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San Francisco, Ca

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Plaintiff,

v.

ORACLE AMERICA, INC.

Defendant.

Case No. 2017-OFC-00006

**OFCCP'S OPPOSITION TO ORACLE'S MOTION FOR JUDGMENT ON THE
PLEADINGS**

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I. INTRODUCTION

Oracle America, Inc.'s ("Oracle") motion for judgment on the pleadings seeks to overturn decades of precedent¹ by attempting to block the Office of Federal Contract Compliance Programs' ("OFCCP") ability to redress continuing violations arising both before and after the narrow temporal window for which Oracle decided to provide data during the compliance review. Oracle's motion relies on the wrong standard for pleading and ignores controlling precedent establishing that once a violation is found, OFCCP may seek redress in its complaint for "acts the same as or similar to those alleged" in a show cause notice but taking place after the period of review. *OFCCP v. Honeywell, Inc. ("Honeywell P")*, 77-OFCCP-3, 1993 WL 1506966, *7 (Sec'y, June 2, 1993). Moreover, the facts alleged here negate Oracle's claim that OFCCP has no evidence to support its allegations outside the narrow window for which Oracle supplied data. OFCCP identified an array of evidence uncovered during its investigation in its Notice of Violation ("NOV") and during the robust 10 month period for conciliation that support its claims here. At no point has Oracle ever asserted that the policies and practices for 2013 and 2014, which OFCCP determined to have a discriminatory impact on protected groups in compensation and in hiring, were ever changed before or since that time period.² Oracle had ample time and incentive to do so during the lengthy conciliation period and chose not to do so. OFCCP's complaint has an ample factual basis supporting its allegations for the full time period for which relief is sought.

¹ Oracle fails to acknowledge the numerous precedents adverse to its position despite the fact that OFCCP had cited these cases in its previously-filed motion on the temporal scope of discovery.

² An inference of continuing discrimination can be made in the absence of changed employment practices. "Proof that an employer engaged in racial discrimination [at an earlier date] might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decision-making process had undergone little change." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 310 n.15 (1977); *Bazemore v. Friday*, 478 U.S. 385, 402 (1986) (same).

Oracle also seeks to impose wholly new procedural hurdles that are nowhere described in regulation or case law by asserting that OFCCP cannot in one complaint seek redress for both a contractor's refusal to provide documents and substantive discrimination violations. The convoluted process advanced by Oracle is contrary to interests of victims, contractors, OFCCP, and this court alike. All parties have an interest in securing the swiftest resolution possible of any OFCCP investigation, rather than stretching such investigations into years or even decades of enforcement proceedings. Oracle has no basis for asserting that OFCCP, facing an uncooperative federal contractor that chooses to produce incomplete data, must choose between (1) pursuing an access case which, when including appeals, can take many years to resolve, leaving victims unremedied, and allowing unlawful practices to go uncorrected in the interim, and (2) pursuing a merits case in which the contractor's failure to cooperate during the investigation goes uncorrected. The regulations are not structured as Oracle suggests and no precedent supports Oracle's arguments.

II. ARGUMENT

A. Oracle's Motion for Judgment on the Pleadings Rests on the Wrong Standard for Judging the Sufficiency of the Pleadings

While OFCCP has adequately pled violations under any standard, Oracle's motion incorrectly argues that the pleading standards contained in the Federal Rules of Civil Procedure ("FRCP") apply in this case. Instead, OFCCP's regulations at 41 C.F.R. Part 60-30 ("OFCCP Rules") set forth the pleading requirements for administrative complaints filed by OFCCP:

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. Since the OFCCP Rules contain a specific provision, they govern the determination of the sufficiency of the complaint, in accordance with 41 C.F.R. § 60-30.1. *See*,

e.g., *OFCCP v. JPMorgan Chase & Co.*, 2017-OFC-7 (April 5, 2017) (“the regulations at 41 C.F.R. § 60-30.5 are controlling with respect to the specificity of the pleading required to survive a motion to dismiss for failure to state a claim”); *OFCCP v. Enterprise RAC Co. of Baltimore*, 2016-OFC-6 (Aug. 8, 2016) (same); *see also OFCCP v. JBS USA Holdings, Inc.*, No. 2015-OFC-1, at p. 16 (April 15, 2016) (“41 C.F.R. § 60-30.5(b) is the governing regulation for administrative complaints” filed by OFCCP); *cf. Evans v. U.S. EPA*, 2012 WL 3164358, ARB Case No. 08-059 (July 31, 2012) (holding that FRCP pleading standards do not apply to whistleblower complaint filed with the OALJ because the applicable regulations set forth a specific pleading standard); *Gallas v. Medical Center of Aurora*, 2017 WL 1968506 (ARB Apr. 28, 2017) (ALJ erred in dismissing claim that satisfied the “low threshold” for stating a claim in OALJ proceeding).

Compared to the FRCP that underlies Oracle’s motion for judgment on the pleadings, “the initial pleading requirements for OFC complaints are relatively minimal.” *JPMorgan Chase & Co.*, 2017-OFC-7, at p. 5. “The main requirement is that the complaint is sufficient to ‘put the defendant on notice’ of the allegations.” *Id.* at p. 6; *see also, JBS USA Holdings*, No. 2015-OFC-1, at p. 16 (April 15, 2016) (denying motion to dismiss when complaint provided “a clear and concise statement putting Defendants on notice” of the claims). With respect to time frame, an administrative complaint satisfies the requirements of the OFCCP Rules if it provides notice of “when [the discrimination] occurred.” *JP Morgan Chase & Co.*, 2017-OFC-7, p. 6; *see also Enterprise RAC*, 2016-OFC-6, p. 6 (same).

Oracle’s contention that the complaint is insufficient because it fails to meet the standards of FRCP “as espoused by *Twombly* and *Iqbal*, [is] without merit.” *JBS USA Holdings*, No. 2015-OFC-1, at p. 16 (April 15, 2016); *see also, Evans*, ARB Case No. 08-059, at p. *4 (rejecting applicability of “plausibility” requirement of *Iqbal* and *Twombly* to administrative complaints filed in whistleblower proceedings before the DOL). The Department’s pleading standards appropriately differ from those contained in the FRCP, which mostly governs complaints filed by

private parties with no prior notification obligation.³ By contrast, before OFCCP files administrative complaints, contractors have already received information about the alleged violations in the Show Cause Notice (“SCN”), and during the conciliation. *See* 41 C.F.R. § 60-1.28 (requiring a SCN putting a contractor on notice that enforcement proceedings may be instituted), and 41 C.F.R. § 60-1.20(b) (requiring “reasonable efforts . . . to secure compliance through conciliation and persuasion” when OFCCP finds deficiencies in a contractor’s compliance with the Executive Order 11246, as amended (“EO”)).

B. OFCCP’s Allegations of When the Discrimination Occurred Are Sufficient.

1. The Plain Language of the Complaint Satisfies the Pleading Requirements of 41 C.F.R. § 60-30.5.

OFCCP’s complaint satisfies the pleading requirements of OFCCP Rule § 60-30.5(b) by adequately putting Oracle on notice of the allegations, including when the alleged discrimination occurred.

The Complaint specified when the discrimination occurred: “from at least January 1, 2014, and on information and belief, from 2013 going forward to the present,” Oracle discriminated against females, African Americans, and Asians in compensation; and, “beginning from at least January 1, 2013 and on information and belief, going forward to the present,” Oracle discriminated against qualified African American, Hispanic and White applicants in favor of Asian applicants. *Id.* at ¶¶ 7-9, 10. Language virtually identical to these allegations has repeatedly been found to satisfy the pleading requirements of 41 C.F.R. § 60-30.5. *See, e.g., JPMorgan Chase & Co.*, 2017-OFC-7, p.6 (denying motion to dismiss allegations of discrimination “[s]ince at least May 15, 2012”); *Enterprise RAC*, 2016-OFC-6, at p.1, n.1, 6 (denying motion to dismiss allegation that the contractor discriminated “from August 1, 2006

³ Even under *Twombly* and *Iqbal*, private plaintiffs’ allegations of pattern and practice discrimination violations are deemed adequately pled despite being supported by *no* employer-specific statistical evidence. *See Moussouris v. Microsoft Corp.*, No. C15-1483JLR, 2016 WL 6037978, at *5–6 (W.D. Wash. Oct. 14, 2016).

through at least July 31, 2008”). In fact, the Complaint provides more precise notice of when the discrimination is alleged to occur than language recently upheld in *JBS USA*. 2015-OFC-1, at pp. 15-16, 20 (allegations of discrimination “to at least September 30, 2006”, put contractor on notice that discrimination after 2006 was at issue in enforcement proceeding), *citing OFCCP v. Bank of America*, 2010 WL 10838227, at *61 (DOL ALJ Jan. 21, 2010) (interpreting “since at least January 1993” to be an allegation of ongoing violations). Oracle’s motion for judgment on the pleadings should likewise be denied.

