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Office of Administrative Law Judges
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 COMPENDIUM OF ADMINISTRATIVE CASES IN SUPPORT OF REPLY
FOR MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT**

Exhibit 1: *OFCCP v. JPMorgan Chase & Co.*, 2017-OFC-00007 (Apr. 5, 2017)

Exhibit 2: *OFCCP v. JBS USA et al.*, Case NO. 2017-OFC-00002 (ALJ, Apr. 23, 2018)

Exhibit 3: *OFCCP v. Analogic*, 2017-OFC-00001, Order Granting OFCCP Motion for Partial
Summary Decision and Denying Analogic Motion for Summary Decision (Aug. 16,
2017)

OFCCP v. Oracle America, Inc., Case
No. 2017-OFC-00006

Exhibit 4: *OFCCP v. Enterprise RAC Company of Baltimore LLC*, 2016-OFC-0006 (Mar. 27, 2017)



U.S. Department of Labor

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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
DN CN=STEPHEN R HENLEY,
OU=ADMINISTRATIVE LAW JUDGE
O=US DOJ 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_-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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Issue Date: 23 April 2018

CASE NO.: 2017-OFC-00002

In the Matter of:

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

v.

**JBS USA LUX S.A. F/K/A JBS USA, LLC, JBS USA, INC., AND SWIFT & CO.,
AND SWIFT BEEF COMPANY, COLLECTIVELY D/B/A JBS AND JBS USA,
Defendants**

**ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND
COMPLAINT; GRANTING IN PART PLAINTIFF'S MOTION TO COMPEL AND TO
AMEND SCHEDULING ORDER; AND GRANTING IN PART DEFENDANT'S
MOTION FOR PROTECTIVE ORDER AND TO SHARE COSTS**

This is an action brought by the Office of Federal Contract Compliance Programs of the United States Department of Labor (herein "OFCCP" or "Plaintiff") against JBS USA LUX S.A. f/k/a JBS USA, LLC, JBS USA, Inc., and Swift & Co., and Swift Beef Company, Collectively d/b/a JBS and JBS USA (herein "Defendants") in which OFCCP alleged violations of Executive Order 11246 (30 Fed. Reg. 12319), as amended, and associated regulations at 41 C.F.R. Chapter 60.

On March 14, 2018, OFCCP mailed for filing its Motion to Compel Production of Emails and to Amend the Scheduling Order. On March 23, 2018, Defendants opposed the Motion and filed their Cross-Motion for Protective Order and to Share Costs. That same day, OFCCP filed its Motion for Leave to Amend Complaint, seeking to add gender discrimination to its claims. On March 30, 2018, Defendants opposed that Motion. OFCCP filed its responses to Defendants' filings on April 9, 2018. Defendants filed their reply on April 17, 2018.

Amendment of Complaint

The Code of Federal Regulations states that the contents of an administrative 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).

For an administrative complaint to be amended, the C.F.R. requires the following:

The complaint may be amended once as a matter of course before an answer is filed, and the defendant may amend its answer once as a matter of course not later than 10 days after the filing of the original answer. Other amendments of the complaint or of the answer to the complaint shall be made only by leave of the Administrative Law Judge or by written consent of the adverse party; and leave shall be freely given where justice so requires.

41 C.F.R. § 60-30.5(c)(emphasis added).

Amendments are to be “freely granted.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Pleading technicalities should not be controlling; instead, “if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.” *Id.* The Supreme Court also proscribed boundaries to a lower court’s discretion in granting an amendment. Undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, futility of the amendment, or undue prejudice to the opposing party, may warrant denying an amendment. *Id.*

Here, OFCCP seeks to add gender discrimination allegations to its Administrative Complaint, claiming that the earlier audit did not discover the basis of such allegations. Rather, OFCCP indicates that it first learned of the basis of its gender discrimination allegations in November 2017 in the course of discovery.

Defendants claim that OFCCP’s gender discrimination allegations are procedurally barred and, as such, any amendment is futile. I recognize that OFCCP failed to conciliate the gender discrimination claims but note that the issues herein relate generally to the hiring and maintenance of statistical data regarding Job Group 8A. I also note that the remedy for failing to conciliate may include a stay of litigation to afford the parties an opportunity to do so. *Mach Minign, LLC v. EEOC*, 135 S.Ct. 1645, 1656 (2015). For purposes of judicial economy, I permit the amendment of gender discrimination claims. If the claims were not included here, OFCCP could simply file a separate action based upon its discovery in November 2017 that, allegedly, statistical data indicates gender disparities. I further find that staying the action for conciliation efforts would itself be futile, as other conciliation efforts herein were unsuccessful.

Defendants also claim that they will be unfairly prejudiced by the inclusion of gender discrimination allegations at this juncture. Undue prejudice may result if: (1) a motion is filed in close proximity to the time of the trial (after years or months of pre-trial activity); (2) the amendment would cause undue delay in reaching a final disposition; (3) witnesses have become unavailable for examination; and (4) amendment would require the opposing party to engage in

expensive and time-consuming new discovery. *Merit Ins. Co. v. Colao*, 1986 U.S. Dist. LEXIS 17363 *10 (N.D. Ill. Nov. 21, 1986). Courts have also held prejudice is most likely to occur “when the amended claims arise out of a subject matter different from what was set forth in the complaint and raise significant new factual issues.” *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1208 (10th Cir. 2006); *Ross v. Colo. Dept. of Transp.*, 2012 U.S. Dist. LEXIS 186847 at *19 (D. Co. 2010); *Tex. Instruments, Inc. v. Biac Corp.*, 2009 U.S. Dist. LEXIS 90209 at *6 (D. Col. 2009). In the same way, prejudice may ensue when a change in tactics or theories by the other party causes difficulty in prosecuting or defending a claim. *LeaseAmerica Corp. v. Eckel*, 710 F.2d 1470, 1474 (10th Cir. 1983). With these principles in mind, I conclude at this stage of the proceeding that Defendants suffer minimal actual harm in terms of prejudicial effects by permitting an amendment. This formal hearing is scheduled in July 2019, more than a year away. The parties are presently engaged in discovery. Thus, I find that the amendment will not cause substantial delay in a final disposition. Lastly, Defendants expressed concern that amending the Complaint will increase their costs in defending this matter. Notably, I find the amendment relates to discriminatory practices concerning the same job group, facility, and employer during the same time frame.

Additionally, despite Defendants’ arguments to the contrary, I do not find that there was undue delay or bad faith by Plaintiff. OFCCP discovered inconsistencies in Defendants’ applicant flow data in November 2017. At that time, OFCCP first discovered an alleged statistical disparity against female applicants in Job Group 8A. I find that OFCCP’s amendment, filed less than five months after its receipt of the applicant flow data in discovery, was not unreasonably delayed. Moreover, evidence of untimeliness is not conclusive. *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365-66 (10th Cir. 1993).

Accordingly, for the foregoing reasons and in the interest of a just, speedy, and less expensive determination of this matter, I GRANT Plaintiff’s Motion for Leave to Amend Complaint to include gender discrimination claims. The litigation in this case will now proceed on the basis of the Amended Complaint. Moreover, I amend my earlier order and fix December 31, 2016, as the date after which the Court will not consider, in this action, Defendants’ alleged violations of EO 11246. This decision is without prejudice to OFCCP’s right to seek relief in a different action.

Production of Emails

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 Federal Rule of Civil Procedure 26(b)(1), 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).

The recent revision to Rule 26 "reinforced 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). Moreover, Rule 26(b)(2)(B) and (C) allow courts to place limits, enter protective orders, and specify conditions for discovery. Rule 26(c)(1) further allows cost sharing when the "expense of the proposed discovery outweighs its likely benefit...." Fed. R. Civ. P. 26(c)(1); *D'Onofrio v. SFX Sports Group, Inc.*, 254 F.R.D. 129, 134 (D. D.C. 2008). To establish good cause, the party seeking a protective order "must articulate specific facts to support its request and cannot rely on speculative or conclusory statements...." *Friends of the Earth v. U.S. Dept. of Interior*, 236 F.R.D. 39, 41 (D. D.C. 2006).

I agree with Defendants that OFCCP's requests nearly amount to a fishing expedition and find that Defendants' concerns regarding the burden and costs of producing the requested information are valid and convincing. Accordingly, the production shall be limited to 27 custodians and not more than 100 search terms. These limitations apply to all discovery, including discovery under the newly Amended Complaint. That is, Plaintiff will not be permitted to seek further discovery of its gender discrimination claims outside of these search parameters. Should OFCCP seek additional discovery outside of these search parameters, the undersigned would then be inclined to apportion 50% of the costs of production to Plaintiff.

