

**U.S. Department of Labor**

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**Issue Date: 19 June 2017**

CASE NO.: 2017-OFC-00006

*In the Matter of:*

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

vs.

**ORACLE AMERICA, INC.,**  
*Defendant.*

**APPEARANCES:**

LAURA C. BREMER, Esq.  
MARC A. PILOTIN, Esq.  
IAN H. ELIASOPH, Esq.  
U.S. Department of Labor  
Office of the Solicitor  
For Plaintiff

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ERIN M. CONNELL, Esq.  
Orrick, Herrington & Sutcliffe, LLP  
For Defendant

**ORDER DENYING SUMMARY JUDGMENT  
AND DENYING STAY**

This matter arises under Executive Order 11246 (30 Fed.Reg. 12319), as amended, and associated regulations at 41 C.F.R. Chapter 60. It is currently set for hearing in San Francisco, California, on June 26, 2018. Defendant Oracle America, Inc. ("Oracle") moves the court for summary judgment in its favor or, in the alternative, for a stay to facilitate conciliation between the parties on the issue before the

court. The court held a hearing on the motion on June 16, 2017. Attorneys Laura C. Bremer, Marc A. Pilotin, and Ian H. Eliasoph appeared for Plaintiff, while Attorneys Warrington S. Parker, III, and Erin M. Connell appeared for Defendant. The matter was argued and submitted.

Executive Order 11246 does not simply prohibit discrimination. On the contrary, it obligates government contractors to take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. It further obligates government contractors to furnish reports and information to the Secretary of Labor regarding their compliance with the Executive Order. It authorizes the Secretary of Labor to impose sanctions on contractors when, in the Secretary's judgment, the contractor's affirmative actions are not sufficient. It is not a criminal statute, and the Secretary of Labor's imposition of a sanction under Executive Order 11246 does not necessarily indicate the contractor has intentionally discriminated against anyone.

#### Standard for Decision

A motion for summary judgment lies only when there is no genuine dispute as to material facts; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried. Given this function, the [trial] court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists rather than for the purpose of resolving that issue. Similarly, although the summary-judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues. *This it has been held that summary judgment would be improper if the existence of material fact issues is uncertain.*

Wright and Miller, 10A Federal Practice and Procedure Civil § 2712 (4th ed.) (emphasis added).

On a motion for summary judgment, I must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact, and whether the moving party is entitled to summary judgment as a matter of law. *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert den* 498 U.S. 1026 (1991); 29 C.F.R. §1978.107; 29 C.F.R. §§ 18.40(c), 18.41(a). I must look at the record as a whole, and determine whether a fact-finder could rule in the non-moving party's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio*

*Corp.*, 475 U.S. 574, 587. “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Accordingly, denial of a Motion for Summary Judgment is not a decision on the merits. It is nothing more than the court’s determination that the parties disagree on a material issue of fact. The court does not decide that issue at this time.

**The Record Does Not Show OFCCP’s Conciliation Efforts  
Were Unreasonable as a Matter of Law**

In this case, Plaintiff OFCCP contends Defendant has not performed its obligations under Executive Order 11246. Obviously, Defendant does not agree. By this Motion, Defendant argues the court should not hear OFCCP’s claim at all, because, in Defendant’s view, 1) OFCCP had a legal obligation under 41 C.F.R. §60-1.20(b), before filing this action, to make “reasonable efforts” to conciliate its claims against Defendant;<sup>1</sup> and 2) OFCCP failed to do so. Defendant contends there is no dispute of fact between the parties on those two points.

In support of its position, Defendant relies on the Declaration of Shauna Holman-Harries, its Director of Diversity and Compliance. Ms. Holman-Harries outlines Defendant’s communications with OFCCP during the pre-filing investigation, including her own conversations with Brian Mikel of OFCCP; copies of e-mails between Defendant and OFCCP; and the lack of an “exit conference” after OFCCP held an on-site meeting with Defendant on June 22-25, 2015. Additionally, Defend-