2. *Oracle’s Contention that OFCCP is Legally Precluded from Asserting Claims Beyond Oracle’s Preferred Temporal Scope Has Been Repeatedly Rejected.*

The gravamen of Oracle’s claims is not that OFCCP’s complaint fails to provide adequate notice of the claims at issue, but that OFCCP is legally precluded from asserting claims where the temporal scope of the violations is broader than the investigatory period in which most of the evidence was collected. This argument fundamentally misapprehends OFCCP’s claims here. Despite Oracle’s repeated suggestion, OFCCP does not allege any new claims. The complaint simply alleges the violations identified by OFCCP during its compliance review—violations which Oracle has had notice of since at least the March 2016 NOV—have continued unabated since 2013. Connell Decl., Exs. B and C; Amended Complaint ¶¶ 7-10, 18, 19. The evidence obtained during the compliance review shows compensation and hiring discrimination and Oracle’s failure to correct or suggest any alteration of any kind to their disputed practices provide an ample basis for asserting that the violations occurred since 2013 and are continuing.

Oracle’s position here is directly contrary to the Secretary’s decision in *Honeywell I*, 77-OFC-3, 1993 WL 1506966. In that case, which was “one of the largest discrimination cases” ever submitted to the Secretary, *id.* at *1, the contractor asserted that OFCCP was prohibited from seeking relief for violations after September 1975 in part “because there has been no

conciliation on such claims.” *Id.* at *3. The Secretary denied the contractor’s objection, even though the “show cause notice [issued in 1976] did not mention discrimination . . . after September 25, 1975 because, at that time, Plaintiff had no information indicating that discrimination in these areas continued and OFCCP had reason to believe such discrimination ceased.” *Id.* at 8.⁴ The Secretary found that “nothing in the record shows the government waived the right to seek relief for the [victims] and all other new hires in perpetuity” and that limiting the cause of action to remedying violations before September 1975 would effectively serve as a “grant of immunity to practice” the same discrimination after the cutoff date. *Id.* at 7. Relying in part on Ninth Circuit precedent, the Secretary observed that “[i]n comparable situations under Title VII, courts have permitted both private plaintiffs and the EEOC to prove that acts the same as or similar to those alleged in the charge, but taking place after it was filed, have occurred.” *Id.*⁵

The Administrative Law Judge in *OFCCP v. Enterprise RAC Company of Baltimore LLC*, 2016-OFC-0006 (Mar. 27, 2017), recently opined on this exact issue. In that case, the contractor argued that OFCCP could not pursue a continuing violation claim because it did not “follow OFCCP regulations for the post-[review] period.” *Id.* at 2. The contractor further argued—as Oracle does in its motion—that “[OFCCP] is bound to follow its procedures of

⁴ Here, contrary to the less favorable situation considered in *Honeywell*, OFCCP had every reason to believe that the alleged discriminatory practices and policies remained in place both because Oracle refused to change the disputed practices and because in a lengthy conciliation period, Oracle never once suggested its practices in 2014 were any different than they had been either before or since that time. Connell Decl., Ex. B and C; Amended Complaint ¶ 18.

⁵ The regulations also support the inclusion of continuing discrimination in a single enforcement action, by requiring that once a compliance evaluation begins, all personnel and employment records “are relevant until OFCCP makes a final disposition of the evaluation,” which (in enforcement actions) occurs 30 days after a final, unappealed order is issued. *Id.*; 41 C.F.R. § 60-1.12(a).

conducting an onsite review, issuing a notice of violation, attempting to conciliate and issue a show cause notice prior to filing a complaint for any period [after the review period].” *Id.* at 3.

The ALJ rejected these arguments, and stated:

I find that Plaintiff has followed its procedures. Plaintiff conducted a review, issued a notice of violation and a show cause notice and is only attempting to determine if the alleged violation continues or has been abated. Defendant argues that it has not violated the Executive Order, and it does not allege that any of its procedures have changed.

Id. at 5. The judge also concluded that “any further attempts to conciliate would be futile” since the parties had already conciliated “on these very issues and were unsuccessful in resolving the matter.” *Id.* at 6. The judge explicitly recognized that “Administrative law judges have allowed complaints to allege continuing violations,” and held that “evidence of post-[review period] conduct is relevant to whether Defendant has complied with the Executive Order.” *Id.* at 5–6 (citations omitted).⁶

Moreover, as the decision in *OFCCP v. Sunshine Biscuits, Inc.*, 81-OFCCP-2, 1984 WL 484540 (Dept. of Labor, Dec. 3, 1984) makes clear, notice through the NOV and SCN is not necessary in order to receive constitutional due process. As long as the contractor receives notice through the complaint, or at some time before the ultimate ALJ hearing on the issues, that notice is sufficient for constitutional purposes. *Id.* at *3 n. 2. Oracle will receive a hearing in the current ALJ proceedings, thus receiving “a full and fair opportunity to litigate all issues raised.” *Sunshine Biscuits*, 1984 WL 484540, at *3 n. 2 (rejecting due process argument raised related to the sufficiency of an OFCCP complaint).

⁶ See also the cases cited in OFCCP’s Motion for a Ruling Overruling Oracle’s Objections Regarding the Temporal Scope of Discovery, including *Dept. of Labor v. Jacksonville Shipyards Inc.*, 89-OFC-1 (Mar. 10, 1989) (granting OFCCP’s motion to compel discovery after the compliance review period, and rejecting arguments that separate conciliation efforts for each additional period of time were necessary); and *OFCCP v. Volvo GM Heavy Truck Corp.*, 1996-OFC-2, at 3 (Apr. 27, 1998) (rejecting the defendant’s argument that OFCCP was not entitled to discovery after the review period because the agency had “made no investigations or findings and did not conciliate for periods after [the review period]”).

3. OFCCP Has an Ample Factual Basis for the Claims Alleged.

OFCCP's allegations that the violations continued before and after the narrow snapshot of information provided are not based on guesses, speculation, or rumor. Oracle's MJP at pp. 14-15. OFCCP conducted a compliance review, in which it reviewed Oracle's employment policies and practices, interviewed management, human resources, and non-management employees, examined employee complaints, and conducted statistical analyses of the compensation data Oracle provided from 2014, and the applicant and hiring data from January 1, 2013 through June 30, 2014. Amended Complaint ¶¶ 6-10; Connell Decl., Ex. B, p. 2. During conciliation, Oracle refused to provide a rebuttal analysis or substantive response to the statistical evidence OFCCP included in the NOV. Amended Complaint ¶¶ 17, 18; Connell Decl., Ex. B, pp. 4-6 and Attachment A, and Ex. C, p. 2. It also failed to take the corrective actions listed in the NOV. Connell Decl., Ex. B, pp. 3-6, 8, and Ex. C; Amended Complaint ¶ 18. The evidence uncovered during OFCCP's investigation, and Oracle's failure to provide a legitimate explanation or correct the violations provides a justification for inferring that Oracle's discriminatory employment practices are continuing, as OFCCP alleged in the complaint. Amended Complaint ¶ 19.⁷ These allegations satisfy the stricter *Twombly* standard, although inapplicable in these proceedings.

Moreover, OFCCP's inability to complete a statistical analysis of Oracle's compensation for 2013 is entirely due to Oracle's misconduct. Oracle refused to supply 2013 compensation data in violation of the EO. *Id.* at ¶ 12. As with any contractor, this data is uniquely within Oracle's control, which is the reason that the regulations require that contractors maintain the data and supply it to OFCCP upon request. 41 C.F.R. §§ 60-1.12(a), (c); *see also* Government

⁷ The Supreme Court has specifically held that liability for discriminatory compensation practices continues with each pay check until the employer affirmatively "eradicates" the discrimination. *See Bazemore*, 478 U.S. at 395-96. *Cf.* Lilly Ledbetter Fair Pay Act of 2009, 123 Stat 5 (2009) (amending Title VII to make clear that the charging period for compensation discrimination restarts with every paycheck regardless of when the discrimination began).

Contractors, Affirmative Action Requirements, 62 Fed. Reg. 44174, 44178 (Aug. 19, 1997). Oracle's proclamation that the "OFCCP has substantial regulatory and Executive authority to conduct an extensive investigation," and therefore, had "no excuse" to rely on "information and belief" rings hollow when Oracle prevented OFCCP from conducting a full and complete investigation of compensation discrimination in 2013 by failing to supply data necessary to OFCCP's investigation in violation of the EO and implementing regulations. Under *Iqbal* and *Twombly*, plaintiffs may plead facts on information and belief when the facts are uniquely within the Defendant's control. *See Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010).

4. *Oracle's Motion Rests on Case Law that Is Plainly Inapplicable and Distinguishable.*

Oracle fails to cite any OFCCP cases in its motion for judgment on the pleadings, ignoring the cases cited above, which directly address Oracle's arguments. Instead, it relies on inapplicable cases in different contexts, applying different standards. Specifically, Oracle relies on three cases filed by the EEOC in Federal District Court for the proposition that dismissal of a claim is "appropriate where the agency neglects its pre-filing obligations." Oracle's MJP at p. 12. Notably, none of the cases Oracle cites arises in the context of a motion to dismiss. Two cases were decided on summary judgment, *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012) and *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d. 802 (S.D.N.Y. 2013). The other case arose from an action by the EEOC to enforce an administrative subpoena. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 59, 79 (1984) (holding EEOC charge that respondent had engaged in unlawful employment practices "on a continuing basis from at least July 2, 1965, until the present" met the notice requirements of EEOC charging regulations). Accordingly, none of these cases addressed the sufficiency of pleading under FRCP, or any other standard.

