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**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'S RESPONSE TO ORACLE'S OBJECTIONS
TO ISSUES FOR HEARING**

On December 2, 2019, without leave of Court, Oracle filed objections to this Court's framing of the issues that this Court initially proposed at the pre-hearing conference held on November 26, 2019 and which were contained in this Court's Pre-Hearing Order issued on November 29, 2019. At no point in this litigation has Oracle *ever* suggested that 41 C.F.R. Part

60-20 does not apply to these proceedings based on the 2016 clarifying amendments. To the contrary, Oracle has repeatedly relied upon these regulation, as amended, and affirmatively argued in its Motion for Summary Judgment that the regulation required dismissal of OFCCP's case. Having lost its Summary Judgment bid, and seeing that this Court interprets Part 60-20 in a manner different than it would like, Oracle attempts in this one-page objection to radically change the legal landscape of these proceedings on the eve of trial. This is grossly improper, and is in stark contrast to Oracle's recent opposition to any changes in the issues that are before this Court when OFCCP unsuccessfully requested to amend the pleadings based on its contention that amendment was proper to conform the pleadings to the facts. Further, Oracle did not seek leave to file this additional briefing and objections, and did not meet or confer with OFCCP regarding these objections and last-minute reversal of position. Oracle's objections should not be considered, but if the Court considers Oracle's objections OFCCP request that this Court also consider this Response and provide OFCCP with time to provide more extensive briefing.

Oracle's objection to issue No. 1, which was presaged in its portion of the Joint Pre-Hearing Statement, is that the allegations in this case should not be framed as a breach of contract issue because, although the operative regulations insert the equal opportunity obligation as a contractual provision, the regulations do not expressly frame a breach of the contractual provision as a breach of the contract. Oracle's rhetorical hair splitting here does not make logical sense—when a contractual provision is breached, it is both obvious and unremarkable to describe the breach as one of contract. As to the available remedies, these are spelled out in the Executive Order, the implementing regulations, and the forty years of case law promulgated thereunder.

Oracle's objection to issue No. 2 represents a major shift in Oracle's position as to the governing law that applies in this case, and if accepted, would be highly prejudicial to OFCCP and would throw these proceedings into turmoil. Oracle asks this Court to disregard the governing regulation that Oracle itself has repeatedly referred to and relied upon as governing this action and which Oracle has claimed required that OFCCP's case be dismissed.

In this last-minute, unauthorized filing, Oracle bases this change in stance on the fact that the regulation was amended in 2016, after the compliance review was initiated in this matter but

prior to OFCCP's filing of suit. Certainly, from the beginning of this litigation, Oracle has had the opportunity to make this objection. Oracle chose not to do so and also took the affirmative position in this Court *repeatedly* that these regulations govern these actions. *See, e.g.*, Oracle's Motion for Summary Judgment, MPA at 14 ("Title VII case law, as well as OFCCP's own regulations, dictate that OFCCP's statistics must compare 'similarly situated employees.' *See 41 C.F.R. § 60-20.4(a)*") (emphasis added); Oracle Opposition to OFCCP's Motion for Summary Judgment at 17 ("This alone violates OFCCP's governing regulations. *41 C.F.R. § 60-20.4(a)*.")) (emphasis added)).

Oracle also affirmatively sought and secured judicial adoption that 41 C.F.R. § 60-20.4(a) and (b), as amended, governed these proceedings. In addition to its recent summary judgment briefing, Oracle argued in its February 5, 2019, Opposition to OFCCP's Motion for Leave to File Second Amended Complaint, that these regulations governed these proceedings and relied on these regulations in support of their argument that OFCCP should not be granted leave to amend. Oracle argued that OFCCP should not be able to add a steering claim covered under 41 C.F.R. § 60-20.4(b) as follows:

Indeed, the regulations implementing Executive Order 11246 clearly delineate between the two claims. The regulations first prohibit pay discrimination, stating that "Contractors may not pay different compensation to similarly situated employees on the basis of sex." 41 C.F.R. § 60-20.4(a). The regulations further dictate that proving pay discrimination requires a "case-specific" analysis and is determined by factors such as "tasks performed, skills, efforts, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors." *Id.* § 60-20.4(a). *Separately*, the regulations prohibit job channeling, stating that "Contractors may not grant or deny higher-paying wage rates, salaries, positions, job classifications, work assignments, shifts, development opportunities, or other opportunities on the basis of sex." *Id.* § 60-20.4(b).⁷

Id. at 12. The Court adopted Oracle's position that these regulations govern, but did not agree with Oracle's overall argument regarding the Motion to Amend. *See* Order Granting OFCCP Conditional Leave to File Second Amended Complaint, issued March 6, 2019 ("As to the channeling/assigning complaint, Oracle is correct that the regulations in question differentiate

between this sort of discrimination and discrimination based on compensation disparities between similarly situated employees. *See* 41 C.F.R. § 60-20.4(a)-(b).”).

In addition to doing an about face on its own statements as to the governing regulations, Oracle’s objection here also implicitly seeks reversal of this Court’s recent order regarding the cross-motions for summary judgment – which referenced the governing regulations repeatedly since both parties submitted in their briefing that they governed adjudication of this action. *See, e.g.,* Order on Cross Motion for Summary Judgments at 3 (describing multiple provisions from 41 C.F.R. 60-20.2(b)), 22 (relying on 60-20.2(b)(6) and 20.4 in framing steering violations), 37 n. 29 (“In this case, 41 C.F.R. § 60-20.4 governs . . .”).

Given these facts, Oracle is clearly judicially estopped from now contesting the applicability of the regulations as amended. Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600–01 (9th Cir. 1996). “Judicial estoppel prevents parties from “playing ‘fast and loose with the courts.’” *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quoting *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)). Judicial estoppel not only prevents a party from gaining an advantage by taking inconsistent positions, but also provides for the orderly administration of justice and regard for the dignity of judicial proceedings. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).

