

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



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.

ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS

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.

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.

In this case, Defendant moves for Judgment on the Pleadings under 41 C.F.R. § 60-30.8 and Rule 12(c) of the Federal Rules of Civil Procedure, contending 1) this action, as a matter of law, cannot include alleged violations of fair-employment standards occurring beyond the scope of Plaintiff OFCCP's pre-filing investigation, that is, after June 30, 2014; and 2) the court cannot hear OFCCP to complain that Defendant has "refused" or "failed" to produce information, when

OFCCP did not first seek to obtain those documents under 41 C.F.R. §§ 60.31 and 60-1.26(a)(vii). Plaintiff opposes the Motion. The court has considered the arguments of the parties, and, having done so, denies the motion.

Nature of this Motion

Defendant's Motion for Summary Judgment and Plaintiff's Motion for a Ruling Overruling Oracle's Objections Regarding the Temporal Scope of Discovery,¹ both of which are currently pending before the court, raise the same arguments which come before the court here. The court accordingly first considers what specific relief Defendant seeks under this Motion, as opposed to the relief it seeks under its Motion for Summary Judgment, given counsel's obligations under Rule 11(b). As one commentator observes,

The federal courts have followed a fairly restrictive standard in ruling on motions for judgment on the pleadings. Although the motion may be helpful in disposing of cases in which there is no substantive dispute that warrants the litigants and the courts proceeding further, thereby easing crowded trial dockets in the federal district courts, hasty or imprudent use of this summary procedure by the courts violates the policy in favor of ensuring to each litigant a full and fair hearing on the claims of his or her claim or defense. The importance of this policy has made federal judges unwilling to grant a motion under Rule 12(c) unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.

Wright and Miller, 5C Federal Practice & Procedure Civ. § 1368 (3d ed.). The court may grant such a motion only if all material issues can be resolved on the pleadings by the trial court. *Chavez v. United States*, 683 F.3d 1002, 1008 (9th Cir. 2012); *Fleming v. Pickard*, 581 F.3d 922 (9th Cir. 2009).

Here that is not the case. Defendant, by this motion, appears not to challenge Plaintiff's claims based on alleged acts of discrimination occurring *during* its pre-filing investigation. Stated differently, Defendant seeks to resolve some, but not all, of the claims set forth in the Complaint. For this reason, the court cannot grant relief under Rule 12(c). Because Defendant has already filed a responsive pleading, the court cannot grant relief under Rule 12(b). Accordingly, the court will treat the Motion as a Motion to Strike under Rule 12(f). Such a motion

¹ Court personnel have nicknamed the latter, for ease of reference, the "Doc Brown' Motion." Marty McFly's time-traveling mentor in the *Back to the Future* movies was not only obsessed with anomalies in the space-time continuum, but loquacious to a fault.

. . . permits either party to strike redundant, *immaterial*, impertinent, or scandalous matter from an adversary's pleading . . . The motion serves as a pruning device to eliminate objectionable matter from an opponent's pleadings and, unlike the Rule 12(c) procedure, *it is not directed at gaining a final judgment on the merits* . . .

Wright and Miller, 5C Federal Practice & Procedure Civ. § 1368 (3d ed.)(emphasis added).

When the court denies a Motion to Strike, the court does not rule that the allegations which survive the Motion are true. The court merely rules that the party making the allegations will later have an opportunity to prove them – and, of course, the party on the receiving end of those allegations will have an opportunity to contest them.

Inclusion of Post-June 30, 2014 Allegations

Defendant argues allegations of discrimination beyond the scope of OFCCP's pre-filing investigation are, as a matter of law, irrelevant in this case. In support of this argument, it first cites OFCCP's Federal Contract Compliance Manual for the proposition that a Notice of Violation (and, by extension under the facts of this case, the relevant Show Cause Notice) must include "all violations requiring collective action." In this case, Defendant argues, the Notice of Violation includes no allegations of post-investigation discrimination. Motion, p. 8. Second, Defendant relies on court decisions in EEOC cases to suggest OFCCP failed in its pre-filing obligations, and ought to suffer dismissal as a result. Motion, pp. 12-13. Defendant contends a Show Cause Notice can issue only on "reasonable cause" under 41 C.F.R. § 60-1.28. Motion, p. 13. Finally, Defendant argues allegations of discrimination based on information and belief serve "no purpose other than to highlight that the OFCCP failed to fulfill its obligation to perform a pre-suit investigation and thus lacks sufficient facts and knowledge" to support those claims. Motion, pp. 14-15. Relying on an Advisory Committee note to Rule 11, Defendant argues the court should treat Plaintiff's allegations on information and belief differently than a non-governmental plaintiff's by reason of OFCCP's duty to investigate before filing. Motion, p. 14.

These arguments would be more persuasive if they applied to all of the discrimination allegations in the Complaint, but even Defendant acknowledges, at least for purposes of this motion, that the allegations resting on OFCCP's pre-hearing investigation are not obviously created out of whole cloth. Relying primarily on *OFCCP v. Honeywell, Inc.* ("*Honeywell I*"), 77-OFCCP-3, 1993 WL 1506966 (Sec'y, June 2, 1993), Plaintiff contends it is allowed to seek redress for alleged acts of discrimination taking place after the pre-hearing investigation, and contends the court may infer continuing discrimination "in the absence of changed employment practices." Opposition, p. 1. What is more, Plaintiff argues its Complaint meets the

requirements set forth at 41 C.F.R. § 60-30.5. Under the cases Plaintiff cites at pp. 4-5 of its Opposition, the court concludes it should not, under Rule 12(f), strike the allegations of discrimination occurring outside of the pre-hearing investigation.

Failure or Refusal to Produce Information

The court concludes the expedited-hearing procedure under 41 C.F.R. § 60-30.31 is not a mandatory prerequisite to Plaintiff's seeking relief in this court for an alleged failure or refusal to produce information to OFCCP. The court also concludes production of the information is not the only remedy Plaintiff may seek in this court for such failure or refusal.

Accordingly, under Rule 12(f) of the Federal Rules of Civil Procedure, the court does not strike Plaintiff's allegations of discriminatory conduct occurring after June 30, 2014, and the court does not strike Plaintiff's claim based on Defendant's alleged failure or refusal to produce information. This Order does not comprise a ruling on the merits of any such allegation or claim.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge