282 F. Supp. 39 (E.D. La. 1968), aff'd 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1971). I also find that the regulations promulgated thereunder, which are not unlawful and plainly unreasonable or inconsistent with underlying authority, also have the force and effect of law. Maryland Casualty Co. v. United States, 251 U.S. 342 (1919); Commissioners v. So. Texas Lumber Co., 333 U.S. 496 (1948); United States v. NOPSI, supra.

I would note that in other instances where courts have been asked to hold an Executive Order implementing regulation invalid on the ground of lack of express statutory authorization, the courts have refused to so hold. For instance, in Contractors Ass'n of Eastern Pa., supra, it was argued that the Secretary exceeded his authority in issuing a regulation requiring affirmative action goals and timetables for remedying underutilization of minorities, since the Executive Order does not specifically mention goals and timetables. The Third Circuit held that such a regulation was authorized under the broad delegations of authority in section 201, 442 F.2d at 175. see also; Southern Illinois Builders Ass'n. v. Ogilvie, 327 F. Supp. 1154, aff'd; 471 F.2d 680 (7th Cir. 1972) . Similarly, in United States v. Duquesne Light Co., 423 F. Supp. 507 (W.D. Pa. 1976), the court held that the fact that backpay was not specifically mentioned as a possible remedy under the Executive Order did not mean that backpay was unauthorized, 423 F. Supp. at 510.

While no court has yet considered the validity of the particular regulatory provisions here at issue (except to the extent that NOPSI, supra, broadly upholds the regulations containing the prehearing discovery provisions) , I know of no

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provision of the Executive Order or of other law with which they conflict, and Uniroyal has pointed to none. Thus, under the rationale of Contractors Ass'n of Eastern Pa., supra and NOPSI, supra, I conclude that they are valid.

Indeed, far from conflicting with other law, regulations are specifically authorized under section 201. The regulations in issue here supplement and complement section 202(5) of the Order itself, which expressly requires Government contractors to supply all information which the Government may request pursuant to the implementing regulations and in connection with any compliance investigation. Section 202(5) was held to be valid in NOPSI, supra., 553 F.2d at 465. The appellant in that case had argued, inter alia, that section 202(5) was unconstitutional because it had not been specifically authorized by statute. The Fifth Circuit held that argument to be "without merit in light of the pattern of Congressional approval for the Executive Order program...." 553 F.2d at 472, n.12. Likewise, the absence of specific references to prehearing discovery in the Order or other statutes should not be interpreted as any indication of an intent to preclude it.

The prehearing discovery regulations also complement section 208 of the order, which authorizes the Secretary of Labor to hold hearings, and section 206, which authorizes investigations. Section 208 gives the Secretary authority to decide how to conduct hearings, and places no limits on his ability to provide for prehearing discovery.

Furthermore, administrative discovery is a widespread and favored procedure. Virtually all major Federal agencies significantly involved in Government procurement have promulgated regulations regarding disputes procedures which include prehearing discovery of some sort. Like the Executive Order discovery regulations, the discovery regulations of other agencies are deemed to be part of Government contracts, and the regulations are promulgated on the basis of general rulemaking authority. E.g., 38 CFR 1.77.4; 41 CFR 5A-60, Rule 14; 45 CFR 16.

I conclude that the regulations are authorized by the provisions of the Order authorizing regulations (section 202(l)), requiring contractors to disclose information (section 202(5)) and authorizing hearings (section 208). Moreover, Uniroyal has contracted to comply with these regulations and they do not conflict with underlying authority.

Having resolved the fundamental issue of the validity of the regulations, I will now address the exceptions to the Judge's "Recommended Decision," filed by the parties.

I would note that the Judge's findings and conclusions are based upon his personal observations and conclusions as to witness credibility and the facts, as developed during the course of the hearing. Therefore, his findings will not be disturbed if supported by the record.

I would also note that the regulations confer broad discretion upon the Judge to ensure that a fair hearing is conducted. Therefore, findings and conclusions made pursuant to this discretion will not be disturbed unless the Judge has abused his discretion.

#### Uniroyal's Exceptions

##### Uniroyal's Exception No. 1

Uniroyal excepts to the failure of the Judge to define the class of alleged discrimination as those present and former employees employed at the Company on or after January 28, 1976, which is 180 days prior to the filing of the Notice of Intent to Debar on July 28, 1976.

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The Exception is denied.

Uniroyal asserts that this limitation is consistent with Title VII of the Civil Rights Act of 1964, which must be given controlling weight in the instant proceeding. Aside from Uniroyal's characterization of applicable limitations on the Executive Order, I find that the Executive Order is limited only by the express prohibitions of Title VII. See, e.g., Contractors Ass'n of Eastern Pa., supra. I further find that neither Title VII, the Congressional history surrounding it, nor the authority cited by Uniroyal evidence an intent by Congress or the courts to make Title VII applicable to the Executive Order with respect to Uniroyal's assertion of a 180 day limitation on enforcement actions, brought by the OFCCP. Therefore, I hereby deny Uniroyal's exception.

##### Uniroyal's Exception No. 2

Uniroyal excepts to the failure of the Judge to confine the scope of discovery to the period after January 1, 1975, and to his failure to limit the discovery of information relevant to the issues delineated in the Notice of Intent to Debar.

The Exception is denied.

Uniroyal asserts that the alleged deficiencies in the instant proceeding arose from a compliance review conducted in January, 1976. On the basis of this assertion, Uniroyal unilaterally determined that the proper scope of the proceedings is limited to one year prior to the compliance review. However, the Company's position is inaccurate and ignores the fact that affected class violations were first outlined to the Company during a compliance review at Uniroyal's Mishawaka facility in September, 1972. These violations, in addition to those violations alleged as a result of the 1976 compliance review, were contained in the Notice of Intent to Debar which is the basis of the instant proceeding.