Amended Scheduling Order

In light of the foregoing Orders and, particularly, the scope of electronic discovery, Plaintiff's Motion to Amend the Scheduling Order is hereby GRANTED in part. The following prehearing deadlines shall apply:

Deadline for Written Discovery:	October 31, 2018
Conclusion of Fact Depositions:	December 28, 2018
Plaintiff's Expert Report Submission:	January 28, 2019
Defendant's Expert Report Submission:	February 28, 2019
Plaintiff's Rebuttal Expert Report:	March 29, 2019
Completion of Expert Depositions:	April 29, 2019

Dispositive Motion Deadline: May 29, 2019
Prehearing Exchange: June 12, 2019
Prehearing Motions: July 3, 2019

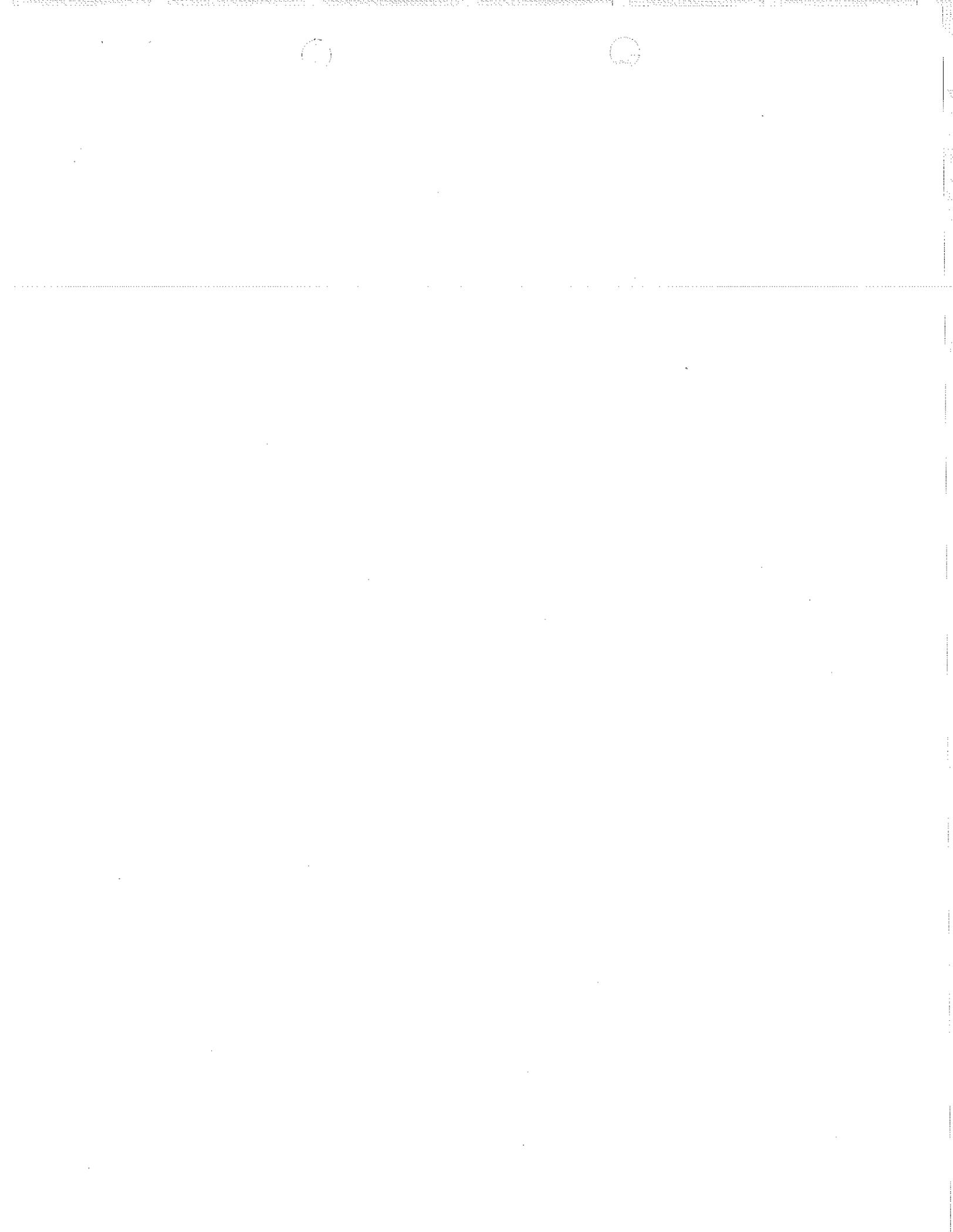
The hearing in the above matter will be held on July 24, 2019, in Amarillo, Texas. The Parties will be notified of the exact location by subsequent order.

ORDER

Considering the submissions of the Parties, Plaintiff's Motions for Leave to Amend Complaint is **GRANTED**. Plaintiff is given leave to include gender discrimination claims during the relevant time period, which is expanded as to all claims through December 31, 2016. Plaintiff's Motion to Compel Production of Emails and to Amend Scheduling Order and Defendants' Cross-Motion for Protective Order and to Share Costs are **GRANTED IN PART**. The scheduling order is amended as provided herein above. Plaintiff is limited to production of emails relating to 27 custodians and one hundred (100) search terms.

So ORDERED.

LARRY W. PRICE
Administrative Law Judge



UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 16 August 2017

ALJ NO.: 2017-OFC-00001

In the Matter of:

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

v.

ANALOGIC CORPORATION,
Defendant.

**ORDER GRANTING OFCCP MOTION FOR PARTIAL SUMMARY DECISION
AND DENYING ANALOGIC MOTION FOR SUMMARY DECISION**

This matter arises under Executive Order 11246 ("EO"), (30 Fed. Reg. 12319), as amended, and the regulations pursuant to 41 C.F.R. Chapter 60. The Court has jurisdiction in this matter under Sections 208 and 209 of the Executive Order and 41 C.F.R. § 60-1.26 and 41 C.F.R. Part 60-30.

On October 3, 2016, the United States Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") filed a complaint alleging Analogic Corporation ("Analogic") violated the EO by paying females employed in Assembler 2 and Assembler 3 positions less than comparable males in those positions. On October 24, 2016, Analogic filed its answer denying the allegations and asserting several affirmative defenses. On May 17, 2017, OFCCP filed a Motion for Partial Summary Decision on Analogic's Fifth Affirmative Defense which asserts OFCCP failed to conciliate prior to filing suit. On June 2, 2017, Analogic Opposed the Motion for Partial Summary Decision. On June 9, 2017, OFCCP filed a Motion for Leave to File Reply Brief in Further Support of Motion for Partial Summary Decision along with the reply. On June 27, 2017, I heard argument on this and several additional motions. The transcript of this argument is referred to herein as TR.

Following oral argument on OFCCP's motion, on July 12, 2017, Analogic filed a Motion for Summary Decision asserting OFCCP failed to engage in reasonable efforts to conciliate and seeking dismissal of the claim. On July 28, 2017, OFCCP filed its opposition to Analogic's motion. Because the two motions are overlapping and present common legal issues, both motions are addressed in this Order.

A. Parties' Positions

1. OFCCP Motion for Partial Summary Decision

OFCCP argues it is entitled to partial summary decision on the Fifth Affirmative Defense asserted by Analogic. Analogic's Fifth Affirmative Defense contends OFCCP failed to engage in good faith conciliation efforts.¹ OFCCP contends it met its obligation to conciliate under 41 C.F.R. § 60-1.20(b) before filing the complaint.² OFCCP Mot. at 6-10. The regulation requires OFCCP to make "reasonable efforts" to secure the employer's voluntary compliance through conciliation and persuasion. OFCCP contends there are no issues of material fact in dispute and it is entitled to summary decision dismissing Analogic's Fifth Affirmative Defense. *Id.*

OFCCP argues the Supreme Court's decision in *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645 (2015), establishing the standard of review for EEOC conciliation efforts controls. OFCCP Mot. at 7-9; OFCCP Rep. at 2-3. Citing the Supreme Court's *Mach Mining* decision, OFCCP asserts it met its obligation to conciliate before filing suit as it provided Analogic with notice of the violations and an opportunity to remedy them. OFCCP Mot. at 7-10; OFCCP Rep. at 3-4. Additionally, OFCCP maintains it provided Analogic sufficient notice it was alleging a continuing pattern and practice violation extending to the present. Rep. at 5-7. Finally, OFCCP states it is not required to conciliate allegations of continuing violations. Rep. at 6-10.

Analogic opposes the motion. As an initial matter, Analogic argues that because OFCCP never conciliated any claims other than the gender-based pay discrimination claims in Assembler 2 and 3 positions arising from the audit which covered the period January 1, 2011 to December 31, 2012, to the extent OFCCP intends to pursue claims arising after December 31, 2012, summary decision is inappropriate as OFCCP never conciliated later claims. Def. Opp. at 1-2, 13-14; Def. Sur Rep. at 2.

