

**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.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**REPLY IN SUPPORT OF
ORACLE AMERICA, INC.'S
MOTION TO CORRECT
OFCCP'S MISLEADING
STATEMENTS TO ORACLE'S
EMPLOYEES**

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REPLY ISO ORACLE'S MOTION TO CORRECT OFCCP'S MISLEADING STATEMENTS
CASE NO. 2017-OFC-00006

I. INTRODUCTION

OFCCP's Opposition asserts it has broad leeway to say what it wishes to Oracle employees, while Oracle—who employs these persons—cannot talk to its employees at all or at least without some stern words of caution. That OFCCP wishes to convey this message is established by the fact that only three of its five arguments are directly relevant to the motion it purports to oppose: Oracle's May 17, 2019 Motion to Correct OFCCP's Misleading Statements ("Motion").

The other two arguments are meant to shore up this notion that OFCCP can say what it wishes to Oracle employees (because it protects their interests) and Oracle cannot (because anything Oracle says could reduce the chance for recovery or will amount to retaliation), which is separately addressed in OFCCP's May 24, 2019 Motion for Protective Order or to Amend Complaint.

Oracle responds to the three relevant issues as follows.

1. *OFCCP's Communications Were Misleading.* This Court can read the language of the communications. There is little more to belabor.¹ But at least some of the arguments made by OFCCP reveal that the communications were, in fact, misleading. For instance, OFCCP's statement to Oracle employees that "**you have not been accused of any wrongdoing**" (bolded in original) simply would not—as OFCCP claims—be interpreted by a layperson to only mean they have not been named as defendants. *See* OFCCP's May 31, 2019 Opposition to Oracle's Motion to Correct OFCCP's Misleading Statements ("Opposition"), at 10-11. One can be accused of wrongdoing and *not* be named a defendant. This statement by OFCCP is one of entire exoneration—not some legalistic narrow statement that communicates that "you might have done something wrong, but we just have not sued you."

2. *Corrective Notice.* OFCCP's ultimate response is that it will not oppose a corrective notice. Opposition at 11. However, there is a heavy dose of "whataboutism." That is, OFCCP

¹ To be clear, OFCCP sent out the communication without prior approval from Oracle as to the wording of the communication.

wishes this Court to adjudicate Oracle's claimed improper communications and issue a corrective notice to punish Oracle. For this Motion, the only real question is whether OFCCP's conduct warrants a corrective notice. Whether *Oracle's* conduct warrants a corrective notice is the separate subject of OFCCP's May 24, 2019 Motion for Protective Order or to Amend Complaint and Oracle's June 6, 2019 opposition to that motion.

3. *The Claim That Oracle Failed to Meet and Confer.* Oracle did meet and confer, both telephonically and in writing. Motion at 2-3. In addition, even if the Motion was filed too early (an argument Oracle does not concede), as of this writing and as of the filing of OFCCP's Opposition, there is no question that this issue has been the subject of a full meet and confer process. *See* Declaration of Erin Connell dated May 23, 2019 ("May 23 Connell Decl."), ¶¶ 7-22.

Oracle now responds to the following issues, which are not relevant to this Motion but must be addressed.

1. *Oracle's Claimed Misconduct.* This issue is the separate subject of OFCCP's May 24, 2019 Motion for Protective Order or to Amend Complaint. Oracle's opposition to this motion is filed concurrent with this Reply. In ruling on the current Motion, this Court need not consider whether Oracle's conduct is improper or warrants some action. Nonetheless, Oracle provides below a brief preview of its responses to OFCCP's arguments and claimed corrective notice issues.

2. *OFCCP's Assertion of Privilege.* OFCCP has disclaimed that it represents Oracle's employees. It is not providing them legal advice. There is no legal basis for the assertion of the attorney-client privilege. In fact, while OFCCP has relied heavily on EEOC cases as a basis for its assertion of privilege, OFCCP must know—but has not informed this Court—that the EEOC may invoke the privilege only *after* it has been asked by an individual to represent him or her *and* acts in that capacity, *i.e.*, to represent the individual's rights. *EEOC v. Republic Servs., Inc.*, No. 2:04-cv-01352-DAE-LRL, 2007 WL 465446, at *2 (D. Nev. Feb. 8, 2007); *see also EEOC v. ABM Indus., Inc.*, 261 F.R.D. 503, 508 (E.D. Cal. 2009) (concluding that the EEOC's

communications with individuals before they asked to be represented by the EEOC and before the EEOC sued on their behalf were not privileged).

To bottom line it, OFCCP's communications are misleading. On that issue, a corrective notice should issue.

II. ARGUMENT

A. OFCCP's Communication Was And Is Misleading

Oracle will not overly belabor a communication this Court can read as well as anyone else. Motion at 3-6. But there are two points that bear noting.