In any event, the law is clear that discovery is not limited to the issues raised by the pleadings and that the correct test for the scope of discovery is relevancy to subject matter of the suit. Goldinger v. Boron Oil Co., 60 F.R.D 562 (W.D. Pa. 1973). Discovery rules, particularly with respect to the complex issues involved in employment discrimination cases, are to be construed liberally in favor of the party seeking discovery. Rich v. Martin Marietta 522 F.2d 333 (10th Cir. 1975); Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973); Blue Bill Borts, Inc. v. Equal Employment Opportunity Commission 418 F.2d 355 (6th Cir. 1969). Thus, the Judge correctly recognized that discovery addressing past conduct which may have created an affected class is necessary and appropriate in order to show any present effects of past discrimination. See, United States v. Jacksonville Terminal, 451 F.2d 418 (5th Cir. 1971), cert. denied 406 U.S. 906 (1971).

Uniroyal also relies on Equal Employment Opportunity Commission v. Packard Electronics Division, 569 F.2d 315 (5th Cir. 1978), in support of its position. Packard, supra, concerns a review by the Fifth Circuit on whether to affirm a district court judge's exercise of discretion in refusing to grant discovery requests by the EEOC. The Court of Appeals found that the district court had based its decision on the criterion of relevance and concluded that the district court's determination would be upheld because it was not clearly erroneous. By the same standard, I find that the Judge, in the March 10 hearing, expressly

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considered relevance, in addition to burdensomeness to the Company, and therefore, affirm his refusal to further limit the scope of discovery.

Furthermore, section 202(5) of the Order imposes upon Uniroyal a contractual commitment to:

"furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders."

I note that the Order contains no time limits on the periods that the Government can engage in discovery, so long as the discovery is related to the contractor's compliance with the Executive Order. I also note that the applicable regulations vest broad discretion in the Judge in conducting such

hearings. See generally, 41 CFR 60-30.15. I conclude that although the Judge could have reasonably required broader discovery, the Judge exercised permissible discretion in defining the scope of discovery.

#### Uniroyal's Exception No. 3

Uniroyal excepts to all evidentiary and procedural rulings made by the Judge in response to objections made by Uniroyal.

The Exception is denied.

Uniroyal presumably excepts to the discretion exercised by the Judge. The applicable regulations allow the Judge to exercise broad discretion in conducting a hearing. I note that the regulations provide, in section 60-30.18, inter alia, that "formal rules of evidence shall not apply."

Insofar as the record does not disclose a particular evidentiary or procedural ruling (nor has Uniroyal cited any) which prejudiced or denied Uniroyal's right to a fair hearing, Respondent's exception is denied.

#### Uniroyal's Exception No. 4

Uniroyal excepts to the assumption of jurisdiction by the Judge, with respect to the allegations contained in OFCCP's Motion No. 4, and to the expansion of the hearing beyond the issues delineated in the Notice of Intent to Debar.

The Exception is denied.

As noted previously, OFCCP's Motion No. 4 for sanctions is based upon Uniroyal's failure to adhere to the requirements of 41 CFR 60-1.32. Presumably, Uniroyal, in its exception, is relying upon 41 CFR 60-1.26(b) which requires the Government to "attempt to resolve the matter, where appropriate, through the conciliation procedure set out in this chapter," before initiating an enforcement proceeding. However, the incidents which are the basis of OFCCP's Motion No. 4 occurred after this enforcement proceeding had been initiated. Therefore, the relevant regulations at that stage in the proceedings are those found at 41 CFR 60.30, entitled Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under E.O. 11246, which relate to the procedures and rules to be followed after administrative enforcement proceedings are instituted. These regulations define the scope of the Judge's jurisdiction broadly and, inter alia, confer the general power to impose appropriate sanctions for violations of regulations arising out of the discovery process.

Therefore, I conclude that no attempt to conciliate was required under

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the circumstances of this case at this stage of the enforcement proceedings under applicable regulations.

#### Uniroyal's Exception No. 5

Uniroyal excepts to Finding of Fact No. 1 wherein the Judge stated that sex and racial discriminating practices are those involved in this proceeding.

The Exception is denied.

Uniroyal asserts that the Judge was limited to matters alleged in OFCCP pending motions. However, I find that the Notice of Intent to Debar, alleging race and sex discrimination, conferred upon the Judge the jurisdiction to make a substantive determination of relevant issues. In addition, the evidence that the OFCCP presented to show that Uniroyal had filed under oath false answers to OFCCP's interrogatories is a sufficient basis for the Judge to make a substantive determination of these issues. Therefore, I hereby affirm the Judge's Finding of Fact No. 1.

#### Uniroyal's Exception No. 6

Uniroyal excepts to Finding of Fact No. 5 wherein the Judge found that the OFCCP's First Set of Interrogatories sought relevant information.

The Exception is denied.

Uniroyal asserts that OFCCP's interrogatories may not seek information outside the issues raised in the February 22, 1976, Show Cause Notice. However, in view of the nature of the case, the broad scope of permissible discovery and the discretion vested in the Judge, I hereby affirm the Judge's ruling that the interrogatories sought relevant information.

#### Uniroyal's Exception No. 7

Uniroyal excepts to Finding of Fact No. 8 and the failure to find that Uniroyal's objections to certain interrogatories and requests for admissions were based on valid legal grounds and therefore could limit its answer accordingly.

The Exception is denied.

The record clearly confirms Uniroyal's failure to answer twenty-five interrogatories in their entirety and that it refused to supply information regarding twenty-eight other interrogatories and fourteen request items for a time period predating January 1, 1975. It also discloses that the Judge considered and rejected the legal grounds Uniroyal interposed to justify its failure to provide the information. Therefore, I hereby affirm Finding of Fact No. 8 for the reasons set forth in my ruling on Uniroyal's Exception No. 2.

#### Uniroyal's Exception No. 8

Uniroyal excepts to that portion of Finding of Fact No. 9 wherein the Judge confirmed his previous orders' requiring Uniroyal to supply the Government with all requested information postdating October 14, 1968.

The Exception is denied.

As noted in my discussion of Uniroyal's Exception No. 2 where there is an allegation of employment discrimination which has created an affected class entitled to relief, it may be necessary to inquire into past conduct in order to fully examine the discriminatory system which created the affected class and to determine whether the affected class is suffering the present effects of past discrimination. Such inquiry into past conduct may, in some instances, predate the effective date of the Order. In the instant case, the Judge ruled that "Uniroyal would be

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required to provide information and documents requested by the OFCCP only from October 14, 1986, the effective date of the amendments to the Order which, *inter alia*, prohibited discrimination on the basis of sex. In view of my discussion in connection with Uniroyal's Exception No. 2, I hereby affirm the Judge's rulings requiring Uniroyal to supply all requested information postdating October 14, 1968.

Uniroyal's Exception No. 9

Uniroyal excepts to Finding of Fact No. 10 and the failure to find that Uniroyal's objections to the submission of any information regarding certain interrogatories was based on valid legal grounds and therefore could be limited accordingly.

The Exception is denied.

Uniroyal asserts that it was legally justified in refusing to supply the information, an argument it previously presented in support of Uniroyal's Exceptions Nos. 2 and 7. In view of my earlier rulings on these exceptions, I hereby affirm the Judge's rulings for the reasons stated in my rulings on Uniroyal's Exceptions Nos. 2 and 7.

Uniroyal's Exception No. 10

Uniroyal excepts to Finding of Fact No. 11 wherein the Judge found that Uniroyal failed to provide OFCCP with relevant material during OFCCP's inspection and copying trip to Uniroyal's Mishawaka facility and that the Uniroyal was ordered to furnish certain information contained in employee histories.

The Exception is denied.

Uniroyal asserts that representatives of OFCCP made two trips to Mishawaka and that counsel for OFCCP testified they had ample opportunity to copy any and all documents in OFCCP's personnel files, but chose not to do so. However, testimony of OFCCP's counsel indicated all the documents were not made available for inspection and copying to the representatives of OFCCP and was corroborated by Uniroyal's witness, Mr. Edgar L. Kavanaugh.

Uniroyal also asserts that the Judge expressly stated that it had never been ordered to refrain from blocking out portions of employee histories. However, the record discloses that the Judge intended that if records include information prior to October 14, 1968, such information would be disclosed (Tr. pp. 228-229).

Thus for the reasons contained herein, I hereby affirm Finding of Fact No. 11

Uniroyal's Exception No. 11

Uniroyal excepts to Findings of Fact No. 19 which states that Uniroyal admitted or stipulated during the hearing that it failed and refused to provide the information requested in twenty of OFCCP's First Set of Interrogatories and that there was no acceptable justification for its failure.

The Exception is denied.

Uniroyal asserts that it provided most of the information sought during the prehearing administrative proceedings, including settlement discussions. However, the testimony of Mr. Kavanaugh, who had primary responsibility for preparing answers to OFCCP's First Set of Interrogatories establishes that Uniroyal failed to provide information requested in specific interrogatories. Kavanaugh had failed to provide such information because Uniroyal had objected to the period of discovery and the information deemed relevant. However, the Judge overruled

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such objections. I hereby find that such rulings are not an abuse of discretion and therefore affirm Finding of Fact No. 19.

Uniroyal's Exception No. 12

Uniroyal excepts to Finding of Fact No. 19 which states that Uniroyal admitted or stipulated at the hearing that it failed and refused to provide documents for inspection and copying requested in five of OFCCP's First Set of Requests for Production of Documents and that there was no acceptable justification or showing for this failure.

The Exception is denied.

Uniroyal asserts that it did not provide requested documents on the ground that the information sought was irrelevant. As noted earlier, this objection was a basis for Uniroyal's objection to OFCCP's First Set of Interrogatories and was considered and rejected by the Judge.

Uniroyal also asserts that the remaining requested information either did not exist or was made available to OFCCP during its inspection visit. However, the record supports the finding of fact that there was no acceptable justification for Uniroyal's failure to make requested information or documents available or to block out portions of documents made available.

In view of my previous rulings denying Respondent's Exceptions Nos. 10 and 11, I hereby affirm Finding of Fact No. 19.

Uniroyal's Exception No. 13

Uniroyal excepts to Finding of Fact No. 20 which states that Uniroyal stipulated at the hearing that it blocked out information relating to active employee histories, that this action violated the court's prior instructions; and that when this violation was called to Uniroyal's attention, it refused to supply the information.

The Exception is denied.

As noted in my ruling on Uniroyal's Exception No. 10, the record clearly discloses that the Judge intended that if the records made available included information prior to October 14, 1968, such information would be disclosed. Therefore, I hereby affirm Finding of Fact No. 20.

#### Uniroyal's Exception No. 14

Uniroyal excepts to Finding of Fact No. 21 that "important portions" of white collar employees personnel files were not made available to OFCCP.

The Exception is denied.

Uniroyal asserts that no evidence was introduced at the hearing to prove that important portions of personnel files were kept from the OFCCP and that OFCCP's Exhibit No. 27 is not an official company document and thus cannot support the finding. However, the record supports the conclusion that Government's Exhibit No. 28, entitled "Salaried Personnel Status Form," is a true and correct copy of a company document regularly maintained in each employees personnel file. In addition the company's own witness, Mr. Kavanaugh, admitted that "Salaried Personnel Status Forms" and portions of personnel files were not made available to OFCCP at its Mishawaka facility. Therefore, I hereby affirm Finding of Fact No. 21.

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#### Uniroyal's Exception No. 15

Uniroyal excepts to Finding of Fact No. 22 which states that Uniroyal failed to provide its "salaried personnel status forms" which consolidated important personnel information about white collar employees although they had been specifically requested by OFCCP.

The Exception is denied.

Uniroyal asserts that such documents were never sought by OFCCP by way of a formal request for production of documents and that OFCCP counsel "simply mentioned" the document during the inspection visit to the Mishawaka facility. Uniroyal also asserts that the Company's Manager of Employment was not aware of the existence of such documents at the time but did subsequently determine that the form was used at the corporate headquarters in Connecticut and consequently unavailable. However the record shows that OFCCP sought written "employment histories" in their First Set of Interrogatories, Interrogatories 50 through 52, and in their First Set of Requests for Production of Documents, request 12. In response, the record indicates that the company represented that such documents would be available at its Mishawaka facility. Further, there is support in the record for the conclusion that such documents were, in fact, maintained at the Mishawaka facility and never produced for OFCCP. Thus, I hereby affirm Finding of Fact No. 22.

#### Uniroyal's Exception No. 16

Uniroyal's excepts to Finding of Fact No. 33 which states that Uniroyal failed to provide to OFCCP position description or job specifications and requirements for all of its jobs as requested by OFCCP in interrogatory 2 and request for production of documents 1.

The Exception is denied.

Uniroyal asserts that its Manager of Employment testified without contradiction that it did not have job descriptions for every job and that all available job descriptions and job specifications had been provided. However, the record indicates that Mr. Kavanaugh's testimony was equivocal. In view of the testimony of OFCCP's counsel wherein he stated that the position descriptions provided the Government were substantially incomplete and interrogatory 2 which asked Uniroyal to individually list the description and/or specifications for the jobs without written position descriptions, I hereby affirm Finding of Fact No. 23.

#### Uniroyal's Exception No. 17

Uniroyal excepts to that portion of Finding of Fact No. 24 that held that it had previously failed to make available to OFCCP documents for inspection and copying.

The Exception is denied.

In support of its exception, Uniroyal relies on its prior exceptions to Findings of Fact Nos. 19 through 23. In view of my decisions to deny applicable exceptions, I hereby affirm Finding of Fact No. 24.

#### Uniroyal's Exception No. 18

Uniroyal excepts to Finding of Fact No. 25 which states that contrary to its assertions in its answers to interrogatories, Uniroyal segregated employee folders and individually tabulated seniority lists on the basis of sex until at least November 1970 and that it utilized a system of classifying male employees and female employees for selection, hiring, placement and recall of production and maintenance employees.

The Exception is denied.

Uniroyal asserts that this finding goes to the merits of the case which the

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Judge reserved for consideration at a later date. However, Finding of Fact No. 25 is based upon the evidence that OFCCP presented to show that Uniroyal had filed, under oath, false answers to OFCCP's interrogatories. I find that Uniroyal had the opportunity to support its denial that it had maintained a sex segregated employment system in violation of the Executive Order. I further find that the Judge exercised permissible discretion in making a finding based upon the evidence presented by OFCCP, in particular the cross examination of company witnesses Kavanaugh and Hoiffer. Therefore, I hereby affirm the Judge's Finding of Fact No. 25.

Uniroyal's Exception No. 19

Uniroyal excepts to the Judge's failure to find that the notices of deposition referred to in Finding of Fact No. 26 were accompanied by administrative subpoenas and that OFCCP never sought to enforce such subpoenas in a court of law.

The Exception is denied.

Uniroyal asserts that the Administrative Procedure Act and the Executive Order require that OFCCP seek to enforce such subpoenas in a court of law. However, as a government contractor, Uniroyal had made a contractual commitment to comply with the applicable regulations. These regulations include 41 CFR 60-30.11(a) which provides that a party may depose a representative of another party through the issuance of proper notice and that the use of administrative subpoenas are permitted, but not required. Furthermore, 41 CFR 6030.11(b) provides, in part, that "it shall be the obligation of each party to produce for examination any person, along with such documents as may be requested, at the time and place, and on the date, set forth in the notice, if that party has control over such person." Therefore, I hereby affirm Finding of Fact No. 26.

Uniroyal's Exception No: 20

Uniroyal excepts to the failure of the Judge to include in Finding of Fact No. 27 the fact that Uniroyal's failure to supply its officials was based upon its legal challenge to the validity of the regulations pending in the Federal courts.

The Exception is denied.

Finding of Fact No. 27 provides that "Uniroyal stipulated that it received the Notices to appear at the Government's depositions and that it failed and refused to produce its officers, agents or employees who were properly noticed" and is not disputed. Uniroyal's basis for such failure was repeatedly considered and rejected by the Judge. I find that the Judge did not err in failing to include Uniroyal's Finding of Fact No. 27 justification in his statement of and therefore, hereby affirm Finding of Fact No. 27.

Uniroyal's Exception No. 21

Uniroyal excepts to the failure of the Judge to find in Finding of Fact No. 32 that Uniroyal had legitimate reasons for not responding to certain requests of OFCCP for admissions based on pending legal challenges to the OFCCP discovery regulations in the Federal courts. Respondent also excepts to the failure of the Judge to find that Uniroyal came into compliance with the Order by answering requests for admissions.

The Exception is denied.

Finding of Fact No. 32 states that Uniroyal failed to respond to the OFCCP's Request for Admissions in a timely manner, in contravention of orders of the court. In failing to respond to the requests in a timely manner, Uniroyal relied on the same justifications as those presented throughout the hearing and considered herein; an argument repeatedly raised

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before the Judge, considered and dismissed. In addition, Finding of Fact No. 32 accurately reflects Uniroyal's failure to respond in a timely manner. Therefore, I hereby affirm Finding of Fact No. 32.

Uniroyal's Exception No. 22

Uniroyal excepts to the failure to note in Finding of Fact No. 35 that the female employees contacted by the OFCCP's representatives were unable to distinguish between the instant action and the Title VII action, Chrapliwy v. Uniroyal, Inc., supra. Uniroyal also states that Finding of Fact No. 35 ignores the testimony of two female employees who testified that their decision to attend the OFCCP's interviews accompanied by attorneys was made immediately after speaking with the OFCCP representatives and before mentioning the interviews to Uniroyal officials.

The Exception is denied.

The record supports Finding of Fact No. 35 in all respects. It is my conclusion that it was not erroneous for the Judge to fail to include the points raised by Uniroyal. Therefore, I hereby affirm Finding of Fact No. 35.

Uniroyal's Exception No. 23

Uniroyal excepts to the failure of the Judge to note in Finding of Fact No. 31 that the female employees contacted by the OFCCP officials became upset and sought the advice of their supervisors. Uniroyal also excepts to the failure of the Judge to note that the women viewed OFCCP's investigation as connected with the Title VII litigation in which these particular women were not involved and wanted to stay uninvolved.

The Exception is denied.

The record supports Finding of Fact No. 37 in all respect It is my conclusion that it was not erroneous for the Judge to fail to include the points raised by Uniroyal. Therefore, I hereby affirm Finding of Fact No. 37.