Second, Analogic urges application of a stricter standard for reviewing OFCCP's conciliation efforts than that set forth in *Mach Mining*. Def. Opp. at 2-3, 14-19; Analogic Sur Rep. at 1-2. Further, Analogic contends that under either standard, Summary Decision is

¹ In its entirety, Analogic's Fifth Affirmative Defense states:

OFCCP failed to engage in good faith conciliation efforts. To the contrary, following Analogic's retention of a statistical expert who was unable to duplicate the results of OFCCP's statistical analysis, OFCCP rejected repeated requests by Analogic for OFCCP to provide Analogic with the underlying factual data so that Analogic could confirm that both parties were working from the same common and correct data set. OFCCP refused, claiming that this factual data - which had been provided in the first place by Analogic - was "proprietary." When Analogic shared with OFCCP the fact that its statistical expert had concluded OFCCP's model was flawed in multiple respects, and further that there was no gender based compensation discrimination, OFCCP stated that they would be engaging a labor economist (and indicating that they were abandoning the statistical analysis that underpinned its claimed violations.) OFCCP also has repeatedly refused to share any other factual basis for its "conclusion" of discrimination.

Analogic Answer at 10.

² 41 C.F.R. § 60-1.20(b) provides that where OFCCP finds deficiencies in compliance with the EO, "reasonable efforts shall be made to secure compliance through conciliation and persuasion."

improper as there are questions of material fact in dispute as to whether OFCCP engaged in “reasonable efforts” to conciliate. Def. Opp. at 2-3, 14-22; Def. Sur Rep. at 3.

2. *Analogic’s Motion for Summary Decision*

Analogic argues OFCCP’s conciliation efforts were a sham. It contends OFCCP failed to engage in reasonable efforts to conciliate because it violated OFCCP’s own guidance in its conciliation efforts. Analogic Mot. at 1-2, 11-15. Analogic argues agencies are required to follow their own guidance and failure to do so without a valid explanation is arbitrary and capricious. *Id.* at 13. Analogic asserts OFCCP Guidance requires OFCCP to “provide the contractor with enough information about OFCCP’s regression model for the contractor to understand the basis for OFCCP’s determinations and for the contractor to replicate OFCCP’s regression model.” *Id.* at 12 (*citing* 71 Fed. Reg. 35,124, 35,131). Analogic states the Guidance ties this requirement directly to the conciliation process. *Id.* Analogic maintains OFCCP violated its own Guidance by failing to provide the company sufficient information about the regression model its audit expert used to enable the company to understand and replicate the analysis. *Id.* at 13-14.

Analogic further asserts the Guidance requires OFCCP to provide the contractor anecdotal evidence of compensation discrimination in the Notice of Violation. In support of this assertion, Analogic points to the Guidance which provides OFCCP “will ... summarize the anecdotal evidence in the NOV issued to the contractor....” *Id.* at 12 (*citing* 71 Fed. Reg. 35, 140). Analogic contends the Guidance prohibits the issuance of a NOV absent anecdotal evidence, except for unusual cases. *Id.* Analogic states OFCCP also violated the Guidance by failing to provide anecdotal evidence of discrimination in the NOV, Show Cause Notice or Amended Show Cause Notice. *Id.* at 14-15. In this regard, Analogic maintains OFCCP’s Rule 30(b)(6) witness failed to provide anecdotal evidence and asserts two other OFCCP witnesses acknowledged there was no anecdotal evidence in the NOV, SCN or Amended SCN. *Id.* at 13-14.

Analogic maintains the undisputed facts show OFCCP failed to engage in “reasonable efforts” to conciliate and it is entitled to summary decision. Analogic Mot. at 11. Analogic asserts dismissal is the appropriate remedy when OFCCP fails to conciliate in good faith. *Id.* at 15-17. Anticipating OFCCP’s position, Analogic argues ordering further conciliation, rather than dismissal, should the undersigned find OFCCP failed to conciliate, is not appropriate, as the company has been substantially prejudiced by OFCCP’s failure to follow its Guidance. *Id.* at 15-16.

In its opposition to Analogic’s motion, OFCCP asserts it engaged in reasonable efforts to conciliate. Opp. at 2-11. OFCCP states Analogic’s assertion OFCCP failed to follow its own Guidance,³ is contrary to the *Mach Mining* decision which states the duty to conciliate is minimal. *Id.* at 6-10. OFCCP maintains Analogic’s reliance on the Guidance to support its motion ignores the purpose of the Guidance and the conciliation process, asserting the Guidance

³ The document Analogic refers to as OFCCP Guidelines, OFCCP refers to as Standards. As the document in question indicates it is a Notice of Final Interpretive Standards for Systemic Compensation Discrimination under Executive Order 11246, I will refer to this document herein as OFCCP Guidance. Opp at 2 n. 1.

does not impose additional conciliation burdens on OFCCP beyond those in the regulation at 41 C.F.R. § 60-1.20(b), which sets forth the conciliation requirement. *Id.* at 4-5. OFCCP explains the purpose of the Guidance was to provide guidance to agency officials and covered contractors on OFCCP's interpretation of the Sex Discrimination Guidelines, 41 C.F.R. § 60-20 ("SDG") and the EO with regard to compensation discrimination. *Id.* at 4-6. The Guidance focuses on the NOV stage, which marks the beginning of the conciliation process. *Id.* at 5. OFCCP argues the Court should look to *Mach Mining* rather than the Guidance in analyzing whether OFCCP satisfied the conciliation requirement in 41 C.F.R. § 60-1.20(b). *Id.* at 5-7.

Second, OFCCP argues it met its requirements under the Guidance. OFCCP states the Guidance was intended to interpret the EO consistently with Title VII. OFCCP Opp. at 11-12. The Guidance explicitly rejected the "pay grade theory" analysis OFCCP had been using because it was inconsistent with the standards Title VII used in analyzing systemic compensation discrimination. *Id.* In support of its assertion that OFCCP complied with the Guidance, OFCCP argues it provided anecdotal evidence through its Rule 30(b)(6) witness who pointed to a sentence in the NOV referring to anecdotal evidence. *Id.* at 12-15. Additionally, OFCCP notes that in discovery it produced, in redacted form, employee interview statements, some of which included additional anecdotal evidence. *Id.* OFCCP states this information was not turned over during the compliance review to protect the employees from potential retaliation. *Id.* OFCCP also contends that it complied with the Guidance by providing information in the NOV, the SCN, and the Amended SCN about the variables and the regression results. *Id.* at 15. In response to Analogic's assertion that OFCCP did not turn over the "data set" requested so that the company could replicate OFCCP's regression analysis, OFCCP notes it offered to review Analogic's database and inform Analogic whether and how it differed from OFCCP's but Analogic declined that offer.

Finally, OFCCP argues that even if I were to determine OFCCP's conciliation efforts did not comply with the regulation at 41 C.F.R. § 60-1.26(B)(2), the proper remedy would be to order additional conciliation, not dismissal. OFCCP Opp. at 16-19.

B. Standard of Review - Summary Decision

The Rules of Practice for Administrative Proceedings To Enforce Equal Opportunity Under Executive Order 11246, provides summary decision is appropriate if the moving party "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 41 C.F.R. § 60-30.23. The standard set forth at 41 C.F.R. § 60-30.23 is derived from Federal Rules of Civil Procedure (FRCP) 56.⁴ A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Maymi v. P.R. Ports Auth.*, 515 F.3d 20, 25 (1st Cir. 2008). And, a genuine issue exists when the non-movant produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. *Anderson*, at 249.

⁴ Rule 56(a) provides that summary decision shall be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(a). The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges has a similar standard for granting summary decision. *See* 29 C.F.R. § 18.72.

In deciding a Rule 56 motion for summary decision, the Court must consider all the material submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-movant. *Anderson*, 477 U.S. 255; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970); *Butler v. Deutsch Bank Trust Co. AMS.*, 748 F.3d 28, 32 (1st Cir. 2014). In other words, the Court must look at the record as a whole and determine whether a fact-finder could rule in the non-movant's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *E.E.O.C. v. Kohl's Dept. Stores, Inc.*, 774 F.3d 127, 131 (1st Cir. 2014). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. If the non-movant fails to sufficiently show an essential element of his case, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Id.* at 322-323.