CRST and *Bloomberg* are distinguishable on the additional ground that the court determined on the merits that the EEOC had not met its pre-suit requirements with respect to **individual** claims, which required investigation and conciliation of each of the individual claims.

The court in *EEOC v. PMT Corp.*, 40 F. Supp. 3d 1122, 1129 (D. Minn. 2014), distinguished *CRST* on this ground, noting that the pre-suit investigation requirements were different than in a pattern and practice case. As the court explained in *EEOC v. JBS USA, LLC*, 940 F. Supp. 2d 949, 964-65 (D. Neb. 2013), in *CRST* “the issue was not whether the investigation was substantively sufficient, but whether the EEOC performed the investigation and conciliation steps before filing suit.” The court expressly rejected an invitation to review EEOC’s substantive findings during the investigation:

Courts “have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the Commission’s investigation.” *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir.2005) (Posner, J.). For this reason, “as a general rule, ‘the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency.’” *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir.2012) (quoting *EEOC v. KECO Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir.1984)); see also *Caterpillar*, 409 F.3d at 833 (stating “The existence of probable cause to sue is generally and in this instance not judicially reviewable.”) (citing *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 242-43, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980)).

JBS, 940 F. Supp. 2d at 694.

Contrary to Oracle’s suggestion, the cases it cites do not authorize the Court to review whether OFCCP had “reasonable cause” to issue the SCN. Trial evidence in an OFCCP pattern-and-practice discrimination case such as this one is not limited to the information that OFCCP obtained before filing a complaint. Under the EO, OFCCP is charged with (1) investigating violations of the order’s equal employment opportunity clause, (2) attempting to resolve violations it discovers through conciliation, and (3) issuing a SCN putting the contractor on notice that enforcement proceedings may be instituted when it has reasonable cause to believe that a contractor has violated the equal opportunity clause. See, e.g., 41 C.F.R. §§ 60-1.20, 60-1.28. These are conditions precedent to OFCCP initiating an enforcement action.

The Court’s role in this case is to conduct a *de novo* analysis of OFCCP’s allegations, not to evaluate the sufficiency of OFCCP’s investigation. *OFCCP v. Florida Hospital of Orlando*, , 2013 WL 3981196, ARB Case No. 11-011 (ARB 2013); see OALJ OFCCP Deskbook, Section

IV(A) (“review by the ALJ is *de novo*”). Ultimately, the court need only determine that OFCCP issued an SCN, which is a pre-requisite to this action. OFCCP alleges that it issued an SCN, which satisfies the pleading requirements for meeting this pre-requisite. Amended Complaint ¶ 18. The evidence supporting the violations will be weighed at the administrative trial, which will focus on whether the evidence supports the claims, not the sufficiency of the evidence supporting the NOV⁸ and SCN.

C. OFCCP’s Claim that Oracle Violated Regulations Requiring It to Supply Records to OFCCP During a Compliance Review Is Legally Sufficient

Oracle cites no authority for its assertion that OFCCP may only pursue violations of contractors’ obligations to provide documents to OFCCP during the compliance review through expedited hearing procedures. Oracle’s MJP, pp. 17-18. The language of the regulation suggests otherwise: “Expedited Hearings *may* be used . . . when a contractor . . . has refused to give access to or to supply records or other information as required by the equal opportunity clause.” 41 C.F.R. § 60-30.31 (emphasis added). The plain meaning of the term “may” indicates that the expedited procedure is an option for OFCCP, but not the exclusive tool available for seeking documents from contractors. *See, e.g. In the Matter of the Heavy Constructors Assoc. of the Greater Kansas City Area*, 1996 WL 376828 (ARB July 2, 1996) (the use of “may” in a regulation is “clearly permissive”).⁹

⁸ Neither the EO nor the regulations at 41 C.F.R. Part 60 requires issuance of a NOV, which OFCCP nevertheless issued to Oracle. Oracle suggests that OFCCP’s Federal Contract Compliance Manual (“FCCM”) establishes requirements for NOVs. However, the FCCM does not create legal rights or requirements. *See*, FCCM, Introduction (“The FCCM does not create new legal rights or requirements”); *see, e.g., Sunbeam Appliance Co. v. EEOC*, 532 F. Supp. 96, 99 (N.D. Ill. 1982) (EEOC’s compliance manual provides internal guidance to the EEOC, but does not confer rights on private parties).

⁹ The only case Oracle cites for its contention that OFCCP’s claim for “refusal to produce relevant data and records is legally improper,” is *OFCCP v. Google, Inc.*, 2017-OFC-08004 (OALJ, Dec. 29, 2016), a case in which OFCCP did use the expedited procedure that the regulations make available. Logically, *Google* provides no support for Oracle’s position. OFCCP’s use of the expedited procedure in one situation does not suggest that this is the

Contrary to Oracle's position, the regulations explicitly permit OFCCP to seek enforcement before the OALJ for multiple types of violations together, including "the results of a compliance evaluation," a "contractor's refusal to provide data for off-site review or analysis," or a contractor's "refusal to establish, maintain and supply records or other information as required by the regulations in this chapter. . . ." 41 C.F.R. § 60-1.26(b)(1) (ii), (vii), (viii). In addition, regulations authorize remedies in enforcement actions that do not distinguish between substantive and access violations. 41 C.F.R. § 60-1.26(b)(1) (enforcement actions may be brought "to enjoin violations, to seek appropriate relief, and to impose appropriate sanctions"). The regulations themselves indicate that these violations can be handled in the same type of enforcement proceeding.

Longstanding authority contradicts Oracle's assertion that OFCCP cannot allege claims for Oracle's refusal to produce documents during the compliance review, because the complaint does not seek an order compelling production of the records, which is the "only appropriate remedy for a 'refusal' claim." Oracle's MJP at 18. In *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 372 (D.D.C. 1979), the District of Columbia upheld the Secretary's debarment sanction (in an enforcement proceeding) against a contractor for refusing to produce documents. The court explained that the contractor's failure to produce documents violated both the Executive Order provision requiring contractors to permit access to information during compliance evaluations and the provision granting the Secretary authority to hold hearings (with the "concomitant power to compel the production of evidence"). *Id.* at 367-68. In ordering debarment as a sanction, the court rejected the contractor's argument that debarment was only authorized for noncompliance with substantive violations, as distinguished from violations of discovery or inspection orders. *Id.* at 371-72. In other words, *Uniroyal* confirms OFCCP's authority to seek a variety of remedies, including debarment, for Oracle's refusal to supply documents. In the complaint,

exclusive procedure at OFCCP's disposal when a contractor refuses to produce documents during the compliance review.

OFCCP sought two forms of relief explicitly authorized in enforcement proceedings, which could provide relief for Oracle's failure to supply records during the compliance review, "appropriate relief" and debarment.¹⁰ 41 C.F.R. § 60-1.26(b)(1).

Furthermore, requesting the production of documents as relief in this action is unnecessary, since the EO and implementing regulations permit discovery in enforcement proceedings. As the Court confirmed in *Uniroyal*, Oracle is separately obligated to provide documents in discovery that it refused to provide during the compliance review, subject to sanctions under the discovery rules if it continues to refuse to produce such records. See 41 C.F.R. § 60-30.10. In fact, OFCCP routinely obtains additional documents and data during enforcement proceedings that contractors failed to produce without bringing a separate denial of access action. For example, in *OFCCP v. JBS USA Holdings, Inc.*, 2015-OFC-1, at p. 2, 5 (Apr. 15, 2016), the ALJ recounted that the contractor produced adverse impact analyses during discovery that it had failed to produce during the compliance review, including analyses beyond the compliance review period.

Oracle's attempts to foreclose OFCCP's options for obtaining relief when contractors refuse to produce documents during the compliance review is not only contrary to the plain meaning of the EO and regulations themselves and case law, it is contrary to the policy of the EO. The Court should not impose on OFCCP the Hobson's choice Oracle seeks: either (1) bringing a separate expedited proceeding to obtain documents a contractor refuses to provide, thereby delaying an enforcement proceeding, or (2) losing the ability seek a remedy for this violation (or to obtain the documents through normal discovery procedures) in an enforcement

¹⁰ Oracle also asserts that "OFCCP asks for a negative inference against Oracle with regard to what unreviewed data might possibly have shown." Oracle's MJF at p. 16. Even if OFCCP had requested an adverse inference, which it did not, any such inference will be unnecessary after Oracle produces data and other information during discovery. At the hearing, OFCCP will rely on evidence to support its claims. Of course, if Oracle continues to refuse to produce relevant information during discovery, OFCCP could seek sanctions, including an adverse inference, in addition to debarment and "other appropriate relief." See FRCP 37.

action. Requiring OFCCP to pursue a separate denial of access case in every case where a contractor refuses to provide documents would greatly hobble the agency's ability to act efficiently and bring cases to an expedient close that benefits victims, the contractors, OFCCP, and this court alike. *See OFCCP v. Bank of America*, ARB Case No. 13-099, at p. 4 (Apr. 21, 2016) (2016 substantive decision of case filed in 1997, following appeal of procedural arguments); *OFCCP v. Convergys*, 2015-OFC-2 to 2015-OFC-8, 2015 WL 7258441 (denial of access cases filed on December 15, 2014, which remains pending before the Administrative Review Board).