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<sup>1</sup> As Defendant points out, Executive Order 11246 and its implementing regulations both require the Secretary of Labor to try to secure compliance by means of conciliation and persuasion. *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1514 (11th Cir. 1985). Yet Defendant admits the courts and the regulations have not defined what “reasonable efforts” are “in the context of OFCCP’s conciliation mandate.” Motion, p. 12. This is the central legal question for purposes of this motion. To determine as a matter of law that OFCCP did not make “reasonable efforts,” the court must know 1) what the absolute *minimum* “reasonable effort” is under Executive Order 11246 and 2) that undisputed facts show OFCCP did not make the minimum “reasonable effort.” At argument, Defendant contended the phrase “reasonable efforts,” as used in the Executive Order, necessarily includes omissions OFCCP allegedly made in this case: OFCCP’s failure to give Oracle its statistical analysis; OFCCP’s failure to specify whether it believes Oracle discriminated intentionally or not; OFCCP’s failure to offer a calculation of damages or penalties, and the bases for its calculations; and OFCCP’s failure specifically to identify which policy or policies of Oracle’s had discriminatory effect, for example. Oracle infers these requirements from court decisions 1) stressing the importance of the statutory language (in this case, “reasonable efforts” from Executive Order 11246) and 2) discussing a plaintiff’s obligation to exhaust administrative remedies before suing an employer under Title VII of the Civil Rights Act of 1964. Of course, here I do not analyze a statute enacted by the Congress, but an Executive Order of the President of the United States. And since no court has affirmed Oracle’s implicit argument that Title VII cases are instructive on the President’s intent, I cannot fairly hold OFCCP to the standard Oracle infers. Instead, in my judgment, a “reasonable effort” under Executive Order 11246 depends on all the facts and circumstances surrounding the conciliation efforts, rather than any one omission, or combination of omissions. I conclude the record before me on this motion does not provide sufficient factual context to decide that question.

ant relies on the Declaration of Attorney Gary R. Siniscalco, who authenticates copies of letters and e-mails between the parties, and describes OFCCP's responses to his overtures for resolution of issues before the filing of this action. In opposition to the Motion, OFCCP submits the Declaration of Jane Suhr, OFCCP's Deputy Director for the Pacific Region.

These materials memorialize at least some of what the parties said to each other in the months before OFCCP brought this action. They offer the court what is presumably a fairly reliable guide to the positions the parties asserted against each other, and they document the parties' impatience with each other. What they do not do is demonstrate that either, as a matter of law, was being reasonable or unreasonable. Without a more complete factual background, the court can only guess whether one party was acting unreasonably, both parties were acting unreasonably, or neither party was acting unreasonably. Lawyers rarely open negotiations with complete candor. They frequently use hyperbole and exaggeration as they attempt to draw concessions from the opposing party. The extent of any given lawyer's hyperbole and exaggeration depends in part on that lawyer's experience, that lawyer's assessment of opposing counsel, and that lawyer's assessment of the opposing party's interests. Thus, for example, a take-it-or-leave-it offer of settlement may be a brilliant negotiating strategy in one case, and the manifestation of impatience and poor judgment in another. Without detailed knowledge of the factual context in which any given statement is made, it is almost impossible for the court to evaluate that statement for reasonableness. And if reasonable minds might differ on the inferences arising from undisputed facts, the court should deny summary judgment. *Warrior Tombigbee Transportation Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296-1297 (11th Cir. 1983).

Take, for example, the declarations of Mr. Siniscalco and Ms. Suhr. Both describe an October 6, 2016, meeting between the parties. Both were present at the meeting. According to Mr. Siniscalco,

At the October 6, 2016 meeting, OFCCP again reiterated that it was not interested in any response to its NOV other than a competing statistical analysis, and was unwilling to even consider cohort or other analyses of individuals or comparator groups at issue. Oracle explained to OFCCP, in detail, that the statistical models on which OFCCP's allegations were based – and solely based – were fundamentally flawed because they compare individuals who are not similarly situated, as required by Executive Order 11246 and Title VII. Oracle further explained that OFCCP had not even made any factual inquiry during the underlying compliance evaluation to determine which employees are similarly situated. OFCCP dismissed Oracle's concerns, and remained unwilling to reconsider the legit-

imacy of its statistical models or provide the models themselves for Oracle to review.

The Agency stated that it was not prepared to discuss any remedy for the alleged recruiting violation. The Agency then offered orally – never in writing – what it described as a “high level” proposal regarding monetary relief to address the alleged compensation violations. As for the alleged hiring violations, OFCCP pointed to a broad dollar range that OFCCP *might* demand once it had reviewed mitigation evidence – though it conceded it currently lacked any such information. When Oracle asked how OFCCP had determined the numbers it was using, OFCCP stated that it would not provide those calculations at that time (and, to my knowledge, it never did so). No conciliation agreement was presented, proposed, or discussed.