FACTUAL FINDINGS

1. OFCCP notified Analogic on December 29, 2011 that OFCCP would perform a compliance review under Executive Order 11246 ("EO"). OFCCP Mot. Attch 1 at ¶¶ 4, 6 ; Def Opp. Engel Decl. at Ex A; Def. Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 1-2.⁵
2. The compliance review occurred from December 2011 to January 2014. OFCCP Mot. Attch 1 at ¶¶ 4, 6; Def. Opp. Engel Decl. at Ex B, Def. Opp. Resp. to OFCCP Stmtnt of Uncontested Facts ¶ 1.
3. On January 17, 2014, OFCCP issued a Notice of Violation ("NOV") to Analogic alleging violations of the EO. OFCCP Mot. Attch 1 at ¶ 7; Def Opp. Engel Decl. at Ex B; Def. Opp. at Ex B, Def. Opp. Resp. to OFCCP Stmtnt of Uncontested Facts ¶ 3.
4. The NOV identified three violations of the EO and identified corrective actions OFCCP deemed necessary to address the alleged violations. First, the NOV alleged Analogic discriminated against females in the Assembler 2 and Assembler 3 positions by paying them less than males in those same positions. The NOV stated Analogic had no formal compensation system in place or oversight over subjective compensation practices that appear particularly susceptible to discrimination. Second, the NOV alleged Analogic failed to perform in depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. Finally, the NOV alleged that Analogic failed to develop and implement an internal audit system that

⁵ As there are competing motions and oppositions the references for factual findings are as follows: OFCCP's Motion for Partial Summary Decision is referred to as OFCCP Mot.; Analogic's Opposition to OFCCP's Motion is referred to as Def. Opp.; Analogic's Motion for Summary Decision is referred to as Analogic Mot.; OFCCP's Opposition to Analogic's Mot. is OFCCP Opp.

periodically measures the effectiveness of its total Affirmative Action Plan. See Def Opp. Engel Decl. at Ex B.⁶

5. The NOV also informed Analogic that in order to come into compliance, it must enter into a Conciliation Agreement encompassing the corrective actions identified, including by providing back pay plus interest ... for *all females* employed in Assembler 2 and Assembler 3 positions (current and former) to remedy the compensation discrimination that began no later than January 1, 2012. See Def Opp. Engel Decl. at Ex B; Analogic Mot., Fry Decl. at Ex B; OFCCP Mot. Stmt of Disputed Facts Pursuant to 41 C.F.R. § 60-30-23(d).
6. The NOV included an attachment with the results of the regression analysis performed by OFCCP, and some of the data utilized in the regression analysis. OFCCP Mot. Attch 1 at ¶ 7; Def. Opp. Resp. to OFCCP Stmt of Uncontested Facts ¶ 5.⁷
7. On February 3, 2014 a conciliation meeting by conference call was held with individuals and representatives from Analogic and from OFCCP. OFCCP Mot. Attch 1 at ¶ 8; Def. Opp. Resp. to OFCCP Stmt of Uncontested Facts at ¶ 6. At the meeting Analogic requested additional information regarding OFCCP's statistical analysis and OFCCP requested information from Analogic regarding geographic market differences in pay. *Id.*
8. On February 27, 2014 another conciliation conference call was held between Analogic and OFCCP. OFCCP provided Analogic information explaining details or variables OFCCP employed in the statistical analysis used in the NOV. OFCCP Mot. Attch 1 at ¶ 9; Def. Opp. Resp. to OFCCP Stmt of Uncontested Facts at ¶ 7.
9. On March 13, 2014 Analogic sent a letter to OFCCP seeking further explanation of the factors used in OFCCP's regression analysis as well as the underlying data used in the analysis. OFCCP Mot. Attch 1 at ¶ 10; Def. Opp. Resp. to OFCCP Stmt of Uncontested Facts at ¶ 8; Def Opp. Engel Decl. Ex C.
10. There were emails and a telephone call between Analogic counsel and OFCCP on July 2 and July 8, 2014 attempting to set up a date for another conciliation meeting, which included Analogic's renewed request for additional information and explanation of OFCCP's statistical analysis prior to the conciliation meeting. OFCCP Mot. Attch 1 at ¶¶ 11-13; Def Opp. Engel Decl. at ¶ 5 and at Ex D;
11. On August 20, 2014, OFCCP provided Analogic a written response to its March 13, 2014 letter. OFCCP's letter acknowledged that based upon information Analogic

⁶ The NOV speaks for itself. Def Opp. Engel Decl. at Ex B. The parties dispute whether the NOV included an "invitation" to conciliate. See OFCCP Mot. Attch 1 at ¶ 7 and Def. Opp. Resp. to OFCCP Stmt of Uncontested Facts at ¶ 4. At any rate, the terms of the NOV establish the NOV initiated the Conciliation Process.

⁷ The parties disagree as to precisely what information was provided with the NOV. OFCCP Mot. Attch 1 at ¶ 7; Def. Opp. Resp. to OFCCP Stmt of Uncontested Facts ¶ 5. However, the attachment to the NOV indicates the information provided with the NOV, that is the results of the regression analysis, and at least some data considered by OFCCP, including positions and number of female employees allegedly disadvantaged in each group. See Def Opp. Engel Decl. Ex B at 4.

provided in the February 27 conciliation meeting, "the narrative portion of the NOV Attachment A contained inconsistencies which did not accurately explain how OFCCP's regression analysis was conducted." OFCCP Mot. Attch 1 at ¶ 16; Def Opp. Engel Decl. at ¶ 6 and Ex E.

12. OFCCP's August 20, 2014 letter also included a settlement offer and requested Analogic provide possible dates to continue conciliation efforts. OFCCP Mot. Attch 1 at ¶ 16; Def Opp. Engel Decl at ¶ 6 and Ex E; Def Opp. Resp to OFCCP Stmtnt of Uncontested Facts at ¶11.
13. On October 6, 2014, Analogic responded to OFCCP's August 20 letter. Analogic informed OFCCP it had hired a statistician who was not able to replicate OFCCP's statistical results, stated it did not believe the compensation paid to Assembler 2 and 3 employees was discriminatory based upon gender, and requested OFCCP's data set and statistical model. The letter also expressed Analogic's view that until OFCCP provided the requested information, "it does not seem to make sense to meet." OFCCP Mot. Attch 1 at 18; Def. Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 13 and Def Opp. Engel Decl., Ex F.
14. On October 9, 2014, OFCCP sent an e-mail to counsel for Analogic, seeking counsel and an Analogic representative with settlement authority, to meet with OFCCP to conciliate this matter prior to OFCCP initiating enforcement action. OFCCP Mot. Attch 1 at 19; Def. Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 14 and Engel Decl. at Ex G.
15. On October 17, 2014, Analogic sent a letter to OFCCP. The letter stated Analogic's statistician was unable to replicate the results of OFCCP's statistical analysis using the variables OFCCP had provided. Analogic stated it was trying to replicate OFCCP's model in order to determine whether it agreed with OFCCP's determination of gender-based compensation discrimination. The letter requested OFCCP's underlying data set and indicated this information was necessary if any further conciliation meeting was to be fruitful. OFCCP Mot. Ex 1 at ¶ 21; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 18 and Def Opp. Engel Decl., Ex I.
16. On October 27, 2014, OFCCP e-mailed Analogic seeking dates for a meeting with Analogic representative with settlement authority to conciliate the matter. The e-mail also indicated OFCCP would work with Analogic's statistician before or during the face-to-face meeting so Analogic can better understand OFCCP's regression analysis. OFCCP Mot. EX 1 at ¶ 22; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 19 - 20 and Def Opp. Engel Decl., Ex J.
17. On November 3, 2014, OFCCP received a letter from Analogic indicating the company was not rejecting the on-going conciliation process, but needed information it had previously specified regarding OFCCP's data set, and OFCCP's comments regarding the variables and coding reflected in the data. The letter again stated Analogic viewed this information as essential to understand OFCCP statistics, and it would allow Analogic's statistician to analyze and hopefully duplicate OFCCP statistics. Analogic believed this may lead to constructive dialogue with OFCCP stating the sooner the information was provided the quicker the process could move forward. OFCCP Mot. EX 1 at ¶ 23; Def

Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 21-22 and Def Opp. Engel Decl., Ex K.⁸

18. On November 13, 2014, OFCCP held a telephone conference with Analogic in which several officials from both parties participated. There was a discussion of OFCCP's findings, its settlement offer and Analogic's concerns regarding OFCCP's regression analysis. OFCCP Mot. EX 1 at ¶25; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 24 and Def Opp. Fry Decl., ¶7.
19. On November 17, 2014, OFCCP received a letter from Analogic indicating the company was agreeable to continued efforts to conciliate. In furtherance of that effort, Analogic agreed to have the parties' respective statisticians speak directly with one another. Analogic explained it continued to seek information as to OFCCP's data set and variables OFCCP used in its data set and analysis, in order to assess OFCCP's position. OFCCP Mot. EX 1 at ¶26; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 25 and Def Opp. Engel Decl., Ex M.
20. On December 2, 2014, OFCCP responded by e-mail to Analogic's November 17 letter. OFCCP's e-mail indicated it was agreeable to having OFCCP's statistician available by phone to discuss the regression analysis with Analogic's statistician.⁹ OFCCP also provided further explanation of its regression analysis. OFCCP Mot. EX 1 at ¶26; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 26-27 and Def Opp. Engel Decl., Ex N.
21. On December 16, 2014, OFCCP had another phone call with Analogic in an effort to conciliate the claim. OFCCP Mot. EX 1 at 29; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 30 and Def Opp. Fry Decl., ¶ 8. Statisticians for each party participated in the call. *Id.*¹⁰
22. OFCCP spoke by telephone with Analogic on December 18, 2014. Analogic informed OFCCP it was unwilling to make a settlement offer. OFCCP Mot. EX 1 at ¶ 30; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 32-33.¹¹

⁸ On November 4, 2014, Analogic e-mailed OFCCP and essentially reiterated the substance of its November 3, 2014 letter. OFCCP Mot. EX 1 at ¶ 24; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 23 and Def Opp. Engel Decl., Ex L.

⁹ The letter also stated OFCCP officials would participate in the phone call, and perhaps OFCCP's counsel from the Solicitor's office would participate as Analogic had not yet provided a settlement offer and advised that if no resolution was reached after the statistician call, OFCCP expected to refer the matter for enforcement. Def. Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 27 and Def Opp. Engel Decl., Ex N.

¹⁰ The parties disagree as to precisely what was discussed during the call. OFCCP Mot. EX 1 at ¶ 29; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 30-31 and Def. Opp. Fry Decl., ¶ 8.

¹¹ The parties do not agree on other aspects of this telephone call. OFCCP Mot. EX 1 at ¶ 30; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 34.

23. On December 24, 2014, OFCCP issued a letter and Notice to Show Cause to Analogic. OFCCP Mot. EX 1 at ¶ 31; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 35, Def Opp. Engel Decl., Ex O.
24. On the same day, OFCCP sent an e-mail to Analogic requesting counsel to contact it if Analogic wished to conciliate the case instead of enforcement. OFCCP Mot. EX 1 at ¶ 31; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 36-37, Def Opp. Engel Decl., Ex P.
25. On January 22, 2015, Analogic sent a letter to OFCCP. Among the issues raised were Analogic's allegation that OFCCP did not conciliate, and its assertion that neither statistical nor anecdotal evidence supports OFCCP's claim of gender-based pay discrimination. OFCCP Mot. EX 1 at ¶ 32; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 38; Def Opp. Engel Decl., Ex Q.
26. On April 24, 2015, the parties held a telephone call in an effort at further conciliation. During this call OFCCP discussed some items in OFCCP's statistical research including hire dates. OFCCP Mot. EX 1 at ¶ 33; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 40.¹²
27. Analogic sent a follow-up e-mail to OFCCP on April 29, 2015. OFCCP Mot. EX 1 at ¶ 34; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 41, Def Opp. Engel Decl., Ex R.
28. On May 14, 2015, OFCCP and Analogic had a telephone call to discuss issues related to resolution. OFCCP Mot. EX 1 at ¶ 35; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 42.
29. On July 17, 2015, OFCCP issued an Amended Notice to Show Cause. OFCCP Mot. EX 1 at ¶ 36;¹³ Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 43, Def Opp. Engel Decl., Ex S.
30. On August 14, 2015, Analogic sent a letter to OFCCP in response to the Amended Notice to Show Cause. OFCCP Mot. EX 1 at ¶ 37; Def Opp. Engel Decl., Ex T.
31. On September 30, 2015, OFCCP referred the matter to the Solicitor's Office for enforcement. OFCCP Mot. EX 1 at ¶ 39; Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 44.

¹² There is no agreement as to other aspects of this telephone call. For example, OFCCP contends it discussed two additional elements of its statistical research including performance and rating criteria. OFCCP Mot. EX 1 at ¶ 33. Analogic did not agree that these two additional factors were discussed. Additionally, Analogic contends that in this call OFCCP informed the company that it had discovered inaccurate hiring dates for some employees and suggested to the company this may explain why it could not replicate OFCCP's statistical analysis. Def Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 40.

¹³ OFCCP states the Amended Notice to Show Cause was issued on July 7, 2015. This appears to be an error as the Amended Notice to Show cause is dated July 17, 2015. See Def, Opp. Resp. to OFCCP Stmtnt of Uncontested Facts at ¶ 43, Def Opp. Engel Decl., Ex S. In any event, the precise date the document was issued is not a material fact.

32. On October 3, 2016, OFCCP filed an Administrative Complaint against Analogic alleging violations of Executive Order 11246. OFCCP Mot. EX 1 at ¶ 40; Def Opp. Resp. to OFCCP Stmt of Uncontested Facts at ¶ 45; Def Opp. Engel Decl. Ex U.
33. Along with filing the Complaint in October 2016, OFCCP issued a press release stating “Analogic Corporation’s compensation policies resulted in systemic discrimination against women employed in Assembler 2 and Assembler 3 positions, in violation of Executive Order 11246.” Analogic Mot., Fry Decl. ¶ 22 citing <https://www.dol.gov/newsroom/release/ofccp/ofccp20161003>).¹⁴
34. In 2006 OFCCP published a document titled “Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination” (“OFCCP Guidance”). 71 Fed. Reg. 35,124(June 16, 2006); see also OFCCP Opp. at Ex A.
35. The OFCCP Guidance state that, except in unusual cases, OFCCP will not issue a NOV alleging systemic compensation discrimination without providing anecdotal evidence, and require that any such anecdotal evidence be summarized in the NOV. 71 Fed. Reg. 35,124, 35,140-141.
36. In discovery depositions, OFCCP witnesses testified the Guidance applied to the compliance evaluation of Analogic, and OFCCP was required to follow the Guidance. Analogic Mot., Engel Decl. at Ex A, Ex B and Ex C; OFCCP Mot. Stmt of Disputed Facts.
37. For example, OFCCP’s Rule 30(b)(6) representative, District Director Rhonda Aubin-Smith, testified as follows:

Q: By the way, before I have you look at Exhibit 2, among the documents you stated that you had reviewed were the compensation regulations from 2006. Correct?

A: Yes.

Q: Okay. And you understand that those, that document, regulations or guidelines apply, applied to the audit of Analogic in this case. Correct?

A: Yes.

Q: Okay. And even though those were later rescinded as to future audits, that is the governing document for this case. Correct?

¹⁴ Analogic’s motion includes a Statement of Uncontested Facts containing 41 facts. OFCCP disputes only “uncontested” facts 21, 29, 33, 39 and 40. Several of the Uncontested Facts in Analogic’s Motion are the same as the facts laid out above and which I have determined are uncontested as they relate to OFCCP’s Motion for Partial Summary Decision. Therefore, I will not repeat them. Suffice it to say for purposes of Analogic’s motion, I will include the additional uncontested facts relevant or material to its motion.

A: Yes.

Analogic Mot., Engel Decl. at Ex A (Deposition of Aubin-Smith, Tr. 21:18-22:9.)

Q: Just so I understand the nomenclature, this is called Guidelines. What is your understanding of what is meant by guidelines when they are issued ... in the manner that this document was issued....

A: Guidelines are, in this case, a document that you can follow in carrying out the procedure or process or task.

Q: ... Is it, was it your understanding that OFCCP was expected to follow guidelines once issued?

A: We would follow the guidelines.

Analogic Mot., Engel Decl. at Ex A (Deposition of Aubin-Smith at 67:17-70:15 (objections omitted)).

38. OFCCP's Rule 30(b)(6) representative testified the present matter was not the unusual case where anecdotal evidence was unnecessary. Analogic Mot., Engel Decl. at Ex B at 119:15-18.
39. OFCCP Compliance Officers Linda Frazier and Judith Morrow-Maloney testified the NOV issued to Analogic did not identify any anecdotal evidence of compensation discrimination. Analogic Mot. Engel Decl. Ex B (Deposition of Frazier, Tr. at 46:6-20); and Ex C (Deposition of Morrow-Maloney, Tr. at 23:8-12); OFCCP Mot. Stmt of Disputed Facts.
40. In response to comments received by OFCCP to the proposed Guidance, OFCCP stated it "will provide the contractor with enough information about OFCCP's regression model for the contractor to understand the basis for OFCCP's determinations and for the contractor to replicate OFCCP's regression model." 71 Fed. Reg. at 35,131. The Guidance itself provides OFCCP will attach the regression analyses and results to the NOV. 71 Fed. Reg. at 33140.
41. OFCCP's Rule 30(b)(6) witness testified that she understood that OFCCP was obligated to provide this information in its compliance evaluation of Analogic. Analogic Mot. at Engel Decl., Ex A (Deposition of Aubin-Smith, TR at 88:11-21); OFCCP Mot. Stmt of Disputed Facts.

CONCLUSIONS OF LAW

A. Scope of Review in Evaluating OFCCP Conciliations

Executive Order 11246 ("EO") prohibits employment discrimination by federal contractors on the basis of race, color, religion, sex or national origin and requires affirmative action to ensure equal opportunity in employment. The legal standards developed under Title

VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e,¹⁵ apply to actions brought under the EO. *OFCCP v. Greenwood Mills, Inc.*, ARB Nos. 00-044, 01-089, slip op. at 5, 2002 WL 31932547 at 4 (DOL Adm. Rev. Bd Dec. 20, 2002); *OFCCP v. Cleveland Clinic Found.*, 191-OFC-020, slip op. at 3 (ARB July 17, 1996); *U.S. Dep't of Labor v. Honeywell, Inc.*, 1977-OFC-003, 1993 WL 1506966, slip op. at 10 (Sec'y June 2, 1993).

Title VII requires where EEOC finds reasonable cause to believe a violation exists, it must “endeavor” to eliminate any alleged employment discrimination by informal methods of conference, conciliation, and persuasion. 42 U.S.C. § 2000e-5(b). In *Mach Mining, LLC v. E.E.O.C.*, 135 S.Ct. 1645, 1652-53 (2015), the Supreme Court determined courts could review the EEOC’s conciliation efforts. However, the Court held the review contemplated was narrow and limited. 135 S. Ct. at 1656. The Court’s decision recognizes the EEOC’s wide flexibility and latitude in how to seek voluntary compliance. *Id.* In particular, the Court noted Congress left the EEOC with the strategic decisions as to whether to make a bar-minimum offer, to lay all cards on the table, or to respond to each counteroffer and the duration of conciliation efforts. *Id.* at 1654.¹⁶

The Supreme Court established what it termed a “manageable standard” the EEOC must meet in satisfying its requirement to “endeavor” to achieve an employer’s voluntary compliance to “eliminate [the] allegedly unlawful employment practice by informal methods of conference, conciliation and persuasion” prior to initiating suit. 135 S.Ct. at 1655-56. The Court determined the EEOC’s obligation to conciliate before filing a complaint is fulfilled by providing the defendant notice of the violations and an opportunity to remedy. Specifically, the Court stated the enforcement agency’s conciliation attempts require that it (1) inform the employer of the specific discrimination allegation, and (2) try to engage the employer in some form of discussion to give the employer an opportunity to remedy the allegedly discriminatory practice. *Id.* at 1656. In reviewing whether the EEOC met its obligation, the Court looks to whether the agency satisfied these two requirements. *Id.*¹⁷

¹⁵ Title VII precludes employment discrimination on the basis of race, color, religion, sex and national origin.

¹⁶ In discussing the flexibility afforded the EEOC in the conciliation efforts, the Court stated:

To begin with, the EEOC need only “endeavor” to conciliate a claim, without having to devote a set amount of time and resources to that project. § 2000e-5(b). Further, the attempt need not involve any specific steps or measures; rather, the Commission may use in each case whatever “informal” means of “conference, conciliation, and persuasion” it deems appropriate. *Ibid.* And the EEOC alone decides whether in the end to make an agreement or resort to litigation: The Commissioner may sue whenever “unable to secure” terms “acceptable to the Commission.” § 2000e-5(f)(1) (emphasis added). All that leeway respecting how to seek voluntary compliance and when to quit the effort is at odds with Mach Mining’s bargaining checklist. Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer’s counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.

135 S.Ct at 1654.

¹⁷ More recently, the Second Circuit extended the *Mach Mining* rationale to apply to EEOC investigations. *EEOC v. Sterling Jewelers, Inc.*, 801 F.3d 96, 99 (2d Cir. 2015). The Second Circuit determined the “sole question for judicial review is whether the EEOC conducted an investigation.” *Id.* at 101. It concluded the “[c]ourts may not review the sufficiency of an investigation – only whether an investigation occurred.” *Id.*

Following *Mach Mining*, Courts have recognized the limited scope of review of EEOC conciliation efforts. In *EEOC v. Jetstream Ground Services, Inc.*, 134 F. Supp. 3d 1298 (D. CO. 2015), the District Court rejected the employer's partial summary decision request based upon an assertion the EEOC did not engage in a "sincere and reasonable conciliation" because OFCCP requested the Employer create a settlement fund for unidentified aggrieved individuals. The District Court citing *Mach Mining*, denied the motion for partial summary decision stating the employer's arguments all relate to the "**substantive terms of the bargaining between it and the EEOC** – not the process of conciliation or whether EEOC attempted to consulate." *Id.* at 1316 (emphasis in original). The District Court held EEOC engaged in adequate conciliation efforts by exchanging multiple settlement offers, meeting in person, and attempting to engage the employer in some form of discussion...so as to give [employer] an opportunity to remedy the allegedly discriminatory practice." *Id.* (quoting *Mach Mining*).¹⁸

Similar to the Title VII process, under the EO, OFCCP conducts compliance reviews to determine whether contractors are maintaining nondiscriminatory employment practices and taking appropriate affirmative action to ensure employees are hired, trained, and promoted without regard to race, color, religion, sex, etc. 41 C.F.R. § 60-1.20. The compliance review may include a desk audit, an on-site review, and an off-site review. 41 C.F.R. § 60-1.20(a)(1)-(3). Subsection (b) of the regulation sets forth the conciliation process stating "where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion." 41 C.F.R. § 60-1.20(b). After completing a compliance evaluation, OFCCP may notify a contractor of deficiencies through a Notice of Violation ("NOV").¹⁹ OFCCP's Federal Contract Compliance Manual ("FCCM") states the NOV begins the conciliation process. FCCM 8F01, p. 264. The FCCM provides, "[c]onciliation is a negotiation between the compliance officer and the contractor to resolve findings of noncompliance." FCCM 8G, p.265. Following the compliance officer's issuance of a NOV, the officer "attempt[s] to reach an acceptable resolution of the violation findings through voluntary conciliation with the contractor." FCCM 8G01, p.266. The regulations implementing the EO provide that where OFCCP "has reasonable cause to believe that a contractor has violated the equal opportunity clause" it may issue a Notice to Show Cause ("SCN") putting the contractor on notice that enforcement proceedings or other action may be instituted. 41 C.F.R. § 60-1.28.

Analogic argues the *Mach Mining* scope of review should be rejected in reviewing OFCCP's conciliation efforts, because the regulation addressing OFCCP's conciliation requirement is materially different than that imposed on the EEOC by Title VII. As noted, the OFCCP regulation governing conciliation under the EO states: "[w]here deficiencies are found to

¹⁸ Analogic's reliance on *EEOC v. OhioHealth Corp.*, 115 F. Supp. 3d 895 (S.D. Ohio 2015) to support its position OFCCP failed to make reasonable efforts to conciliate is unpersuasive as it is contrary to the Supreme Court's *Mach Mining* decision. Analogic Mot. at 15 n. 4. Several courts have determined *OhioHealth* was incorrectly decided. See *EEOC v. Mach Mining, LLC*, 161 F. Supp. 3d 632, 635 (S.D. Ill 2016) (*Mach Mining* decision on remand); *EEOC v. Amsted Rail Co.*, 169 F. Supp. 3d 877, 885 (S.D. Ill 2016). These cases criticized the *OhioHealth* decision because it considered the substance, that is, the positions taken by the parties during the conciliation process.

¹⁹ A NOV is not required by OFCCP regulation. The OFCCP Federal Contract Compliance Manual ("FCCM") explains a NOV is a letter informing a contractor that during a compliance evaluation the Compliance Officer found a violation of the EO. FCCM 8F. The FCCM can be found at https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf.

exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion....” 41 C.F.R. § 60-1.20(b). Analogic asserts because the regulation addressing OFCCP’s conciliation efforts provides OFCCP must make “reasonable” efforts to secure compliance, OFCCP must meet a more rigorous standard for its conciliation efforts than that required of the EEOC to “endeavor” to conciliate under Title VII. Analogic contends a court reviewing OFCCP’s conciliation efforts must find the OFCCP satisfied a higher standard, that is, a court must find OFCCP’s conciliation effort was reasonable.

As an initial matter, there is little difference between a requirement to make “reasonable efforts” to conciliate and the Title VII requirement that the EEOC “endeavor” to conciliate.²⁰ The *Mach Mining* Court’s decision did not turn on the meaning of “endeavor”; instead it relied, in part, upon the EEOC’s flexibility in conciliation efforts. The conciliation regulation under the EO requires OFCCP to make “reasonable efforts” to secure compliance through conciliation and persuasion. 41 C.F.R. § 60-1.20((b)). The regulation reflects OFCCP has similar flexibility and latitude in its conciliation attempt. For example, the regulation does not require OFCCP to “devote a set amount of time or resources” for conciliation and does not require OFCCP to “involve any specific steps or measures in its conciliation effort.” *Mach Mining*, 135 S.Ct. at 1654.

Additionally, EEOC and OFCCP are both charged with routing out and/or correcting alleged employment discrimination. The agencies have signed a Memorandum of Understanding (“MOU”) in order to cooperate in advancing that goal in a number of ways. The EEOC and OFCCP share information related to employment practices of government contractors or subcontractors that support the enforcement mandates of each agency and their joint enforcement efforts. The information shared may include complaints, charges, investigative files, and compliance evaluation reports and files. MOU at 1. The MOU established Coordination Advocates in each agency for the purpose of ensuring “consistent compliance and enforcement standards and procedures, and to make the most efficient use of their available resources through coordination.” MOU at 10. As OFCCP points out, one way in which the agencies cooperate is the MOU authorizes OFCCP to serve as an agent for the EEOC in conciliating dual-filed claims. MOU at 7. It would make little sense to require and apply different conciliation standards, one for conciliating claims under the EO and another for conciliating claims under Title VII.²¹

The *Mach Mining* decision sets forth the scope of review a court applies in evaluating whether EEOC met its conciliation requirement prior to filing suit. After careful review of the *Mach Mining* decision and the OFCCP conciliation regulation at 41 C.F.R. § 60-1.20(b), I find the *Mach Mining* standard establishing a limited scope of judicial review applies to whether

²⁰ Endeavor is defined as “strive to achieve,” “make an effort,” and “a serious determined effort.” Webster’s Third New International Dictionary (Unabridged) at 748. Black’s Law Dictionary defines “endeavor” as “[a] systematic or continuous effort to attain some goal.” Black’s Law Dictionary (7th ed. 2014). Reasonable is defined as moderate, not extreme, well balanced, or fair. Webster’s Third New International Dictionary (Unabridged) at 1892. The OFCCP regulation directs OFCCP to make “reasonable efforts” to conciliate.