III. CONCLUSION

For the reasons stated above, OFCCP respectfully requests that this Court deny Oracle's motion for judgment on the pleadings.

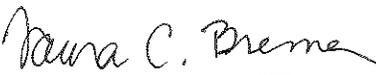
Respectfully submitted,

DATED: May 19, 2017

NICHOLAS C. GEALE
Acting Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

IAN H. ELIASOPH
Counsel for Civil Rights


LAURA C. BREMER
Senior Trial Attorney

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Attorneys for OFCCP

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

OALJ Case No.

OFCCP No. R00197955

2017 JAN -4 PM 2:19

US DEPT OF LABOR
ADMIN LAW JUDGES
WASHINGTON, DC

**COMPLAINT FOR DENIAL OF ACCESS TO RECORDS IN VIOLATION OF
EXECUTIVE ORDER 11246, SECTION 503 OF THE REHABILITATION ACT, THE
VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT, AND
REGULATIONS PROMULGATED THEREUNDER**

Subject to Expedited Proceedings under 41 C.F.R. § 60-30.31

Plaintiff Office of Federal Contract Compliance Programs, United States Department of Labor ("OFCCP") brings this action against Defendant Google, Inc., to enforce the obligations imposed by Executive Order 11246, as amended by Executive Orders 11375, 12086 and 13279 ("Executive Order 11246" or the "Executive Order"); section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 ("Rehabilitation Act"); section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. § 4212 ("VEVRAA"); and the rules and regulations issued pursuant to each of the foregoing at 41 C.F.R. chapter 60.

OFCCP alleges the following:

JURISDICTION

1. The Court has jurisdiction of this action under sections 208 and 209 of Executive Order 11246; 41 C.F.R. §§ 60-1.26, 60-300.65, and 60-741.65; and 41 C.F.R. part 60-30.

DEFENDANT AND ITS STATUS AS A GOVERNMENT CONTRACTOR

2. Defendant Google, Inc., is a wholly-owned subsidiary of Alphabet, Inc. Google offers, among other things, Internet advertising services. It is located at 1600 Amphitheatre Parkway in Mountain View, California.

3. At all times relevant hereto, Google has had 50 or more employees.

4. At all times relevant hereto, Google has had at least one contract with the federal government of \$50,000 or more. For example, on or about June 2, 2014, the General Services Administration awarded Defendant Contract No. GS07F227BA for "Advertising and Integrated Marketing Solutions" ("Advertising and Integrated Marketing Solutions Contract"). To date, Google has received in excess of \$600,000 under the Advertising and Integrated Marketing Solutions Contract.

5. The Advertising and Integrated Marketing Solutions Contract incorporates an equal employment opportunity clause as required by the Executive Order, VEVRAA, and the Rehabilitation Act. The Contract also incorporates by reference certain Federal Acquisition Regulations ("FAR"), including FAR 52.222-26 concerning Equal Opportunity under which Google agreed to, among other things, "comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor"; and to

permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order.

Similarly, Google agreed "to comply with the rules, regulations, and relevant orders of the Secretary of Labor" issued under the Rehabilitation Act and VEVRAA.

6. Google voluntarily agreed to these terms in exchange for government business. For instance, with respect to the Advertising and Integrated Marketing Solutions Contract, Google “affirm[ed] that no exceptions are being taken to the terms and conditions related to” the underlying contract solicitation, which contained the FAR provisions above, and that its affirmation “reflect[ed] the outcome of negotiations between Google and” the General Services Administration.

7. Based on the foregoing, Google has been a contractor within the meaning of the Executive Order, the Rehabilitation Act and VEVRAA, and has been subject to the obligations imposed on contractors by the Executive Order, the Rehabilitation Act, VEVRAA, and the regulations issued pursuant thereto. Those regulations require, among other things, contractors submit to OFCCP upon request items they are required under the regulations to retain and items that may be relevant to the compliance evaluation and pertinent to compliance with the Executive Order, the Rehabilitation Act, and VEVRAA. *See, e.g.*, 41 C.F.R. § 60-1.12(c)(2); *id.* § 60-1.43.

**GOOGLE’S DENIAL OF ACCESS TO RECORDS OFCCP REQUESTED AS PART OF
ITS COMPLIANCE EVALUATION**

8. On or about September 30, 2015, OFCCP sent Google a scheduling letter stating that OFCCP had selected its establishment at 1600 Amphitheater Parkway in Mountain View, CA for a compliance evaluation under Executive Order 11246, VEVRAA, and the Rehabilitation Act, and their implementing regulations (“Scheduling Letter”). OFCCP selected the facility pursuant to its neutral selection process. The Office of Management and Budget approved the Scheduling Letter, which bore OMB No. 1250-0003.

9. As part of the compliance evaluation, on or before June 1, 2016, OFCCP requested various items relevant to Google's compensation policies and, thus, relevant to the compliance evaluation. Among the requested items were:

- a. a compensation snapshot as of September 1, 2014;
- b. job and salary history for employees in a September 1, 2015 compensation snapshot that Google had produced and the requested September 1, 2014 snapshot, including starting salary, starting position, starting "compa-ratio," starting job code, starting job family, starting job level, starting organization, and changes to the foregoing; and
- c. the names and contact information for employees in the previously-produced September 1, 2015 snapshot and the requested September 1, 2014 snapshot.

10. On June 17, 2016, Google communicated its refusal to produce the items identified in paragraphs 9.a through 9.c ("Subject Items"), among others. In the months that followed, OFCCP repeatedly attempted to obtain Google's agreement to produce the Subject Items. Despite OFCCP's efforts to obtain Google's voluntary compliance, Google denied OFCCP access to the Subject Items, among others.

11. In accordance with 41 C.F.R. §§ 60-1.28, 60-300.64, and 60-741.64, OFCCP served a Notice to Show Cause ("Show Cause Notice") on Google on or about September 16, 2016. After issuing the Show Cause Notice, OFCCP continued to attempt to obtain Google's voluntary compliance. However, as of the date of this Complaint, Google has persisted in its refusal to produce the Subject Items.

VIOLATIONS

12. Google's refusal to provide access to relevant items as part of the compliance evaluation, as described in paragraphs 10 and 11, violates the Executive Order, the Rehabilitation Act, VEVRAA, and the regulations pursuant thereto. Moreover, Google's conduct breaches the contractual obligations it accepted in exchange for obtaining business from the federal government.

13. All procedural requirements prior to the filing of this Complaint have been met. OFCCP attempted unsuccessfully to secure voluntary compliance, as set forth in paragraphs 10-11.

14. Unless restrained by an administrative order, Google will continue to violate its obligations under the Executive Order, the Rehabilitation Act, VEVRAA, and the regulations issued pursuant thereto.

15. This matter is subject to the expedited hearing procedures set forth at 41 C.F.R. §§ 60-30.31 through 60-30.37. OFCCP requests that expedited hearing procedures be applied in this case.

PRAYER FOR RELIEF

BASED ON THE FOREGOING, Plaintiff OFCCP requests a decision and order pursuant to 41 C.F.R. §§ 60-30.35 and 60-30.37 providing the following:

(a) permanently enjoining Google, Inc., and its successors, officers, agents, servants, employees, divisions, subsidiaries and all persons in active concert or participation with them, from failing and refusing to comply with the requirements of the Executive Order, the Rehabilitation Act, VEVRAA, and the regulations issued pursuant thereto;

(b) directing Google to provide to OFCCP all of the Subject Items and otherwise to permit OFCCP to conduct and complete its compliance review;

(c) subjecting Google to the following, in the event Google fails to provide the above-identified relief: (1) an order canceling all of its federal government contracts and subcontracts and those of its officers, agents, successors, divisions, subsidiaries and those persons in active concert or participation with them, and declaring said persons and entities ineligible for the extension or modification of any such existing Government contract or subcontract; and (2) an order debarring Google and its officers, agents, servants, successors, divisions and subsidiaries and those persons in active concert or participation with them from entering into future federal government contracts and subcontracts until such time as Google satisfies the Director, Office of Federal Contract Compliance Programs, that it has undertaken efforts to remedy its prior noncompliance and is currently in compliance with the provisions of the Executive Order, the Rehabilitation Act, VEVRAA, and the regulations issued pursuant thereto; and

(d) any other relief as justice may require.