The application of judicial estoppel is especially warranted here, as this Court has already expressly agreed with Oracle that the amended regulations apply to these proceedings. *See Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir.1982) (“Though perhaps not necessarily confined to situations where the party asserting the earlier contrary position there prevailed, it is obviously more appropriate in that situation.”); *see also New Hampshire v. Maine*, 532 U.S. 742, 750 (“courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position”); *cf. Rissetto*, 94 F.3d at 601 n.3 (9th Cir. 1996) (noting district court decision that explained that “most of the cases can be read as saying that judicial estoppel is

particularly appropriate when the party succeeded in the prior proceeding, but they do not really say that the doctrine cannot be applied absent such prior success”).

Even absent the history here, Oracle’s objection has no merit on its substance. While the regulations were updated in 2016, the 2016 updates were clearly designated as “clarifying” already existing principles, and did not create new or alter obligations on contractors. Indeed, the purpose of the rule was to reduce uncertainty and costs. 81 Fed. Reg. 39110 (“the final rule should resolve ambiguities, reducing or eliminating costs that some contractors may previously have incurred when attempting to comply with part 60–20”). As the preamble explained:

The final rule *clarifies* OFCCP’s interpretation of the Executive Order as it relates to sex discrimination, consistent with title VII case law and interpretations of title VII by the EEOC. *It is intended to state clearly contractor obligations to ensure equal employment opportunity on the basis of sex.*

The final rule removes outdated provisions in the current Guidelines. It also adds, restates, reorganizes, and clarifies other provisions to incorporate legal developments that have arisen since 1970 and to address contemporary problems with implementation.

The final rule does not in any way alter a contractor’s obligations under any other OFCCP regulations. In particular, a contractor’s obligations to ensure equal employment opportunity and to take affirmative action, as set forth in parts 60–1, 60–2, 60–3, and 60–4 of this title, remain in effect.

Similarly, inclusion of a provision in part 60–20 *does not in any way alter a contractor’s obligations to ensure nondiscrimination on the bases of race, color, religion, sexual orientation, gender identity, and national origin under the Executive Order; on the basis of disability under Section 503 of the Rehabilitation Act of 1973 (Section 503); or on the basis of protected veteran status under 38 U.S.C. 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act.* Finally, it does not affect a contractor’s duty to comply with the prohibition of discrimination because an employee or applicant inquires about, discusses, or discloses his or her compensation or the compensation of other applicants or employees under part 60–1.

81 Fed. Reg. 39109 (emphasis added).

As a clarifying regulation, it is certainly applicable to this lawsuit. It is well-settled that an agency’s regulation or rule that clarifies an unsettled or confusing area of law may be applied

retroactively. *See, e.g., Grant Med. Ctr. v. Burwell*, 204 F. Supp. 3d 68, 81 (D.D.C. 2016), *aff'd sub nom. Grant Med. Ctr. v. Hargan*, 875 F.3d 701 (D.C. Cir. 2017) (“a clarifying amendment, which does not change the law, can be applied retroactively”); *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir.1993) (holding that a regulation “simply clarifying an unsettled or confusing area of the law ... does not change the law, but restates what the law according to the agency is and has always been.”); *In the Matter of Johnson Elec. Co. Grand Rapids, Mi*, No. WAB Case No. 80-03, 1983 WL 144665, at *3 (Apr. 11, 1983) (“[T]he Department did this only in the interest of clarification of the existing regulation. The Board does not agree with petitioner's argument that the revision represented a change in Wage and Hour's policy or procedure.”).

The clarifying amendments to 41 C.F.R. Part 60-20 are to be read in conjunction with the non-discrimination obligations under Part 60-1. *See* 41 C.F.R. 60-20.1. Both before, and after promulgation, Title VII principles applied to the case analysis. What the amendment of 60-20 provided was additional clarity on how these principles would be applied in a case like this. In amending the regulation, OFCCP was explicit, that, with respect to the amended § 60-20.4, this *section does not create new obligations for contractors. See, e.g.* 81 Fed. Reg. 39125 (emphasis added).¹

¹ Indeed, one commentator suggested that 60-20.4 was superfluous and should be deleted:

A law firm comments that proposed § 60–20.4 is unnecessary and redundant, because the existing regulation at paragraph 60–2.17(b)(3) requires contractors to evaluate their compensation systems to determine whether there are any sex-, national origin-, or race-based disparities. The commenter asserts that the section does not change contractors’ obligations with regard to assessing their compensation systems or the compliance evaluation procedures that OFCCP uses to assess compliance and that it therefore has no purpose. OFCCP concludes that the section should remain in the final rule. The section does not create new obligations for contractors, but it does provide specific examples based in title VII law to help contractors assess their compliance. OFCCP’s rulemaking authority is not constrained to issuing regulations that create new obligations for contractors or that necessitate new enforcement mechanisms to assess contractor compliance. Since § 60–20.4 provides more clarity regarding the types of practices that can form the basis of a compensation discrimination violation of E.O. 11246, it should not be eliminated from the final rule.

For these reasons, Oracle's objections to the framing of the legal issues in this case should be overruled.

Respectfully submitted,

December 3, 2019

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CERTIFICATE OF SERVICE

I am over 18 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 3, 2019, I served the foregoing

OFCCP'S RESPONSE TO ORACLE'S OBJECTIONS TO ISSUES FOR HEARING

on Defendant Oracle America, Inc. by serving its attorneys below via electronic mail, pursuant to the parties' agreement:

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

Date: December 3, 2019

/s/ *Llewlyn D. Robinson*

LLEWLYN ROBINSON