²¹ As discussed in greater detail below, OFCCP Guidance titled “Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination” published as interpretive standards in June 2006, (71 Fed. Reg. 35124-01 (June 16, 2006)), which Analogic relies upon expressly states OFCCP is changing its interpretation to conform to interpretations applied under Title VII.

OFCCP met its obligation to conciliate under the EO. Under this standard, OFCCP has wide flexibility and discretion in the conciliation process.

B. Application of *Mach Mining*

Applying the *Mach Mining* standard here, I note OFCCP informed Analogic that OFCCP alleged the company discriminated against females employed in Assembler 2 and Assembler 3 positions by paying them less than comparable males employed in Assembler 2 and Assembler 3 positions. OFCCP also alleged Analogic failed to identify through in depth analysis whether there were gender-based disparities in its compensation systems as applied to the Assembler 2 and Assembler 3 positions and failed to develop and implement an internal audit system that measures the effectiveness of its total Affirmative Action Program. Thus, I find OFCCP satisfied the requirement of informing the company of the specific discrimination allegations.

As noted above, under the second factor the *Mach Mining* decision established, a reviewing court looks at whether OFCCP “tr[ie]d to engage the employer in some form of discussion to give the employer an opportunity to remedy the allegedly discriminatory practice.” *Mach Mining*, at 1656. OFCCP made several attempts extending over several months, to secure Analogic’s compliance. This included several e-mails and telephone conferences, the exchange of views and documents, and a settlement offer. *See* Undisputed Facts ¶¶ 5-23, 26-30. Although OFCCP declined to share every document Analogic sought during conciliation that does not mean OFCCP failed to conciliate, or that its attempts at conciliation were not reasonable. OFCCP has wide latitude in the manner in which conciliation efforts are performed. OFCCP is not required to provide every piece of evidence or data it may eventually rely upon at a trial during the conciliation process. Based upon the undisputed facts laid out above, I find OFCCP made multiple reasonable efforts to conciliate this claim. Therefore, I find OFCCP has satisfied the second requirement a reviewing court evaluates in determining whether an enforcement agency met the conciliation requirement.

Contrary to Analogic’s apparent view, the Court’s review of the conciliation process is not intended to challenge the substance of OFCCP’s conciliation efforts. Despite Analogic’s protestations, its challenge to the conciliation process is an attack on the substance of the negotiation between it and OFCCP to voluntarily resolve the alleged violations of the EO. Requiring reviewing courts to assess the merits of those discussions would essentially result in a mini-trial of the allegations at the conciliation stage. This is precisely what the *Mach Mining* decision prohibits.²²

C. Effect of the OFCCP Guidance on the Conciliation Process

Analogic argues OFCCP’s conciliation efforts were a sham and OFCCP failed to make reasonable efforts to conciliate as required by the regulation at 41 C.F.R. § 60-1.20(b) because it violated its own Guidance titled “Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination.” 71 Fed. Reg. 35124-01 (June 16, 2006); Analogic Mot. at 11. Analogic contends specifically that OFCCP violated the OFCCP Guidance by failing to provide the company with enough information for Analogic to

²² OFCCP’s conciliation efforts here far exceeded the EEOC’s effort at issue in *Mach Mining*.

replicate OFCCP's regression model and by failing to provide anecdotal evidence of compensation discrimination in the Notice of Violation. Consequently, Analogic contends the case should be dismissed.

The OFCCP Guidance was published as interpretive standards on June 16, 2006, and intended to provide agency officials, covered contractors and subcontractors guidance on OFCCP's interpretation of the EO and the Sex Discrimination Guidelines ("SDG") found at 41 C.F.R. § 60-20. 71 Fed. Reg. at 35,137-38.²³ Specifically, the Guidance explains one purpose was to inform contractors OFCCP would no longer use the "pay grade theory" OFCCP had been using in analyzing compensation practices for systemic compensation discrimination cases.²⁴ 71 Fed. Reg. at 35,124. The second reason for the Guidance was to inform contractors OFCCP was adopting a multiple regression statistical technique for assessing the combined effects of multiple legitimate factors that influence employers' compensation decisions. *Id.* The final purpose outlined was a discussion of the importance of anecdotal evidence of discrimination to support a claim of systemic discrimination. *Id.*

Contrary to Analogic's assertions, the Guidance cannot be read as imposing greater requirements on OFCCP than those imposed in the regulation governing OFCCP conciliation responsibilities under the EO. The conciliation regulation at 41 C.F.R. § 60-1.20(b), requiring OFCCP to engage in reasonable efforts to conciliate, is never cited in the Guidance, and the term "conciliate" is mentioned only once in the Guidance and that is in the section addressing comments OFCCP received on its adoption of the multiple regression analysis.²⁵ 71 Fed. Reg. at 35,131. Nowhere in the Guidance does it state the Guidance was intended to modify or trump the conciliation regulation. Nor does the Guidance indicate anything short of exact fealty to the Guidance is a violation of the conciliation regulation, or precludes OFCCP from enforcing the important public policy goals of the EO.²⁶ Accordingly, I find that the OFCCP Guidance is not

²³ OFCCP rescinded the Guidance on February 28, 2013, but indicated it remains applicable to "any OFCCP review scheduled, open or otherwise pending" on that date. 78 Fed. Reg. 13,308, 13,520 (Feb. 28, 2013).

²⁴ OFCCP explained it was rejecting this theory because the assumptions underlying the "pay grade theory" were not consistent with administrative and judicial interpretations under Title VII, and OFCCP intended to interpret the EO consistently with Title VII. 71 Fed. Reg. at 35,124. In the Substantive Discussion portion of the Guidance, OFCCP stated the pay grade theory was no longer being used. *Id.* at 35,137. Instead OFCCP stated it interprets the EO and the SDG as "prohibiting systemic compensation discrimination involving dissimilar treatment of individuals who are similarly situated, based upon similarity in work performed, skills and qualifications involved in the job, and responsibility levels." *Id.*

²⁵ Analogic ties its claim the Guidance controls in determining whether OFCCP satisfied the conciliation regulation at 41 C.F.R. § 60-1.20(b) partially on one paragraph in the section discussing comments received in response its proposed guidance, which states OFCCP "will provide the contractor with enough information about OFCCP's regression model for the contractor to understand the basis for OFCCP's determination and for the contractor to replicate OFCCP's regression model." 71 Fed. Reg. 35,131. Analogic Mot. at 12. It further states "OFCCP agrees that providing such information to contractors will permit the agency to conciliate alleged violations effectively and expeditiously. . . With such information, contractors will have an opportunity to discuss settlement with OFCCP or to attempt to rebut OFCCP's determination." *Id.*

²⁶ Analogic acknowledged the Guidance does not have the binding effect of law. Def. Sur-Rep. at 2 n.2. Analogic's reliance on *OFCCP v. Bank of America*, Case No. 13-099, 2016 WL 2892921 at 22 (ARB Apr. 21, 2016) to support its contention that failure to follow the Guidance here was arbitrary and capricious is misplaced. OFCCP cites only the concurring opinion of one judge, not the plurality decision.

relevant or applicable to a determination that OFCCP properly conciliated under 41 C.F.R. § 60-1.20(b).

However, given Analogic has made an assertion that OFCCP violated two sections of the OFCCP Guidance, for sake of completeness, I will address whether OFCCP did in fact comply with the OFCCP Guidance.

Analogic first alleges OFCCP violated the Guidance by not including anecdotal evidence in its NOV. The Guidance provides OFCCP will “summarize the anecdotal evidence in the Notice of Violations issued to the contractor or subcontractor.” 71 Fed. Reg. at 35,140. The Guidance does not require direct evidence of discrimination in the NOV. In the section addressing comments received following the proposed Guidance, the OFCCP explained: “[O]fCCP’s reference to ‘anecdotal evidence’ in these final interpretive standards is evidence that leads to an inference that the employer subjected . . . particular employees to disparate treatment in compensation.” 71 Fed. Reg. at 35,134. OFCCP explained:

The interpretive standard on anecdotal evidence is not intended to place burdens on OFCCP in establishing a violation beyond what is required by interpretations of Title VII. Rather, the interpretive standard sets forth OFCCP’s interpretation that anecdotal evidence is important in establishing systemic compensation discrimination and its position that rarely will a Notice of Violation be issued by OFCCP alleging systemic compensation discrimination absent anecdotal evidence.

Id.

In this case, OFCCP’s Rule 30(b)(6) witness, Ms. Aubin-Smith, testified OFCCP’s NOV provided anecdotal evidence when it stated “[a]dditionally, Analogic had no formal compensation system in place or oversight over subjective compensation practices that appear particularly susceptible to discrimination.”²⁷ OFCCP Mot., Ex D at 60-61. While this statement is certainly general and does not provide specific information other than to alert Analogic that lack of a formal compensation system and subjective compensation practices appear susceptible to discrimination and would be potentially discriminatory, I am persuaded the statement satisfies the minimal requirement to summarize the anecdotal evidence in the NOV.

The Guidance recognizes anecdotal evidence can support statistical evidence of systemic gender compensation discrimination and directs OFCCP to summarize anecdotal evidence in the NOV issued in systemic discrimination cases. Here, OFCCP summarized the anecdotal evidence as subjective practices affecting pay decisions in the NOV, and during the conciliation process OFCCP provided additional detail as to the nature of alleged subjective practices contributing to

²⁷ I am not persuaded by Analogic’s assertion Ms. Aubin-Smith’s testimony stating anecdotal evidence was included in the NOV was contradicted by the deposition testimony of two compliance officers stating no anecdotal evidence was included. Analogic Mot. at 5-6. Neither of the compliance officers’ testimony on this point is entitled too much weight as neither of them had the final decision for nor the final approval of the NOV. Analogic Mot., Engel Decl., EX B at 46, Ex C at 23. In contrast, Ms. Aubin-Smith is the District Director of the Boston Regional Office, was the final approver of the NOV, and was the designated Rule 30(b) witness to speak for OFCCP.

the alleged gender pay discrimination.²⁸ OFCCP is not required in the NOV or during the conciliation stage, to provide an employer with all anecdotal evidence it intends on relying on in the event the case proceeds to hearing.

Analogic also maintains OFCCP failed to provide it with enough information to replicate OFCCP's regression model in violation of the OFCCP Guidance.²⁹ In particular, Analogic argues OFCCP refused to turn over its "data set" so the company could replicate OFCCP's regression analysis. Mot. at 12. The Guidance states OFCCP will "attach the regression analyses and results to...the Notice of Violations issued to the contractor or subcontractor." 71 Fed. Reg. at 35,140. In the instant matter, OFCCP provided the results of the regression analysis and provided information about the variables it used in its regression analysis in the NOV, and during the conciliation process. When Analogic informed OFCCP its expert was unable to recreate the regression analysis, OFCCP offered to have the experts talk directly with one another, and a telephone conversation for that purpose occurred on December 16, 2014. OFCCP also points out, it offered to review Analogic's database and to tell Analogic whether and how its database differed from OFCCP's, an offer Analogic elected to decline. The factors OFCCP considered in the regression analysis came from information Analogic provided OFCCP and OFCCP provided the regression analysis in the NOV, and during the conciliation process provided additional details of variables used.

Based on the foregoing, I find that the OFCCP Guidance is inapplicable to a determination of whether OFCCP engaged in reasonable efforts to conciliate under 41 C.F.R. § 60-1.20(b), and in any event, OFCCP complied with the minimal requirements set forth in the Guidance. Furthermore, Analogic has cited no authority to support a finding that any deviation from the Guidance warrants dismissal of a case. Such a dismissal would greatly frustrate the purpose of the EO in ensuring federal contractors do not engage in prohibited discrimination against its employees.

D. Conciliating an Alleged Continuing Violation

²⁸ Although Analogic's General Counsel Mr. Fry's declaration attached to Analogic's Motion states he participated in three phone calls with OFCCP after the NOV and "[a]t no time did OFCCP ever identify anything it contended constituted anecdotal evidence of gender discrimination," his declaration at ¶15 cites to an April 29, 2015 e-mail which is attached to his declaration as Ex F. Compare Analogic Mot. Fry Decl ¶7 with Fry Decl ¶15, Ex F. That e-mail communication was from Analogic's outside Counsel to Diana Sen, of OFCCP, following up on a phone call from the "other day," and did discuss anecdotal evidence. Specifically, the e-mail noted reviews of female employees referenced how such individuals get along with peers, but reviews of male employees do not include similar comments.

²⁹ OFCCP is no longer relying on its regression analysis to support its allegation of gender based pay discrimination for women in Assembler 2 and Assembler 3 positions. TR 44. It now intends to rely upon a labor analysis in proving its allegations at hearing. *Id.*

Nevertheless, OFCCP has now provided Analogic the database supporting the NOV, the Show Cause Notice and the Amended Show Cause Notice even though it has stated it will not rely on the regression analysis in its efforts to prove Analogic violated the EO by paying females employed in Assembler 2 and Assembler 3 positions less than males in those positions. TR 26. In response to discovery requests, OFCCP provided the databases or spreadsheets and redacted a few columns asserting the deliberative process privilege. TR 26-27. The database redactions are the subject of a Motion to Compel and have been produced to the undersigned for *in camera* review.

Analogic also argues partial summary decision in favor of OFCCP is not appropriate to the extent OFCCP is alleging a violation outside the audit period January 1, 2011 through December 21, 2012, because OFCCP did not conciliate claims that arose after the audit period. Def. Opp at 13. OFCCP argues Analogic had notice of the continuing nature of the violation in its Administrative Complaint. OFCCP Rep. at 6-10. OFCCP asserts it is not required to conciliate allegations of continuing violations. *Id.* The complaint alleges violations beginning no later than January 1, 2012 and continuing thereafter, that is, a continuing violation through the present. Analogic asserts that unless OFCCP succeeds in establishing a violation during the audit period it could not maintain claims based on alleged violations in later years. Def. Opp. at 13-14, citing *EEOC v. CollegeAmerica Denver, Inc.*, 75 F. Supp. 3d 1294 (D. Col. 2014); *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95_LRR, 2009 WL 2524402, (Aug. 13, 2009);³⁰ Def Sur-Reply at 2-3. At the oral argument of the motion, counsel for OFCCP acknowledged that if OFCCP is not successful in establishing a violation during the audit period, it could not establish a continuing violation beyond the audit period. TR 65.

There is nothing requiring OFCCP to conciliate continuing violations. On the facts here OFCCP was not required to engage in conciliation of alleged violations of the EO that were exactly the same as those alleged except for continuing to the present. Should OFCCP succeed in demonstrating a violation during the audit period it may very well show the same violation(s) continue to the present, without having to have conciliated the continuing violation.

Finally, to the extent Analogic claims it has been denied due process or is prejudiced by the conciliation process, such claims are misplaced. Analogic will have a full opportunity to present its evidence and to defend itself against the findings in the NOV and the allegations in the Administrative Complaint at the hearing in this matter. Although Analogic asserts the press release announcing the filing of the Administrative Complaint caused irreparable damage to Analogic, the company has not provided specific evidence or examples of any irreparable damage. In addition, Analogic may well prevail at hearing and may issue its own press release.

³⁰ Two of the cases cited by Analogic to support its position are inapposite. Both *EEOC v. CollegeAmerica Denver, Inc.*, and *EEOC v. CRST Van Expedited, Inc.*, initially involved individual claims and not allegations of systemic, pattern and practice claims such as the present matter. In *CRST Van Expedited*, the EEOC attempted to include 67 individuals for whom no investigation had been conducted. In *CollegeAmerica*, the EEOC failed to provide employer notice of and to conciliate claims that Separation Agreements of other employees not involved in the matter violated the Age Discrimination in Employment Act (“ADEA”).

Additionally, both parties cite *OFCCP v. Bank of America*, ARB No. 13-099, 2016 WL 2941106 (ARB Apr. 21, 2016) to support their respective positions. Although OFCCP asserts it relies on the plurality decision, its argument inexplicably relies heavily upon the dissenting opinion of Judge Royce, which is not precedential. OFCCP Rep at 8-10. Analogic’s assertion the plurality opinion in *Bank of America* supports its position is overblown. *Bank of America* alleged unlawful disparate treatment in hiring based upon race during two periods 1993 and 2002 to 2005. In rejecting OFCCP’s argument that the alleged discriminatory employment practice in 2002-2005 was a continuation of the 1993 pattern of practice finding it affirmed, the plurality determined the 2002-2005 period must be examined as a separate claim. *Bank of America*, ARB No. 13-099, slip op at 17. The Court pointed out the statistical analysis for each of the periods substantially differed, the Bank changed its recruiting process in the years between 1993 and 2002-2005, and the ten year gap between the two time periods as well as other evidence precluded a logical connection between the two periods. *Bank of America*, ARB No. 13-099, slip op at 17-18. The factors the plurality cited in *Bank of America* are not present in the instant matter.

ORDER

Having carefully considered the undisputed facts, the parties' arguments and the controlling legal authority, I find there are no material facts in dispute and OFCCP met the requirement to conciliate in this claim. Accordingly, OFCCP's Motion for Partial Summary Decision is **GRANTED**, and Analogic's Fifth Affirmative Defense is dismissed. Analogic's Motion for Summary Decision is **DENIED**.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts



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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.

MORRIS D. DAVIS
Administrative Law Judge

Washington, D.C.