Respectfully submitted,

Date: December 29, 2016

M. PATRICIA SMITH
Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
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IAN ELIASOPH
Counsel for Civil Rights



MARC A. PILOTIN
Trial Attorney

CERTIFICATE OF SERVICE

I am a citizen of the United States of America. I am over eighteen years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103. On December 29, 2016, I served the within

COMPLAINT FOR DENIAL OF ACCESS TO RECORDS IN VIOLATION OF EXECUTIVE ORDER 11246, SECTION 503 OF THE REHABILITATION ACT, THE VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT, AND REGULATIONS PROMULGATED THEREUNDER

on the Defendant in this action by placing a true and correct copy in a sealed government envelope addressed to:

Matthew J. Camardella
Daniel V. Duff, III
JACKSON LEWIS P.C.
58 South Service Road, Suite 250
Melville, NY 11747

Executed: December 29, 2016



/s/Llewlyn D. Robinson
LLEWLYN D. ROBINSON
Paralegal Specialist

OFFICE OF THE SOLICITOR
UNITED STATES DEPARTMENT OF LABOR

RECEIVED



MAR 13 3 23 PM '89

CIVIL RIGHTS
DIVISION

.....
 In the Matter of :
 :
 U.S. DEPARTMENT OF LABOR, : Case No. 89-OFC-1
 Plaintiff :
 :
 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 TURECK
Administrative Law Judge

Dated: March 10, 1989
Washington, DC

JT/jb

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



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").¹ 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*

¹ 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.)² 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.)³

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

² 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.)

³ 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.⁴

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.⁵

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).⁶ 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.

⁴ 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.

⁵ 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”).

⁶ 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.
HENLEY
DN: CN=STEPHEN R. HENLEY,
OU=ADMINISTRATIVE LAW JUDGE,
O=US DOL Office of Administrative Law
Judges, L=Washington, S=DC, C=US
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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Issue Date: 27 March 2017

Case No.: **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 FOR PROTECTIVE ORDER

This case arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, and the rules issued pursuant thereto at 41 C.F.R. Chapter 60. Jurisdiction over this action exists under §§ 208 and 209 of Executive Order 11246, and 41 C.F.R. § 60-1.26, 41 C.F.R. § 4.8 and 41 C.F.R. Part 60-30.

Background

Procedural

On June 8, 2016, the Office of Administrative Law Judges received 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" or "OFCCP"), for alleged violations of the above Executive Order by Enterprise RAC Company of Baltimore, LLC ("Defendant"). On June 30, 2016, Defendant filed *Defendant's Motion to Dismiss Plaintiff's Administrative Complaint*. Plaintiff filed an *Opposition to Defendant's Motion to Dismiss Plaintiff's Administrative Complaint* on July 14, 2016. Defendant filed *Defendant's Reply in Support of Defendant's Motion to Dismiss* on August 4, 2016. On August 8, 2016, Chief Administrative Law Judge Stephen R. Henley issued an order denying Defendant's motion. Thereafter, on August 23, 2016, this case was assigned to me. On December 27, 2016, I received *Defendant's Motion for a Protective Order* ("Def. Mot."). On January 13, 2017, I granted Plaintiff an extension of time to respond to Defendant's motion. Plaintiff filed its *Opposition to Defendant's Motion for Protective Order* ("Pl. Opp'n") on January 17, 2017.

Factual Background¹

On May 1, 2008, Plaintiff issued a letter scheduling a compliance review of Defendant's Linthicum, Maryland, car leasing facility. Plaintiff audited Defendant's hiring practices for the period August 1, 2006 through July 31, 2008. On March 13, 2013, Plaintiff issued a Notice of Violation alleging that Defendant: (1) discriminated against African-American applicants on the basis of their race in hiring for Management Trainee positions; (2) failed to maintain all the data used in its recruitment and selection process; (3) failed to conduct an adverse impact analysis of its total selection process for all positions; and (4) did not develop and implement an auditing system that periodically measured the effectiveness of its total affirmative action program.

Between April 2013 and May 2014, Plaintiff and Defendant held six conciliation meetings regarding the alleged violations. The conciliation meetings failed to resolve the dispute. Accordingly, Plaintiff issued a Notice to Show Cause why it should not initiate enforcement proceedings regarding the violations alleged to have occurred from August 1, 2006 through July 31, 2008. Thereafter, Plaintiff filed its complaint alleging that the violations occurred from August 1, 2006 through July 31, 2008, and that the discrimination continues to occur to the present. On October 19, 2016, Plaintiff served on Defendant Requests for Admissions, Interrogatories, and Requests for Production of Documents, several of which related to dates that extend beyond July 31, 2008.

In its motion, Defendant argues that discovery requests regarding hiring practices after July 31, 2008 are "more than annoying, embarrassing, oppressive, or burdensome, they are in violation of Defendant's constitutional due process rights." (Def. Mot. at 4). Defendant argues that while Plaintiff followed the OFCCP regulations with regards to the period from August 1, 2006 through July 31, 2008, it did not follow the same regulations for post-July 2008 period. (*Id.* at 6). Defendant claims that because Plaintiff did not follow the OFCCP regulations for post-July 2008 period Plaintiff cannot pursue a continuing violation claim. (*Id.* at 8). Plaintiff contends that a protective order is the wrong vehicle for Defendant's request and its motion is a "thinly-disguised rehash of its failed Motion to Dismiss." (Pl. Opp'n at 1).

Discussion

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

Protective orders are governed by 29 C.F.R. § 18.52, which states, in pertinent part:

- (a) *In general.* A party or any person from whom discovery is sought may file a written motion for a protective order. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without the judge's action. The judge may, for good cause, issue an order to protect a party or person

¹ The parties do not dispute the essential facts.

from annoyance, embarrassment, oppression, or undue burden or expense, including one or more the following:

(1) Forbidding the disclosure or discovery; . . . [and]

(4) Forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; . . .

(b) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the judge may, on just terms, order that any party or person provide or permit discovery.

Here, Defendant did not provide a certification that it has in good faith conferred or attempted to confer with Plaintiff in an attempt to resolve the dispute as required by § 18.52(a). Furthermore, Defendant failed to articulate exactly how Plaintiff's discovery request was "more than annoying, embarrassing, oppressive, or burdensome."

Section 18.51 sets forth the scope and limits of discovery. Discovery is permissible if it is reasonably calculated to lead to the discovery of admissible evidence. § 18.51(a). Here, the complaint specifically alleges that Defendant's discrimination "continues to the present." Therefore, Plaintiff's discovery request could reasonably lead to admissible evidence.

For the foregoing reasons, I find that Defendant has failed to show that Plaintiff's discovery request is annoying, embarrassing, oppressive or burdensome. Furthermore, I find that Plaintiff's request could reasonably lead to admissible evidence.

Defendant's Argument

In the present motion, Defendant raises one of the arguments advanced in its earlier unsuccessful motion to dismiss. Specifically, Defendant argues to limit the allegations in the complaint to the timeframe from August 1, 2006 through July 31, 2008. Defendant contends that Plaintiff is bound to follow its procedures of conducting an onsite review, issuing a notice of violation, attempting to conciliate and issue a show cause notice prior to filing a complaint for any period post-July 2008.² (Def. Mot. at 6). Defendant says that because these steps were not followed, it is without notice of Plaintiff's continuing claim and, therefore, post-July 2008 allegations should be barred. (*Id.* at 8). Defendant further argues that its constitutional due process rights have been violated and cites the *Accardi* doctrine and *OFCCP v. Bank of America*, ARB Case No. 13-099 (April 21, 2016), in support. (*Id.* at 6).

(a) Due Process Claim

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the

² Defendant admits that Plaintiff followed the procedural step for its investigation of the period from August 1, 2006 through July 31, 2008. (Def. Mot. at 6).

nature of the case.” *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). Defendant’s due process argument is unclear as it fails to state specifically what right it has been deprived of without due process of law. Plaintiff surmises that Defendant attempts to assert a property interest in compensation that Defendant allegedly owes to African-American applicants. (Pl. Opp’n at 4). To establish a deprivation of property, Defendant must establish: (1) that it was deprived of a protected property interest and (2) that Plaintiff deprived it of that interest without providing the process that was due. *See Orange v. District of Columbia*, 59 F.3d 1267, 1273 (D.C. Cir. 1995). Defendant would clearly fail on both prongs because to date Defendant has not been deprived of a property interest and will be afforded the opportunity for a full hearing on the merits of the case.

In its due process argument, Defendant raises the *Accardi* doctrine (based on *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). Defendant reasons that because Plaintiff’s onsite review, notice of violation and show cause notice did not assert a continuing violation, Plaintiff has violated its due process rights. The *Accardi* doctrine generally states that “an agency’s failure to afford an individual procedural safeguards required under its own regulations may result in the invalidation of the ultimate administrative determination.” *United States v. Morgan*, 193 F.3d 252, 266 (4th Cir. 1999). However, contrary to Defendant’s assertion, a violation under the *Accardi* doctrine does not necessarily amount to a constitutional due process violation. *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 92 n. 8 (1977) (explaining that *Accardi*, *supra*, “enunciate[s] principles of federal administrative law rather than of constitutional law”). “When the minimal due process requirements of notice and hearing have been met, a claim that an agency’s policies or regulations have not been adhered to does not sustain an action for redress of procedural due process violations.” *Goodrich v. Newport News School Bd.*, 743 F.2d 225, 227 (4th Cir. 1984). Therefore, a separate analysis under the *Accardi* doctrine is necessary.

(b) The Accardi Doctrine

Under the *Accardi* doctrine, “rules that are promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency.” *Leslie v. Att’y Gen.*, 611 F.3d 171, 175 (3rd Cir. 2010). Initially, the *Accardi* doctrine would automatically invalidate an agency’s action for failure to adhere to its own rules. *United States v. Morgan*, 193 F.3d 252, 267 (4th Cir. 1999). However, “the Supreme Court has since required that claimants demonstrate prejudice resulting from the violation unless ‘the rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion; or unless an agency required by the rule to exercise independent discretion has failed to do so.’” *Id.* Absent prejudice, when a violation “implicates less than fundamental rights, wholesale remand places an ‘unwarranted and potentially unworkable burden on the agency’s adjudication.’” *Leslie*, at 179. Therefore, the Fourth Circuit, where this case originated, as a general rule requires a showing of prejudice. *Morgan*, at 267.

Here, Defendant asserts that by alleging in the complaint that the violation continues to the present Plaintiff has failed to follow its own procedures. Specifically, Defendant argues that Plaintiff failed to conduct an onsite review, issue a notice of violation and issue a show cause

notice for the period after July 31, 2008. (Def. Mot. at 5). Plaintiff contends that it has not violated its procedures. (Pl. Opp'n at 5).

I find that Plaintiff has followed its procedures. Plaintiff conducted a review, issued a notice of violation and a show cause notice and is only attempting to determine if the alleged violation continues or has been abated. Defendant argues that it has not violated the Executive Order, and it does not allege that any of its procedures have changed.

Nonetheless, even if Plaintiff violated its procedures, it has not run afoul of the *Accardi* doctrine. OFCCP is not exercising unfettered discretion as its determination is subject to review and a full hearing before the Office of Administrative Law Judges. Therefore, Defendant would be required to show prejudice, and Defendant has not set forth how it is prejudiced. Furthermore, I find that Defendant has suffered no prejudice, nor will it, because it has the full right and opportunity to present its case at the hearing.

Defendant cites *Bank of America, supra*, in support of its argument.³ Its reliance on *Bank of America* is misplaced. The Administrative Review Board ("ARB") found that the evidence presented in *Bank of America* did not support the idea that the same pattern or practice of intentional discrimination applied to the bank's hiring practices in 1993 and 2002-2005 and therefore, it evaluated the 2002-2005 alleged violations as a separate claim.⁴ Upon evaluation, the ARB found that the record did not support the Administrative Law Judge's "finding of a pattern or practice of intentional discrimination during 2002 through 2005." *Bank of America, supra*. Furthermore, the ARB specifically took no position as to whether Plaintiff was able to conduct a follow-up review for the period of 2002-2005. *Id.* at n. 47.

Administrative law judges have allowed complaints to allege continuing violations.⁵ For instance, in *DOL v. Volvo GM Heavy Truck Corp.*, 1996-OFC-00002 (Apr. 27, 1998), the defendant objected to providing discovery for the period after the OFCCP compliance investigation. The administrative law judge rejecting that argument saying:

In *U.S. Department of Labor v. Jacksonville Shipyards Inc.*, Case No. 1989-OFC-00001, AU Order, March 10, 1989, the compliance investigation conducted by the OFCCP only covered 1985. The administrative law judge reasoned that (1) separate conciliation efforts for each additional period of time would be impractical and inefficient; (2) since the case was already in litigation, additional

³ Defendant's argument is based on Administrative Appeal Judge Brown's concurrence in the plurality opinion. Judge Brown wrote separately to state that OFCCP violated Bank of America's procedural protections by not following the procedures under 41 C.F.R. § 60-1. However, Judge Brown went on to clarify that he did not mean to suggest "that the OFCCP was not entitled to pursue discovery beyond the 1993 period as part of the enforcement action filed . . . such post-violation discovery would be warranted in order to determine . . . if the charged violations are continuing." Here, Plaintiff alleging that the violation continues is precisely what Judge Brown described.

⁴ The ARB noted that during the time frame the bank changed names from NationsBank to Bank of America, and the recruiting process dramatically changed. *Bank of America, supra*. The court found that the 10 year gap in data and evidentiary information between the time periods prevented any realistic ability to logically connect the two periods. *Id.*

⁵ See also *DOL v. Frito-Lay, Inc.*, ARB Case No. 10-132 (May 8, 2012) (ARB noted that OFCCP has an on-going duty to ensure compliance with the Executive Order).

conciliation efforts regarding continuing unlawful conduct would be futile; and (3) evidence of post-1985 conduct was relevant to the case because it was challenged in the complaint. *Id.* Thus, the administrative law judge allowed post-1985 discovery citing *Uniroyal, Inc.*, 1977 OFCCP-00001, 26 (Final Decision of the Secretary, June 28, 1979), which stated: "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." *Jacksonville Shipyards, Supra*, at 2.

Likewise, in the present case, any further attempts to conciliate would be futile as Plaintiff and Defendant have already held six conciliation meetings on these very issues and were unsuccessful in resolving the matter. *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972) (to require a second filing by the aggrieved party after termination of state action would serve no useful purpose other than creating an additional procedural technicality). Further, evidence of post-July 2008 conduct is relevant to whether Defendant has complied with the Executive Order.

For the foregoing reasons, Defendant's motion is **DENIED**.

SO ORDERED.



Digitally signed by MORRIS D. DAVIS
DN: CN=MORRIS D. DAVIS,
OU=ADMINISTRATIVE LAW JUDGE,
O=US DOL Office of Administrative Law
Judges, L=Washington, S=DC, C=US
Location: Washington DC

MORRIS D. DAVIS
Administrative Law Judge

Washington, D.C.

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

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FILE COPY



Issue Date: 05 April 2017

Case Number: 2017-OFC-00007

In the Matter of:

25001700125

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

Plaintiff

v.

JPMORGAN CHASE & Co.,

Defendant.

ORDER DENYING 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. Part 60-30.

Background

This matter was docketed in the Office of Administrative Law Judges ("Office") on January 17, 2017, when the Regional Solicitor, New York City office, U.S. Department of Labor, on behalf of the Office of Federal Contract Compliance Programs, ("Plaintiff") filed an Administrative Complaint.¹ On January 25, 2017, I issued a *Notice of Docketing* instructing Defendant to file an answer and both parties to file and exchange certain prehearing information within 30 days.² On February 15, 2017, I issued an order clarifying the filing deadline. On February 24, 2017, Plaintiff filed its prehearing information and Defendant filed its prehearing

¹ Plaintiff alleges that "since at least May 15, 2012," Defendant discriminated against "female employees with regard to compensation"; and "fail[ed] to perform in-depth analyses of its total employment processes to determine whether and where impediments to equal employment opportunity exist, and fail[ed] to develop and implement and auditing system to periodically measure the effectiveness of its total 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 female employees, including, but not limited to, lost wages, interest, salary adjustments, fringe benefits, and all other lost 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 "[i]n the event [Defendant] fails to provide relief as ordered."

² The parties were instructed to provide a witness list with a summary of expected testimony; identify other related proceedings;

information, a *Motion to Dismiss the Administrative Complaint*, and a *Memorandum of Law in Support of JPMorgan Chase & Co.'s Motion to Dismiss the Administrative Complaint* ("Motion"), and an *Unopposed Motion to File Attachments Under Seal* ("Motion to File Under Seal"). On March 6, 2017, I orally granted an unopposed motion by Plaintiff for an extension of time to March 31, 2017 to reply to Defendant's Motion. I issued an order memorializing the ruling on March 7, 2017. On March 31, Plaintiff filed its *Opposition to Defendant's Motion to Dismiss Administrative Complaint* ("Opposition").

Positions of the Parties

Defendant

Defendant argues that the Administrative Complaint should be dismissed for failure to state a claim. 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. (Motion at 3.) 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. (Motion at 4.)

Defendant makes seven main arguments why the Administrative Complaint fails to state a claim. First, Defendant contends that Plaintiff has not complied with its own standards regarding how to interpret Executive Order 11246 "with regard to systemic compensation discrimination." Defendant cites "the 2006 Standards" published at 71 Fed. Reg. 35,137, (Motion at 4), and avers that it requires Plaintiff to provide a summary of anecdotal evidence of discrimination and the regression analysis in its Notice of Violations ("NOV"), (Motion at 5.) Defendant contends that Plaintiff did not properly provide anecdotal evidence in the NOV. (Motion at 6, 7.)

Second, Defendant asserts that Plaintiff has not pleaded "any facts to establish that the alleged pay disparities exist" between similarly situated employees because it has not "develop[ed] facts about the employees, such as actual work performed, responsibility level, and required skills and qualifications" to establish that the employees are similarly situated. (Motion at 8.)

Third, Defendant argues that Plaintiff has not stated a plausible disparate impact claim. Defendant states that the NOV and the Administrative Complaint "never references a disparate impact claim." (Motion at 10.)

Fourth, Defendant contends that Plaintiff has not stated a plausible claim of pay discrimination for any time after 2012 because Plaintiff did not review data from after 2012 and the regulations only allow for an audit period extending two years prior to the date of the scheduling letter. (Motion at 14-16.)