First, as OFCCP acknowledges, one must look at the communication as a whole to determine whether it is misleading. Opposition at 1-2. Thus, OFCCP's parsing of each sentence followed by a declaration of its truth does not answer that ultimate question. For example, OFCCP's communication to Oracle employees represented that it has "determined that these employees have been underpaid by as much as 20% relative to their peers." OFCCP simply responds that this is an accurate statement. *Id.* at 7. But it is the context of this statement that renders it inaccurate and misleading.

OFCCP did not send this communication to a bunch of lawyers. So, when OFCCP states the case is ready to go to trial, it unmistakably communicates that OFCCP has made a determination of underpayment, that OFCCP wants to end this discrimination and get money for the injured employees (not even allegedly injured employees), and that the case is simply about distributing funds. This is misleading.

Second, and as referenced in the Introduction, OFCCP has communicated to Oracle employees that "**we want to assure you that you have not been accused of any wrongdoing**" (bold in original). To tell Oracle employees (including managers) that they have not been accused of wrongdoing is not—as OFCCP suggests—a statement that they are not named as defendants. Opposition at 10-11. No layperson would arrive at such a construction. No layperson would say to themselves, "I guess I won't be a defendant, so of course I am not accused of wrongdoing." Indeed, not even a lawyer would arrive at OFCCP's proposed

construction given the number of persons accused of wrongdoing in civil and criminal cases that are not sued as defendants.

B. A Corrective Notice Should Issue

OFCCP does not oppose a corrective notice. On this issue, this Court should require a corrective notice to issue as proposed by Oracle. As is set forth below, it should not be the one that OFCCP offers in its pique of “whataboutism.” *See* Section D, *infra*.

C. The Parties Met And Conferred

Oracle’s Motion sets forth the meet and confer process *concerning the issue of OFCCP’s misleading communication*. That process was completed before Oracle filed this Motion. Motion at 2-3. The parties only continued to discuss issues regarding communications thereafter because *OFCCP introduced the claim that Oracle’s communications were improper*. May 23 Connell Decl., ¶¶ 16-23.

Therefore, as of May 17 when Oracle filed this Motion, the parties had met and conferred—both telephonically and in writing—on the issues arising from OFCCP’s communications. *Id.*, ¶¶ 7-15. Following, Oracle and OFCCP met and conferred on OFCCP’s issues with Oracle’s communications. *Id.*, ¶¶ 16-23. OFCCP now wishes to bundle the two issues—its communications with Oracle’s—in terms of some blended resolution. But these issues require separate adjudication.

Nevertheless, there was ample discussion bearing on this topic before OFCCP filed its Opposition on May 24, 2019. *Id.*, ¶¶ 7-23. Indeed, on May 22, 2019, OFCCP declared an impasse. *Id.*, ¶ 21, Ex. N.

D. OFCCP’s Proposed Corrective Notice Seeks To Punish Oracle And Remedy Issues Not Present

Oracle has not engaged in any misconduct. This is further explained in Oracle’s May 23, 2019 Reply in Support of Oracle’s Second Motion to Compel and as argued in Oracle’s concurrently filed Opposition to OFCCP’s May 24, 2019 Motion for Protective Order.

Next, OFCCP's proposed corrective notice does little to nothing to address the issues caused by OFCCP's communication. It is remarkably one-sided and overcompensates for any alleged harm caused by Oracle's communication.

As an example, OFCCP refuses to include in the notice that the claims remain unadjudicated.²

The corrective notice also warns employees that speaking to Oracle could ruin their chance of recovering any money through the litigation. In the words of OFCCP's proposed notice, speaking to Oracle could "eliminate[e] or reduc[e] any relief that may be granted . . ." as though there was such an entitlement to begin with. *See* OFCCP's May 24, 2019 Motion for Protective Order, Attachment A. And because there is no similar caveat concerning communications with OFCCP, the corrective notice will have the natural effect of hampering Oracle's attempt to gather facts that are relevant to this case.

Finally, OFCCP wants this "corrective notice" sent to *all* current and former employees who worked in the job functions at issue since January 1, 2013—not merely those to whom OFCCP sent its original notice. *See* Declaration of Laura C. Bremer dated May 24, 2019, ¶ 13. Yet OFCCP has submitted evidence demonstrating that Oracle contacted a very small subset of employees. Thus, OFCCP seeks a remedy that is far broader than any claimed offense.

In short, OFCCP's proposal—which is really aimed at Oracle's claimed conduct—is not justified.