Uniroyal's Exception No. 24

Uniroyal excepts to Finding of Fact No. 38. Finding of Fact No. 38 states that Uniroyal determined that a uniform approach through the plant regarding the scheduled interviews was needed. It also states that Uniroyal decided to suggest to prospective interviewees that they attend, the OFCCP interviews in the presence of an attorney; that Timothy Woods would be recommended as legal counsel; and, that the Company would pay for his services.

The Exception is denied.

Uniroyal asserts that the record demonstrates that the employees personally decided they desired legal representation and either requested the name of an attorney from the Company or insisted that the Company supply them with a lawyer. Uniroyal also asserts that the record shows that the Company only recommended specific attorneys by name when an employee did not have a personal lawyer, that Uniroyal made clear to the employees that they could use their own attorneys and that, in either event, the Company would pay their legal expenses.

However, the record supports Finding of Fact No. 38 in all respects. It is my conclusion that it was not erroneous for the Judge to fail to include the points raised by Uniroyal. Therefore, I hereby affirm Finding of Fact No. 38.

#### Uniroyal's Exception No. 25

Uniroyal excepts to the failure to note in Finding of Fact No. 39 that the

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employees chose to have Mr. Woods as their attorney after full disclosure of his relationship with Uniroyal and to the failure to find that the employees had a right to attend the interview with counsel.

The Exception is denied.

Finding of Fact No. 39 states that the law firm with which Mr. Woods is employed and associated represented the Company for a number of years and has entered an appearance in Chrapliwy v. Uniroyal, Inc., *supra*, and Uniroyal, Inc. v. Marshall, *supra*. These facts are supported by the record and are not disputed by Uniroyal. I conclude that it was not erroneous for the Judge to fail to include the points raised by Uniroyal. Therefore, I hereby affirm Finding of Fact No. 39.

#### Uniroyal's Exception No. 26

Uniroyal excepts to the failure to find in Finding of Fact No. 40 that of the sixteen or seventeen employees interviewed, four or five of them were interviewed without the presence of any counsel and further excepts to the finding that the interviews were curtailed because they were conducted in the presence of private counsel.

The Exception is denied.

The record supports Finding of Fact No. 40 in all respects. It is my conclusion that it was not erroneous for the Judge to fail to include the points raised by Uniroyal. Therefore, I hereby affirm Finding of Fact No. 35. Consideration of the legal issues raised by Uniroyal in the exception dealing with, section 60-1.32 is deferred until Uniroyal's Exception No. 38 which more properly excepts to the Judge's conclusion of law.

#### Uniroyal's Exception No. 27

Uniroyal excepts to Finding of Fact No. 41 which states that Mr. Woods discussed the interviews with Mr. Frey and that Uniroyal sought and was in fact-furnished information regarding the substance of the interviews. Uniroyal further excepts to the Judge's apparent reliance upon the OFCCP assertion that Uniroyal had knowledge of the interviews because of the detailed affidavits of attorneys Woods and Blackmond.

The Exception is denied.

The Judge's Findings are based upon his personal evaluation of the credibility of the witnesses. The record indicates that Mr. Woods had occasion to discuss the interviews with Mr. Frey. I decline to endorse Uniroyal's speculation concerning such a basis. Therefore, I hereby affirm Finding of Fact No. 41.

#### Uniroyal's Exception No. 28

Uniroyal excepts to the implication of Finding of Fact No. 43 that the Company had any part in other female employee subsequently declining to be interviewed by the OFCCP.

The Exception is denied.

Finding of Fact No. 43 states that "Uniroyal's actions resulted in female interviewees and potential interviewees not responding favorably to Government subsequent requests, with Government representatives in the presence of Uniroyal attorneys." The record supports Finding of Fact No. 43 in all respects. It is my conclusion that it was not erroneous, for the Judge to find that Uniroyal's actions resulted in female interviewees and potential interviewees not responding favorably to subsequent OFCCP requests. Therefore, I hereby affirm Finding of Fact No. 43.

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#### Uniroyal's Exception No. 29

Uniroyal excepts to the statement in the "Discussion and Conclusions" portion of the Recommended Decision that Uniroyal's actions constituted a refusal to cooperate and that the facts in this proceeding are not in substantial dispute. Uniroyal further excepts to the statement that it had contracted to comply with the prehearing discovery regulations.

The Exception is denied.

Uniroyal asserts that its actions were based on good faith legal challenges to the regulations. As discussed earlier, these legal challenges were considered and rejected by the Judge. Thus, it cannot be disputed that Uniroyal has failed to provide requested information in the face of repeated orders of the Judge. I conclude that Uniroyal's actions have frustrated the purpose and intent of the instant proceeding and find no error in the Judge's characterization that these actions constitute "a refusal to cooperate."

As evidenced by Uniroyal's Exceptions Nos. 4 through 27, it was inappropriate for the Judge to state that the facts in this proceeding are not in substantial dispute. However, I conclude that such error was harmless in nature.

In addition, as discussed and concluded herein, Uniroyal is a Government contractor subject to the provisions of Executive Order 11246 and the rules and regulations issued pursuant thereto. As such, Uniroyal agreed to comply with the EEO clause of its Government contracts wherein it agreed to "comply with the rules, regulations and relevant orders of the Secretary of Labor." Therefore, I hereby deny Uniroyal's Exception 29.

#### Uniroyal's Exception No. 30

Uniroyal excepts to the characterization of the governing law in Conclusion No. 3 which states that the regulations of a Federal agency which do not conflict with the authorizing provisions of Federal law have the force and effect of law.

The Exception is denied.

Uniroyal asserts that the proper test of the validity of any regulation under the Order is whether it is authorized by Congress or whether it is within the scope of the Order. Uniroyal, in support of its position, cites cases which state that regulations have validity only to the extent that they remain within the scope of the Executive Order. See, Pan American World Airway v. Marshall, 15 FEP Cases 1607 (S.D.19.Y. 1977); NOPSI, supra. Although I would note that there is little, if any, distinction between the standards urged by the Uniroyal and the standard adopted by the Judge, I hereby affirm the Judge's Conclusion No. 3. I conclude that it is well established that regulations used by government agencies, pursuant to Federal law, have the force and effect of law unless they are in conflict with the authorizing provisions. Maryland Casualty Company v. United States, 251 U.S. 342 (1920); Leslie Miller v. Ash, 352 U.S. 187 (1996); Paul v. United States, 371 U.S. 245 (1963); G.L.Christian and Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963); Barclay v. United States, 333 F. 2d 847 (Ct. Cl. 1963).

#### Uniroyal's Exception No. 31

Uniroyal excepts to Conclusion No. 4 which states, inter alia, that the prehearing discovery regulations, issued pursuant to Order do not conflict

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with the provisions of the Executive Order and therefore have the force and effect of law. Uniroyal also excepts to the characterization of its position in reliance on the NOPSI, supra, decision.

The Exception is denied.

It is my view that the Judge is correct in his conclusion as for the validity of the regulations. Far from conflicting with the Order, the regulations are specifically authorized by the provision of the Order authorizing the Secretary of Labor to adopt such rules and regulations as he deems necessary and appropriate to achieve the purposes of the Order (section 201) .

In addition, the regulations in issue supplement and complement the provision of the Order which expressly requires Government contractors to supply all information which the Government may request 'pursuant to the Secretary of Labor's regulations and in connection with any compliance investigation (section 202(5)), Section 202(5) was held to be valid in NOPSI, supra. The appellant in that case argued, inter alia, that § 202(5) was unconstitutional because it had not been specifically authorized by statute. The Fifth Circuit held that argument to be "without merit in light of the pattern of Congressional approval for the Executive Order program ..." 553 F.2d at 472, N.12. While the Court of Appeal's Decision in NOPSI was recently vacated and remanded by the Supreme Court for reconsideration of the Company's Fourth Amendment argument in light of the Court's holding in Marshall v. Barlow's Inc., 436 U.S. 307(1978), the portion of the holding of the Court of Appeals cited by the Judge in Conclusion No. 4, and relied upon herein, was not vacated.

The prehearing discovery regulations also complement section 208 of the Executive Order, which authorizes the Secretary of Labor to hold hearings, and section 206, which authorizes investigations. Section 208, in particular, gives the Secretary authority to decide how to conduct hearings and places no limits on his ability to provide for prehearing discovery.

The Order explicitly gives the Secretary of Labor broad power to engage in fact-gathering during the investigative stage to ascertain compliance and to hold enforcement hearings to prosecute violations discovered during those investigations. In view of the broad rulemaking authority conferred upon the Secretary and given the detailed enforcement scheme and broad investigative powers established by the Executive Order, the prehearing discovery rules at issues are both reasonable and appropriate. Therefore, I hereby affirm the Judge's Conclusion No. 4.

#### Uniroyal's Exceptions No. 32

Uniroyal excepts to Conclusion No. 8 that it is contractually required to comply with the prehearing discovery regulations.

The Exception is denied.

Pursuant to section 202(4) of the Executive Order, Uniroyal has agreed to:

"... comply with all provisions of Executive Order 11246... and of the rules, regulations, and relevant orders of the Secretary of Labor."

Given its clear contractual commitment to comply with the Secretary's regulations, and in view of any earlier conclusion that the prehearing discovery regulations are

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valid, I hereby affirm the Judge's Conclusion No. 8.

Uniroyal's Exception No. 33

Uniroyal excepts to Conclusion No. 9 which states that based on Findings of Fact No. 5 through 25, Uniroyal has breached its duty as a Government contractor to fully and completely answer OFCCP interrogatories and requests for production of documents, violated at least five court orders, and further, refused to permit entry by OFCCP representatives to inspect and copy records in accordance with the terms of the contracts and applicable regulations.

The Exception is denied.

In view of previous rulings upholding the applicable Findings of Fact, I hereby affirm Conclusion No. 9.

Uniroyal Exception No. 34

Respondent excepts to the reaffirmation in Conclusion No. 11 of the Judge's Order denying Uniroyal's Motion to Stay Discovery.

The Exception is denied.

In support of its exception, Uniroyal relies on the reasons stated in its Exception No. 28. In view of my previous rulings affirming the applicable Findings of Fact and denying said exception, I hereby affirm Conclusion No. 11.

Uniroyal's Exception No. 35

Uniroyal excepts to Conclusion No. 12 that it provided false and misleading answers to certain OFCCP interrogatories.

The Exception is denied.

In support of its exception, the Uniroyal states that it relies on the reasons stated in Exception No. 17. However, the reasons stated in Exception No. 18 are more applicable and presumably the Uniroyal intends to rely on the reasons stated therein. In Exception No. 18, Uniroyal excepts to Finding of Fact No. 25 and states, *inter alia*, that the Judge failed to delineate or analyze the evidence relied on to establish that Uniroyal's responses to interrogatories 26 through 33 were untrue. In view of my previous ruling affirming Finding of Fact No. 25, I hereby affirm Conclusion No. 12.

Uniroyal's Exception No. 36

Uniroyal excepts to the statement in Conclusion No. 13 that it breached any duty under the regulations to produce its officers, agents or employees for depositions.

The Exception is denied.

In support of its exception, Uniroyal relies on the reasons stated in its Exceptions Nos. 18 and 19. However, the reasons stated in Exceptions 19 and 20 are more applicable and presumably it intends to rely on the reasons stated therein. Uniroyal, in Exceptions Nos. 19 and 20, excepts to Findings of Fact Nos. 26 and 27: the failure of the Judge to find that OPCCP never sought to enforce its administrative subpoenas in a court of law, and that its reason for failure to supply its officials was based upon its pending legal challenge to the regulations. In view of my previous rulings affirming the applicable findings of fact and denying said exceptions, I hereby affirm the Judge's Conclusion No. 13.

Uniroyal's Exception No. 37

Uniroyal excepts to Conclusion No. 14 which states that based upon Findings of Fact 29 through 34 and the record, Uniroyal breached its duty to properly answer the court's orders when it failed and refused to timely admit or deny the OFCCP's Requests for

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Admissions.

The Exception is denied.

In support of its exception, Uniroyal relies on the reasons set forth in exceptions to Findings of Fact Nos. 19 through 34. In view of my previous rulings affirming the applicable findings of fact and said exceptions, I hereby affirm the Judge's Conclusion No. 14.

Uniroyal's Exception No. 38

Uniroyal excepts to the statements in Conclusion No.15 that Uniroyal "orchestrated" the hiring of counsel, that its activities have been tantamount to interference under 41 CFR 60-1.32 and to the Judge's interpretation of said provision.

The Exception is denied.

In order to prove a violation of 41 CFR 60-1.32, OFCCP must establish that the contractor has failed to take all necessary steps to ensure that no person intimidates, threatens, coerces or discriminates against any individual for the purpose of interfering with, *inter alia*, furnishing information, or assisting or participating in any manner in an investigation or hearing. In order to conclude that this section has been violated, it is not necessary to base that conclusion on a finding of actual coercion. A failure to

take all appropriate action to avoid possible coercion or intimidation constitutes a violation of 41 CFR 60-1.32, regardless of whether Uniroyal successfully coerced or intimidated any employees.

From a thorough review of the entire record, I conclude that the Judge's conclusion that section 60-1.32 was violated is supported by the facts underlying the Judge's conclusion that Uniroyal "orchestrated" the hiring of counsel for the employees which OFCCP sought to interview. These facts include, but are not limited to, Uniroyal's suggestion to its employees that they be represented by the same attorneys who represented Uniroyal in the prior Title VII action, Chrapliwy v. Uniroyal, Inc., *supra*, and the presence of those attorneys while the representatives of OFCCP attempted to interview Uniroyal employees.

In addition, I would note that the special nature of the employment relationship makes certain conduct, under appropriate circumstances, more coercive and intimidating than would otherwise be the case, e.g., Blue Flash Express, Inc., 109 NLRB 591 (1954); Struksnes Construction Co., 165 NLRB 1062 (1967); Wirtz v. Continental Finance and Loan Co., 326 F.2d 561 (5th Cir. 1964).

Therefore, I hereby affirm the Judge's conclusion that the totality of Uniroyal's conduct constituted a violation of 41 CFR 60-1.32.

#### Uniroyal's Exception No. 39

Uniroyal excepts to the failure to hold in Conclusion No. 16 that cancellation termination, suspension or debarment from Government contracts is an improper sanction for violation of the contractual provisions of section 202 of the Executive Order.

The Exception is denied.

Pursuant to section 202(4) of the Order, Uniroyal has a contractual commitment to "comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor." In addition, pursuant to section 202(6) of the Executive Order, Uniroyal has contractually agreed that "in the event of the contractor's noncompliance with the EEO clauses of this contract or with any of such rules, regulations, or orders," appropriate

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sanctions, including those specified in Conclusion No. 16 maybe imposed. Therefore, I hereby affirm said conclusion.

#### Uniroyal's Exception No. 40

In Conclusion No. 17, Uniroyal excepts to the following conclusions:

- ▣ that a class action for monetary relief is maintainable under the Order;
- ▣ that an enforcement action under the Order cannot be conducted without discovery;
- ▣ that an authorized compliance review was conducted by the OFCCP at Uniroyal's Mishawaka facility in 1977;
- ▣ that Uniroyal refused to cooperate in the prehearing discovery proceedings;
- ▣ that the subpoena power is not an issue in this proceeding;
- ▣ that the Secretary of Labor's prehearing discovery regulations are valid, and that Uniroyal violated them;
- ▣ that a hearing on the merits without benefit of discovery would be fruitless;
- ▣ that Uniroyal breached its contractual obligations by failing to comply with prehearing discovery requirements, and that such violation constitute a contract breach of the type warranting the application of sanctions;
- ▣ that the prehearing discovery regulations are not unlawful or unreasonable and that they do not conflict with or go beyond underlying authority;
- ▣ that Uniroyal's conduct warrants sanctions against it as authorized by section 202(6) of the Order.

Regarding those exceptions concerning monetary relief under the Order, section 202(6) of the Order provides, *inter alia* that where a contractor violates the order or the rules and regulations issued pursuant thereto, the Secretary may impose sanctions and invoke remedies not only provided by the Order but also provided "by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law." In view of applicable regulations which provide for such relief, in addition to long standing practice and judicial support, I hereby conclude that a class action for monetary relief is maintainable under the Order. See, 41 CFR 60-2.1(b); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975); United States v. Duquesne Light Co., 423 F. Supp. 507 (W.D. Pa. 1976). In addition, in view of my rulings, contained herein, addressing the remaining issues raised by Uniroyal's Exception No. 40, I hereby affirm Conclusion No. 17.

#### Uniroyal's Exception No. 41

Uniroyal excepts to the conclusion and recommendations of the Judge contained in Conclusion No. 18 which concludes that Uniroyal is not in compliance with the rules, regulations and orders. Based upon section 202 (6) of the Order, he recommended that Uniroyal's present Government contracts be cancelled, terminated or suspended, and that Uniroyal be declared in-eligible from further contracts until such time as it can satisfy the Director of OFCCP that it is in compliance with the Order and the Secretary's regulations issued pursuant thereto.

The Exception is denied.

For the reasons state herein, I find that the Judge's recommendations are appropriate under the circumstances and I hereby adopt his conclusions and recommendations as contained in Conclusion No 18.

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In addition to the above exceptions, Uniroyal filed Supplemental Exceptions on June 22, 1978. OFCCP has correctly asserted that these exceptions, Nos. 42 and 43, are untimely and not in accordance with 41 CFR 60-30.28. The OFCCP further asserts that Uniroyal failed to appropriately move for an extension of time to file its Supplemental

Exceptions. Accordingly, OFCCP urges the Secretary to consider Uniroyal's Supplemental Exceptions Nos. 42 and 43. However, in view of the lack of any attendant prejudice, I hereby waive the abovementioned regulation and consider Uniroyal's Supplemental Exceptions.

Uniroyal's Exception No. 42

Uniroyal excepts to the Judge's reliance on NOPSI, supra, wherein the Court stated that "there has been implied Congressional approval of the (Executive Order) program; it can even be argued that there has been express ratification."

The Exception is denied.

Uniroyal asserts that the implied Congressional approval of the Executive Order program has been overruled by the recent Supreme Court case, Securities and Exchange Commission v. Sloan, 436 U.S. 103 (1978). However, Uniroyal does not state in its exception how the Court's ruling in Sloan affects the Executive Order program. Presumably, Uniroyal is relying upon the case because the Supreme Court found that a sufficient showing of Congressional awareness of the Securities and Exchange Commission's (SEC) construction of an Act had not been made. The Court stated that the SEC construction would result in a construction of the statute which is not only at odds with the language of the section in question and the pattern of the statute taken as a whole, but is extremely far reaching in terms of the virtually untrammelled and unreviewable power it would vest in a regulatory agency."

The instant case is clearly different. As indicated in the NOPSI case and more recently the Supreme Court in Regents of the University of California v. Bakke, 98 S. Ct. 2733 (1978), (Brennan, White, Marshall and Blackman concurring in part and dissenting, p. 2781, n.28), Congressional ratification of the Executive order program is evident.

Furthermore, the regulations in question are clearly consistent with the detailed enforcement scheme and broad investigative powers conferred by the Executive Order. In addition, the regulations do not expand this agency's powers but are consistent with those adopted by other agencies. Therefore, I hereby affirm my earlier rulings affirming applicable conclusions of the Judge.

Uniroyal's Exception No. 43

Uniroyal excepts to Conclusion No. 9 which states, inter alia, that Uniroyal refused to permit entry by OFCCP representatives at its Mishawaka plant premises to inspect and copy records in accordance with the terms of the contracts and regulations issued pursuant to the order.

The Exception is denied.

In support of its exception, Uniroyal asserts that its refusal to permit entry by OFCCP representatives at its Mishawaka plant was justified since OFCCP representatives did not have a search warrant as required by Marshall v. Barlow's Inc., 436 U.S. 307 (1978).

However, the Barlow's decision is not applicable to the

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present case and can be distinguished in that Barlow's concerned the right of the agency to inspect the facility in the investigative, pre-enforcement stage whereas the present case concerns a refusal after the issuance of the administrative complaint.

In addition, Barlow's requires Occupational Safety and Health Administration compliance officers to obtain a search warrant when the employer fails to give its consent to the search. As a government contractor, Uniroyal has specifically consented to permit the Government to examine its records to determine if it has violated the Executive Order or regulations promulgated pursuant thereto.

In any event, Uniroyal had made no mention, until the filing of its Supplemental Exceptions, that its refusal was based upon its belief that the OFCCP was required to have a search warrant prior to inspection of its records, thus foreclosing the OFCCP even the opportunity to secure such a warrant had it decided to do so.

Further, as noted above, Uniroyal had made a contractual commitment to adhere to the provisions of the Executive Order and the prehearing discovery regulations. Therefore I hereby affirm Conclusion No. 9.

Exception of the Complainant, the Office of Federal Contract Compliance Programs

The OFCCP excepts to the Judge's determination that the OFCCP waived Uniroyal's violation of 41 CFR 60-1.32.

The Exception is granted.

The OFCCP asserts that its representatives sufficiently manifested their objection to the presence of Uniroyal's counsel during the March 1977 interviews. In any event, the OFCCP contends that the interference allegation is a continuing violation in this instance and that the OFCCP never manifested a waiver of Uniroyal employer actions and attendant effects. In addition, OFCCP asserts that public policy dictates that, as a matter of law, it cannot waive a violation of this nature.

I conclude that it was not until the final interview of March 5, 1977, conducted with Ms. Belinda Dolke, that the representatives of OFCCP were confronted with an unequivocal statement from a witness that the attorneys present actually represented Uniroyal. At that point, I find that the representatives of the OFCCP manifested sufficient objection to preclude a finding of waiver of any violation of 41 CFR 60-1.32.

In addition, I find that as a matter of law, Uniroyal's violation of 41 CFR 60-1.32 cannot be waived by the Government as a result of the acts of its agents. The regulation in question serves a substantial public interest in that it is intended to assure the public and affected employees, that they are free to come forward without threat of intimidation or interference and cooperate with a Government investigation, and thereby protect the public interest in ensuring that equal employment opportunities are afforded by all Government contractors. Therefore, I hereby overrule the Judge's determination that the OFCCP waived Uniroyal's violation of 41 CFR 60-1.32.

Exception of the Intervening Female Workers

The intervenors except to the Judge's failure to strike Uniroyal's defense and to recommend cancellation, termination, and debarment for the separate and additional reason that the company already has litigated and lost in United States District Court the issue it seeks to raise by its defense and relitigate in this proceeding.

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The exception is denied.

In view of the Judge's conclusion "that Uniroyal is not in compliance with the Secretary's rules, regulations and orders," I find no prejudicial error in the Judge's failure to strike the Company's defense. Accordingly, I hereby deny the intervenor's exception.

Conclusion and Administrative Order

After review of the record, I accept and adopt the Recommended Decision of the Administrative Law Judge except for Conclusion No. 15 which is modified herein. Therefore, I hereby order, in accordance with sections 209(a) (5) and (6) of the Order and 41 CFR 60-1.26 and 60-30.30, that: Uniroyal's present Government contracts and subcontracts be cancelled, terminated or suspended and that Uniroyal be declared ineligible from further contracts and subcontracts, and from extensions or modifications of any existing contracts and subcontracts, until such time that it can satisfy the Director of OFCCP that it is in compliance with Executive Order 11246 and the Secretary of Labor's regulations issued pursuant thereto.

The sanctions invoked herein shall be applicable to Uniroyal, its officers, subsidiaries and divisions and all purchasers, successors, assignees and transferees.

Signed at Washington, D. C., this 28th day of June, 1979.

RAY MARSHALL  
Secretary of Labor

**[ENDNOTES]**

<sup>1</sup>October 14, 1968, was the effective date of Executive Order 11375, which amended Executive Order 11246 to add "sex" as one of the prohibited grounds of discrimination.

<sup>2</sup>Affirmed, Uniroyal, Inc., v. Marshall, 579 F.2d 1060 (7th Cir. 1978).