Fifth, Defendant asserts that the allegations were untimely raised in the NOV. (Motion at 17-20.)

Sixth, Defendant contends that Plaintiff did not provide enough detail regarding its claim that Defendant failed to comply with provisions requiring contractors to review their employment practices and develop internal systems to evaluate the effectiveness of their affirmative action programs. (Motion at 20.)

Seventh, Defendant argues that Plaintiff's request for an order permanently enjoining Defendant from failing to provide complete relief to the affected employees is improper. Defendant asserts that "[b]ack-pay remedies under federal discrimination law are not imposed through injunctions" and speculates that Plaintiff's request "may be designed to sidestep the untimeliness of its allegations . . . or the lack of statutory authority for its back-pay regulations." (Motion at 21.) Defendant contends that back pay awards are not statutorily authorized in this matter. (Motion at 21-22.)

Defendant attaches the NOV dated March 12, 2015, (Attachment A); FAQs put out by OFCCP, (Attachment B); a Functional Affirmative Action Program (FAAP) Agreement between Plaintiff and Defendant "in effect during 2012," (Attachment C); and a FAAP Agreement between the parties that was signed October 23, 2013, (Attachment D).

Defendant requests that the FAAP Agreements in Attachments C and D be filed under seal "to protect confidential and commercially-sensitive business information from public disclosure." Defendant states that it "designates the FAAP Agreements as confidential business information under 29 CFR § 70.26(b) and requests pre-disclosure notice under 29 CFR § 70.26(d)." (Motion to File Under Seal at 1.) Defendant contends that the FAAP Agreements come under FOIA Exemption 4.

Plaintiff

Plaintiff contends that its Administrative Complaint "plainly complies with the pleading requirements of 41 C.F.R. § 60-30.5(b) and more than adequately notifies Defendant . . . of the issues for litigation." Plaintiff explains that

the Complaint identifies the type of discrimination committed by [Defendant] (compensation), when it occurred (since at least May 15, 2012), which functional unit (Investment Bank, Technology & Market Strategies) and job titles (Application Developer Lead II, Application Developer Lead V, Project Manager, and Technology Director) were involved, that the discrimination is supported by statistical evidence, and that the disparity remains even after adjusting for differences in legitimate compensation-determining factors."

(Opposition at 1.) Plaintiff explains that the correct standard of review is provided by § 60-30.5(b), which requires only that the Complaint contain sufficient information to put the defendant on notice of the allegations. (Opposition at 1-2, 4-6.) Plaintiff contends that Defendant erroneously relies on OFCCP's 2006 Standards, which "did not alter the pleading requirements or otherwise provide a rationale for a motion to dismiss." (Opposition at 2; Opposition at 6-9.) Plaintiff avers that it is not required to reference either disparate impact or disparate treatment at the pleading stage. (Opposition at 2, 10-12.) Plaintiff asserts that it has

provided enough detail to put Defendant on notice regarding its post-2012 pay discrimination allegations. (Opposition at 2, 12-16.) Plaintiff contends that Defendant has “invent[ed] a time limit where none otherwise exists” in reference to the length of time between alleged violations and Plaintiff’s issuance of the NOV, and points out that Defendant does not allege that it was prejudiced. (Opposition at 3, 16-17.) Finally, Plaintiff contends that there is not “a consequential distinction between legal and equitable remedies, so the phrasing of the remedies sought is improper grounds for dismissal.” (Opposition at 3.) Plaintiff requests leave to amend its Complaint in the event that its request for an injunction requesting damages is improper. (Opposition at 17-18.) Plaintiff attaches three previous orders in OFC cases.

The Administrative Complaint

Plaintiff’s Administrative Complaint includes the following provisions:

13. Since at least May 15, 2012, JPMorgan has violated the Executive Order and regulations promulgated thereto in carrying out its government contracts by discriminating against female employees with regard to compensation.

14. Since at least May 15, 2012, pay-deciding officials of JPMorgan have exercised discretion when setting compensation amounts for employees within the IB-TMS unit under the job titles of Application Developer Lead II, Application Developer Lead V, Project Manager and Technology Directors (the “Impacted Employee Group”).

15. In so doing, JPMorgan discriminated against at least 93 females employed within the Impacted Employee Group, by paying them less than comparable males employed in the same positions.

16. This compensation disparity remains after adjusting for differences in legitimate compensation-determining factors.

17. Upon information and belief, this failure continues to the present.

...

19. Since at least May 15, 2012, JPMorgan has violated the Executive Order and regulations promulgated thereto in carrying out its government contracts by failing to perform in-depth analyses of its total employment processes to determine whether and where impediments to equal employment opportunity exist, and failing to develop and implement an auditing system to periodically measure the effectiveness of its total affirmative action program.

20. Specifically, JPMorgan failed to evaluate compensation systems applicable to individuals employed in the Impacted Employee Group to determine whether there were gender-based disparities.

Applicable Law and Analysis

Motion to File Attachments Under Seal

Confidential information is handled differently in this Office than in federal courts. Documents filed constitute agency information subject to the requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* (1988), which requires federal agencies to disclose requested documents unless they are exempt from disclosure. *Faust v. Chemical Leaman Tank Lines, Inc.*, Case Nos. 92-SWD-2 and 93-STA-15, (ARB Mar. 31, 1998).³ The provisions of FOIA control disclosures from agency files. Each request from the public for copies of documents will be evaluated under FOIA to determine whether it is subject to disclosure. Documents that are subject to disclosure, and which are not exempt, must be released. Exemption 4 protects against the release of certain confidential commercial information. 5 U.S.C. § 552(b)(4).

Defendant contends that its FAAP Agreements qualify for FOIA Exemption 4 because they contain confidential commercial information. I find that Defendant has designated the FAAP Agreements as confidential commercial information in good faith. Accordingly, the DOL is required to take steps to preserve the confidentiality of that information, and must provide the parties with predisclosure notification if a FOIA request is received seeking release of that information. Consequently, before any confidential information is disclosed pursuant to a FOIA request for Attachments C or D, the DOL is required to notify the parties and permit them to file any objections to disclosure. See 29 C.F.R. § 70.26.

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. The initial pleading requirements for OFC complaints are relatively minimal. The regulations provide that

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.

³ The Federal courts are not subject to FOIA; as a result, they have developed separate procedures for the protection of confidential and privileged information.

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.

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 it occurred; the job position involved; “that the discrimination is supported by statistical evidence”; as well as “auditing failures.” Nothing more is required at this stage of the administrative proceedings.

Order

Defendant’s Motion requesting dismissal of the Administrative Complaint 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.
HENLEY
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Judges, L=Washington, S=DC, C=US
Location Washington DC

STEPHEN R. HENLEY
Chief Administrative Law Judge

SERVICE SHEET

Case Name: OFCCP_-NEW_YORK_NY_v_JPMORGAN_CHASE_and_C_

Case Number: 2017OFC00007

Document Title: ORDER DENYING MOTION TO DISMISS

I hereby certify that a copy of the above-referenced document was sent to the following this 5th day of April, 2017:



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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 Envtl. 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 exactly." 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 (5th 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); OFCCP 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.

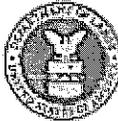
I do not find that the request is either substantively or temporally overbroad. The request in this matter is akin to Plaintiff's request of charges and complaints against the Board of Education. Plaintiff's request is limited to the particular Hyrum, Utah facility and to the particular types of discrimination 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 22nd day of April, 2016, at Covington, Louisiana.



Digitally signed by LEE J. ROMERO JR
DN: CN=LEE J. ROMERO JR,
OU=Administrative Law Judge, C=US
DCL, Office of Administrative Law
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:



Digitally signed by Sheryl E. Heavilin
DN: cn=Sheryl E. Heavilin, o=Legal
Assistant, ou=US DOL Office of Administrative
Law Judges, l=Covington, st=LA, c=US
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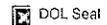
[DOL Home](#) > [OALJ](#) > [OFCCP](#) > OFCCP v. Volvo GM Heavy Truck Corp., 1996-OFC-2 (ALJ Apr. 27, 1998)

USDOL/OALJ Reporter

OFCCP v. Volvo GM Heavy Truck Corp., 1996-OFC-2 (ALJ Apr. 27, 1998)

U.S. Department of Labor

Office of Administrative Law Judges
603 Pitkin House Drive, Suite 300
Newport News, Virginia 23606-1904
(757) 873-3099
(757) 873-3634 (FAX)



Date: April 27, 1998

Case No.: 96-OFC-2

In the Matter of:

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

v.

VOLVO GM HEAVY TRUCK
CORPORATION,
Defendant.

Pamela A. Gibbs, Esq.,
Debra A. Millenson, Esq.
For Plaintiff

James M. Powell, Esq.,
Gregory P. McGuire, Esq.
For Defendant

Before:

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

**ORDER GRANTING IN PART PLAINTIFF'S
MOTION TO COMPEL DISCOVERY**

On April 10, 1998, Plaintiff, the United States Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), filed a motion to compel Defendant, Volvo GM Heavy Truck Corporation ("Volvo"), to respond further to its first and second sets

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of interrogatories. Specifically, Plaintiff requests an order compelling Defendant to: (1) produce information and answer interrogatories about its post-1989 hiring and employment practices; and (2) identify those documents withheld because of the attorney-client and work-product privileges. Defendant filed a timely response on April 16, 1998.

On December 18, 1995, Plaintiff filed an administrative complaint against Defendant for allegedly violating Executive Order 11246, seeking back pay and benefits for an affected class of females from March 8, 1987 to present, injunctive relief, and an order canceling Defendant's current contracts with the federal government and barring Defendant from participating in contracts with the federal government until such time as it is in compliance with the executive order. On February 11, 1998, Defendant filed an answer: (1) denying that it discriminated against female applicants for assembler positions, (2) contending that Plaintiff's action was not filed within an appropriate statute of limitations period and (3) contending that Plaintiff failed to meet the procedural prerequisites to filing an administrative action regarding alleged discrimination for any period other than January 1, 1998 to December 31, 1988, since it made no investigation or findings and did not conciliate with Defendant for any period other than January 1, 1988 to December 1988.

On December 15, 1995, Plaintiff filed its first set of interrogatories and request for production of documents, which sought information about the assembler position, Volvo's procedures for filling vacancies including its selection and hiring process during the period from March 7, 1987 to the present, and Volvo's computerized personnel and payroll systems. Plaintiff has also filed a second set of interrogatories and request for production of documents concerning Defendant's efforts to obtain and preserve the testimony of company officials involved in the selection and hiring process from March 7, 1987 to the present.

Defendant complied with the requests for lists of individuals hired, personnel files, applications, interview notes, and other documents relating to hiring during 1987, 1988,

and 1989. However, Defendant has objected to and refused to answer any requests that sought information about its selection and hiring process beyond December 31, 1989. Defendant has also refused to answer Interrogatories number 34 and 35 of Plaintiffs second set of interrogatories on the same grounds. Defendant also objected to Interrogatory numbers 5 and 9 of Plaintiffs first set of interrogatories on the grounds of attorney-client and work-product privileges. Plaintiff then filed the motion to compel described above.

ISSUES

I. Whether Defendant should be compelled to produce information about its post-1989 hiring and employment practices.

II. Whether the documents withheld from discovery by Defendant because of the attorney-client and attorney work-product privileges have been described in sufficient detail.

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DISCUSSION

I. Post-1989 employment data

Discovery rules, particularly with respect to employment discrimination cases, are to be construed liberally in favor of the party seeking discovery. Sweat v. Miller Brewing Company, 708 F.2d 655 (11th Cir. 1983) (noting that liberal discovery rules are applied in Title VII litigation); Arbrey v. United Parcel Service, 798 F.2d 679, 684 (4th Cir. 1986), cert. denied, 480 U.S. 934 (1987) (the scope of discovery in Title VII cases is geared to allowing plaintiffs to proceed under either a disparate treatment or pattern or practice theory, or both).

Defendant argues that, because Plaintiff has made no investigations or findings and did not conciliate for periods after December 31, 1988, hiring practices after this date are irrelevant and discovery is unwarranted. Plaintiff acknowledges that it has not undertaken these procedures as regards post-1988 conduct but argues that the conduct is still relevant to the case and discoverable.

The case law supports Plaintiffs position. In U.S. Department of Labor v. Jacksonville Shipyards, Inc., Case No. 89-OFC-1, AU Order, March 10, 1989, the compliance investigation conducted by the OFCCP only covered 1985. The administrative law judge reasoned that (1) separate conciliation efforts for each additional period of time would be impractical and inefficient; (2) since the case is already in litigation, additional conciliation efforts regarding continuing unlawful conduct would be futile; and (3) evidence of post-1985 conduct is relevant to the case because it is challenged in the complaint. Id. Thus, the administrative law judge allowed the post-1985 discovery, citing Uniroval, Inc., 77-OFCCP 1, 26 (Final Decision of the Secretary, June 28, 1979), which stated: "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." Jacksonville Shipyards, supra, at 2.

The situation in the present case is very similar to that in Jacksonville Shipyards. Plaintiff alleged in its administrative complaint that Defendant discriminated against female applicants for assembler positions from March 7, 1987 to the present, and, thus, evidence of post-1988 conduct is relevant. Additional conciliation efforts for each period would thwart the goal of efficient resolution of pattern and practice claims. Defendant has not sought to distinguish Jacksonville Shipyards from the present case, nor has it offered case law to the contrary. The fact that all but one of the officials who conducted Volvo's interviews and made hiring recommendations in 1988 have left the plant does not necessarily lead to the conclusion that the company is not continuing to

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discriminate and does not preclude discovery on the issue. Nor does Plaintiffs lack of evidence as to post-1988 conduct, as alleged by Defendant, prevent it from seeking such evidence to show continuing unlawful conduct through discovery, particularly in light of the broad discovery allowed in employment discrimination cases. Thus, I overrule Volvo's objections to OFCCP's request for post-1989 employment data.

II. Attorney-Client and Work Product Privilege

Plaintiff argues that Defendant's assertion of the attorney-client and work-product privileges in response to interrogatories 5 and 9 was improper and insufficiently specific. Defendant, in its response to this motion to compel discovery, has supplemented its responses to the interrogatories to reflect that the documents protected by the privilege are specifically:

1. Any notes taken by Volvo's attorneys after initiation of the compliance review during conversations with Volvo company officials regarding hiring and selection decisions. These documents were prepared in anticipation of litigation, reflect the mental impressions of Volvo's attorneys, and contain confidential attorney-client privileged communications.
2. Memoranda, letters, statistical summaries and other data summaries prepared by Volvo's attorneys regarding their mental impressions of the case and legal strategies for responding to the compliance review and enforcement action. These documents were prepared in anticipation of litigation, reflect the mental impressions of Volvo's attorneys, and contain confidential attorney-client privileged communications.
3. Memoranda, letters, statistical summaries and other data summaries prepared by Volvo's company officials at the direction of Volvo's attorneys and in formats requested by Volvo's attorneys. These documents were prepared in anticipation of litigation, reflect the mental impressions of Volvo's attorneys, and contain confidential attorney-client privileged communications.

4. Legal memoranda prepared by Volvo's attorneys. These documents were prepared in anticipation of litigation, reflect the mental impressions of Volvo's attorneys, and contain confidential attorney-client privileged communications."

Even if Defendant's initial response to the interrogatories did not sufficiently identify the documents protected by privilege (which I need not decide), the supplemented response is sufficiently clear. Defendant has satisfactorily described documents which it is legally entitled to withhold from discovery.

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ORDER

For the above reasons, it is ORDERED that Plaintiff's motion to compel discovery is hereby GRANTED in part:

1. Defendant is required to produce information and answer interrogatories about its post-1989 hiring and employment practices as it has for such practices between 1987 and 1989.
2. Defendant has sufficiently described those documents protected by attorney-client and work-product privileges and need not further respond to interrogatories 5 and 9 by more specifically identifying the protected documents. Thus, Plaintiff's motion to compel more specific identification of these documents is DENIED.

FLETCHER E CAMPBELL, JR
Administrative Law Judge

FEC/ccw
Newport News, Virginia

CERTIFICATE OF SERVICE

I, Llewlyn Robinson, am a citizen of the United States of America and am over 18 years of age. I am not a party to the within action; my business address is 90 7TH Street, Suite 3-700, San Francisco, California 94103.

On May 19, 2017, I served the foregoing

OFCCP'S OPPOSITION TO ORACLE'S MOTION FOR JUDGMENT ON THE PLEADINGS

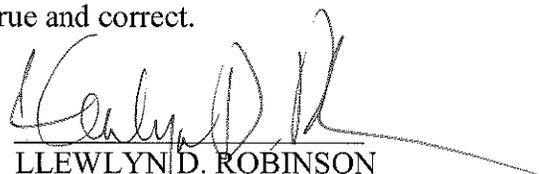
OFCCP'S COMPENDIUM OF ADMINISTRATIVE CASES IN SUPPORT OF ITS
OPPOSITION TO ORACLE'S MOTION FOR JUDGMENT ON THE PLEADINGS

in this action by email, to:

Gary R. Siniscalco: grsiniscalco@orrick.com
Erin M. Connell: econnell@orrick.com
Jessica R.L. James: Jessica.james@orrick.com
Jacqueline Kaddah: jkaddah@orrick.com
Orrick Herrington & Sutcliffe LLP
405 Howard Street
San Francisco, CA 94105-2669

I certify under penalty of perjury that the above is true and correct.

Executed: May 19, 2017


LLEWLYN D. ROBINSON
Paralegal Specialist

Office of the Solicitor
United States Department of Labor

5. *OFCCP v. Enterprise RAC Company of Baltimore LLC*, 2016-OFC-0006 (Mar. 27, 2017)¹
6. *OFCCP v. JPMorgan Chase & Co.*, 2017-OFC-7 (Apr. 5, 2017)
7. *OFCCP v. JBS USA Holdings, Inc.*, No. 2015-OFC-1 (Apr. 15, 2016)

¹ OFCCP notes that this order was referenced in its temporal scope motion, but was not included in the compendium for that motion.