E. OFCCP's Assertion Of The Attorney-Client Privilege Is Misplaced

1. The Common Interest Privilege And An Assertion Of The Attorney-Client Privilege Are Not the Same Thing

As OFCCP previously has acknowledged, the common interest privilege does not create a privilege, but instead is an *extension* of the attorney-client privilege. *See* Declaration of Warrington Parker dated May 3, 2019, Ex. 12 at p. 24 of 32; OFCCP's Opposition to Oracle's Second Motion to Compel, May 17, 2019, at 16-17. In other words, the common interest

² These are just examples of the arguments made in Oracle's Opposition.

privilege only applies *if there is an existing attorney-client privilege*. Oracle's Second Motion to Compel, May 3, 2019, at 7-9 (citing and discussing cases). But as Oracle has pointed out, the common interest does not protect OFCCP's communications with employees because there is no attorney-client privilege in the first instance. *Id.* OFCCP is not representing the employees of Oracle. And OFCCP has made clear that it is not providing legal advice. Parker Decl., Ex. 12 at pp. 31-32 of 32. Therefore, there is no common interest or attorney-client privilege.

2. There Is No Attorney-Client Privilege As Between OFCCP And Oracle Employees

OFCCP says that it is protecting the "interest" of Oracle employees and references inapposite case law as proof that there is a privilege.

Protecting *an interest* without more is too removed a relationship to allow for the creation of an attorney-client relationship such that communications are protected by the attorney-client privilege. In those cases in which a privilege has been found, the government agency at issue (1) has been empowered to bring *and* (2) seeks to bring or has brought individual claims (3) on behalf of a complaining party *who has asked* the government agency to represent his or her interest. Thus, in *United States v. Gumbaytay*, 276 F.R.D. 671 (M.D. Ala. 2011), the Court noted that the Fair Housing Act allows an individual to submit his or her claim to the government, and the government "shall commence and maintain, a civil action *on behalf of* the aggrieved person" *Id.* at 674 (citation omitted, emphasis in original).

Similarly, in the EEOC context, the statutory scheme allows an individual to seek to have the EEOC pursue his or her personal claims on that person's behalf. Indeed, OFCCP relies on *EEOC v. DiMare Ruskin, Inc.*, No. 2:11-cv-158-FtM-99SPC, 2012 WL 12067868 (M.D. Fla. Feb. 15, 2012), which states:

After the EEOC undertakes to file suit seeking relief for individual victims of discrimination, it stands in a unique position. The Supreme Court has stated that 'the EEOC is not merely a proxy for the victims of discrimination.' *Gen. Tel. Co. of the NW, Inc. v. EEOC*, 446 U.S. 318, 326, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). Indeed, the EEOC stands in the role of attorney for those individuals.

Id. at * 6; *see* OFCCP’s May 17, 2019 Opposition at 17 n. 24.

Thus, Courts have found privilege only where the EEOC is suing on behalf of an individual. *See, e.g., EEOC v. Int’l Profit Assocs. Inc.*, 206 F.R.D. 215, 219 (N.D. Ill. 2002) (collecting cases all of which note that the EEOC sued on behalf of the individual); *see also Bauman v. Jacobs Suchard, Inc.*, 136 F.R.D. 460, 462 (N.D. Ill. 1990); *Donovan v. Teamsters Union Local 25*, 103 F.R.D. 550, 552, 553 (D. Mass. 1984) (Department of Labor representing the rights of an individual after that individual submitted claim to the Department of Labor).³

But when an agency is *not* suing on behalf of an individual and there is no request that the agency do so, as is the case here, there is no attorney-client privilege, even in the context of the EEOC. Thus, for example, in *Republic Servs.*, 2007 WL 465446 at *2, the court concluded there was no privilege to protect EEOC’s communications when those communications were *not* for the purpose of representing persons, and when the EEOC was *not* representing them. *See also ABM Indus.*, 261 F.R.D.at 508 (no privilege when communications had with individuals and witnesses). Because OFCCP will never represent Oracle’s employees, it cannot “establish the requisite attorney-client relationship to cut off the requested ex parte contact.” *EEOC v. SVT, LLC*, 297 F.R.D. 336, 342 (N.D. Ind. 2014). Oracle therefore may “informally contact[] identified potential class members” because “not allowing [Oracle] to conduct such informal discovery would impair its ability to investigate [OFCCP’s] claims, including with its own former and current nonmanagerial employees.” *Id.*

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³ OFCCP also cites *EEOC v. Chemtech Int’l Corp.*, Civ. A. No. H-94-2848, 1995 WL 608333 (S.D. Tex. 1995), (Opposition at 10 n. 8), which relies on *Bauman*.

III. CONCLUSION

For all the reasons set forth above, Oracle respectfully requests that the Court grant Oracle's motion and order OFCCP provide corrective notice.

June 7, 2019

Respectfully submitted,

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I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. My electronic service address is jkaddah@orrick.com.

On June 7, 2019, I served the interested parties in this action with the following document(s):

REPLY IN SUPPORT OF ORACLE AMERICA, INC.'S MOTION TO CORRECT OFCCP'S MISLEADING STATEMENTS TO ORACLE'S EMPLOYEES

by serving true copies of these documents via electronic mail in Adobe PDF format the documents listed above to the electronic addresses set forth below:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 7, 2019, at San Francisco, California.



Jacqueline D. Kaddah