The meeting ended cordially, with OFCCP requesting additional information from Oracle and both sides agreeing that progress had been made.

Declaration of Gary R. Siniscalco, p. 2, paragraphs 9-11.

Ms. Suhr, on the other hand, describes the meeting like this:

OFCCP explained that Oracle’s objection to OFCCP’s use of job title and career level as variables in its analysis was inconsistent with what OFCCP learned about Oracle’s compensation system through its review. OFCCP also explained that it considered Oracle’s assertion that each employee was too unique in intangible ways to be pooled for analysis was unpersuasive. Oracle insisted that variations in its business rendered multiple regression analysis of its workforce inappropriate. OFCCP informed Oracle that it would need to do more than repeat the same legal positions that OFCCP had already rejected in responding to the NOV.

Also, at the October 6th conciliation meeting, OFCCP presented an approximation of back wages based on the limited information it had and carrying the violations forward to the present, as Oracle had not indicated that it had made any change in its employment practices. OFCCP presented damages at approximately \$22 million per year for the compensation discrimination violations and between \$64 and \$168 million for the hiring violations. That range did not take into account mitigation of lost wages, as Oracle had not provided any such in-

formation. OFCCP also informed Oracle of the shortfalls in hiring resulting from its statistical model. At the meeting, OFCCP identified other remedies it was seeking for the compensation violations and for recruiting and hiring violations.

At the October 6th conciliation meeting, Oracle offered no substantive rebuttal of the NOV. It did not provide a competing analysis of the information it had provided to OFCCP during the investigation showing no disparity in pay or hiring. It did not provide additional information that would impact OFCCP's assessment of its employment practices.

Based on the discussion, I left the October 6th meeting with the understanding that Oracle would respond to the NOV in substance or provide a meaningful settlement proposal.

Declaration of Jane Suhr, p. 3, paragraphs 7-9.

Mr. Siniscalco and Ms. Suhr describe the respective positions Plaintiff and Defendant took at the October 6, 2016, meeting. But the record does not clearly show that either position was reasonable or unreasonable. Mr. Siniscalco, for example, implicitly assumes that "cohort or other analyses of individuals or comparator groups at issue" are as relevant or useful as OFCCP's statistical analysis. Ms. Suhr claims "Oracle offered no substantive rebuttal of the NOV," suggesting Mr. Siniscalco's assumption is wrong. The court has no way of knowing, on the record before it, whether either Mr. Siniscalco or Ms. Suhr is correct on this point. Ms. Suhr says OFCCP told Oracle it might owe "\$22 million per year for the compensation discrimination violations and between \$64 and \$168 million for the hiring violations," although the back-wage figure was admittedly based "on the limited information [OFCCP] had," while Mr. Siniscalco says OFCCP conceded it lacked information to support "the broad dollar range" OFCCP might demand after reviewing the mitigation evidence. The record does not allow me to conclude whether OFCCP's figures, whatever they may have been, were reasonable or unreasonable under the circumstances. The parties agree they met on October 6, and they agree on some of the topics they discussed at the meeting, but that is not enough to allow the court to conclude, as a matter of law, that OFCCP was acting unreasonably.

The record is not sufficient to allow the court to conclude, as a matter of law, that OFCCP did not make a reasonable effort to conciliate its difference with Defendant before filing this action. Accordingly, the court denies the Motion for Summary Judgment without further analysis.<sup>2</sup>

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<sup>2</sup> Specifically, the court does not decide that OFCCP's conciliation efforts were "reasonable," or whether Defendant would be entitled to judgment in its favor if, in fact, OFCCP's conciliation efforts were not reasonable.

**A Stay of the Action is Unwarranted**

In the alternative, Defendant asks the court for a stay of these proceedings, contending OFCCP should attempt conciliation before this action goes any further. Because it is possible OFCCP has made reasonable efforts already, the court cannot stay this action.

Of course, nothing prohibits the parties from attempting to resolve these issues even while the matter is pending. The court's Pre-Hearing Order issued April 11, 2017, provided the parties with information about the court's Settlement Judge Program and encouraged them to explore settlement with or without court assistance. The court repeated this suggestion at the hearing and urged the parties to consider it.

The court denies Defendant's Motion for Summary Judgment.

The court denies Defendant's Motion for Stay.

The court makes no ruling on the merits of any party's claims or defenses.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge