On January 21, 2025, the White House and President Donald Trump issued an Executive Order, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," revoking Executive Order 11246. For additional information, see Secretary's Order 03-2025, To Cease and Desist All Investigative and Enforcement Activity Under Rescinded Executive Order 11246 (Jan. 24, 2025).

Judges' Deskbook:
Office of Federal Contract Compliance Programs (OFCCP)

Updated January 2021

The Office of Federal Contract Compliance Programs is charged with investigating and prosecuting alleged violations of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (Rehabilitation Act), and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (Veterans' Act or VEVRAA). The purpose of Executive Order 11246 is to promote and ensure equal employment opportunity for all persons without regard to race, color, religion, sex, or national origin. It applies to those persons who are employed or seeking employment with government contractors or with contractors performing under federally assisted construction contracts. The Veterans' Act requires that government contractors take affirmative action to employ and advance qualified disabled veterans and veterans of the Vietnam Era. Finally, the Rehabilitation Act requires that government contractors take affirmative action to employ and promote qualified handicapped individuals.

Captions for these cases are: *Department of Labor, Office of Federal Contract Compliance Programs, Plaintiff v._, Defendant. See* 41 C.F.R. §§ 60-30.5 and 60-30.6. Pursuant to 41 C.F.R. § 60-30.35 the administrative law judge issues a recommended decision and "[t]he recommendations shall be certified, together with the record, to the Administrative Review Board, . . . for a final Administrative order."

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I. Statutory and regulatory authority

- Executive Order 11246 at 30 Fed. Reg. 12319, enacted on September 28, 1965, as amended; 41 C.F.R. Part 60-1, 60-2, 60-3, 60-4, 60-20, and 60-50. *See also History of Executive Order 11246*, available at https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history (last accessed January 21, 2021).

- Section 503 of the Rehabilitation Act of 1973 at 29 U.S.C. § 793; 41 C.F.R. § 60-741; 41 C.F.R. Part 60-741.65

- Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974; 38 U.S.C. § 4211; 38 U.S.C. § 4212; 41 C.F.R. § 60-300; 41 C.F.R. Part 60-300.65

The rules of practice and procedure before the Office of Administrative Law Judges for the foregoing Executive Orders and enactments are found at 41 C.F.R. § 60-30. *See* 41 C.F.R. § 60-300.65(b) (Vietnam Act); 41 C.F.R. § 60-741.65 (Rehabilitation Act).

II. Generally

A. Purpose

The purpose of Executive Order 11246 is to provide a more efficient and effective method of redressing discrimination than was possible by other means requiring federal court litigation. ***Uniroyal, Inc. v. Marshall***, Case No. OFCCP 79-1702 (Sec'y July 20, 1979).

The purpose of the Rehabilitation Act is essentially the same as that of Title VII of the Civil Rights Act of 1964 and Executive Order 11246; namely, the purpose is to eradicate discrimination against handicapped persons and to make victims of such discrimination whole for injustices suffered. ***OFCCP v. Black***, 482 F. Supp. 364 (D.D.C. 1979).

B. Executive Order 11246 has "force and effect of law"

In ***OFCCP v. Uniroyal, Inc.***, OFCCP 1977-1 (Sec'y June 28, 1979), *aff'd sub nom.*, ***Uniroyal, Inc. v. Marshall***, 482 F. Supp. 364 (D.D.C. 1979), the Secretary cited to numerous decisions, including ***Regents of the University of California v. Bakke***, 98 S. Ct. 2733, 2781 n.28 (1978) and ***United States v. New Orleans Public Service, Inc.***, 553 F. 2d 459 (5th Cir. 1977), and stated that "it has been held by the courts that the Executive Order program has the force and effect of law."

III. Jurisdiction

A. Section 715 of the National Defense Authorization Act of 2012

OFCCP COMPLIANCE REVIEW OF HOSPITAL PROVIDING SERVICES TO TRICARE PATIENTS IS BARRED BY SECTION 715 OF THE NATIONAL DEFENSE AUTHORIZATION ACT OF 2012

In ***OFCCP v. Florida Hospital of Orlando,*** ARB No. 11-011, ALJ No. 2009-OFC-2 (ARB Oct. 19, 2012) (en banc), the ARB held en banc that OFCCP did not have authority to engage in a compliance review of Florida Hospital under E.O. 11246, Section 503 of the Rehabilitation Act and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act, because Section 715 of the National Defense Authorization Act (NDAA) for Fiscal Year 2012 precludes such a review.

TRICARE is the Defense Department's world-wide health care program for active-duty and retired military and their families. TRICARE contracts for managed care support. Humana Military Healthcare Services (HMHS) contracted with TRICARE to provide networks of healthcare providers to TRICARE patients. The Respondent, Florida Hospital, is a not for profit hospital that entered into a sub-agreement to

be a HMHS participating hospital and part of the network of providers that HMHS agreed to make available to TRICARE under the prime contract.

In 2008, OFCCP informed Florida Hospital that it had been selected for a compliance review. OFCCP later filed an administrative complaint with DOL's Office of Administrative Law Judges when Florida Hospital refused to comply with OFCCP's request for a compliance review. Florida Hospital argued that it did not qualify as a federal contractor or subcontractor and that OFCCP lacked jurisdiction. The ALJ granted summary decision in favor of OFCCP.

While the matter was pending on appeal before the ARB, President Obama signed the NDAA into law on December 11, 2011. Section 715 of the NDAA, entitled "Maintenance Of The Adequacy Of Provider Networks Under The Tricare Program" amended 10 U.S.C.A. 1097b to provide that "For the purpose of determining whether network providers under [TRICARE] provider network agreements are subcontractors for purposes of the Federal Acquisition Regulations or any other law, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies on the basis of such requirement."

In December 2010, OFCCP had issued Policy Directive 293 on "Coverage of Heath Care Providers and Insurers," addressing inter alia coverage questions pertaining to TRICARE, and concluding that OFCCP jurisdiction is driven by the existence of a federal contractor or subcontractor relationship, giving as an example as a covered relationship Florida Hospital's healthcare services to TRICARE beneficiaries. Four months after enactment of Section 715 of NDAA, OFCCP rescinded Policy Directive 293.
The ARB ordered additional briefing on the impact of Section 715 on the Florida Hospital appeal pending before it.

The ARB first determined that Section 715 applies to the pending appeal because its application imposed no retroactive effect. The ARB found that Section 715 "appears to remove from the definition of 'subcontract' for purposes of [41] C.F.R. Part 60 (as it relates specifically to this case), the subcontract/sub-agreement between HMHS and Florida Hospital establishing Florida Hospital as a medical network provider for TRICARE beneficiaries pursuant to the prime contract between TRICARE and HMHS." USDOL/OALJ Reporter at 18. The ARB found no significance to OFCCP's argument that Section 715 had retroactive effect because it impaired its right to take a compliance review of Florida Hospital. Thus, the ARB determined that Section 715 applies to the appeal before it.

The basis for OFCCP's jurisdiction in the matter was grounded in the regulations at 41 C.F.R. Chap. 60, which permit compliance reviews of Federal contractors and subcontractors. The focus thus was on the regulatory definition of a "subcontract" at 41 C.F.R. § 60.1.3. That regulation defines "subcontract" as "any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee: (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or (2) Under which any portion of the contractor's obligations under any one or more contracts is performed or undertaken or assumed."

Although OFCCP conceded that Section 715 removed the basis for its jurisdiction under the second prong of the regulatory definition of subcontract, it argued that Section 715 did not remove jurisdiction under the first prong because Florida Hospital's services as a participant in the network were "necessary to

the performance" of the prime contract. The ARB rejected this argument finding that under the particular contract at issue, Section 715 would apply and preclude OFCCP jurisdiction.
Three members of the Board concurred in part and dissented in part.

OFCCP JURISDICTION UNDER PRONG ONE OF 41 C.F.R. § 60-1.3 TO CONDUCT A COMPLIANCE REVIEW OF A HOSPITAL UNDER SUBCONTRACT TO A TRICARE REGIONAL CONTRACTOR; SECTION 715 OF THE NATIONAL DEFENSE AUTHORIZATION ACT OF 2012 BARS PRONG TWO, BUT NOT PRONG ONE JURISDICTION

OFCCP JURISDICTION TO CONDUCT A COMPLIANCE REVIEW OF A HOSPITAL UNDER SUBCONTRACT TO A TRICARE REGIONAL CONTRACTOR; QUESTION OF WHETHER TRICARE IS A FEDERAL FINANCIAL ASSISTANCE PROGRAM NOT SUBJECT TO OFCCP'S JURISDICTION; ARB CONCLUDES THAT CONGRESSIONAL INTENT IS CRUCIAL, AND REMANDS FOR FURTHER DEVELOPMENT OF THE RECORD ON THAT QUESTION

In ***OFCCP v. Florida Hospital of Orlando,*** ARB No. 11-011, ALJ No. 2009-OFC-2 (ARB July 22, 2013) (en banc), the ARB granted reconsideration of its decision in ***OFCCP v. Florida Hospital of Orlando***, ARB No. 11-011, ALJ No. 2009-OFC-2 (ARB Oct. 19, 2012) (en banc), in which it had held that an OFCCP compliance review of a hospital providing services to TRICARE patients was barred by Section 715 of the National Defense Authorization Act of 2012 (hereinafter "Section 715"). The ARB rendered its decision on the merits on reconsideration in a separate opinion by the full Board issued that same day, ***OFCCP v. Florida Hospital of Orlando***, ARB No. 11-011, ALJ No. 2009-OFC-2 (ARB July 22, 2013) (en banc). The ARB determined that the Florida Hospital contract qualified as a subcontract under the first prong of the regulation as a matter of law, but that because of an unaddressed issues of law and material facts, a remand was necessary for the ALJ to consider whether OFCCP is nevertheless barred from asserting jurisdiction over Florida Hospital because the payments the Hospital receives under the TRICARE program constitute federal financial assistance. [NB: The ARB's decision is detailed and technical, and researchers must read the full decision to fully understand the issues presented and the ARB's rulings on those issues.]

OFCCP modifies its assertion of jurisdiction to rely on Prong One of 41 C.F.R. § 60-1.3

Although originally asserting jurisdiction over the hospital to conduct a compliance review under the second prong of 41 C.F.R. § 60-1.3, OFCCP withdrew this basis for jurisdiction because during the course of the litigation Congress enacted the Section 715 bar, and OFCCP essentially conceded that Section 715 applies to bar jurisdiction under prong two. OFCCP instead now seeks instead to establish jurisdiction under the first prong of 41 C.F.R. § 60-1.3(1).

Section 715 does not bar OFCCP jurisdiction under Prong One

The ARB first rejected the Respondent's argument that Section 715 bars OFCCP jurisdiction under both prong one and two of 41 C.F.R. § 60-1.3, based on the straightforward terms of the law and the legislative history of the provision. See 10 U.S.C.A. § 1097b(a)(3).

The Respondent is a subcontractor within the meaning of the regulations; meaning of "nonpersonal services"; "Necessary for Performance" condition

The ARB then turned to the Respondent's argument that it was not, within the meaning of the regulations, a subcontractor subject to incorporation of the EEO clause into its service contract. The ARB described the regulatory context as follows:

The regulations enforcing OFCCP's authority to conduct compliance reviews of Federal government contractors and subcontractors under the EO Laws are set out at 41 C.F.R. Chap. 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity). These regulations apply to all Government contracting agencies and to contractors and subcontractors who perform under Government contracts. Under the regulations, a "contract" is "any Government contract or subcontract." A "Government contract" means any "agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services," and the term "contractor" means "a prime contractor or subcontractor."

"Prime contractor" refers to "any person holding a contract and, for the purposes of Subpart B of this part, any person who had held a contract subject to the order." The term "subcontractor" means "any person holding a subcontract and, for the purpose of Subpart B of this part, any person who had held a subcontract subject to the order." A "subcontract" is defined as follows:

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of the employer and an employee):

(1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts;

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

41 C.F.R. § 60-1.3.

The regulations state that "each contracting agency shall include the . . . equal opportunity [EEO] clause contained in Section 202 of the [Executive] [O]rder in each of its Government contracts." The regulations state that the EEO clause is "incorporated by reference in all Government contracts and subcontracts," and "by operation of the [Executive] Order" is "considered to be a part of every contract and subcontract required by the Order and the regulations . . . whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written."

USDOL/OALJ Reporter at 10-11 (footnotes omitted) (see the decision at 9-12 for a fuller description of the regulatory process).

One of the central issues in the instant case was the meaning of the term "nonpersonal services" in the service contract, a term not defined by the EO laws. The ARB, however, found that the definition had been settled in its decision in *OFCCP v. UPMC Braddock* , ARB No. 08-048, ALJ Nos. 2007-OFC-001, -002, -003 (ARB May 29, 2009), *aff d UPMC Braddock v. Harris* , __ F. Supp. 2d __, 2013 WL 1290939 (D.D.C. Mar. 30, 2013), and found that the contract was for the purchase of nonpersonal services because the undisputed facts demonstrated that the hospital's medical care professionals operate independently from the TRICARE regional contractor when deciding the ultimate care provided to beneficiaries.

> Another issue was the second condition for prong one jurisdiction, the "Necessary-for-Performance" condition." The ARB stated
>
> > The threshold for the Necessary for Performance Condition is low. By its plain terms, the Florida Hospital contract satisfies this condition if Florida Hospital provides, "in whole or in part," personal property or nonpersonal services necessary to the performance of the HMHS contract. We find that it does.

USDOL/OALJ Reporter at 27. Although the Respondent advanced several arguments to minimize the significance of its role with respect to the contract with the regional TRICARE contractor, the ARB found that "[t]he record indisputably establishes medical services as the essential reason for the TRICARE-HMHS-Florida Hospital arrangement." USDOL/OALJ Reporter at 29. The ARB stated: "Like the intermediary in *UPMC Braddock* , HMHS is much more than an insurer; HMHS must establish and maintain a high-level network to ensure that members actually receive medical care, not simply insurance or access to health care." USDOL/OALJ Reporter at 29. The ARB found immaterial the Respondent's argument that it had not expressly agreed to be such a subcontractor, stating that it had previously rejected this argument in *UPMC Braddock* (equal opportunity clause is incorporated into any federal contract or subcontract even if it has not been expressly included).

The ARB thus concluded that OFCCP has jurisdiction under prong one as a matter of law.

Potential exemption based on TRICARE's possible status as a "federal financial assistance" program

The ARB then addressed whether the Respondent could demonstrate that it is nevertheless exempt from OFCCP jurisdiction because the payments it receives under the TRICARE program constitute federal financial assistance.

The Respondent argued in a cross-motion for summary judgment "that TRICARE has stated that it is a federal financial assistance program subject to Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d *et seq* . (West 2003), and substantially resembles the federally subsidized health programs like Medicare Part A and Part B. Because courts have found that Medicare payments constitute federal financial assistance, Florida Hospital argues that the payments to Florida Hospital also constitute federal financial assistance not subject to OFCCP's jurisdiction." USDOL/Reporter at 31 (footnote omitted). OFCCP's response was that "TRICARE was established to ensure or optimize the delivery of quality medical services to military personnel (or uniformed services) and, therefore, it is different from Medicare and not a federal financial assistance program." ." USDOL/Reporter at 31-32. The ALJ had concluded that TRICARE differs from Medicare, and therefore is not a federal financial assistance program. The ARB found that the parties failed to address the most critical question the intention of the government. Noting that the statutes governing TRICARE created a "very comprehensive" program, the ARB found that "[n]either of the parties analyzed whether Congress intended that funding for any of these statutory provisions constituted federal financial assistance or a part of military compensation or entitlements that TRICARE would provide through military medical providers and/or private medical providers." USDOL/OALJ Reporter at 35. The ARB also noted that TRICARE had evolved into the current program, making analysis of congressional intent complex. The ARB found that the parties had not specifically analyzed the evolutions and whether Congress intent in those evolutions was to provide federal financial assistance. The ARB also found that the record must be developed to establish "which programs, medical services, beneficiaries and corresponding federal funding source(s) relate to the medical services Florida Hospital provides prior to the ALJ's analysis of the Congressional intent question." USDOL/OALJ Reporter at 36. The Board concluded by stating: "Our ruling on this issue of federal financial assistance is simply that the parties must provide additional argument and supplement the facts as necessary on the issue of congressional intent to allow the ALJ to make the necessary additional findings of fact and ultimate determination on the issue of federal financial assistance." The majority of the Board thus remanded to the ALJ for further proceedings.

Two members of the Board dissented on the ground that Section 715 removes OFCCP jurisdiction under both prongs of the regulation.

B. Contract for Legal Services

CONTRACT FOR LEGAL SERVICES; WHETHER CONTRACTOR IS SUBJECT TO THE EO LAWS AND THEREFORE AN OFFCP COMPLIANCE REVIEW IS DEPENDENT ON WHETHER THE CONTRACT AT ISSUE WAS FOR "NONPERSONAL SERVICES"; FEDERAL ACQUISITION REGULATION DEFINITION MAY BE USED FOR THIS DETERMINATION; KEY QUESTION IS THE NATURE OF THE GOVERNMENT'S SUPERVISION AND CONTROL OVER THE CONTRACTOR'S EMPLOYEES

In ***OFCCP v. O'Melveny & Myers LLP***, ARB No. 12-014, ALJ No. 2011-OFC-7 (ARB Aug. 30, 2013), the Defendant, a law firm, entered into a contract with the U.S. Department of Energy (DOE) under which it agreed to provide legal advice and assistance, including legal representation in administrative proceedings, in connection with the DOE's divestiture of a naval petroleum reserve. OFCCP sent a scheduling letter to the Defendant initiating a compliance review under the EO Laws, and requesting a copy of the Defendant's Affirmative Action Plan and other specified supporting documentation. After several unsuccessful attempts to secure the Defendant's compliance with its request for documents, OFCCP filed an administrative complaint with the Office of Administrative Law Judges. The ALJ granted summary decision in favor of OFCCP, and ordered that the Defendant comply with OFCCP's request for documents and inspection. The Defendant appealed.

Whether the contract for services constituted a "Government contract" within the meaning of OFCCP's regulations

The central issue before the ARB was whether the contract for services constituted a "Government contract" within the meaning of 41 C.F.R. §§ 60-1.3, 60-741.2(i), and 60-250.2(i). The ARB observed:

For O'Melveny to be subject to OFCCP's jurisdiction under the EO Laws, the contract with DOE must constitute a "Government contract" within the meaning of the EO Laws' implementing regulations, which define "Government contract" in pertinent part as:

> any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services. . . . The term "nonpersonal services" as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. The term Government contract does not include: (1) Agreements in which the parties stand in the relationship of employer and employee; and (2) Federally assisted construction contracts. 41 C.F.R. § 60-1.3. See also 41 C.F.R. §§ 60-741.2(i), 60-250.2(i) (setting forth same definition).

USDOL/OALJ Reporter at 8. The ARB noted that neither the EO Laws nor the OFCCP regulations define the term "nonpersonal services," and agreed with the ALJ's decision to use the Federal Acquisition Regulation definition at 48 C.F.R. § 37.104 to determine whether the contract at issue was a "nonpersonal services" contract. The FAR regulations identify six indicia of a personal services contract:

> (1) Performance on site.
> (2) Principal tools and equipment furnished by the Government.
> (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

(4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
(5) The need for the type of service provided can reasonably be expected to last beyond one year.
(6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to:

(i) Adequately protect the Government's interest;
(ii) Retain control of the function involved; or
(iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

48 C.F.R. § 37.104(d). The FAR regulations emphasize that "the overarching and 'key question' for assessing whether a government contract is for personal services is: 'Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?' 48 C.F.R. § 37.104(c)(2)." USDOL/OALJ Reporter at 9-10 (footnote omitted). Moreover, the FAR regulations dictate that in "determining whether a government contract is for personal or nonpersonal services, '[e]ach contract arrangement must be judged in the light of its own facts and circumstances.' [48 C.F.R. § 37.104(c)(2).] "

USDOL/OALJ Reporter at 10 (footnote omitted).

In the instant case, the parties stipulated to the facts on their cross motions for summary decision before the ALJ. The ARB, however, found that those stipulated facts were insufficient to reach a decision. Specifically, the ARB found that four of the six factors of the FAR guidance appeared to cut equally for and against the conclusion that the services at issue were of either a personal or nonpersonal nature, and that in regard to the remaining two factors, the factual record presented by the parties was insufficient to reach a conclusion one way or the other in resolving the issue of whether the contract was a qualifying "Government contract" under the EO laws.

In regard to the fourth element of the FAR guidance -- whether comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel – the Defendant pointed only to a contract clause that stated that it "was to provide "professional legal assistance to the Office of the General Counsel." The ARB found that this contract clause was not sufficient to determine the question.

In regard to the key question of the nature of the Government's supervision and control over the contractor's employees (the sixth element of the FAR guidance), the ARB found that the affidavits presented by the Defendant stating that there was no close government supervision were not relevant, because the focus is not on whether supervision occurs, but whether it should occur. The ARB stated: "It must be demonstrated that the supervision is necessary to assure that the Government's interests are protected, that control of the contractually-provided services is maintained, or that a duly authorized government official or employee retains full personal responsibility for the provided services." USDOL/OALJ Reporter at 12. The ARB stated the contract's terms were of little assistance in addressing the question, and instead turned to the manner of the DOE's contract administration. Both parties had focused in their stipulations on a period of time under the contract when the Defendant was representing

DOE in administrative proceedings, and disregarded almost six years of legal services provided under the contract, worth almost three million dollars in legal services. The total payment for the entire duration of the contract was $3,415,340.00. The ARB found this record "woefully inadequate for drawing any meaningful conclusion regarding the supervision and control DOE exercised over O'Melveny's attorneys during the entire ten-year period the DOE contract covered." USDOL/OALJ Reporter at 14. The ARB also found that even if it was justifiable to focus only on part of the contract services, "still the evidence of record does not afford a sufficient basis upon which any meaningful conclusion can be reached regarding the nature and extent of DOE's supervision and control of O'Melveny's attorneys for this four-year period. There was very little detail of the work O'Melveny actually performed to determine whether it was directly connected to an 'integral' DOE function or mission or whether it was work that federal civil service employees could not perform." USDOL/OALJ Reporter at 14 (citation omitted). The ARB therefore remanded the case to the ALJ for further proceedings.

One member of the Board would have affirmed the ALJ's finding that the contract was a nonpersonal services contract, noting that the regulation at 48 C.F.R. § 37.104(b) states that "[a]gencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. 3109) to do so." This member noted that there was not explicit statutory authority for the contract at issue, and stated that given the presumption of agency regularity, and no suggestion that the contract was unlawful, the contract was necessarily one for nonpersonal services. This member acknowledged that the OFCCP and FAR regulation should be construed consistently, but argued for abolishment of any distinction between a personal and nonpersonal service contract for purposes of the OFCCP regulations and enforcement of the EO laws because such a distinction is no longer relevant to the operation of the Federal government, which has been increasingly privatized and reliant on service contracts of all varieties.

Whether Defendant Contractually Obligated Itself to Compliance with the EO Laws

The ARB also addressed another challenge by the Defendant regarding the ALJ's conclusion that the Defendant contractually obligated itself to comply with the EO Laws. The ARB rejected the ALJ's conclusion, writing:

Given the sparse record before us, we agree with O'Melveny's understanding of the Contract's incorporation language: the fact that the laws or their implementing regulations are incorporated into the DOE contract by reference merely signifies that should any of the cited laws or regulations be applicable, the parties agree to their adherence. To interpret the incorporated references in any other manner would render a number of the references in the DOE contract nonsensical, as for example the incorporation by reference of 48 C.F.R. § 52.229-5 (cited by O'Melveny), which refers to taxes on contracts performed in U.S. Possessions or Puerto Rico, or reference to 48 C.F.R. § 52.249-4, which requires the use of U.S.-flag air carriers for government-financed international air transportation of personnel. Consequently, in the specific circumstances of this case, we agree with O'Melveny that the incorporated references to various FAR pertaining to the EO Laws are applicable to O'Melveny only if its contract with DOE constitutes a "Government contract" within the meaning of those laws and their implementing regulations.

C. Regulations only authorize OFCCP to file complaint with OALJ

FEDERAL CONTRACTOR'S COMPLAINT REQUESTING DECLARATORY RELIEF PROPERLY DISMISSED BY ALJ ON THE GROUND THAT THE REGULATIONS ONLY AUTHORIZE OFCCP TO FILE A COMPLAINT WITH OALJ

In ***Entergy Services, Inc.***, ARB No. 13-025, ALJ No. 2013-OFC-1 (ARB May 19, 2014), the Complainants, which were federal contractors subject to the equal opportunity laws, filed an "Administrative Complaint for Declaratory Relief" with the Office of Administrative Law Judges (OALJ) seeking declaratory relief from compliance reviews scheduled by the Office of Federal Contract Compliance Programs (OFCCP). The Chief ALJ dismissed the Complaint for lack of jurisdiction. The ARB affirmed the dismissal. The ARB stated:

> The Office of Administrative Law Judges is an administrative tribunal that exercises authority only as defined by statute or regulation. *See, e.g., Matthews v. Leavitt*, 452 F.3d 145, 152 (2d Cir. 2006) ("The authority of an ALJ is circumscribed by the appointing agency's enabling statutes and its regulations."). The ARB found that the applicable OFCCP regulations at 41 C.F.R. § § 60-30.5 and 60-30.32(a) expressly grant only the OFCCP the authority to file a complaint and that there was "no authorization in the statutes or their implementing regulations empowering any other party to file a complaint under the EO Laws."

USDOL/OALJ Reporter at 3.

IV. The complaint

A. Where to file

1. Generally

The regulations at 41 C.F.R. § 60-741.26(a) require that a complaint be filed "with the Director." It was further held that a signed statement accompanying the complaint demonstrating that the complainant was "regarded as having an impairment" was for the benefit of the agency and any alleged deficiencies in the statement do not constitute grounds for dismissal. ***OFCCP* v. *E.E. Black Ltd.***, Case No. 1977-OFCCP-7R (ALJ Sept. 13, 1978), *aff'd* (Ass't Sec'y Feb. 26, 1979).

2. No requirement that individual complaint be filed prior to compliance review complaint

The filing of a Section 503 complaint by a worker is not a condition precedent to the filing of an administrative complaint by OFCCP. The regulations provide OFCCP with express authority to conduct compliance reviews and to follow-up such investigations by the filing of an administrative complaint. ***OFCCP* v. *Conagra Poultry Co.***, Case No. 1989-OFC-15 (ALJ Feb. 5, 1990) (order denying summary judgment).

3. Discretion to investigate incomplete complaints

OFCCP has the discretion to act or decline to act on an unsigned and, therefore, incomplete complaint. ***OFCCP* v. *Yellow Freight System, Inc.***, Case No. 1979-OFCCP-7 (ALJ Aug. 26, 1988), *remanded on other grounds* (Ass't Sec'y, Aug. 24, 1992). *See also* ***OFCCP* v. *Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ Nov. 9, 1982), *remanded on other grounds*, (Ass't Sec'y, Feb. 24, 1994) (although

the regulations impose a requirement that the complaint be in writing and signed by the complainant, an informal presentation reduced to writing by the agency itself and sufficiently documented as to the identity of the discriminatee constitutes substantial compliance with the regulation).

E. Who may file

1. Generally

The regulatory provisions at 41 C.F.R. § 60-741.15 authorize any one of several interests, such as the agency, the director, the prime contractor, or subcontractor, to precipitate an agency investigation without a discriminatee's formal complaint. However, the investigation must follow the same procedures and it carries the same potential consequences. ***OFCCP* v. *Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ Nov. 9, 1982), *remanded on other grounds*, (Ass't Sec'y, Feb. 24, 1994). It was further held that all facts and issues which come to light from the investigation of a properly filed complaint may be used against Defendant at trial.

2. Impleader and intervener

In ***OFCCP* v. *Burlington Northern Railroad***, Case No. 1981-OFCCP-21 (ALJ Feb. 8, 1984), the ALJ denied Defendant's motion to implead two unions on the ground that any retroactive seniority could not be effective without their approval. The requirement of Fed. R. Civ. P. 19, that complete relief cannot be accorded without the third party, was not established.

The ALJ issued orders which affirmed a union's right to intervene in a case between OFCCP and United Airlines under 41 C.F.R. § 60-30.24(a)(3) without "[disrupting] the proceeding." The ALJ held that Air Line Pilots Association's (ALPA) petition was untimely, but granted the petition to the extent that its counsel would be allowed to participate at the hearing by cross-examining any witnesses whose testimony is related to ALPA's collective bargaining agreement with United Airlines and any remedy which could affect seniority/working conditions of ALPA pilots. ***OFCCP* v. *United Airlines***, Case No. 1994-OFC-1 (ALJ Aug. 17, 1995).

F. Class actions permitted

A class action for monetary damages is maintainable under Executive Order 11246. ***OFCCP v. Uniroyal, Inc.***, Case No. OFCCP 1977-1 (ALJ, Apr. 11, 1977), *aff'd* (Sec'y June 28, 1979) (citing to 41 C.F.R. § 60-2.1(b), ***United States v. Allegheny-Ludlum Industries, Inc.***, 517 F.2d 826 (5th Cir. 1975), and ***United States v. Duquesne Light Co.***, 423 F. Supp. 507 (W.D. Pa. 1976)).

G. Exhaustion of remedies

In ***NationsBank Corp. v. Herman***, 174 F.3d 424 (4th Cir.), *cert. denied*, Case No. 99-394 (1999) (Case No. 1997-OFC-16), the Fourth Circuit held that Defendant was required to exhaust administrative remedies in bringing a Fourth Amendment suit against OFCCP based on the alleged improper selection of certain facilities for compliance reviews. In support of its holding, the court cited to ***Volvo GM Heavy Truck Corp. v. Dep't of Labor***, 118 F.3d 205 (4th Cir. 1997) and ***Thetford Properties IV L.P. v. Dep't of Housing and Urban Dev.***, 907 F.2d 445 (4th Cir. 1990). The Fourth Circuit required exhaustion of remedies even where the suit was premised on constitutional challenges and it reasoned as follows:

> If, as NationsBank alleges and the district court suspected, the OFCCP did single out NationsBank for investigation and either has no policy governing its selection of targets for compliance review or has one but intentionally disregarded it, exhausting would serve the frequently noted purpose of allowing the agency to correct its mistakes before facing judicial review.

Id. at 430. The court determined that NationsBank was not entitled to a waiver from the requirement that it exhaust all administrative remedies on grounds that constitutional claims are unsuited for administrative exhaustion or that "OFCCP's questionable behavior, which so aroused the district court's suspicion" would justify waiver.

In ***American Airlines, Inc. v. Herman***, 176 F.3d 283 (5th Cir. 1999) (Case No. 1994-OFC-9), OFCCP alleged that American Airlines (American) failed to comply with Section 503 of the Rehabilitation Act of 1973 and its implementing regulations. These laws require that every covered government contractor not discriminate against any employee or applicant on grounds of physical or mental handicap. Under the procedural history of the case, the ALJ recommended dismissal of the complaint against American on grounds that the government conducted an unauthorized compliance review. The parties appealed to the "then-highest authority within the DOL," the Assistant Secretary who, in turn, disagreed with the ALJ's decision and remanded the case for further proceedings. Rather than permitting the case to be remanded to the ALJ, American filed for declaratory and injunctive relief in federal district court. The district court judge entered judgment in favor of American. OFCCP appealed and argued that the district court erred in denying its motion for summary judgment Abased on American's failure to exhaust administrative remedies." The circuit court agreed and stated the following:

> Neither the ALJ, the Assistant Secretary, nor the Administrative Review Board has ruled on the merits of the OFCCP's claim that American discriminated in employment on the basis of disability.
>
> . . .
>
> Grants of partial summary disposition by an agency are generally considered interlocutory orders not subject to immediate review. American has not demonstrated that it will suffer irreparable injury that cannot be remedied by petitioning for review at the conclusion of the administrative proceedings.

As a result, the appellate court reversed the judgment of the district court and dismissed the complaint for lack of subject matter jurisdiction.

For an additional discussion of constitutional issues, see Chapter VII.

E. Service

In ***OFCCP v. Penzoil Exploration and Production Co.***, Case No. 1995-OFC-11 (ALJ Apr. 17, 1995) (order pursuant to conference call), the question involved when the time for answering a complaint begins to run. Under the expedited hearing procedures of 41 C.F.R. 60-30.31, OFCCP contended that the date mailed starts the time in which Defendant has to answer. The ALJ agreed with OFCCP that, under the Fed. R. Civ. P. 4, a complaint is served when mailed, but since this complaint was mailed first class, OFCCP was required to take additional steps, such as supplying a return envelope and postage. *See* Fed. R. Civ. P.

4(c)(2)(C)(ii). The ALJ reasoned that, if a complaint was considered served upon first class mailing, it would place a defendant in an unfair position because it could not be determined that the mail was received in a timely fashion.

V. Scope of investigation

A. Generally

In ***OFCCP* v. *City Public Service of San Antonio***, Case No. 1989-OFC-5 (Ass't Sec'y Jan. 18, 1995), the Assistant Secretary held that a complaint investigation is distinct from a compliance review and the investigation is more narrow than the compliance review. The scope of a complaint investigation should be reasonably related to the violations alleged in "such complaint." However, the Assistant Secretary found that the fact that OFCCP sought to conduct an investigation which exceeded its authority is not a ground for dismissal of the complaint.

For a discussion of case law related to Fourth Amendment challenges to the scope of an investigation and other constitutional issues, see Chapter VII.

B. Discretionary decisions by the Secretary not presumptively reviewable by federal courts

In ***Greer v. Chao***, 492 F.3d 962 (8th Cir. 2007), the court held that the Secretary of Labor discharged her statutory obligations under the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA) to investigate a complaint filed by appellant Greer even though the Secretary declined to seek an enforcement action against Eaton Corporation, the employer.

Under the relevant facts of the case, Greer filed a complaint with the OFCCP alleging that Eaton had not adequately trained its employees regarding VEVRAA "and had not adhered to the affirmative obligations that the statute imposes." The court noted that OFCCP's investigation began in less than two weeks and was concluded 18 months later after an on-site visit, interviews with co-workers and managers, and review of Greer's employment file. In the end, OFCCP found no violations under the VEVRAA and declined to seek an enforcement action.

Greer sought district court review of OFCCP's actions pursuant to 5 U.S.C. § 701 *et seq.* of the Administrative Procedure Act (APA). Here, although the court noted a "stong presumption that agency action is reviewable by courts," the Eighth Circuit held that an agency's decision to seek (or not seek) an enforcement action is "not presumptively reviewable." In this vein, the court cited to 5 U.S.C. § 701(a)(2) of the APA, which provides an exception to judicial reviewability where agency action is "committed to agency discretion by law."

C. Time limit for filing a complaint; 180 days

1. Generally

a. Complaint for discrimination

In ***OFCCP* v. *Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ Nov. 9, 1982), *remanded on other grounds*, (Ass't Sec'y Feb. 24, 1994), it was held that the 180-day time limit for filing a complaint is for the agency's benefit and is not jurisdictional.

The Assistant Secretary held that 41 C.F.R. § 60-741.26(a), providing that a complaint under Section 503 of the Rehabilitation Act must be filed within 180 days from the date of the alleged violation, is not jurisdictional. ***OFCCP* v. *CSX Transportation, Inc.***, Case No. 1988-OFC-24 (Ass't Sec'y Oct. 13, 1994).

b. Administrative complaint based on compliance review

The regulations implementing Section 503 of the Rehabilitation Act, which require the filing of a complaint within 180 days, refer solely to the individual complaint filed with the Director. The regulations contain no time limits for formal administrative complaints, filed by the Solicitor with the Office of Administrative Law Judges arising out of compliance reviews. ***OFCCP* v. *American Airlines, Inc.***, Case No. 1994-OFC-9 (Ass't Sec'y Apr. 26, 1996).

2. Each claim analyzed separately

a. Generally

When the complainant alleged two distinct claims of discrimination (denial of full-time employment and denial of re-employment) the timeliness of each claim should be analyzed separately. ***OFCCP* v. *Yellow Freight Systems, Inc.***, Case No. 1982-OFC-2 (ALJ Sept. 30, 1986), *remanded on other grounds* (Ass't Sec'y Oct. 6, 1993). The ALJ found that the complainant did not have sufficient information to make a charge of discrimination when complainant was told by Defendant's doctor that he would not be hired as a full-time employee, but complainant continued to work for Defendant. On the other hand, the complainant had sufficient information to make a charge of discrimination when the discriminatee was told by his supervisor that Defendant would no longer need his services, and this confirmed the earlier statement made by Defendant's doctor. Even if the function of particular procedural requirements of the regulations, such as the 180-day filing deadline, is to provide notice to Defendant that OFCCP has made an initial finding of discrimination and intends to act upon such finding, a procedurally deficient claim will not be barred if administrative convenience outweighs prejudicial harm to Defendant. OFCCP may waive the 180-day filing requirement upon a showing of good cause.

b. Continuing violations

i. Established

In ***OFCCP* v. *CSX Transportation, Inc.***, Case No. 1988-OFC-24 (ALJ Mar. 23, 1990) (order granting dismissal), *rev'd and remanded on other grounds* (Ass't Sec'y Oct. 13, 1994), the Assistant Secretary held that a complaint alleging a violation under Section 503 is timely, if an incident of repeat violation occurred within 180 days of the filing of the complaint. Under the facts of the case, the union's letter to Defendant requesting that the complainant be reinstated and Defendant's denial constituted a refusal to re-employ him. Because this rejection occurred within 180 days of the filing of the complaint, it was timely. It was further determined that an employer should not be allowed to shield itself in perpetuity from its obligations under Section 503 by arguing that past circumstances rendered the employee disqualified.

Rather, upon request, Defendant is required to reconsider its employment decision after the passage of time when the employee's handicap is subject to change over time.

ii. Not established

A complaint alleging a violation of Section 503 filed by a complainant with OFCCP is timely, if an incidence of repeat violation occurs within 180 days of the filing of the complaint. ***OFCCP* v. *CSX Transportation, Inc.***, Case No. 1988-OFC-24 (Ass't Sec'y Oct. 13, 1994). Indeed, a continuing violation may be relevant to the timeliness of a complaint, or to the issue of relief. Under the facts of the case, the ALJ held that Defendant did not commit a continuing violation by failing to pay the complainant's back wages or by failing to rehire the complainant after new medical evidence was submitted which allegedly demonstrated that complainant was capable of returning to work. Rather, the ALJ concluded that a continuing violation is where there is a prevailing scheme of alleged discrimination. Based upon the facts before him, the ALJ found that Defendant's decision to disqualify the complainant from employment as a track repairman for medical reasons was a single act and, although the complainant suffered the effects of the act, the act only occurred once.

In ***OFCCP* v. *Burlington Northern, Inc.***, Case No. 1980-OFCCP-6 (Ass't Sec'y Dec. 11, 1991), the Assistant Secretary held that Defendant's single refusal to hire did not constitute a continuing violation.

3. Extension of time to file claim

i. ALJ without authority to grant

In ***OFCCP v. CSX Transportation, Inc.***, Case No. 1988-OFC-24 (ALJ Mar. 23, 1990) (order granting dismissal), *rev'd and remanded on other grounds* (Ass't Sec'y Oct. 13, 1994), the ALJ declined to extend the 180-day filing period for good cause shown because the regulation at 41 C.F.R. § 60-741.26 granted such authority only to the Director of OFCCP.

ii. Director with authority to grant for good cause

Although the complainant filed his complaint with OFCCP in April 1988, allegations of discrimination occurring before that time are not time-barred by the 180-day time period for filing complaints. The ALJ held that OFCCP's motion to amend the complaint to embrace an earlier time period constituted an extension by the OFCCP Director of the time for filing the complaint. ***OFCCP v. Jefferson County Board of Education***, Case No. 1990-OFC-4 (ALJ Nov. 21, 1990) (order granting motion to amend complaint).

In ***OFCCP v. Norfolk and Western Railway Co.***, Case No. 1990-OFC-8 (ALJ July 9, 1991), the ALJ held that OFCCP's investigation and prosecution of a complaint received 187 days after the filing deadline constituted an implicit waiver by the OFCCP Director of the 180-day limit.

In ***OFCCP v. Yellow Freight Systems, Inc.***, Case No. 1982-OFC-2 (ALJ Sept. 30, 1986), *remanded on other grounds* (Ass't Sec'y Oct. 6, 1993), the ALJ held that OFCCP may not waive the 180-day filing requirement for administrative convenience, but only for good cause. Good cause is an abstract term and its meaning must be determined not only from the verbal context of the statute, but also from the context of the action and procedures involved and the type of case presented. If the Director's finding of

good cause appears reasonable and does not represent an abuse of discretion, it will be upheld. Under the facts presented, the ALJ concluded that good cause was established where there was evidence that the complainant made a good faith effort to file a cause of action at the state level and sought federal relief, but was told no such relief existed.

In ***OFCCP v. Norfolk & Western Railway Co.***, Case No. 1993-OFC-4 (Ass't Sec'y, July 20, 1995), the Assistant Secretary held that it was improper for the ALJ to grant Defendant's motion for summary judgment while OFFCP's discovery motions were pending. OFCCP was entitled to have access to information that would support its determination that Defendant's continuous refusal to reinstate the complainant for medical reasons constituted a continuing violation and was "good cause" to extend the filing date past 180 days. Because the plaintiff should also have the opportunity to make specific arguments in support of its opposition to Defendant's summary judgment motion, OFCCP had a right to discovery prior to the adjudication of the summary judgment motion.

Abuse of discretion

In ***OFCCP v. Norfolk & Western Railway Co.***, Case No. 1993-OFC-4 (ALJ Aug. 19, 1993), *remanded on other grounds*, (Ass't Sec'y, July 20, 1995) (remanded without addressing the merits because the ALJ improperly granted summary judgment without resolving pending discovery requests), the ALJ held that the regulatory provisions at 41 C.F.R. § 60-741.26 provide that a Section 503 complaint must be filed within 180 days of the alleged violation, unless the time is extended by the OFCCP Director for good cause shown. A union grievance initiated on behalf of a Section 503 complainant does not constitute a Section 503 complaint. Because Defendant posted notices regarding employees' rights under the Rehabilitation Act, the ALJ was not persuaded by a suggestion that Complainant was unaware of his Section 503 rights and, thus, the ALJ declined to find good cause for Complainant's failure to file a timely complaint. Indeed, the ALJ concluded that the OFCCP Director accepted the untimely filing in error because: 1) the record did not support a finding of a continuing violation; 2) the complaint was filed more than two years after the alleged violation; and 3) Defendant had posted notices regarding employees' Rehabilitation Act rights.

4. Not controlled by Title VII statute of limitations

The Title VII statute of limitations does not extend to actions brought under Executive Order 11246. There was no authority to support a finding that the Title VII statute of limitations applied to Executive Order actions. Moreover, Defendant's argument that the government's claim for back pay and seniority relief stemming from conduct which occurred more than 180 days from the date of filing the complaint was rejected. ***Dep't. of the Treasury v. Harris Trust***, Case No. 1978-OFCCP-2 (ALJ Jan. 30, 1981). *See also* ***OFCCP v. Uniroyal, Inc.***, Case No. OFCCP 1977-1 (Sec'y June 28, 1979).

D. Laches

1. Held inapplicable

In ***OFCCP v. First Federal Savings Bank of Indiana***, Case No. 1991-OFC-23 (Sec'y Oct. 26, 1995), the Secretary adopted the ALJ's holding and reasoning on the issue of laches. Under the facts of the case, there was a ten-month delay between the date OFCCP informed First Federal that the matter was being referred to the Solicitor's Office for formal enforcement and the filing of the administrative complaint. The ALJ concluded that the defense of laches requires a showing of lack of due diligence by the

party against whom the defense is asserted, and prejudice to the party asserting the defense. As a general rule, actions by the government to protect the public interest are not subject to the defense. The ALJ found that the ten month delay between the final notice of referral for enforcement and filing the administrative complaint was not so lengthy as to amount to a lack of due diligence, citing ***OFCCP v. Georgia-Pacific Corp.***, Case No. 1990-OFC-25 (Sec'y Dec. 28, 1990) (19-month delay not unreasonable). The ALJ also noted that the regulations provide no statute of limitations applicable to the filing of a complaint by OFCCP, and that First Federal failed to show that the delay prejudiced its defense.

In ***OFCCP* v. *East Kentucky Power Cooperative, Inc.***, Case No. 1985-OFC-7 (ALJ Mar. 17, 1988), the ALJ concluded that the first element of laches, inexcusable delay, was met where OFCCP offered no excuse for the lapse of more than two years between the end of conciliation and the filing of an administrative complaint. However, it was determined that the second element, substantial prejudice to Defendant, was not established. The ALJ noted that Defendant was able to introduce key documents at the hearing and was able to offer testimony from crucial witnesses.

E. Collateral estoppel

1. Held applicable

In ***OFCCP v. Beverly Enterprises, Inc.***, 1999-OFC-11 (ALJ Nov. 5, 2001), the ALJ applied collateral estoppel and adopted a finding by the National Labor Relations Board, which was affirmed on appeal, that the parent and subsidiaries of Beverly Enterprises constituted a "single employer." The case was appealed to the ARB and the parties subsequently submitted a consent decree which resolved the outstanding issues. ***OFCCP v. Beverly Enterprises, Inc.***, ARB Case No. 02-009, 1999-OFC-11 (ARB Apr. 30, 2002).

In ***Exxon Corp. v. U.S. Dep't. of Labor***, 2002 WL 356517 (N.D. Tex. Mar. 5, 2002) (Memorandum Opinion and Order), the court concluded that OFCCP was collaterally estopped from litigating the issue of whether a recovering alcoholic was discriminated against through the employer's policy where the employer precluded him from "safety sensitive" positions in the company. In particular, OFCCP pursued a complaint under Section 503 of the Rehabilitation Act alleging that Exxon violated the affirmative action requirements of the Act in a non-safety sensitive position. The ALJ and ARB held that the Act was violated because Mr. Strawser was a qualified individual with a disability and . . . Exxon failed to show that the policy, as applied to Strawser, was supported by 'business necessity and safe job performance.'" The court then noted that, in a related matter styled ***EEOC v. Exxon Corp.***, Civil Action Nos. 3:95-CV-1311-H and 3:95-CV-2537-H, it adopted findings by a magistrate judge and entered judgment for Exxon "holding that the Plaintiffs were not disabled under the ADA and therefore, the policy as applied to them, did not violate the ADA. *See EEOC v. Exxon Corp.*, 124 F. Supp. 2d 987, 1015 (N.D. Tex. 2000)." Because the definition of a "disabled individual" under the Americans With Disabilities Act (ADA) and the Rehabilitation Act is identical, the court held that OFCCP was collaterally estopped from pursuing its complaint under the Rehabilitation Act with regard to Strawser. In applying collateral estoppel, the court noted that the EEOC and OFCCP Aare charged with the same mission and purpose in addressing claims of disability and discrimination." Moreover, the issue in both cases was whether the "Plaintiffs are individuals with disabilities." In addition, the court found that the same judicial body is addressing both cases, both agencies are arguing that the same Exxon policy is discriminatory for the same reasons, and but burden of proof under the summary judgment standard is the same." As a result, summary judgment in favor of Exxon was granted. For a review of the underlying ALJ and ARB decisions in this case, *see* ***OFCCP v. Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd in part,* (ARB Oct. 28, 1996).

2. Held inapplicable

In ***OFCCP v. Norfolk Southern Corp.,*** 1989-OFC-31 (Ass't Sec'y Oct. 3, 1995), the Assistant Secretary concluded that OFFCP was not collaterally estopped from litigating a Section 503 enforcement action where the state civil rights commission issued an adverse decision in a case involving the same alleged victim of discrimination (among others) and the same employer. The Assistant Secretary found both that: (1) the state commission did not rule on the nondiscrimination/affirmative action employment policy and standards issues relating to the OFCCP action; (2) OFCCP was not a party, nor in privity with the employee or the state commission in the state proceeding; and (3) traditional collateral estoppel doctrines do not apply to Section 503 litigation. The Assistant Secretary concluded that the ALJ failed, under ***University of Tennessee v. Elliott,*** 478 U.S. 788 (1986), to first determine whether Section 503 expressly or impliedly treats judicially unreviewed state agency decisions as preclusive. *See also* ***Astoria Federal Savings and Loan Association v. Solimino,*** 501 U.S. 104 (1991). Although there is a presumption is favor of estoppel where the statute is silent on the issue, the Assistant Secretary concluded that implicit Congressional intent was to except Section 503 litigation from traditional collateral estoppel in regard to handicap discrimination decisions of state agencies acting under state laws, because Congressional policy was that Sections 503 and 504 of the Rehabilitation Act be enforced in a consistent and effective manner. *See* ***Daniels v. Barry,*** 659 F. Supp. 999 (D.D.C. 1987).

A decision by an arbitrator in favor of Defendant on the union's grievance concerning Defendant's removal of the complainant from active duty and retention of sick benefits does not divest OFCCP of jurisdiction in this case, nor do principles of collateral estoppel or res judicata apply. ***OFCCP v. American Telephone and Telegraph Co. (AT&T)***, Case No. 1992-OFC-5 (ALJ Mar. 8, 1996).

Defendant's removal of the complainant from active duty and retention of sick benefits does not divest OFCCP of jurisdiction in this case, nor do principles of collateral estoppel or res judicata apply. ***OFCCP* v. *American Telephone and Telegraph Co. (AT&T)***, Case No. 1992-OFC-5 (ALJ Apr. 23, 1995). In so holding, the ALJ stated that a labor arbitrator has only authority to resolve questions of contractual rights and his task is to "effectuate the intent of the parties." However, the arbitrator lacks general authority to invoke public laws that conflict with the bargain between the parties, such as Title VII or Section 503 of the Rehabilitation Act. Therefore, even had the arbitrator's decision not been made pursuant to a collective bargaining agreement, OFCCP could have brought an action in its role as a government agency charged with enforcement of federal anti-discrimination statutes. The principles of *res judicata* or collateral estoppel do not apply to such an action based on an arbitrator's decision. Moreover, the ALJ concluded that Defendant's argument that OFCCP lacked subject matter jurisdiction because ERISA preempts the Act was wholly without merit. *Id.* at 8.

There is no collateral estoppel or *res judicata* in a complaint filed under Executive Order 11246 based on a prior Title VII court action. The parties and issues were different in the two proceedings. The legal issues in the Title VII court action were limited to discrimination practices against black applicants or employees whereas the administrative proceeding also addressed affirmative action for Vietnam veterans and other minority groups. ***OFCCP v. First Alabama Bank of Montgomery***, Case No. 1980-OFCCP-32 (ALJ Dec. 5, 1980), *aff'd* (Sec'y Mar. 16, 1981).

F. Bankruptcy stay not apply

In ***OFCCP v. Jacksonville Shipyards, Inc.***, Case No. 1989-OFC-1 (ALJ June 10, 1997), the ALJ found that the automatic stay provisions of the Bankruptcy Code did not apply to a back pay award because the proceeding fell under the Department of Labor's regulatory authority. *See* ***Eddleman v. U.S. Dep't of Labor***, 923 F.2d 782 (10th Cir. 1991); ***In Re James H. Crockett***, 204 B.R. 705 (Bank. W.D. Tex. 1997); ***Martin v. Safety Electric Construction Co.***, 151 B.R. 637 (Bank. D. Conn. 1993).

G. Bifurcated hearing; no jurisdiction over appeal

In ***OFCCP v. Interstate Brands Corp.***, ARB Case No. 00-071, Case No. 1997-OFC- 6 (ARB Sept. 29, 2000), after a bifurcated hearing process, the ALJ issued a decision on liability while reserving the decision on damages. The ALJ advised the parties that, after the ARB's review of the liability issue, he would adjudicate the remedy. Citing to various environmental whistleblower decisions, the ARB initially noted that it disfavored interlocutory appeals and piecemeal litigation. In addition, the ARB stated that, in ***OFCCP v. The Cleveland Clinic Foundation***, Case No. 1991-OFC-20 (Sec'y Apr. 18, 1995), the Secretary refused to consider an interlocutory appeal under Executive Oder 11246 where the ALJ bifurcated the liability and damages issues and the case involved damages owed only to two individuals. On the other hand, the ARB found that the Secretary accepted an interlocutory appeal in ***OFCCP v. Honeywell, Inc.***, Case No. 1977-OFC-3 (Sec'y June 2, 1993) where the case was one of the largest compliance cases ever submitted for decision and the case had been pending before a succession of Secretaries for over ten years." Upon review of the facts in ***Interstate Brands***, the ARB concluded that it would not accept an interlocutory appeal. It stated that "[w]hile we are not unsympathetic to Interstate's concerns regarding the complexity of the damages calculations and the time and cost involved in litigating the issue, these factors are inherent in all complex litigation." The ARB also rejected the argument that it must accept the appeal upon agreement of the parties; rather, the ARB concluded that its acceptance or rejection of an appeal "is not subject to agreement by the private parties."

H. Issues of constitutionality and validity

For an in-depth discussion of constitutional challenges to investigations under the anti-discrimination enactments, see Chapter VII.

1. ALJ without authority to determine validity of regulations

In ***OFCCP v. Goya De Puerto Rico, Inc.***, Case No. 1998-OFC-8 (ALJ June 22, 1999), *aff'd*, ARB No. 99-104 (ARB Mar. 21, 2002), the ALJ stated that he was without authority to rule on the validity of the Executive Order or its implementing regulations. *See* ***Stouffer Foods Corp. v. Dole***, 1990 WL 58502 1 (D. S.C. Jan. 23, 1990) (citing to ***Oesterich v. Selective Service System***, 393 U.S. 233, 241-42 (concurring opinion) (1968)).

The Secretary of Labor may void regulations only through proper rule-making pursuant to the Administrative Procedure Act. ***OFCCP* v. *Ozark Air Lines, Inc.***, Case No. 1980-OFCCP-24 (Dep'y Under Sec'y, June 13, 1986).

An administrative tribunal is without jurisdiction to adjudicate the validity of OFCCP regulations that implement the Rehabilitation Act. ***OFCCP* v. *American Airlines***, Case No. 1979-OFCCP-2 (ALJ June 30, 1980), *aff'd*, (Dep'y Under Sec'y May 2, 1985).

The ALJ and Assistant Secretary have the power to decide if an employer has violated Section 503 and the implementing regulations, but may not determine the underlying validity of the regulations. ***OFCCP* v. *Western Electric Co.***, Case No. 1980-OFCCP-29 (Dep'y Under Sec'y Apr. 24, 1985). For purposes of administrative enforcement proceedings, the validity of the waiver provisions at 20 C.F.R. § 60-741.25(a)(5) must be assumed.

2. Language not unconstitutionally vague

The definition of "handicapped individual" contained in the Act and the regulations is not unconstitutionally vague. ***E. E. Black, Ltd*. v. *Marshall***, 497 F. Supp. 1088, 1097-98 (D. Hi. 1980).

3. Improperly Appointed ALJ

ARB ORDERS "*LUCIA*" REMAND FOR RECONSIDERATION BEFORE A NEW, PROPERLY APPOINTED ALJ OF ISSUES FOR WHICH EXCEPTIONS WERE FILED

In ***OFCCP v. Convergys Customer Management Group, Inc.***, ARB No. 16-013, ALJ Nos. 2015-OFC-2 through 8 (ARB Jan. 31, 2019), the ARB had stayed the appeal pending the U.S. Supreme Court's decision in *Lucia v. S.E.C.*. The ARB noted that the Supreme Court issued its decision on June 21, 2018, *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018), and held that

> ALJs at the Securities and Exchange Commission (SEC) are subject to the appointments clause, that the SEC judge decided Lucia's case without a constitutional appointment, that Lucia timely objected, and that the appropriate remedy was to hold a new hearing before a different ALJ. The Court specified that a properly appointed official cannot be the same ALJ who previously decided the case because he 'cannot be expected to consider the matter as though he had not adjudicated it before.'

Slip op. at 2 (footnote omittted). The ARB thus dismissed Convergy's petition for review and remanded "for the appointment of an ALJ to reconsider the issues raised in Convergys' exceptions to [the original] ALJ...'s July 31 2017 Recommended Decision and Order." *Id*.

I. "Working on the contract" is a jurisdictional issue and cannot be presumed

1. Generally

The issue of "working-on-the-contract" is one of subject matter jurisdiction, which cannot be presumed. ***OFCCP* v. *Texas Industries, Inc.***, Case No. 1980-OFCCP-28 (Ass't Sec'y June 21, 1996). Although neither party raised the contract issue before the ALJ or the Assistant Secretary, the Assistant Secretary is required to address the issue before the case may proceed. *See also* ***OFCCP* v. *Texas Utilities Generating Co.***, Case No. 1985-OFC-13 (Ass't Sec'y Aug. 25, 1994).

The "working-on-the-contract" issue is jurisdictional and must be specifically addressed by the ALJ prior to proceeding to the merits. ***OFCCP* v. *Norfolk Southern Corp.***, Case No. 1989-OFC-31 (Ass't Sec'y Oct. 3, 1995).

In ***OFCCP* v. *United Airlines, Inc.***, Case No. 1986-OFC-12 (Ass't Sec'y Dec. 22, 1994), the Assistant Secretary remanded the case to the ALJ for appropriate findings on the "working-on-the-contract" issue, and held that, "[a]lthough the "working-on-the-contract" jurisdictional issue was not raised or addressed below or in the pleadings filed subsequent to the [ALJ] Recommended Decision and Order, I am required to address this matter before the case can proceed."

For a discussion of whether a defendant is a government contractor, see Chapter VIII.

2. Admission by defendant; insufficient to establish "working on the contract"

Defendant's mere acknowledgment that it is a federal contractor under Section 503 of the Rehabilitation Act cannot be construed as an admission that it had federal contracts which complainants would have performed. ***OFCCP* v. *Yellow Freight Systems, Inc.***, Case No. 1979-OFCCP-7 (Ass't Sec'y Aug. 24, 1992).

J. Included in contract by law

In ***OFCCP v. First Federal Savings Bank of Indiana***, Case No. 1991-OFC-23 (Sec'y Oct. 26, 1995), Defendant asserted that it was not covered by Executive Order 11246 because the agreements under which Defendant was an issuing agent for United States Savings Bonds and a depository for federal funds did not include the equal opportunity clause. The Secretary rejected this argument and held that the regulations establish that "[b]y operation of the [Executive] order, the equal opportunity clause shall be considered to be a part of every contract . . . required by the order and regulations . . . to include such a clause whether or not it is physically incorporated in such contracts . . .." *See* 41 C.F.R. § 60-1.4(e). *See also* ***OFCCP v. Southern Pacific Transportation***, Case No. 1979-OFC-10A (ALJ, Nov. 9, 1982), *remanded on other grounds* (Ass't Sec'y Feb. 24, 1994).

In ***OFCCP v. Goya De Puerto Rico, Inc.***, Case No. 1998-OFC-8 (ALJ June 22, 1999), *aff'd,* ARB No. 99-104 (ARB, Mar. 21, 2002), the ALJ concluded that Defendant violated the provisions of Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and Section 503 of the Rehabilitation Act of 1973 for failing to develop and maintain a written affirmative action program. Defendant operated under federal contracts to distribute food to two United States commissaries in Puerto Rico and argued that OFCCP's exclusive remedy lie under the Contract Disputes Act at 41 U.S.C. §§

601-613. Citing to the implementing regulations at 41 C.F.R. § 60-1.1, the ALJ noted that the procedures underlying the Executive Order apply "regardless of whether or not the contract contains a 'Disputes' clause."

K. Interplay with other statutes

1. Department of Transportation jurisdiction

Where an overlap of jurisdiction occurs, the agency exercising its authority cannot take actions which impinge on another Federal agency's jurisdiction. However, the fact that there is overlap of jurisdiction between Department of Transportation truck driver qualifications and Rehabilitation Act's prohibition against handicap-based discrimination does not necessarily constitute an intrusion into another agency's jurisdiction. ***OFCCP* v. *Yellow Freight Systems, Inc.***, Case No. 1979-OFCCP-7 (Dep'y

Under Sec'y Apr. 8, 1987). The Deputy Under Secretary held that, requiring that OFCCP wait until the Department of Transportation has ruled on the qualifications of drivers who fail to meet carriers' additional requirements before it can institute proceedings, preempts jurisdiction of the Rehabilitation Act and deprives drivers of remedies provided through Section 503, *i.e.*, back pay, lost fringe benefits, and reinstatement, which are not available under the Motor Carrier Act. It was noted that OFCCP conceded that the Department of Transportation had authority to set minimum qualification standards for drivers and that OFCCP and the Department of Transportation have concurrent jurisdiction over job qualifications imposed by the carrier. Where drivers are qualified under Department of Transportation standards, they also meet the definition of qualified handicapped individuals under the Rehabilitation Act.

In ***OFCCP v. Texas Industries, Inc.***, 1980-OFCCP-28 (Sec'y June 7, 1988), the Secretary stated the following with regard to DOT authority as it relates to complaints filed under the Rehabilitation Act:

> [A]fter a thorough consideration of DOT's authority over physical qualifications for drivers, it was held that exhaustion of DOT administrative remedies is not a prerequisite to a Rehabilitation Act proceeding where the handicapped employee or applicant for employment holds a valid DOT medical certificate.

2. Civil Rights Act of 1964

The Civil Rights Act of 1964 does not limit application of Executive Order 11246. The legislative history of the Act indicate that enforcement is to be separate from that of the Executive Order and that, while the purpose of Title VII is remedial and preventive, the goal of the Executive Order is to promote job opportunities irrespective of a finding of discrimination. ***In the Matter of Firestone***, Case No. 1978-OFCCP-13 (Sec'y Dec. 8, 1978).

A federal contractor is not exempt from complying with the affirmative action requirements of Executive Order 11246 on grounds that those requirements might conflict with Title VII. The courts, and not an administrative tribunal, are the appropriate forum in which to challenge the constitutionality of the Executive Order. ***Dep't of Treasury v. Nat'l Bank of Commerce of San Antonio***, Case No. 1977-OFCCP-2 (Sec'y May 3, 1978).

In ***OFCCP v. The Cleveland Clinic Foundation***, Case No. 1991-OFC-20 (ARB July 17, 1996), the ARB adopted the ALJ's approach of paralleling the regulations implementing Executive Order 11246, which required covered contractors "to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the order . . .", with the anti-retaliation provision at § 704(a) of Title VII of the Civil Rights Act.

3. Contract Disputes Act

In ***OFCCP v. Goya De Puerto Rico, Inc.***, Case No. 1998-OFC-8 (ALJ June 22, 1999), *aff'd,* ARB No. 99-104 (ARB Mar. 21, 2002), the ALJ concluded that Defendant violated the provisions of Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and Section 503 of the Rehabilitation Act of 1973 for failing to develop and maintain a written affirmative action program.

Defendant operated under federal contracts to distribute food to two United States commissaries in Puerto Rico. Defendant argued that OFCCP's exclusive remedy lie under the Contract Disputes Act at 41 U.S.C. §§ 601-613. Citing to the implementing regulations at 41 C.F.R. § 60-1.1, the ALJ noted that the procedures underlying the Executive Order apply "regardless of whether or not the contract contains a 'Disputes' clause." In addition, the ALJ noted that Section 605(a) of the Contract Disputes Act provided that it did not apply "to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle or determine." Consequently, it was determined that OFCCP had a right of action against Defendant which was not barred by the Contract Disputes Act.

VI. Review

A. By the ALJ

The ALJ conducts a *de novo* review of the record. *See e.g.,* ***OFCCP v. Bridgeport Hosp.***, 1997-OFC-1 (ALJ, Jan. 21, 2000), *aff'd in relevant part*, ARB Case No. 00-034 (ARB Jan. 31, 2003); ***OFCCP v. Beverly Enterprises, Inc.***, 1999-OFC-11 (ALJ July 22, 1999), *remanded on other grounds*, ARB Case No. 01-028 (ARB, Jan. 31, 2001).

B. By the ARB

1. In General

DISMISSAL OF ARB REVIEW WHERE EXCEPTIONS ARE NOT TIMELY FILED

In ***OFCCP v. D & S Construction of Pineville, Inc.***, ARB No. 14-088, ALJ No. 2010-OFC-6 (ARB Aug. 28, 2014), the ARB issued a final order affirming the ALJ's recommended decision granting the Plaintiff's (OFCCP) motion for default judgment. The motion was based on the Plaintiff's inability to contact the Defendant to determine whether the Defendant obtained new counsel after former counsel withdrew. The ALJ put the Defendant on notice of the nature of the motion and warned that failure to respond timely could result in the motion being granted. The ARB noted that 17 months had passed since the ALJ issued his recommended decision; that no party had filed exceptions with the Board; that the ALJ's recommended decision contained a certification that it was served on the Defendant at its last known address (at which the Defendant had previously accepted mail); there was no evidence that the ALJ's recommended decision was returned as undeliverable or that the Defendant provided any alternative address. The ARB thus found that the period for filing exceptions had expired.

In ***OFCCP v. Patriot Steel, LLC, ARB No. 2019-0086, ALJ No. 2019-OFC-00001*** **(ARB Sept. 24, 2019) (Final Administrative Order)**, because no party filed exceptions to the ALJ's Recommended Decision and Order of Default Judgment, the ARB adopted the ALJ's decision as the Final Administrative Order in the matter and directed the parties to comply therewith. Because of the default, the ALJ entered OFCCP's requested order debarring Defendant indefinitely from receiving future contracts or modifications or extensions of existing contracts, until it satisfies the Director of the OFCCP that it has undertaken efforts to

remedy its prior noncompliance and is currently in compliance with the provisions of the Executive Order 11246 and it implementing regulations.

2. Standard of Review

In ***OFCCP v. Goodyear Tire & Rubber Co.***, ARB Case No. 97-039, Case No. 1994- OFC-11 (ARB Aug. 30, 1999), the ARB held that it "retains complete freedom of decision" as though it heard the case when reviewing an ALJ's recommended decision under Section 503 of the Rehabilitation Act. *See also* ***OFCCP v. Keebler Co.***, ARB Case No. 97-127, Case No. 1987-OFC-20 (ARB Dec. 21, 1999) ("[o]ur review is *de novo*").

In ***OFCCP v. Yellow Freight Systems, Inc.,*** Case No. 1989-OFC-40 (Sec'y Sept. 18, 1995) (order), OFCCP moved to strike a letter from the Chief Counsel of the Federal Highway Administration, United States Department of Transportation, which was attached to Defendant's exceptions. The Secretary denied the motion because he found that the letter contained only legal argument and, therefore, did not violate the regulation requiring that the Secretary render a decision "on the basis of the record" made before the ALJ. 41 C.F.R. §§ 60-30.29 and 60-741.29(b)(1). Similarly, the Secretary denied a motion to strike portions of the exceptions that relied on arguments made in Chief Counsel's letter on grounds that the portions of the letter which were targeted did not contain references to extra-record evidence.

In ***OFCCP v. Bank of America***, ARB Case No. 00-079, 1997-OFC-16 (ARB Mar. 31, 2003), the ARB concluded that the ALJ erred in granting summary judgment because "genuine issues of material fact" existed. Citing to 41 C.F.R. §§ 60-30.29 and 60-30.30 as well as Secretary's Order No. 1-2002, the ARB held that it has "plenary power to determine whether summary judgment should be granted."

ARB'S STANDARD OF REVIEW IN OFCCP APPEALS IS DE NOVO; HOWEVER, ARB MAY ACCEPT ALJ'S FINDINGS OF FACT IF THEY SUPPORTED BY SUBSTANTIAL EVIDENCE

In ***OFCCP, USDOL v. Bank of America,*** ARB No. 13-099, ALJ No. 1997-OFC-16 (ARB Apr. 21, 2016), the ARB described its standard of review of ALJ's Recommended Decision and Order in appeals arising under EO 11246, the Rehabilitation Act, and the Veterans' Act. The ARB stated:

> Because no standard of review exists in EO 11246, the implementing regulations, or Secretary's delegation of authority, we rely on the Administrative Procedure Act. Under the Administrative Procedure Act, we have previously determined that our review is de novo and that the standard of proof in administrative adjudications "is the traditional preponderance-of-the-evidence standard." Even under a de novo review, nothing prohibits us from accepting as our own the ALJ's material fact findings that led up to the ALJ's ultimate finding of fact (i.e., intentional discrimination) if those findings are supported by substantial evidence. In *Bobreski v. J. Givoo Consultants* (*Bobreski II*), we defined substantial evidence as evidence in the record that logically supports each of the material findings of fact and the record as a whole does not overwhelm the particular finding or expose the fact finding as genuinely unresolved.

USDOL/OALJ Reporter at 9-10 (footnotes omitted).

In the instant case, the ARB found that because of "the extensive hearing presentation before the ALJ and the ALJ's firsthand observations, we accept the ALJ's predicate fact findings supported by substantial evidence." *Id*. at 10. The ARB stated that it would "review de novo the ALJ's ultimate finding of discrimination and her legal conclusions." *Id*.

BURDENS OF PROOF AND PRODUCTION IN EO 11246 INTENTIONAL DISCRIMINATION CASE; AFTER FULL HEARING, THE QUESTION FOR REVIEW ON APPEAL IS WHETHER OFCCP PROVED THE CASE, AND BURDEN OF PRODUCTION ANALYSIS IS UNNEEDED

In ***OFCCP, USDOL v. Bank of America,*** ARB No. 13-099, ALJ No. 1997-OFC-16 (ARB Apr. 21, 2016), the ARB noted that this particular case was grounded in OFCCP's charge of intentional disparate treatment, and not disparate impact or a claim that the Defendant violated its affirmative action obligation under the EO laws. The ARB noted in this regard that, in addition to "EO 11246, its implementing regulations, and Department precedent, we also look to federal appellate court decisions addressing similar pattern or practice claims of intentional discrimination adjudicated under Title VII of the Civil Rights Act of 1964." USDOL/OALJ Reporter at 11 (footnote omitted). The ARB then described the legal burdens of the parties for an intentional racial discrimination case:

> To prove that [the defendant] violated EO 11246 by engaging in a pattern or practice of intentional discrimination, the OFCCP must prove that unlawful discrimination was [the defendant]'s regular procedure or policy. … In a pattern or practice claim of intentional race discrimination, the OFCCP must show that there was a sufficient disparity and prove that race was a cause. Often in such cases, the complainant or plaintiff employees point to a substantial disparity in selection rates for a particular job as proof of an unlawful bias against members of a disadvantaged or protected class, an allegation that must be proven by a preponderance of the evidence. Palmer, 815 F.2d at 90. The burden of proving pattern or practice discrimination remains at all times with the plaintiff. *Segar v. Smith*, 738 F. 2d 1249, 1268-69, 1287 (D.C. Cir. 1984); *Craik v. Minn. State Univ. Bd.*, 731 F. 2d 465, 486-87 (8th Cir. 1984). Once the OFCCP proves a pattern or practice of discrimination against African-American applicants, each qualified African-American applicant benefits from a rebuttable presumption that he or she suffered from the same discrimination. *Teamsters*, 431 U.S. at 361-62. This rebuttable presumption shifts the burden of proof to the employer to demonstrate that it rejected the individual applicant for lawful reasons. *Id*. at 362.

USDOL/OALJ Reporter at 12 (footnotes omitted). The ARB then noted that after a full evidentiary hearing, the question on appeal is the ultimate question of whether OFCCP proved the case:

> In reviewing the ALJ's ruling on the merits, we focus on the *ultimate question* of whether the OFCCP proved that [the Defendant] engaged in a pattern or practice of intentionally rejecting African-American applicants and that race was a factor. After a full evidentiary hearing, there is no need to engage in the burden of production analysis to determine whether the OFCCP presented a prima facie case or whether BOA presented legitimate, non-discriminatory reasons for its practices. This burden of production analysis applies to motions for summary judgment and motions for judgment as a matter of law. To decide the ultimate question of causation the ALJ must consider both the complainant's and the respondent's evidence. The complainant's evidence may include a wide variety of circumstantial evidence, including motive, bias, work pressures from the employer, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence.

Id. at 12-13 (footnotes omitted) (emphasis as in original). The ARB rejected OFCCP's contention that the Defendant failed, as a matter of law, to present proper rebuttal for the ARB to consider on the question of intention discrimination – specifically, that once OFCCP presented its evidence, the Defendant had the

burden of showing that OFCCP's "statistical proof was unsound or to prove that the disparity occurred as a result of legitimate, non-discriminatory reasons." *Id*. at 13. The ARB stated that the burden of proof always remains with OFCCP, and that the Defendant's task had been to present admissible rebuttal evidence, just as in any civil tort litigation.

3. Interlocutory appeal not favored

In ***OFCCP v. Bank of America***, ARB Case No. 04-169, *remanding* 1997-OFC-16 (ARB Dec. 17, 2004), the Board declined to accept Defendant's interlocutory appeal of the ALJ's *Recommended Decision and Order on Cross-Motions for Summary Judgment*. In particular, the ALJ issued partial summary judgment in favor of Plaintiff on the issue of Defendant's Fourth Amendment challenge to its selection for a compliance review. The ALJ further noted that the merits of Plaintiff's complaint had yet to be litigated. Citing to ***Plumley v. Federal Bureau of Prisons***, 1986-CAA-6 (Sec'y Apr. 29, 1987), the Board addressed the procedure for requesting an interlocutory appeal. After noting its "strong policy against . . . piecemeal appeals," coupled with the ALJ's denial of Defendant's request that the case be certified for interlocutory review, the Board denied the interlocutory appeal and remanded the matter for adjudication on the merits of Plaintiff's complaint.

Subsequently, on January 21, 2010, the ALJ issued a *Recommended Decision and Order* finding that Defendant had intentionally and unlawfully discriminated against African-American candidates in hiring. Defendant appealed and the Board declined to accept the appeal on grounds that it was interlocutory. Notably, the Board found that the ALJ retained jurisdiction to adjudicate remedies such that the case was remanded to the ALJ for adjudication of damages. ***OFCCP v. Bank of America***, ARB Case No. 10-048, ALJ Case No. 1997-OFC-016 (ARB Apr. 29, 2010) (a party seeking review of a non-final order must demonstrate that the order *"*involves a controlling question of law,*"* there is *"*substantial ground for difference of opinion in resolving the issues presented by the order,*"* and an *"*immediate appeal from the order may materially advance the ultimate termination of the litigation*"*; here, the Board found *"*at least nine*"* controlling questions of law and decline to accept the appeal).

ARB NOTES THAT WHETHER INTERLOCUTORY REVIEW IN OFCCP CASES IS AVAILABLE IS AN OPEN QUESTION; INSTEAD OF DECIDING THAT QUESTION, ARB DETERMINED WHETHER SUCH REVIEW WAS WARRANTED IN THE CASE BEFORE IT; REVIEW DENIED IN VIEW OF LACK OF CERTIFICATION BY ALJ, INAPPLICABILITY OF COLLATERAL ORDER EXCEPTION, DISTINGUISHING FACTORS FROM *HONEYWELL* , AND FAILURE TO MEET *CHENEY* CRITERIA FOR MANDAMUS

INTERLOCUTORY REVIEW UNDER *CHENEY* WRIT OF MANDAMUS CRITERIA; WHETHER ARB HAS MANDAMUS AUTHORITY IS AN OPEN QUESTION; RATHER THAN DECIDING THAT QUESTION, ARB FINDS THAT INTERLOCUTORY REVIEW WAS NOT WARRANTED WHERE IT IS COMMON TO DENY SUCH REVIEW OF A MOTION TO DISMISS AND WHERE THE ALJ MADE A REASONABLE INTERPRETATION OF THE REGULATIONS IN FINDING THAT THE PLEADING STANDARD FOR OFCCP ADMINISTRATIVE COMPLAINTS WAS NOT GOVERNED BY *IQBAL/TWOMBLY* PLAUSIBILITY STANDARD

In ***OFCCP v. JPMorgan Chase & Co.***, ARB No. 17-063, ALJ No. 2017-OFC-7 (ARB Oct. 5, 2017), OFCCP filed an Administrative Complaint alleging that the Respondent violated E.O. 11246 and its implementing regulations by discriminating against female employees in regard to compensation. The ALJ denied the Respondent's motion to dismiss for failure to state a claim. The Respondent had based on the motion on the ground that the complaint did not meet the plausibility standard for stating a claim under FRCP 8 as set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544

(2007) (*Iqbal/Twombly*). The ALJ also denied the Respondent's request for reconsideration and for certification of an interlocutory appeal. The Respondent argued before the ARB that exceptional circumstances for interlocutory review through a writ of mandamus existed under *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380-381 (2004). The ARB denied interlocutory review.

The ARB first noted that the regulations implementing E.O. 11246 do not provide a mechanism for interlocutory review. The ARB noted that some caselaw indicated that such review is not available, but also noted that the caselaw was not uniform and that the Secretary's Order delegating authority to the ARB includes the authority to conduct interlocutory review in exceptional circumstances. The ARB thus proceeded to consider whether interlocutory review was warranted in this case.

The ARB noted that interlocutory appeals are disfavored and that there is a strong policy against piecemeal appeals. The ARB noted that the ALJ had not certified the question as a controlling question of law under 28 U.S.C. § 1292(b), a statute that the ARB uses as guidance on such matters. The ARB noted that the Respondent had not addressed the collateral order exception, presumably because the ALJ's denial of its motion to dismiss did not involve a collateral order. The ARB distinguished the granting of interlocutory review in *OFCCP v. Honeywell, Inc.,* 1977-OFC-3 (Sec'y June 2, 1993), on the grounds that interlocutory review in the instant case would not encourage the parties to pursue voluntary mediation as it had in *Honeywell*, and that unlike in *Honeywell*, OFCCP objected to interlocutory review in this case.

The ARB noted that it has not yet been determined whether it has mandamus authority. The ARB continued to pretermit the question in the instant case, and instead found that the Respondent failed to demonstrate that the circumstances met the *Cheney* criteria. The ARB noted that it is common for courts to deny interlocutory review of motions to dismiss. The ARB also found that the Respondent had not demonstrated that its right to a writ was clear and indisputable because the ALJ's finding that OFCCP pleading standard at 41 C.F.R. § 60-30.5(b) applies to this complaint was a reasonable interpretation.

41 C.F.R. § 60-30.19(b) UNAMBIGUOUSLY RESTRICTS THE ARB FROM INTERLOCUTORY REVIEW OF ALJ RULINGS, DESPITE THE GENERAL AUTHORITY OF THE ARB TO PERFORM INTERLOCUTORY REVIEW FOUND IN SECRETARY'S ORDER 01-2019

ALTHOUGH ARB DENIES INTERLOCUTORY REVIEW, IT SUGGESTS THAT THE ISSUES OF DELEGATED DISCRETION, SYSTEMIC COMPENSATION DISCRIMINATION, AND IDENTIFICATION OF STATUTORY AUTHORITY TO PROCEED WITHOUT A STATUTE OF LIMITATIONS, ARE NOT EXCEPTIONAL CIRCUMSTANCES THAT WOULD WARRANT INTERLOCUTORY REVIEW

ALTHOUGH ARB DENIES INTERLOCUTORY REVIEW, IT NOTES LACK OF SHOWING THAT IT HAS JURISDICTION TO PASS ON THE CONSTITUTIONAL VALIDITY OF CONTESTED SECRETARIAL ACTIONS

In ***OFCCP v. JPMorgan Chase & Co.***, ARB No. 2020-0011, ALJ No. 2017-OFC-00007 (ARB Nov. 26, 2019), the ALJ denied Defendant's motion to dismiss Plaintiff's E.O. 11246 complaint. Defendant then petitioned for interlocutory review by the ARB of four issues:

- Whether the delegated discretion alleged by Plaintiff states a claim upon which relief can be granted;
- Whether the systemic compensation discrimination alleged by Plaintiff states a claim upon which relief can be granted;
- Whether Plaintiff must identify statutory authority to proceed without any statute of limitations; and

- Whether the instant proceedings before the ALJ and this Board continue to violate Article II of the United States Constitution.

Slip op. at 2. Defendant relied on the fact that Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (April 3, 2019), had been relied upon by the ARB in the past to review interlocutory rulings in cases arising under E.O. 11246. Plaintiff responded that 41 C.F.R. § 60-30.19(b) specifically limits the authority of the ARB to hear interlocutory appeals. The ARB applied the canon of construction that—when there is a conflict between a general provision and a more specific provision, the specific provision generally prevails—and found that in the instant case the general provision of the Secretary's Order must yield to the specific and unambiguous restriction of the regulation. The ARB declined to credit prior decisions of the ARB to the contrary in the face of the unambiguous regulatory prohibition. In a footnote, the Board noted that the decision to deny interlocutory review was unanimous.

Despite the denial of interlocutory review, the ARB commented on Defendant's petition in a footnote:

> In light of this disposition, the Board need not address Defendant's arguments concerning the legal sufficiency of the allegations against it or Plaintiffs assertion that the Board could not grant the requested relief in an appropriate circumstance. But even if the Board were inclined to look beyond the prohibition of interlocutory review in § 60-30.19(b), it must be noted that a panel of this Board previously denied interlocutory review to the same petitioner in the same case raising largely indistinguishable issues based on the decision of a previous ALJ. *Office of Federal Contract Compliance Programs v. JPMorgan Chase & Co.*, ARB No. 17-063, ALJ No. 2017-OFC-007 (ARB October 5, 2017). The Board held that "none of the recognized possible 'extraordinary circumstances' for interlocutory review have been established" in the case. *Id*. at 8. If the relevant non-constitutional circumstances were determined by the Board to be unexceptional in 2017, it is unlikely that they have become more exceptional with the passage of time. As for the constitutional challenge to the ongoing adjudication, the complaint is noted for the record. However, there has been no showing that the Board has any jurisdiction to pass on the constitutional validity of contested secretarial actions, and, in the absence of such showing, the issues raised must be resolved in a court of the United States with jurisdiction over matters arising under the federal Constitution.

Id. at 4, n.1.

C. Reconsideration

In ***OFCCP v. Florida Hospital of Orlando,*** ARB No. 11-011, ALJ No. 2009-OFC-2 (ARB July 22, 2013) (granting reconsideration), the ARB granted reconsideration of an en banc decision it had rendered in October 2012 finding that Section 715 of the National Defense Authorization Act for Fiscal Year 2012 precluded the OFCCP's exercise of jurisdiction over a TRICARE network hospital under "Prong Two" of the "subcontract" definition in OFCCP's regulations at 41 C.F.R. § 60-1.3(2). Because of a split panel, the ARB had not resolved whether OFCCP had enforcement jurisdiction under "Prong One" of the "subcontract" definition, at 41 C.F.R. § 60-1.3(1). The OFCCP sought reconsideration arguing that the ARB's failure to resolve the question of Prong One jurisdiction will impede compliance reviews, needlessly protract litigation, and adversely affect the rights of employees of TRICARE network hospitals by leaving them vulnerable to discrimination. The ARB stated that it generally uses a four factor test stated in *Avlon v.*

American Express Co., ARB No. 09-089, ALJ No. 2008-SOX-51 (ARB Sept. 14, 2011), in determining whether to reconsider a previously rendered decision The ARB stated that the four factors are not the sole criteria upon which reconsideration may be granted, and that it has adopted principles employed by federal courts under FRAP 40 and FRCP 59 and 60 in deciding requests for reconsideration. The ARB noted that the FRAP use a more general and lenient standard than the ARB's four-part test. The ARB further noted that the 4th Circuit local rules also permit reconsideration where the proceeding involves one or more questions of exceptional importance. The ARB found the 4th Circuit local rule to be persuasive, and that the purpose of a rehearing is to provide an opportunity to see that justice is done. The ARB found that in the instant case, a majority of the Board failed to appreciate the extent to which OFCCP raised an independent ground for Prong One jurisdiction. The ARB also observed that reconsideration in the instant case was not of the merits but the ARB's decision to consider the merits of an important legal issue in an exceptional case where it previously bypassed the issue on procedural grounds.

In ruling on the OFCCP motion, the ARB noted the Respondent's opposition on the ground that the motion was not timely. The ARB stated that in absence of rules of procedure governing the timeliness of such motions, it generally insists that the motion be made within a reasonable period following issuance of the decision for which reconsideration is sought. The ARB further noted that the Federal court rules allow the Federal government or its officers and agencies a longer period for the filing of such motions in recognition of the fact that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing.

Two members of the ARB dissented, finding that OFCCP had failed to advance an argument satisfying the criteria ARB requires for a grant of reconsideration.

D. When an ALJ decision becomes final

1. When expedited procedures apply

In ***USDOL, OFCCP v. United Space Alliance, LLC***, ARB No. 11-033, ALJ No. 2011-OFC-2 (ARB Apr. 11, 2011), the ALJ's decision under expedited procedures of 41 C.F.R. § 60-30.21 to 60-30.37 (2010) became final Administrative Order when Board did not issue a final order within 30 days after the expiration of the time for filing exceptions.

2. When expedited procedures do not apply

The failure of the ARB to issue a final order within one year of the ALJ's recommended decision, or exceptions and responses thereto, is not grounds for dismissal of the appeal; the time limit is directory and not jurisdictional. In ***USDOL, OFCCP v. Frito-Lay, Inc.***, ARB No. 10-132, ALJ No. 2010-OFC-2 (ARB May 8, 2012), the ARB found that the provision in 41 C.F.R. § 60-1.26(b)(2) providing that the ARB issue a final order within one year of either the ALJ's recommended decision or the submission of exceptions and responses to exceptions, whichever occurs first, is directory not jurisdictional. Consequently, the ARB denied the Respondent request that the ARB dismiss appellate review in ***USDOL, OFCCP v. Frito-Lay, Inc.***, ARB No. 10-132, ALJ No. 2010-OFC-2 (ARB May 8, 2012). The Respondent had noted that the ARB had closed the appeal in *USDOL, OFCCP v. United Space Alliance, LLC* , ARB No. 11-033, ALJ No. 2011-OFC-2 (Apr. 11, 2011). The ARB, however, distinguished that case because it arose under the expedited review procedure at 41 C.F.R. §§ 60-30.37, a regulation that sets forth consequences for a failure to act in a timely

manner. [Editor's note: in *Frito-Lay*, the ALJ hearing had been conducted under the expedited review procedure; however, on appeal the parties waived expedited proceedings before the ARB.]

E. By the courts

When a final agency action is challenged under the APA in district court, if the relevant statute does not provide for direct review by the court of appeals, the district court is to sit as an appellate tribunal and determine whether the agency made an error of law. If such an error has been made, the court must remand the matter to the agency for further action consistent with the corrected legal standard. ***PPG Industries, Inc. v. United States of America***, 52 F.3d 363 (D.C. Cir. 1995) (formerly Case No. 1986-OFC-9)**.** In addition, there is nothing to restrict an agency from reopening proceedings for the admission of new evidence, after the grounds on which it relied are determined by a reviewing court to be invalid. *See also* ***Partridge v. Reich***, 141 F.3d 920 (9th Cir. 1998) (application of "arbitrary and capricious" standard; questions of law are reviewed *de novo*).

VII. Evidence

A. Back wages owed

1. Burdens, generally

Complainant has the initial burden of production in establishing back pay. ***Pettway v. American Cast Iron Pipe Co.***, 494 F.2d 211 (5th Cir. 1974). Back pay is calculated by establishing what the worker's earnings and fringe benefits would have been had the discrimination not occurred. This figure should include promotions and raises. Moreover, the employment history of co-workers may be used to establish the injured worker's career path and his or her hypothetical earnings. ***E.E.O.C. v. Korn Industries, Inc.***, 662 F.2d 256 (4th Cir. 1981).

Examination of company payroll records and time cards as well as interviewing employees is an acceptable method of reconstructing back pay damages. Under these circumstances, it is not necessary to prove the precise amount of uncompensated or under-compensated wage payments to affected employees. Rather, the reconstructed records must only demonstrate wages owed for the amount and extent of work done in the job classification as a matter of reasonable inference, even though the result is approximate. Defendant bears the consequence of the imprecision because of its failure to maintain accurate records of hours worked in violation of its contractual and statutory responsibilities. ***Dep't of the Treasury v. Harris Trust***, Case No. 1978-OFCCP-2 (ALJ Jan. 30, 1981) (citing to ***Anderson v. Mt. Clemens Pottery Co.***, 328 U.S. 680 (1946)).

2. Utilization of a class-wide analysis to establish

In ***OFCCP v. Jacksonville Shipyards, Inc.***, Case No. 1989-OFC-1 (ALJ June 10, 1997), the ALJ determined that a class wide approach to the measure of back pay was necessitated because the employer's hiring requirements and the qualifications of the job applicants were ambiguous. The facts of the case did not provide a clear indication of which individuals would have been hired absent discrimination. *See* ***Pettway v. American Case Iron Pipe Co.***, 494 F.2d 211, 260-61 (5th Cir. 1974). In addition to the 69 women who applied for 191 positions, 1,065 men (93.92% of the applicant pool) also applied, making it statistically impossible to say that all 69 women would have been hired. The ALJ concluded that a more likely outcome is that the

number of females hired would be the same proportion as the total proportion of female applicants, *i.e.* since 6.08% of the applicants were female, 6.08% of the total hired should have been female. As it was virtually impossible to determine which of the 69 applicants would actually have been hired, a class wide approach based on the percentage of overall hires who, absent discrimination, would have been women is more equitable. This approach has been accepted and utilized by numerous courts. *See* ***Dougherty v. Barry,*** 869 F.2d 605 (D.C. Cir. 1989); ***Pitre v. Western Elec. Co.***, 843 F.2d 1262 (10th Cir. 1988); ***Stewart v. General Motors Corp.***, 542 F.2d 445 (7th Cir. 1986). Consequently, it was noted that three women were actually hired, which equaled 1.57% of the total number hired. As previously noted, absent discrimination, it would have been expected that 6.08% of the persons hired would be female. Therefore, the shortfall percentage was 4.51%. The back pay determination was then calculated by taking the number of total earnings by all hirees during the applicable time period and multiplying that number by the shortfall percentage. *See* ***EEOC v. Spring and Wire Forms Specialty Co.***, 790 F. Supp. 776, 780 (N.D. Ill. 1992).

3. After-acquired evidence

Defendant's contention that the complainant is not entitled to relief because of "after acquired evidence" consisting of omissions on his application is a remedial issue to be addressed on remand. ***OFCCP* v. *Yellow Freight System, Inc.***, Case No. 1984-OFC-17 (Ass't Sec'y Dec. 22, 1993).

B. The Rehabilitation Act

See also Chapter X for an in-depth discussion of case law under Section 503 of the Rehabilitation Act.

1. Burdens, generally

The shifting, tripartite burdens of proof established under Title VII apply to cases brought under Section 503 of the Rehabilitation Act. ***OFCCP* v. *Yellow Freight Systems, Inc.***, Case No. 1982-OFC-2 (ALJ Sept. 30, 1986), *remanded on other grounds* (Ass't. Sec'y Oct. 6, 1993). Specifically, to establish a *prima facie* claim, OFCCP must demonstrate that the employee is a qualified handicapped person and Defendant utilized a physical job requirement that excluded the handicapped worker from employment. Once OFCCP establishes a *prima facie* case, the burden of proof shifts to Defendant who may rebut this inference by establishing that (1) the physical requirement is job related and consistent with business necessity and safe job performance, or (2) the adverse employment decision was based on prior poor performance. If Defendant rebuts the *prima facie* case, then OFCCP must establish that Defendant's justification is based on misconceptions or is a pretext for a discriminatory motive.

In ***OFCCP* v. *American Commercial Barge Line Co.***, Case No. 1984-OFC-13 (Ass't Sec'y Apr. 15, 1992), the Assistant Secretary held that burdens of proof and production in Title VII cases apply to individual handicap discrimination cases. It was initially noted that the burden of establishing a *prima facie* case was not an onerous one and required that OFCCP merely establish that the worker was discharged under circumstances which give rise to unlawful discrimination. Once OFCCP established a *prima facie* case, Defendant had the burden of articulating some legitimate, non-discriminatory reason for the employee's discharge. Once Defendant offers a legitimate, non-discriminatory reason for the discharge, the burden of production shifts back to OFCCP to establish that the proffered reasons were pretextual, *i.e.* the true motivation for the discharge was the intent to discriminate. It is noted that OFCCP bears the ultimate burden of persuading the fact-finder that Defendant intentionally discriminated against the worker. As an example, under the facts of ***American Commercial***, Defendant met its burden of

demonstrating that a manic depressive employee's termination was for a non-discriminatory reason, *i.e.*, his failure to release his psychiatric records held by the VA hospital to the employer. OFCCP failed to prove that the manic depressive employee actually and seriously re-applied for an available position after he was terminated. Thus, the fact that the contractor did not re-employ him, even after he released his medical records, did not establish that the stated reason for discharge (failure to release medical records) was a pretext for discrimination.

2. Dual motives

In ***OFCCP* v. *Norfolk & Western Railway Co.***, Case No. 1980-OFCCP-14 (Assoc. Dep'y Under Sec'y Dec. 8, 1986), it was determined that the burdens of proof to be applied in dual motive cases arising under the Rehabilitation Act are those enunciated in ***Dartey* v. *Zack Co. of Chicago***, Case No. 1982-ERA-2 (Sec'y Aug. 25, 1983) (a case arising under the Energy Reorganization Act of 1974 at 42 U.S.C. § 585). In ***Dartey***, the Secretary applied the Supreme Court's analysis in ***Mt. Healthy City School District Board of Education* v. *Doyle***, 429 U.S. 274 (1976). The Secretary further held that the burdens of proof set forth in ***Texas Department of Community Affairs* v. *Burdine***, 450 U.S. 248 (1981) are not to be applied in dual or mixed motive cases. Upon application of the ***Mt. Healthy*** standards, if OFCCP proves by a preponderance of evidence that the protected conduct was a motivating factor in the company's adverse employment action, then the employer must prove by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. When there is an even balance of evidence as to whether the employee was discharged for legitimate or illegitimate reasons, the burdens of proof for a mixed motive case should be applied. Under this analysis, in considering whether the employer's justification for taking the employment action was pretext, the ALJ may properly consider evidence presented as part of the *prima facie* case.

In ***OFCCP v. Yellow Freight System Inc.***, Case No. 1989-OFC-40 (ALJ May 17, 1994), in defense of a *prima facie* case of discrimination, Defendant has the burden of producing evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Where both legitimate and prohibited motives constitute the basis for the adverse employment action, Defendant has the burden of proof to establish by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

C. Executive Order 11246

1. Burdens, generally

In an Executive Order 11246 class action, it is the government's burden to establish a *prima facie* case of the existence of a discriminatory system affecting a class of employees. After this discriminatory system is established, the government must demonstrate that certain employees are members of the affected class and are entitled to compensatory relief. Then, the burden shifts to the employer to provide that the individuals are not entitled to relief. ***OFCCP v. Honeywell, Inc.***, Case No. 1977-OFCCP-3 (Sec'y Mar. 2, 1994).

Based on statistical data and testimony, the government demonstrated by a preponderance of the evidence that a few women and minorities managed to attain managerial positions or become officers, but their scarcity in comparison to the numerous comparably qualified white males who have attained such

positions established the continuing effects of Defendant's employment discrimination. ***Dep't of the Treasury v. Harris Trust***, Case No. 1978-OFCCP-2 (ALJ Dec. 22, 1986).

In ***OFCCP v. Greenwood Mills, Inc.,*** Case No. 1989-OFC-39 (Sec'y Nov. 20, 1995), the Secretary held that Defendant's successful hiring of females into positions in a job group about which it had received notice of an OFCCP audit "might tend to show the existence of prior discrimination and an effort to repair the harm after discovery." Slip op. at 17-18, quoting ***Rich v. Martin Marietta Corp.,*** 522 F.2d 333, 346 (10th Cir. 1975) (footnote omitted). Moreover, the Secretary held that "ulterior motives" are not a prerequisite to a finding of sex discrimination. Rather, the test is whether a person was treated in a manner but for which his or her sex, the treatment would have been different.

In ***OFCCP v. The Cleveland Clinic Foundation***, Case No. 1991-OFC-20, slip op. at 7, 8 (ARB July 17, 1996), the ARB found evidence of discriminatory intent and disparate treatment where a black employee was fired for sending a letter to the employer's Board of Governors alleging racial discrimination, but where a white employee, who repeatedly violated the employer's disciplinary procedures and work rules to an extreme degree, never received more than "verbal counseling." Other evidence of disparate treatment was found where a black employee, who lied on her application about previous applications for worker's compensation, was terminated from employment, but a white employee only received a one-day suspension for making false statements.

In ***OFCCP v. Burlington Industries, Inc.***, Case No. 1990-OFC-10 (ALJ Nov. 1, 1991), the ALJ dismissed the government's complaint under Executive Order 11246 for failure to sustain its burden of establishing disparate treatment of its minority applicants. Citing to ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973), the ALJ noted that the government has the threshold burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination. Under ***Texas Dep't. of Community Affairs v. Burdine***, 450 U.S. 248 (1981) and ***United Postal Service Board of Governors v. Aikens***, 460 U.S. 709 (1983), the Supreme Court clarified its holding regarding the *prima facie* burden of establishing discrimination to state that it gives rise to a presumption that the employer engaged in unlawful discrimination; "plaintiff need only show that qualified minority applicants were rejected under circumstances which give rise to an inference of unlawful discrimination." Under the facts of the case, the ALJ noted that the evidence of record demonstrated that non-minority applicants were hired when qualified minority applicants were available. The selection process "was not random" and "[n]on-minorities were accorded a limited preference." The ALJ concluded that the "hiring data together with the hiring practice, which Burlington has admitted, resulted in an affirmative hiring of non- minorities . . .." As a result, the presumption of disparate treatment of minorities was invoked and the burden shifted to Burlington to provide legitimate, non-discriminatory reasons for its hiring practices.

Upon establishing a *prima facie* case, the burden then shifts to the employer to put forth evidence that minority applicants were rejected, or non-minorities were preferred, for legitimate, non-discriminatory reasons. ***Burdine***, 450 U.S. at 254; ***Aikens***, 460 U.S. at 714. If the employer sustains this burden, then the government must demonstrate that the proffered reasons were not the true reasons underlying the employment decisions, but were merely a pretext. The government carries the burden of adducing evidence that the purported reason for the rejection of qualified minority applicants was, in fact, a pretext for unlawful discrimination. *See* ***International Brotherhood of Teamsters v. United States***, 431 U.S. 324, 362 n.50 (1977). The ALJ emphasized that the ultimate burden of persuasion that Burlington "intentionally discriminated" against minority applicants "remains at all times with the Plaintiff." In this vein, the ALJ noted that the ***Burdine*** presumption was designed "progressively to sharpen the inquiry into

the elusive factual question of intentional discrimination." *See also* ***E.E. Black Ltd. v. Marshall***, 1981 WL 265 (D. Hi. 1981).

OFCCP INTENTIONAL DISCRIMINATION COMPLAINT; ARB AGREES IN REGARD TO FIRST HIRING SEASON THAT COMBINATION OF STATISTICAL EVIDENCE, AND EVIDENCE OF LACK OF DECISION MAKING STANDARDS, ANECDOTAL EVIDENCE OF ARBITRARY TREATMENT, AND DISPARATE USE OF DISPOSITION CODE WAS SUFFICIENT FOR OFCCP TO SHOW DISCRIMINATION

PLURALITY OF ARB REJECTS PORTION OF OFCCP'S CASE RELATED TO SECOND HIRING SEASON, ONE MEMBER FINDING IT INSUFFICIENT BECAUSE IT WAS SUPPORTED ONLY BY STATISTICAL EVIDENCE OF SMALL SHORTFALLS IN HIRING AFRICAN AMERICANS, ONE MEMBER FINDING THAT OFCCP SHOULD NOT HAVE BEEN ALLOWED TO EXPAND THE COMPLAINT TO INCLUDE THE SECOND HIRING SEASON, AND THE DISSENTING MEMBER FINDING THAT THE STATISTICAL EVIDENCE ALONE WAS SUFFICIENT IN THIS CASE

In ***OFCCP, USDOL v. Bank of America***, ARB No. 13-099, ALJ No. 1997-OFC-16 (ARB Apr. 21, 2016), the ARB, in a plurality decision, affirmed the ALJ's finding that in 1993 the Respondent intentionally discriminated against African-American job applicants for entry level positions. For different reasons, two members of the ARB reversed the ALJ's finding that the Respondent was liable for intention discrimination in hiring in 2002-2005.

This matter began as a desk audit of the Respondent by OFCCP in 1994. During the 1993 hiring for two job groups, the Respondent had used two recruiters who did initial screening and testing. If the recruiters determined that the applicant was qualified and a good fit for the position, an interview was set with the hiring manager. When an applicant was disqualified or rejected for a position, the Respondent used disposition codes to record the reason. Two codes fell more harshly on the African-American applicants – a code relating to credit checks, and a code relating to incompatible hours. OFCCP's expert found a standard deviation of 6.9. Extensive litigation caused an eight year gap in the review of the Respondent's hiring practices. By 2002-2005, the Respondent' hiring practices had changed significantly. The job groups originally at issue were by then treated as a single group; there were now 58 recruiters; the Respondent had stopped using credit checks. OFCCP's expert found a combined standard deviation of 4.0 for these years. OFCCP filed an Administrative Complaint that was based solely on a claim of intentional disparate treatment; the complaint did not charge disparate impact or that the Respondent violated its affirmative action obligations under the EO laws.

All three ARB judges agreed with the ALJ's finding about the 1993 hiring. The ALJ relied on statistical analysis; the lack of standards for some decision-making processes; anecdotal evidence of arbitrary treatment; and troubling and disparate use of the disposition code. The lead opinion rejected the ALJ's finding with regard to the 2002-2005 hiring because the ALJ had relied solely on the statistical disparity of that period as a whole. He found that the quality and quantity of evidence supporting the determination on the 1993 hiring was fundamentally different than the support for the determination on the 2002-2005 hiring. One ARB judge concurred in the resolution of the appeal but on the ground that 2002-2005 hiring had been adjudicated without affording the Respondent the full procedural protections of EO 11246 and 41 C.F.R. Part 60-1 (i.e., the newer review resulted from discovery information rather than a compliance review initiated under the regulations). The third ARB judge would have found that the 2002-2005 hiring was within the scope of OFCCP's original Administrative Complaint that alleged ongoing violations. This judge criticized the majority for analyzing the two periods as separate claims of pattern or practice discrimination, and noted caselaw that if a plaintiff produces statistically significant evidence of discrimination, it is not necessary to also provide anecdotal evidence or prove gross disparity.

2. Rebuttal by defendant

In ***OFCCP v. Burlington Industries, Inc.***, Case No. 1990-OFC-10 (ALJ Nov. 1, 1991), the government established a *prima facie* case of disparate treatment of minorities. In particular, the ALJ noted that the evidence of record demonstrated that non-minority applicants were hired when qualified minority applicants were available. The selection process "was not random" and "[n]on-minorities were accorded a limited preference." The ALJ concluded that the "hiring data together with the hiring practice, which Burlington has admitted, resulted in an affirmative hiring of non-minorities . . .." As a result, the presumption of disparate treatment of minorities was invoked and the burden shifted to Burlington to provide legitimate, non-discriminatory reasons for its hiring practices. To rebut the presumption, the ALJ held that "Burlington must come forward with evidence that minority applicants were rejected, or non-minority applicants were preferred, for legitimate, non-discriminatory reasons. Upon review of the record, the ALJ concluded that Defendant sustained this burden:

> Burlington explained that (certain) job groups . . . were concentrated with minorities, and, as such, it sought to address the concentration problem by hiring non-minorities. It further emphasizes that it forthrightly described this hiring strategy to OFCCP in its (Affirmative Action Plan), and OFCCP approved the Plan.

Slip. op. at 17. The ALJ noted that Burlington was required to consider the eight factors set forth at 41 C.F.R. § 60-2.11, but that it was entitled to calculate concentration in accordance with the "C-3 Agreement" underlying the Affirmative Action Plan. The ALJ stated the following:

> OFCCP's contention that its post-hearing brief that the JTAR formula and the JAAR formula are the same, thereby suggesting that calculations under both formulas should yield the same result, seems to ignore that fact that the C-3 agreement uses external availability for each job group, as well as the fact that the OFCCP investigator admitted at the hearing that job groups . . . were concentrated using the JTAR formula. The testimony of OFCCP witnesses at the hearing indicate that JTAR and JAAR calculations would not be expected to yield the same results.

Slip op. at 17. The ALJ also placed significant importance on the fact that Burlington disclosed its Affirmative Action Plan to OFFCP and it was approved. Moreover, he found that "[i]t is also probative that OFCCP had approved precisely the same hiring policy in years past at other Burlington facilities which experienced instances of concentration of particular job groups." Slip op. at 17, 18. In sum, the ALJ concluded that the evidence demonstrated that "Burlington attempted to reduce the minority concentration in these entry level jobs, because OFCCP viewed the minority concentration as a 'red flag' that the concentration itself may be due to discrimination." Consequently, the ALJ determined that Burlington rebutted the government's *prima facie* case.

3. Pretext

In ***OFCCP v. Burlington Industries, Inc.***, Case No. 1990-OFC-10 (ALJ Nov. 1, 1991), the ALJ dismissed OFCCP's complaint on grounds that it could not demonstrate that Burlington's proffered reasons for its hiring practices were pre-textual. *See* ***International Brotherhood of Teamsters v. United States***, 431 U.S. 324, 362 n.50 (1977). The ALJ noted that no present or past employee "testified that they perceived any discriminatory animus in any of the personnel decisions at the plant." Moreover, OFCCP officials did not testify that Burlington's "strategy of hiring non-minority applicants was based on anything

other than the concerns expressed in the (Affirmative Action Plan) to soften the concentration of minorities in the entry level 6B and 7B jobs." The ALJ further noted that hiring non-minorities in jobs concentrated with minorities was not Burlington's idea; rather, the record contained a memorandum to the company from a Department of Defense Equal Opportunity Specialist recommending the hiring practice that the company implemented:

> Whether or not the Specialist was authorized to make the recommendation, the record shows that the hiring strategy was devised, not as a pretext by Burlington, but rather was accepted by Burlington at the insistence of the Specialist to facilitate an 'in compliance' report. The record reveals no hint of animus or pretextual motivation on Burlington's part in accepting the hiring policy here challenged. *See* ***New York Transit Authority v. Beuzer***, 440 U.S. 568, 584 (1979).

Slip. op. at 19. The ALJ further noted that Burlington revealed its Affirmative Action Plan to OFCCP and it was approved. Indeed, the ALJ stated that "[b]oth Burlington and OFCCP knew that job groups 6B and 7B at Pioneer I were concentrated (with minorities) for reasons wholly unrelated to discrimination"; yet, OFCCP was "unwilling to advise the company that it did not need to de-concentrate the job groups" to avoid prosecution. In conclusion, the ALJ stated:

> Now, this is not to suggest that an approved (Affirmative Action Plan), which contains isolated but discriminatory proposals inadvertently overlooked by OFCCP provides a defense in all cases. The hiring of non-minorities as a means of addressing minority concentration was repeatedly approved over a period of many years. The acceptance and approval was not a singular and inadvertent oversight. Nor was the hiring plan one which the contractor originated and then buried in a voluminous (Affirmative Action Plan).

As a result, the ALJ dismissed OFCCP's complaint to state that the government did not establish that the company's employment decisions were motivated by discriminatory reasons.

4. Cost of compliance not a valid defense to discrimination

The cost of compliance does not constitute a valid defense to discriminatory conduct. ***OFCCP v. Black***, Case No. 1977-OFCCP-7R (Dep'y Sec'y Feb. 26, 1979).

D. Use of statistical data; circumstantial evidence of discrimination

In ***Dep't of the Treasury v. Harris Trust***, Case No. 1978-OFCCP-2 (ALJ Dec. 22, 1986), the ALJ noted that "[s]tatistics may be used as circumstantial evidence of intentional discrimination" but they are not irrefutable . . .." The ALJ further found that "statisticians conventionally consider statistics to be significant at two or three deviations."

In ***OFCCP* v. *Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ Nov. 9, 1982), *remanded on other grounds*, (Ass't Sec'y Feb. 24, 1994), the ALJ held that one consideration which justifies discrimination based on mere statistical probability has been the degree of risk to human life. Where it cannot be determined whether an individual is qualified for a position, Defendant may determine the job qualifications by applying the criterion of a class characteristic if (1) the discriminatee is a member of that

class, and (2) all or substantially all members of that class are immediately unable to do the job. When there is statistically a risk of massive loss of human life, then (1) the degree of risk of harm, (2) the degree of probability of defect, and (3) the immediacy of the danger may be weighed.

In ***OFCCP v. Jacksonville Shipyards, Inc.***, Case No. 1989-OFC-01 (Sec'y May 9, 1995), the Secretary advised that statistical evidence has long been accepted as an appropriate method for establishing a violation of Title VII of the Civil Rights Act of 1964. A defendant cannot rebut statistical evidence by mere conjectures or assertions; rather, the defendant must introduce evidence establishing that missing factors can explain how the disparities in employment were a product of a legitimate, nondiscriminatory selection criterion.

Proof that a disparity between the selections of men and women for particular jobs was caused by sex discrimination need not be direct. Circumstantial evidence that the disparity, more likely than not, was a product of prohibited discrimination will suffice to prove a pattern or practice of discrimination. The circumstantial evidence may be entirely statistical in nature. Gross statistical disparities alone may be *prima facie* proof of a pattern or practice of discrimination. However, the probative weight of statistical evidence is weak if it fails to focus on the appropriate labor pool. In ***OFCCP v. Greenwood Mills, Inc.,*** Case No. 1989-OFC-39 (Sec'y Nov. 20, 1995), OFCCP alleged that Defendant discriminated against women in entry level positions in one job group involving transportation and cleaning. The ALJ found that OFCCP's statistical evidence was based on too narrow a timeframe and job grouping. The ALJ concluded that the job group in issue should have been considered together with two other job groups because all three groups drew new hires from a common pool of individuals chosen for entry level positions.

However, the Secretary held it was error for the ALJ to view all three groups together because the three job groups had different sets of qualifications and, in reality, there were different applicant pools for each group. The Secretary observed that grouping the three pools masked the statistical disparity in hiring women for the job group at issue, which was inconsistent with the regulatory framework at 41 C.F.R. §§ 60-2.1(b), 60-2.11(b), and 60-2.23 for remedying discrimination through focused analysis of job groups. While the ALJ noted that Defendant's overall female employment statistics were good, the Secretary disproved the ALJ's notation of this fact, noting that the proper focus is on individual discrimination. The Secretary cited to case law to state that an employer's apparent nondiscrimination in various jobs or employment categories does not immunize or exonerate that employer's discrimination in particular jobs or organizational units. In regard to the appropriate time period, the ALJ criticized OFCCP for not waiting until the end of the Affirmative Action Plan year to conduct its audit and found that, when the statistical period was extended to the end of the plan year, rather than the period of alleged discrimination, any *prima facie* case of discrimination was rebutted. In this vein, the ALJ noted that Defendant hired several women near the end of the plan year apparently upon realizing that it had not yet met its goal for hiring women for the subject job group.

The Secretary concluded, to the contrary, that the fact that Defendant met its female affirmative action plan goal by the end of the plan year did not prove that it did not discriminate against female applicants prior to that date. The Secretary cited to case law and held that the effect that post- complaint actions of an employer do not remedy past discrimination or rebut a *prima facie* case. Such evidence, if anything, confirms the discrimination and goes to proper remedy rather than the existence of discrimination. The Secretary also noted that, even assuming it was correct to extend the statistic period, the hiring rate for females was approximately 3.3 standard deviations below the hiring rate for males, and that a disparity of two or three standard deviations is sufficient to establish a *prima facie* case of discrimination.

OFCCP WITHDRAWS APPEAL OF ALJ'S DETERMINATION THAT "NON-ASIAN" IS NOT A "RACE" OR "ETHNIC GROUP"

In ***OFCCP v. VF Jeanswear Limited Partnership***, ARB No. 13-089, ALJ No. 2011-OFC-6 (ARB Sept. 25, 2013), the ARB closed the case before it upon OFCCP's filing of notice that it would not be filing exceptions to the ALJ's recommended decision and order. OFCCP had brought a complaint against the Respondent on the ground that it had allegedly discriminated against non-Asian job applicants. The ALJ granted summary decision against OFCCP on the ground that "non-Asian" was not a "race" or "ethnic group" either by regulatory definition or common parlance. *See* 41 C.F.R. 60-33 A and 60-34 B. *OFCCP v. VF Jeanswear Limited Partnership* , 2011-OFC-6 (ALJ Aug. 5, 2013).

In ***OFCCP v. Interstate Brands Corp.***, Case No. 1997-OFC-6 (ALJ July 19, 2000), OFCCP alleged that Defendant violated Executive Order 11246 by discriminating against minorities for entry-level bakery positions. Initially, the ALJ noted that OFCCP must demonstrate disparate treatment based on race, color, religion, sex, or national origin. Although evidence of discriminatory intent is required, such proof may be based on circumstantial evidence, including statistical evidence. Indeed, "[a]n unlawful motive may be inferred from a disparity between class members and comparably qualified members of a minority group." Citing to ***Hazelwood School District v. United States***, 433 U.S. 299 (1977) and ***OFCCP v. Greenwood Mills, Inc.***, Case No. 1989-OFC-39 (Sec'y Nov. 20, 1995), the ALJ noted that a *prima facie* case of discrimination "may be entirely statistical." It was noted that, in ***Hazelwood***, the Supreme Court held that a disparity of two or three standard deviations is sufficient to establish *prima facie* case of unlawful discriminatory animus.

If a *prima facie* case exists, then the burden shifts to Defendant to demonstrate that OFCCP's statistical evidence is inadequate, *i.e.* by "attacking" the government's statistical methods or by demonstrating that the disparity arose from legitimate, non-discriminatory factors. If rebuttal is established, then the burden shifts again to OFCCP to prove that the proffered reasons were pretext. The ALJ found, based on the statistical evidence before him, that Defendant hired black applicants at a statistically significantly lower rate than non- black applicants. In particular, he noted that the standard deviation exceeded 3.8. Although Defendant proffered rebuttal, the ALJ was not persuaded by it. He stated the following with regard to Defendant's rebuttal:

> For example, IBC rejected 14 out of 102 black applicants in 1992-93 because they 'could not get references.' In all of 1990, 1991, and 1994, IBC never used this reason for rejecting any applicant. Also, during the 1992-93 period, no whites were rejected on this basis. I consider (1) the numerically disparate treatment of blacks, and (2) the unique use of the 'could not get references' reason to be significant evidence of pretext even though there is relatively little evidence specific to individual applicants that any given reason was false.
>
> In addition, during the 1992-93 period, 30 black applicants were rejected because they 'did not demonstrate interest in the position,' whereas only four whites were rejected for this reason. Prior to 1992, this reason was never used as a basis for rejection of an applicant. Again, I find that the selective and discriminatory use of the all-purpose reason for rejection is strong circumstantial evidence that it is pre-textual.

Slip op. at 30-31.

ROLE OF STATISTICAL EVIDENCE IN EMPLOYMENT DISCRIMINATION CASES; RULING OUT CHANCE CREATES AN INFERENCE

In ***OFCCP, USDOL v. Bank of America***, ARB No. 13-099, ALJ No. 1997-OFC-16 (ARB Apr. 21, 2016), OFCCP had presented statistical evidence in support of its charge of intentional racial discrimination by the Defendant. The ARB noted:

> While some disagreement continues in the courts about the role of statistical evidence in employment discrimination cases, a few principles seem fairly established. For example, statistical evidence may be used to rule out chance as a likely reason for a significant racial disparity. Courts have consistently found significance in disparities exceeding the two standard deviation mark. *See Hazelwood School Dist. v. U.S.*, 433 U.S. 299, 308, n.14 (1977); *Adams v. Ameritech* , 231 F.3d 414, 424 (7th Cir. 2000). Ruling out chance does not automatically mean race discrimination was a motivating factor, but it makes such a reason a viable factor that could be inferred. The more severe the statistical disparity, the less additional evidence is needed to prove that the reason was race discrimination. Very extreme cases of statistical disparity may permit the trier of fact to conclude intentional race discrimination occurred without needing additional evidence.

USDOL/OALJ Reporter at 13-14 (footnotes omitted). The ARB stated that in the instant case: "Ultimately, the OFCCP must present enough evidence to persuade the ALJ that race discrimination was a motivating factor in [the Defendant]'s hiring decisions. What constitutes sufficient evidence must be evaluated on a case-by-case basis." *Id*. at 14.

E. Carrying out a government contract; burden to establish on OFCCP

For additional discussion of government contracts, see Chapter VIII.

1. Generally

Coverage extends to employees who were employed in, and applicants for, positions that are engaged in carrying out a government contract. To establish coverage, OFCCP must demonstrate that the duties of the position included work that fulfilled, was necessary to, or facilitated a contract. In ***OFCCP v. Keebler Co.***, ARB Case No. 97-127, 1987-OFC-20 (ARB Dec. 12, 1996), the ARB held that OFCCP had met this burden where the employee was a production attendant at one of only two Keebler facilities that produced 'Tato Skins, some which it had contracted to provide to the government. Although the products were not designated for any particular designation, and the attendants at the two locations were not separated according to who worked on goods designated to fulfill government contracts, the ARB found that OFCCP had established that the employee was covered under § 60-741.4(a)(2) because the duties of the production attendant included work on government contracts.

2. Rebuttable presumption

In ***OFCCP* v. *Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ Nov. 9, 1982), *aff'd*, (Ass't Sec'y Feb. 24, 1994), the ALJ held that there is a rebuttable presumption that a discriminatee was employed to carry out the federal contract as long as he was working at a site which was not totally segregated from the federal contract site.

F. Admissibility issues

1. Hearsay

EXCLUSION OF A DECEASED PHYSICIAN'S REPORT

In ***Texas Eastern Transmission Corp.***, Case No. 1988-OFC-30 (ALJ June 11, 1990), the ALJ denied OFCCP's motion to admit into evidence the medical report of a deceased physician containing his opinion regarding complainant's ability to perform the job in question on the grounds that the report constituted hearsay and did not fall within a recognized exception at Fed. R. Evid. 803. Moreover, the ALJ held that the deceased physician's report constituted an unsworn statement of a declarant who could not be subjected to cross-examination and, thus, the report lacked sufficient indicia of reliability to be considered probative. In determining that report of deceased physician should not be admitted in evidence, the ALJ interpreted the standards of admissibility set forth at 41 C.F.R. § 60-30.18 as substantially the same as the standards imposed under the Federal Rules of Evidence, even though the regulation provides that formal rules of evidence do not apply in Section 503 administrative proceedings.

2. Admissions

In ***OFCCP* v. *USAir, Inc.***, Case No. 1991-OFC-2 (ALJ, Feb. 24, 1993), the ALJ held that Defendant's admission that it rejected the complainant because of his handicap obviated the need for OFCCP to commence discovery to prove that Defendant knew about the handicap and considered it as part of its decision-making process. However, the ALJ further determined that the admission did not foreclose the presentation of evidence by Defendant regarding other factors which it considered in deciding to reject the complainant.

Defendant's failure to file an answer constitutes an admission of OFCCP's complaint allegations pursuant to 41 C.F.R. § 60-30.6(b). Moreover, the failure to file an answer will result in a waiver of the right to a hearing and the ALJ may properly adopt OFCCP's materials fact as alleged in the complaint pursuant to 41 C.F.R. § 60-30.6(c). On this basis, default judgment and sanctions, including debarment, may be entered. ***OFCCP v. Rampart Electric, Inc.,*** Case No. 1989-OFC-14 (Sec'y Sept. 11, 1995).

In ***OFCCP v. Owens-Illinois***, Case No. 1977-OFCCP-11 (ALJ Nov. 21, 1980), the government was not permitted to compel disclosure of prior settlements made by Defendant based on prior sex discrimination claims. The ALJ noted that evidence of the settlements would be inadmissible and there was no indication that the settlements would lead to the discovery of admissible evidence. Further, the ALJ reasoned that if such discovery was allowed, it would discourage employers from settling employment discrimination claims, with the result that the prescribed conference, conciliation, and mediation which are prerequisites to sanctions would be greatly hindered, if not nullified.

3. Studies from other federal agencies

In ***Exxon Corp. v. U.S. Dep't of Labor***, 2002 WL 356517 (N.D. Tex. Mar. 5, 2002) (Memorandum Opinion and Order), the court concluded that Mr. Strawser was not a "disabled individual" under the Rehabilitation Act because OFCCP was collaterally estopped from litigating the issue as EEOC had unsuccessfully litigated the same issue under the Americans With Disabilities Act before the same court in a case involving the same employer and the same allegedly discriminatory policy. However, the

holdings of the ALJ and ARB may be instructive. *See* ***OFCCP v. Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd in part,* (ARB Oct. 28, 1996).

In ***OFCCP* v. *Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd on other grounds*, (ARB Oct. 28, 1996), the ALJ concluded that FAA studies regarding its policy of returning recovering alcoholic pilots into the work place are relevant in determining the risk of relapse of a recovering alcoholic because the FAA policy appeared to be the only industry-wide program of its kind.

4. Evidence admitted on remand; legal error committed by ALJ

In ***Cissell Mfg. Co. v. U.S. Dep't of Labor***, 101 F.3d 1132 (6th Cir. 1996), the circuit court concluded that the agency committed a "legal error" in the adjudication of the complaint below such that it was proper to remand the case to the Department of Labor to reopen the record and allow OFCCP to present evidence that the complainant was employed to carry out a government contract.

G. Credibility determinations

In ***OFCCP v. Jacor, Inc.***, Case No. 1995-OFC-17 (Sec'y Jan. 19, 1996) (interim order), OFCCP challenged a finding that Defendant made oral contacts with recruitment sources and argued that there was no corroborating evidence on the point. The Secretary concluded that corroborating evidence is not required for any finding in hearings convened pursuant to Executive Order 11246 and 41 C.F.R. Part 60-30. The Secretary further noted that the ALJ found the witness testimony on this matter to be highly credible.

In ***OFCCP v. Beverly Enterprises, Inc.***, ARB No. 99-112, Case No. 1999-OFC-11 (ARB Sept. 1, 1999), the ARB held that a government official is presumed to be telling the truth when making a sworn statement. It is noted that, in a subsequent appeal to the ARB, in ***OFCCP v. Beverly Enterprises, Inc.***, ARB Case No. 02-009, 1999-OFC-11 (ARB Apr. 30, 2002), the parties submitted a consent decree which was approved by the Board.

H. Expert opinions

1. Generally

An expert opinion may be important in drawing inferences or estimates regarding harm to an affected class as well as the amount of damages resulting from the class discrimination practices. However, an expert opinion is not required to establish discriminatory practices, where such practices are otherwise demonstrated. ***Dep't of the Treasury v. Harris Trust***, Case No. 1978-OFCCP-2 (ALJ Dec. 22, 1986).

2. Treating physician entitled to particular deference

In ***OFCCP* v. *Norfolk and Western Railway Co.***, Case No. 1990-OFC-1 (ALJ June 26, 1991), a case arising under Section 503 of the Rehabilitation Act, the ALJ held that the opinion of the complainant's treating physician is entitled to particular deference. Under the facts of the case, Defendant demonstrated that employment of the complainant, who suffered from monocular vision, may pose a possibility of injury or an elevated risk of harm. However, Defendant failed to establish a reasonable probability of substantial harm in light of the opinions of the complainant's treating physician and OFCCP's other medical expert as

well as the fact that the record contained evidence that the complainant performed the job duties in question and that other individuals with monocular vision safely performed the job.

VIII. Discovery

A. Generally

Discovery rules are to be liberally construed in favor of the requesting party. Under the facts before him, the Secretary determined that discovery addressing past conduct may be appropriate in employment discrimination cases. Moreover, he found that the pre- hearing discovery rules are reasonable in light of the broad grant of power and detailed enforcement procedures. ***OFCCP v. Uniroyal, Inc.***, Case No. OFCCP 1977-1 (Sec'y June 28, 1979), *aff'd sub nom.,* ***Uniroyal, Inc. v. Marshall***, 482 F. Supp. 364 (D.D.C. 1979) (the Executive Order's discovery provisions and implementing regulations are valid).

In discrimination actions, where statistical data is often of critical importance, discovery is particularly essential to the production of material evidence and, hence, should not be proscribed or unduly limited. ***OFCCP v. Owens-Illinois, Inc.***, Case No. 77-OFCCP- 11 (ALJ Nov. 21, 1980); ***Donaldson v. Pillsbury Co.***, 554 F.2d 825.832 (8th Cir. 1977); ***Burns v. Thiokol Chemical Corp.***, 483 F.2d 300, 304-305 (5th Cir. 1973).

In ***OFCCP v. Owens-Illinois, Inc.***, Case No. 1977-OFCCP-11 (ALJ Nov. 21, 1980), the ALJ held that, in discrimination cases, discovery is not restricted to the narrow inquiry of an individual violation; rather, it is extended to obtain evidence which demonstrates patterns of discriminatory action in other aspects of employment from which a reasonable inference of discriminatory motivation may be drawn. The ALJ cited to ***Laufman v. Oakley Building and Loan Co.***, 72 F.R.D. 116, 120 (S.D. Ohio 1976) and ***Bluebell Boots, Inc. v. Equal Employment Opportunity Commission***, 418 F.2d 355, 358 (6th Cir. 1969) in support of this holding.

B. Applicability of the Federal Rules of Civil Procedure

All hearings under Section 503 of the Rehabilitation Act shall be governed by the rules of procedure at 41 C.F.R. Part 60-30. However, in the absence of a specific provision on point, the Federal Rules of Civil Procedure shall apply. ***OFCCP* v. *Mississippi Power Co.***, Case No. 1992-OFC-8 (ALJ July 16, 1993), *rev'd on other grounds* (Ass't Sec'y July 19, 1995).

In ***OFCCP* v. *American Airlines, Inc.***, Case No. 1994-OFC-9 (ALJ Jan. 19, 1995), the ALJ held that the Federal Rules of Civil Procedure only apply in the absence of an applicable regulatory provision. The implementing regulations for actions brought under Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, are found at 41 C.F.R. Chapter 60. With regard to interrogatories, he noted that 41 C.F.R. § 60-30.9 does not limit the number of interrogatories which one party may serve upon another party. Thus, the 25 interrogatory limit contained in Fed. R. Civ. P. 33 did not apply. However, a test of reasonableness would be imposed.. Under the particular circumstances of the case, the ALJ declined to further expand the issues in this case and denied OFCCP's motion to compel responses to discovery requests pertaining to events that occurred subsequent to the period covered by the 1988-1989 compliance review. The ALJ held that, in his judgment, the interests of all concerned will be served by ordering Defendant to supply the requested telephone numbers and addresses for all former and current employees except those with authority to speak for the company; and, further, to supply addresses, either work addresses or home addresses, of former and current management employees with authority to bind the company for the limited purpose of

allowing OFCCP to notice depositions. Finding OFCCP's subject requests overbroad and unduly burdensome and oppressive, the ALJ denied OFCCP's request to compel Defendant to respond to its interrogatories concerning Defendant's system of storing personnel information on computers. On the other hand, the ALJ granted OFCCP's request to compel Defendant to respond to a second set of interrogatories which sought "facts and documents which American relied upon in support of each of the 24 affirmative defenses raised in its Answer, as well as the individuals with knowledge of such facts." The ALJ held that, by raising affirmative defenses, Defendant has placed at issue the specific facts, documents, regulations, and statutes upon which they are based. OFCCP is entitled to sufficient information regarding these affirmative defenses to enable it to prepare for trial.

C. Discovery of testimony of government officials

In ***Beverly Enterprises, Inc. v. Herman***, Civil Action No. 99-2408 (RMU) (D.D.C. Aug. 24, 2000), a case arising under anti-discrimination laws, the district judge determined that it was within the ALJ's discretion to decline discovery of the testimony of Solicitor of Labor Henry Solano where the testimony would "only repeat information that was included with other evidence."

D. Failure to file an answer, effect of

Defendant's failure to file an answer constitutes an admission of OFCCP's complaint allegations pursuant to 41 C.F.R. § 60-30.6(b). Moreover, the failure to file an answer will result in a waiver of the right to a hearing and the ALJ may properly adopt OFCCP's material facts as alleged in the complaint pursuant to 41 C.F.R. § 60-30.6(c). On this basis, default judgment and sanctions, including debarment, may be entered. ***OFCCP v. Rampart Electric, Inc.,*** Case No. 1989-OFC-14 (Sec'y Sept. 11, 1995).

E. Failure to comply with pre-hearing exchange, effect of

In ***OFCCP v. United Parcel Service, Inc.***, Case No. 1988-OFC-7 (ALJ Sept. 25, 1990), *stipulated dismissal* (Ass't Sec'y Jan. 14, 1992), the ALJ held that Defendant demonstrated good cause for failure to request a hearing and failure to file a pre-hearing exchange as ALJ ordered where counsel candidly admitted that lack of hearing request resulted from oversight or absence of memory and counsel did not receive ALJ's order regarding pre-hearing exchange. The ALJ further noted that the case was allowed to languish in the Office of Administrative Law Judges for two years before it was assigned and parties had pursued discovery such that the proceedings were not prejudiced.

In ***OFCCP v. Brown Transport Co.***, 1979-OFCCP-20 (ALJ Apr. 20, 1980), the ALJ held that a response by Defendant that it is without knowledge or information to admit or deny" the request for admission is an insufficient response under 41 C.F.R. § 60-30.1 unless the party states that it made a reasonable inquiry and the information is not available. Moreover, the ALJ concluded that an inadequate response to a request constitutes an admission.

In ***OFCCP v. Rowan Companies, Inc.***, Case No. 1989-OFC-41 (Sec'y Apr. 11, 1995), the Secretary held that a party cannot respond to an interrogatory request by directing the discovering party to an undifferentiated mass of records. If the party responding to the interrogatories is the only one familiar with the organization of the information, then that party must assist the interrogating party in locating and deciphering the requested information.

In ***OFCCP* v. *Holly Farms Foods, Inc.***, Case No. 1991-OFC-15 (ALJ Oct. 24, 1991), the ALJ concluded that 41 C.F.R. § 60-30.9(b), which addresses answers to admission requests, does not require less than Fed. R. Civ. P. 36(a), and thus, does not permit Defendant to simply plead lack of knowledge in response to a request for admission. Rather, a failure to admit a request for lack of sufficient knowledge must also include a statement that a reasonable inquiry has been made.

In ***OFCCP* v. *Crown Zellerbach Corp.***, Case No. 1987-OFC-23 (ALJ June 6, 1989), the ALJ held that OFCCP failed to file its objections to Defendant's First Request for Production of Documents within the 25-day period allowed for responses to discovery requests under the regulations at 41 C.F.R. §§ 60-30.9 and 60-30.10. As a result, the ALJ determined that OFCCP waived any objection to producing the documents requested.

F. Compelling participation in discovery

1. Generally

In ***Uniroyal, Inc. v. Marshall***, Case No. OFCCP 1977-1 (Sec'y June 28, 1979), *aff'd sub nom.*, ***Uniroyal, Inc. v. Marshall***, 482 F. Supp. 364 (D.D.C. 1979), the Secretary held that the ALJ has authority under 41 C.F.R. §§ 60-30.9, 30.10, 30.11, and 30.15 to compel the contracting party to participate in depositions and discovery.

In ***OFCCP v. Jefferson County Board of Education***, Case No. 1990-OFC-4 (ALJ Nov. 16, 1990), the ALJ granted OFCCP's motion to compel Defendant to provide names, addresses, phone numbers, positions, dates of employment educational background, and previous employment for all hires for two-year period because it would be significantly more burdensome on OFCCP to search for this information in Defendant's records as Defendant has greater familiarity with its own records.

2. Failure to comply

a. Exclusion of evidence

In ***OFCCP v. Owens-Illinois***, Case No. 1977-OFCCP-11 (ALJ Nov. 21, 1980), the ALJ held that Defendant was entitled to know how the government intended to calculate back pay for affected class members. Therefore, where the government failed to provide a complete and detailed answer to Defendant's interrogatory regarding back pay calculations, then Defendant is entitled to seek a Rule 37(b)(2)(B) order precluding the government from introducing any evidence related to back pay owed at the hearing.

b. Adverse inference

In ***OFCCP v. Beverly Enterprises, Inc.***, 1999-OFC-11 (ALJ Nov. 5, 2001), the ALJ concluded that the subsidiaries of Beverly Enterprises are considered a "single entity" and, as a result, the subsidiaries may be sanctioned for the actions of the parent." The ALJ based his holding on the fact that Employer failed to respond to interrogatories and document production requests which related to "whether Defendant and its subsidiaries are a single entity." Employer's failure to respond to these discovery requests resulted in the conclusion, pursuant to 29 C.F.R. § 18.6(d)(2)(i) and 41 C.F.R. § 60-30.15(j), that the requested responses, if given, would have been adverse to the Defendant on the single entity/single employer issue."

Slip op. at 3. In particular, based on adverse inferences drawn from Employer's failure to respond to discovery requests, the ALJ concluded that the parent and its subsidiaries had common ownership and the same directors and/or officers. Moreover, the parent company and its subsidiaries emanated from a common source, were dependent on each other, and the parent had *de facto* control over the subsidiaries. Slip op. at 8-9. On the most recent appeal of this case to the ARB, the parties submitted a consent decree which was approved. *See* ***OFCCP v. Beverly Enterprises, Inc.***, ARB Case No. 02-009, 1999-OFC-11 (ARB Apr. 30, 2002).

G. Interrogatories

1. Limitation of number

In ***OFCCP v. American Airlines, Inc.***, Case No. 1994-OFC-9 (ALJ Jan. 19, 1995), the ALJ held that the Federal Rules of Civil Procedure only apply in the absence of an applicable regulatory provision. The implementing regulations for actions brought under Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, are found at 41 C.F.R. Chapter 60. With regard to interrogatories, he noted that 41 C.F.R. § 60-30.9 does not limit the number of interrogatories which one party may serve upon another party. Thus, the 25 interrogatory limit contained in Fed. R. Civ. P 33 did not apply. However, a test of reasonableness would be imposed. Under the particular circumstances of the case, the ALJ declined to further expand the issues in this case and denied OFCCP's motion to compel responses to discovery requests pertaining to events that occurred subsequent to the period covered by the 1988-1989 compliance review.

The ALJ held that, in his judgment, the interests of all concerned will be served by ordering Defendant to supply the requested telephone numbers and addresses for all former and current employees except those with authority to speak for the company; and, further, to supply addresses, either work addresses or home addresses, of former and current management employees with authority to bind the company for the limited purpose of allowing OFCCP to notice depositions. Finding OFCCP's subject requests overbroad and unduly burdensome and oppressive, the ALJ denied OFCCP's request to compel Defendant to respond to its interrogatories concerning Defendant's system of storing personnel information on computers. On the other hand, the ALJ granted OFCCP's request to compel Defendant to respond to a second set of interrogatories which sought "facts and documents which American relied upon in support of each of the 24 affirmative defenses raised in its Answer, as well as the individuals with knowledge of such facts." The ALJ held that, by raising affirmative defenses, Defendant has placed at issue the specific facts, documents, regulations, and statutes upon which they are based. OFCCP is entitled to sufficient information regarding these affirmative defenses to enable it to prepare for trial.

2. Cannot be served on non-parties

In ***OFCCP* v. *Crown Zellerbach Corp.***, Case No. 1987-OFC-23 (ALJ June 6, 1989), the ALJ held that, under the regulations and the Federal Rules of Civil Procedure, interrogatories may only be served on persons who are "parties" to the litigation. The regulatory definition of "party" does not expressly include those persons who were allegedly discriminated against, although their complaints may constitute the basis of any action initiated by OFCCP. As a result, the two job applicants were not considered "parties" to the action and as such, interrogatories could not be served on them. The ALJ further reasoned that OFCCP does not have sufficient "control" over the job applicants, who are the alleged discriminatees in the case, to justify an order compelling OFCCP to obtain their individual employment history details. The only connection the applicants have to OFCCP is as reporters of potential wrongful conduct by

Defendant. They are outside persons with relevant knowledge of the facts at issue in the case and are equally available to both parties for questioning. If Defendant or OFCCP seek to obtain formal discovery from these two individuals, they may do so by deposition pursuant to 41 C.F.R. § 60-30.11(a).

H. Document production

1. Medical examinations, records, and releases

When an employer inquires into an employee's mental condition, the employer must preserve the confidentially of the information that it obtains in response to its inquiry. ***OFCCP* v. *American Commercial Barge Line***, Case No. 1984-OFC-13 (ALJ Sept. 30, 1986), *rev'd on other grounds* (Ass't Sec'y Apr. 15, 1992). The ALJ further held that the complainant's refusal to release medical records is relevant to the issue of liability, but not to the issue of relief.

In ***OFCCP* v. *American Commercial Barge Line Co.***, Case No. 1984-OFC-13 (Ass't Sec'y Apr. 15, 1992), the Assistant Secretary held that the contractor was "within its rights" in seeking more detailed medical records from a manic depressive employee to enable contractor to make an employment decision consistent with business necessity and the safe performance of the job. Indeed, the contractor's request for medical records from an employee is authorized under 41 C.F.R. § 60.741.6(c)(3). Moreover, § 60-741.6(c)(3) does not require that the contractor provide an employee a specific assurance of confidentiality before it may obtain his medical records; the regulation simply requires that contractor observe the confidentiality of these records. As a result, Defendant met its burden of demonstrating that manic depressive employee's termination was for a non-discriminatory reason, *i.e.*, his failure to release to his employer his psychiatric records held by the VA hospital.

In ***OFCCP* v. *Yellow Freight System, Inc.***, Case No. 1984-OFC-17 (Ass't Sec'y July 27, 1993), it was held that Defendant's determination of whether an individual's employment would pose a reasonable probability of substantial harm cannot be based merely on medical reports "except in cases of a most apparent nature." This phrase refers to situations that are very clear, evident and obvious, and not subject to serious dispute. Under the facts before him, the ALJ concluded that the complainant's back x-ray results were not a "case of a most apparent nature" upon which contractor could rely exclusively in determining whether the complainant posed a reasonable probability of substantial harm. Moreover, the Assistant Secretary discounted Defendant's physician's assertions that complainant's employment with a back impairment would pose a reasonable probability of substantial harm. The physician merely reviewed complainant's back x-rays and provided no concrete data or other information to fully justify his position. Defendant's reliance on the complainant's back x-rays in determining whether he posed a reasonable probability of substantial harm constituted a violation of Section 503 because Defendant failed to gather all relevant information and assess both the probability and severity of potential injury in a meaningful and comprehensive manner.

2. Defendant's computer tapes; not entitled to confidentiality

Where an on-site investigation of Defendant's operations indicated various deficiencies and violations which, in turn, required additional off-site analysis of Defendant's computer information, the government was entitled to the computer tapes. Defendant failed to demonstrate that the production of the requested material was unreasonable or unduly burdensome. The government was entitled to receive copies of any computer tapes which included personnel information and data pertaining to

applicants, employees, or former employees of the facilities covered by the compliance review. The government, and not Defendant, must make a determination regarding the confidentiality of the requested materials. ***OFCCP v. Prudential Insurance Co.***, Case No. 1980-OFCCP-19 (Sec'y July 27, 1980).

3. Intervener's right to discovery of settlement

In ***OFCCP v. Cambridge Wire, Inc.***, Case No. 1994-OFC- 12 (ALJ June 1995) (procedural order), OFCCP and Defendant submitted a proposed consent decree. An intervener-union was granted party status to challenge the fairness of certain retroactive seniority provisions contained in the decree. The intervener sought to compel production by OFCCP of documents, and both OFCCP and Cambridge Wire filed oppositions. The ALJ reviewed the documents *in camera* to determine whether they were properly discoverable. The ALJ rejected OFCCP's arguments that the documents were protected from discovery pursuant to Fed. R. Evid. 408, as they related to the negotiation of a settlement of the complaint and, therefore, the documents were irrelevant in determining whether the consent decree was fair, reasonable and adequate.

The ALJ also rejected Cambridge Wire's arguments that intervener already had sufficient information from which to determine whether the consent decree was fair, reasonable and adequate, and that the documents were protected as attorney-client work product. The ALJ recognized that the scope of intervener's participation in the instant case was to challenge the fairness of the retroactive seniority provisions contained in the consent agreement with regard to its members which necessarily limited the scope of discovery to which it would be entitled. However, the ALJ noted the intervener's right to limited discovery was a corollary to its ability to raise meaningful and informed objections to the consent decree, particularly where, as here, the intervener was not included in the settlement negotiations pertaining to the retroactive seniority provisions.

4. No right to harass defendant through discovery

In ***OFCCP v. Prudential Insurance Co.***, Case No. 1980-OFCCP-19 (ALJ June 13, 1980), the ALJ concluded that a search of records, which could have been accomplished during a prior compliance review, would not be permitted. The ALJ determined that the government must establish good cause for searching the records, such as intentional concealment of information or independent evidence not previously considered which indicated the possible existence of an affected class. To hold otherwise, the ALJ reasoned, would be unfair to contractors as new compliance staff could reopen investigations at any time they determine that the previous review was inadequate.

5. Prepared in anticipation of litigation

In ***Dep't of the Treasury v. Harris Bank***, Case No. 1978-OFCCP-2 (Sec'y May 17, 1983), the Secretary held that Harris Trust was not required to produce statistical studies which were prepared in anticipation of litigation. He determined that the studies would be discoverable only if they were relied upon by Harris Trust's experts testifying at the hearing.

I. Interference with investigation

In ***OFCCP v. Uniroyal***, Case No. OFCCP 1977-1 (Sec'y June 28, 1979), the Secretary held that, as a matter of law, it was a violation of 41 C.F.R. § 60-1.32 where the defendant's counsel was present during

interviews between the government and Defendants' employees. In so holding, the Secretary held that the regulatory provision could not be waived by the government.

J. Sanctions for failure to comply with discovery

1. No authority to impose attorney fees and costs

In ***OFCCP v. Mississippi Power Co.***, Case No. 1992-OFC-8 (Ass't Sec'y July 19, 1995), it was held that there is no provision in Department of Labor regulations governing administrative proceedings under Section 503 for an appeal of an ALJ order imposing or denying sanctions for alleged misconduct of an attorney. The only provision for review of ALJ orders in Section 503 cases permits any party to file exceptions to the recommended decision after the hearing. Neither an ALJ nor the Secretary has the authority, absent an explicit grant by statute, to impose the personal sanctions provided for in the Federal Rules of Civil Procedure, *e.g.*, requiring payment of attorneys' fees and costs or holding an individual in contempt for failure to comply with a subpoena. The ALJ had no authority to issue the sanctions order, rather, his authority to regulate discovery and the conduct of parties and their representative is limited to that provided in the regulations. The Assistant Secretary does have the authority to review an ALJ's order imposing sanctions for failure to comply with the regulations where it is material to the issues decided in a recommended decision. The Assistant Secretary may review the propriety of the sanction or take other action provided for in the regulations. The Assistant Secretary may debar a contractor for refusal to comply with the discovery regulations.

2. Debarment

Debarment may be imposed not only for violations of Executive Order 11246, but also for failure to comply with discovery procedures. ***Uniroyal, Inc. v. Marshall***, 482 F. Supp. 364 (D.C. D.C. 1979) (Case No. OFCCP 1977-1). *See also* ***OFCCP v. The Prudential Insurance Co. of America***, Case No. 1980-OFCCP-19 (Sec'y July 27, 1980).

Debarment and other procurement-related sanctions are authorized for both substantive and procedural violations of Executive Order 11246 and its implementing regulations. ***OFCCP v. Rampart Electric, Inc.,*** Case No. 1989-OFC-14 (Sec'y Sept. 11, 1995).

In ***Dep't of the Treasury v. Harris Bank***, Case No. 1978-OFCCP-2 (Sec'y May 17, 1983), the Secretary noted that the ALJ recommended that Defendant's contracts with the government be cancelled, terminated, or suspended, until it established compliance with the ALJ's inspection and discovery orders. Although the case was remanded for resolution of certain discovery matters, and the ALJ's discovery rulings were reversed, the Secretary did not dispute the ALJ's authority to sanction a recalcitrant party, including the authority to use debarment as a sanction.

3. Discovery requests must be decided prior to issuance of summary judgment

In ***OFCCP v. Norfolk & Western Railway***, Case No. 1993-OFC-04 (Sec'y July 20, 1995), the ALJ granted Respondent's Motion for Summary Decision, while the Complainant's Motions for Discovery were unresolved. The Secretary held that the ALJ's decision to grant Respondent's Motion for Summary Decision went beyond the scope of his authority under the circumstances presented and was inappropriate. The Secretary held that the ALJ must allow OFCCP the opportunity to present all

information pertinent to the case. Therefore, the Secretary held that OFCCP's Motion for Discovery must be granted before ruling on the Respondent's Motion for Summary Decision.

K. Privileges

1. Informant's privilege

In ***OFCCP v. Owens-Illinois***, Case No. 1977-OFCCP-11 (ALJ Nov. 21, 1980), the government refused to answer certain interrogatories and document production requests by Defendant on grounds that the information was protected by informant's privilege. Citing to ***Wirtz v. Robinson & Stephens, Inc.***, 368 F.2d 114 (5th Cir. 1966), the ALJ noted that reasonable measures should be taken to preserve the anonymity of those employees who replied to inquires during the course of the compliance review. However, it was held that, under the "informant's privilege," the identity of the informant is protected, but the contents of the communication are not privileged. In this vein, the ALJ cited to ***Roviaro v. United States***, 353 U.S. 53, 60 (1957). As a result, the government was ordered to provide "sanitized" copies of the requested documents where the informant's name, address, and social security number were redacted.

In ***OFCCP* v. *Crown Zellerbach Corp.***, Case No. 1987-OFC-23 (ALJ June 6, 1989), the ALJ held that the initial burden of establishing the existence of, and properly asserting, the "informer's privilege" falls on the party opposing discovery. The "informer's privilege," as the Department of Labor concedes, is a qualified privilege and the public interest in protecting the flow of information to aid law enforcement must be balanced against Defendant's need for disclosure. Under the facts presented before him, the ALJ concluded that invocation of the informer's privilege by the Department was insufficient because the government failed to provide enough information to enable the ALJ to determine the validity of the assertion. In particular, the government failed to submit affidavits confirming the existence of employees whose identities need to be protected, and failed to request an *in camera* review of any other evidence to support the applicability of the privilege.

In ***OFCCP* v. *Holly Farms Foods, Inc.***, Case No. 1991-OFC-15 (ALJ Feb. 19, 1993), the ALJ concluded that the informer's privilege is, in reality, the government's privilege to withhold from disclosure the identity of persons who furnish information of law violations to officers charged with enforcement of that law. The purpose of the informer's privilege is to promote and protect the public interest in effective law enforcement, and the scope of the privilege is limited by its underlying purpose. Moreover, executive privileges must be invoked by the head of the agency or his/her delegee after actual personal consideration by that officer. As a result, the invocation of the informer's privilege by a departmental attorney, without any evidence of a proper delegation of authority from the Secretary of Labor, was defective. Although OFCCP's failure to have the Secretary of Labor invoke the informer's privilege would justify rejection of the claim of privilege, the ALJ was reluctant to disregard the important policy underlying the privilege and, therefore, ordered OFCCP to provide contractor with a more detailed description of the documents withheld on the basis of the privilege and, if contractor continued to challenge the assertions of privilege, OFCCP was required to submit the documents for *in camera* inspection. The party asserting that documents are protected by a privilege must give sufficient identification of the material withheld so that opposing counsel can determine whether the privilege ought to apply.

2. Deliberative process privilege

In ***OFCCP v. Owens-Illinois***, Case No. 1977-OFCCP-11 (ALJ Nov. 21, 1980), the government could not refuse to produce requested documents during discovery by labeling them "official papers" or "inter-agency communications." Rather, if the requested papers contain decisional or policy-making material, the proper procedure is to identify each paper, and upon notice to the party who requested production, to submit it for *in camera* inspection and ruling. In so holding, the ALJ cited to ***Kerr v. U.S. District Court***, 426 U.S. 394, 405-6 (1976).

In ***OFCCP* v. *Crown Zellerbach Corp.***, Case No. 1987-OFC-23 (ALJ June 6, 1989), the ALJ held that a claim of privilege, in contrast to a claim of relevancy, is generally narrowly construed and the initial burden of establishing the applicability of an accepted privilege falls upon the party asserting that privilege. The intra-governmental opinion privilege applies to intra-agency memoranda and documents that record the deliberative pre-decisional process leading to an agency decision. The privilege, however, must be claimed in the form of an affidavit, rather than a mere assertion in a production answer. The affidavit must either by sworn by the head of the agency which has control over the matter or by an official with delegated authority from the agency head, after actual personal consideration by that officer. With the intra-governmental opinion privilege, the agency must demonstrate the precise reasons for preserving the confidentiality of the governmental communication, and must designate and describe those documents claimed to be privileged with sufficient detail so that the validity of the privilege may be determined.

In ***OFCCP* v. *USAA Federal Savings Bank***, Case No. 1987-OFC-27 (ALJ Dec. 20, 1989), the ALJ held that the deliberative process privilege applies where disclosure of pre-decisional deliberative documents would discourage open, candid communication in the decision-making process or would mislead the public about the agency's policies or the bases for maintaining them. The deliberative process privilege must be invoked after personal consideration by the head of the agency with control of the matter or by a delegate acting under specific guidelines. Because the Secretary of Labor is the final adjudicator of cases filed under both Executive Order 11246 and Section 503 of the Rehabilitation Act, s/he is not the proper official to assert the deliberative process privilege after personal consideration of the documents. The Director of OFCCP is the proper official to review deliberative material and invoke the deliberative process privilege in cases which the Secretary of Labor will decide because the Director is a political appointee with political accountability and because s/he is the highest official with detailed knowledge of the case who will not be performing judicial role in the case.

In ***OFCCP* v. *USAir, Inc.***, Case No. 1991-OFC-2 (ALJ Nov. 24, 1992), *aff'd*, (ALJ Feb. 24, 1993), the ALJ held that memoranda prepared by the OFCCP investigator did not fall within the deliberative process privilege because they were primarily factual and did not contain deliberations involving legal strategies or enforcement approaches, or a discussion of strengths and weaknesses of the case or policy pros or cons. Moreover, the memoranda did not place selective emphasis on particular facts or assign relative weight to a conflicting or ambiguous fact situation such that there was no "intertwining of facts with a deliberative or policy making process or discussion." On the other hand, the ALJ concluded that a draft "Notification of Results of Investigation" fell within the deliberative process privilege.

3. Attorney-client privilege

In ***OFCCP v. Crown Zellerbach Corp.***, Case No. 1987-OFC-23 (ALJ June 6, 1989), the ALJ held that, to assert the attorney-client privilege, the party must, at a minimum, establish that any such communication concerned the seeking of legal advice was (1) between a client and an attorney acting in his professional capacity, (2) that the communication was related to legal matters, and (3) the communication was

made in confidence by the client with the intention that the communication would be permanently protected from disclosure by himself or by the legal advisor.

In ***OFCCP v. USAir, Inc.***, Case No. 1991-OFC-2 (ALJ Nov. 24, 1992), *aff'd*, (ALJ Feb. 24, 1993), the ALJ initially noted that the attorney/client privilege applies to communications intended to be confidential. The mere existence of an attorney/client relationship or even the exchange of information with an attorney is not enough to establish the applicability of the privilege. To effectively assert the attorney/client privilege, the party must, at a minimum, establish that the communication involved the seeking of legal advice, was between a client and an attorney acting in his professional capacity, was actually related to legal matters, and was made in confidence by the client with the intention that the communication would be permanently protected from disclosure. The attorney/client privilege applies to the communications themselves, not to any underlying facts or to the particular documents. Non-privileged portions of a multiple-subject document are not exempt from production. Therefore, documents which were prepared by EOS after Joint Review Committee meeting involving OFCCP personnel and their attorneys did not fall within the attorney/client privilege because no legal advice was specifically sought in the documents and none was reported to have been given. The documents were neither responsive to counsel's inquiries nor designed, formulated, or initiated by counsel. On the other hand, the ALJ concluded that a memorandum detailing a conversation between counsel and an OFCCP supervisor, which involved a candid appraisal of legal, procedural and other confidential evaluations of issues, fell within the attorney-client privilege.

In ***OFCCP v. American Airlines, Inc.***, Case No. 1994-OFC-9 (ALJ Jan. 19, 1995), the ALJ held that, pursuant to ***Upjohn Co.* v. *United States***, 449 U.S. 383, 395 (1981), and ***Hickman* v. *Taylor***, 329 U.S. 495, 511 (1947), Defendant may invoke the attorney-client privilege for any discovery request that requires the disclosure of the substance of a confidential communication between an attorney and client. Moreover, Defendant may invoke the attorney work product privilege for any requests to produce documents that were prepared in anticipation of litigation, in contrast to documents prepared in the normal course of business. However, Defendant must identify and justify all instances in which it withholds information on the basis of these privileges. The ALJ noted that Defendant set forth general objections to the discovery of any information that would violate the Defendant's privacy or the privacy of any third party. However, in determining the extent to which privacy rights can foreclose discovery, courts generally "balance the interests." ***Farnsworth* v. *Proctor & Gamble***, 758 F.2d 1545, 1547 (1985). Citing to ***OFCCP* v. *USAir***, Case No. 1988-OFC-17 (ALJ 1990), the ALJ concluded that "OFCCP's interest in pursuing effective and informal discovery outweighs the privacy interests of those individuals whose addresses and telephone numbers are sought." Thus, the privacy interests of third parties did not constitute an absolute privilege.

4. Work-product privilege

In ***OFCCP v. Crown Zellerbach Corp.***, Case No. 1987-OFC-23 (ALJ June 6, 1989), the ALJ held that OFCCP made an untimely, inadequate, and ambiguous argument that the requested documents constituted work product because OFCCP's general descriptions of various documents (*e.g.*, "Letter," "Memo to File") did not provide enough information to determine the validity of its work-product claim. OFCCP submitted no affidavits, no requests for *in camera* review of the documents at issue, and no request for a protective order. Consequently, the ALJ concluded that OFCCP submitted insufficient information and argument to sustain an objection to production on the basis of work product.

IX. Constitutional issues

A. First Amendment

In ***OFCCP v. Aid Association for Lutherans,*** Case No. 1993-OFC-11 (Sec'y Sept. 26, 1995), Defendant was a non-profit fraternal benefit society created for the purpose of benefiting and supporting Lutherans and Lutheran organizations. Defendant's various activities, such as insurance programs, a credit union, a capital management corporation, and a real estate management company, generated substantial amounts of income (e.g., $119.3 million in net income in 1992.) When a mortgagee defaulted on an office building on which Defendant held the mortgage, Defendant foreclosed and assumed ownership. Among the tenants was the United States Government. Defendant entered into a lease with the GSA, followed by eleven leases and supplemental leases. Each lease contained an equal opportunity clause requiring development of written affirmative action programs for each of its establishments. OFCCP scheduled a general compliance review, and it became apparent that Defendant refused to submit affirmative action programs based on the First Amendment.

During the pendency of an enforcement action, Defendant sold the property in question. The ALJ found that requiring Defendant to submit an affirmative action program would pose a constitutionally unacceptable risk of government entanglement with religion (e.g., requiring identification of every position for which being a Lutheran is a bona fide job qualification). On review, the Secretary noted that questions of constitutionality should not be passed on unless such adjudication is unavoidable. Finding this doctrine applicable in administrative adjudication, the Secretary stated that the determination of whether a particular case calls for restraint requires close examination of the specific facts of the case to identify the danger to be avoided, the seriousness of the alleged statutory infraction, the risk of repetition, and the harm to innocent third parties. The Secretary noted the difficulty of applying statutes regulating employment to religious institutions and organizations. He also noted that there is a distinction between enforcement of anti-discrimination laws in individual cases of alleged discrimination, and application of statutes with the potential for pervasive regulation of employment practices. The Secretary concluded that "the exercise of proper restraint dictates dismissal of this matter."

The Secretary examined OFCCP's purpose in seeking enforcement -- uncovering past acts of discrimination, and preventing the occasional contractor from avoiding its contractual obligations. He noted that Defendant no longer held a government contract, and that the risk of repetitious violations by an occasional or sporadic contractor was minor and could be resolved by requiring Defendant to notify OFCCP prior to submitting any future bid for a federal government contract. The Secretary noted that this action was based on OFCCP's compliance review and not on an allegation of discrimination, and that there did not appear to be any employees or applicants who would suffer from dismissal of the matter. He found that no purpose would be served by requiring Defendant to file affirmative actions plans when it no longer hold government contracts and was no longer subject to the Acts and regulations. He found that it was too speculative to support

jurisdiction based the possibility that OFCCP might uncover discriminatory employment practices in analysis of the statistics in a putative affirmative action plan.

B. Fourth Amendment

1. Generally

In ***OFCCP v. Bank of America***, ARB No. 00-079, 1997-OFC-16 (ARB, Mar. 31, 2003), the Board held that the Fourth Amendment applies to administrative searches. The ARB stated that the Supreme Court issued a seminal decision on this issue in ***Marshall v. Barlow's Inc.***, 436 U.S. 307, 311-12 (1978) holding that the Fourth Amendment's requirements apply to the search of a business by an administrative agency. The *Marshall* Court required a warrant for OSHA administrative searches, stating that "[a] warrant . . . would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." The Court further held the "reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute."

The ARB noted that the Supreme Court's interpretation of Fourth Amendment requirements for administrative searches was specifically applied to investigations under Executive Order 11246 in ***United States v. Mississippi Power & Light Co.,*** 638 F.2d 899 (5th Cir. Unit A 1981). The court in *Mississippi Power* held that *Marshall* did not require a warrant for administrative searches in all circumstances. Indeed, the *Mississippi Power* court held that Executive Order 11246 "satisfied the requirements of the Fourth Amendment because the regulatory scheme provided for resort to the courts before an inspection is conducted."

2. "Consent" exception

In ***OFCCP v. Bank of America***, ARB No. 00-079, 1997-OFC-16 (ARB Mar. 31, 2003), the ARB noted that "[c]onsent is an exception to the requirement that searches be conducted under the authority of a warrant or its equivalent." In ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973), the Court held that it was "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." The ARB noted that "[c]onsent can be established by proof of contemporaneous consent at the time of the actual search" or with "[e]vidence of a prior agreement to permit a search for specific documents and of specific places in connection with obtaining a government benefit or contract . . .." However, the ARB noted a split in circuit court decisions where some cases held that consent to search by contract rendered the search lawful, but other cases held that consent to search by contract only authorized a reasonable search. Under the facts in *Bank of America*, OFCCP alleged that the bank voluntarily consented to the search of its records when it did not object to the scheduling letter sent by OFCCP notifying the bank of the fact that OFCCP would be conducting a search of its records. The ARB noted the following:

> BOA urges us to find, based on the scheduling letter alone, that it could not have given voluntary contemporaneous consent, and that OFCCP cannot succeed as a matter of law. That would require us to determine, as BOA suggests, that the scheduling letter can only be construed as coercive or as misrepresenting OFCCP's authority. Moreover, we would have to find that the language of the letter was so coercive or so misrepresented OFCCP's actual authority with respect to the instant review, that any subsequent consent could not have been voluntary. The evidence submitted by BOA on this issue has not indisputably established that that was the case.
>
> We note that the scheduling letter preceded the actual review by more than thirty days, it is susceptible of interpretation both as to content and effect . . . , and factors other than the letter could have entered into whether voluntary contemporaneous consent was given. Also, there is no evidence that the Bank could not have inquired as to its selection, leaving aside the question of voluntary contemporaneous consent. We therefore remand the case for hearing. The Board expects that the evidence submitted on remand will fully establish

> the totality of the circumstances pertinent to whether consent was voluntarily given to the compliance review.

On remand, in ***OFCCP v. Bank of America, N.A.***, Case No. 1997-OFC-16 (ALJ Aug. 11, 2004), a different ALJ issued a *Recommended Decision and Order on Cross-Motions for Summary Judgment* finding that Defendant voluntarily consented to Plaintiff's warrantless search. Citing to ***United States v. Cotnam***, 88 F.3d 487, 495 (7th Cir. 1996), *cert. denied*, 519 U.S. 942 (1996), the ALJ concluded that "BOA failed to demonstrate any indicia of reluctance to cooperate with OFCCP." Specifically, the ALJ found that "BOA did not raise objections or refuse to comply, but submitted each document requested (by OFCCP in its scheduling letter), along with many other correspondences, without a single objection." In this vein, the ALJ noted that OFCCP's scheduling letter was not misleading or coercive. In addition, the ALJ noted that when:

> . . . OFCCP officials arrived at BOA's . . . facility . . . to conduct its onsite investigation, BOA did not refuse access to its facility, but BOA representatives permitted OFCCP officials to proceed with their inspection without a single objection.

Having concluded that Defendant voluntarily consented to the warrantless search, the ALJ determined that "OFCCP's actions are removed from the requirements of the Fourth Amendment" and the parties were advised that a hearing on the merits of OFCCP's compliance action would be held. *See also* ***OFCCP v. Bank of America***, 2006-OFC-3 (ALJ May 22, 2007) (OFCCP failed to prove selection of Respondent for a compliance review based on a neutral administrative plan, but there was no Fourth Amendment violation because Respondent gave "consent" to search; OFCCP's issuance of a letter advising that enforcement proceedings could commence if Respondent failed to cooperate did "not negate the voluntariness of Defendant's consent to the desk audit").

3. Requirements of the Fourth Amendment

In ***OFCCP v. Bank of America***, 2006-OFC-3 (ALJ May 22, 2007), the ALJ cited to ***Marshall v. Barlow's, Inc.***, 436 U.S. 307, 320-23 (1978) and set forth the following test of "reasonableness" in conducting a warrantless administrative search of a business. The proposed search is "reasonable" if it is: (1) authorized by statute; (2) properly limited in scope; and (3) initiated in a proper manner. Utilizing these criteria, the ALJ concluded that the OFCCP search in this case met the first two criteria as a matter of law. As to the third criterion, OFCCP's decision to initiate a search is proper if the decision is based on: (1) specific evidence of an existing violation; (2) reasonable legislative or administrative standards that have been met with respect to a particular contractor; or (3) showing that the search was initiated pursuant to an administrative plan containing specific, neutral criteria. With regard to the third avenue of initiating a search, the ALJ concluded that "the Fourth Amendment does not require that OFCCP implement a *random* process for contractor selection; only a *neutral* process is required." (italics in original).

a. Violated

In ***OFCCP* v. *City Public Service of San Antonio***, Case No. 1989-OFC-5 (Ass't Sec'y Jan. 18, 1995), a case arising under Section 503 of the Rehabilitation Act, the Assistant Secretary found that Defendant consented to be searched by the government in administering and enforcing the Act. In providing its consent, Defendant waived its Fourth Amendment rights, which would otherwise be protected by the warrant application process. An investigation which is conducted where Defendant has consented to the

search is of the same scope as would be permissible under a warrant issued on the basis of an individual complaint; that is, one which is reasonably related to the allegations of the complaint. Therefore, the scope of the investigation is dictated by certain factors, including the detail of the allegations within the complaint and the knowledge and experience of the OFCCP investigators evaluating the nature of the violation. Absent such facts or credible allegations which could form the basis for a reasonable belief that Defendant discriminated against individuals with other handicaps, the Assistant Secretary held that expansion of the investigation beyond the specific disability (back condition) raised by the individual complaint was unreasonable.

Moreover, the defendant cannot be deemed to have consented to an expansive investigation. The Assistant Secretary stated that the evidence of specific violation required to establish administrative probable cause [is] less than that needed to show a probability of a violation [but] must . . . show that the proposed search is based upon a reasonable belief that a violation has been committed." As a result, it was determined that OFCCP's decision to conduct an investigation covering "the past 24 months, for those applicants denied employment for [any] medical reason" was not based on an administrative plan or a regulation with explicit criteria. The Assistant Secretary held that, "without explicit criteria to guide and constrain it, such a decision violates the Fourth Amendment because it devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as when to search and whom to search." From this, it was determined that OFCCP demonstrated probable cause to conduct an investigation covering only the treatment of the individual complainant and City Public Service of San Antonio's policy on hiring applicants with back conditions. On the other hand, the fact that OFCCP sought and litigated its right to conduct an investigation which exceeded its authority is not ground for dismissal of the complaint. Fourth Amendment standards are satisfied for a search in the absence of a formal judicial warrant "if the enforcement procedures . . . in the . . . regulations provide, in both design and practice, safeguards roughly equivalent to those contained in traditional warrants."

b. Not violated

In ***OFCCP v. Bank of America***, 2006-OFC-3 (ALJ May 22, 2007), the ALJ concluded that, although Defendant had not been selected for an on-site review "pursuant to (a) neutral administrative plan requiring strict sequential selection," OFCCP was nevertheless entitled to conduct the on-site review because it "had a reasonable suspicion of a violation of the Executive Order." The ALJ noted the results of OFCCP's desk audit revealed "that the average salary for male employees in (certain) job groups was anywhere from 9.08% to 23.33% higher than the average salary for female employees." Moreover, the desk audit indicated "that the average salary for non-minority employees was anywhere from 5.18% to 23.15% higher than the average slary of minority employees." The ALJ concluded that the foregoing data "provide(d) OFCCP with a reasonable basis for a belief that violations of the Executive Order may be occurring, supporting the agency's request for an on-site review."

In ***OFCCP v. Bank of America, N.A.***, Case No. 1997-OFC-16 (ALJ Aug. 25, 2000), *remanded*, ARB No. 00-079 (ARB, Mr. 31, 2003), the ALJ held that Defendant's challenge regarding the constitutionality of its selection for compliance review under Executive Order 11246 was proper and the complaint was dismissed. The ALJ noted that the Supreme Court held, in ***Donovan v. Dewey***, 452 U.S. 594, 598-99 (1981), that the Fourth Amendment's prohibition against unreasonable searches "applies to administrative searches of private commercial property." In particular, the search of commercial property by federal agents may be deemed unreasonable if it is not legally authorized or it is "unnecessary for the furtherance of federal interests." The ALJ concluded that, in the case before him, Defendant's records regarding its affirmative action policies were searched pursuant to Executive Order 11246 as amended by Executive Orders 11375 and 12806. The contract between the government and Defendant included a clause requiring that Defendant permit access to its records for purposes of investigating compliance with the Executive Orders. Citing to

United States v. New Orleans Public Service, Inc., 723 F.2d 422, 426 (5th Cir. 1984), the ALJ noted that three requirements must be met before a search is justified under the Fourth Amendment: (1) the search is authorized by statute; (2) the search is properly limited in scope; and (3) the agency initiated the search in a proper manner. With regard to the third requirement, the ALJ stated that the search is reasonable if one of the following criteria is satisfied: (1) the search is based on evidence of an existing violation; (2) reasonable administrative standards for conducting the search are satisfied; or (3) the search is conducted "pursuant to an administrative plan containing specific neutral criteria." *New Orleans*, 723 F.2d at 426. It was undisputed in *Bank of America* that the search was not based upon an existing violation and it was not conducted to review Defendant's compliance with the Executive Orders.

As a result, the ALJ determined that the reasonableness of the search would be dependent upon whether the search was conducted pursuant to an administrative plan containing specific neutral criteria. Upon review of the record, the ALJ found that OFCCP's *Equal Employment Data System (EEDS) Manual* set forth the neutral administrative plan to follow. However, OFCCP failed to comply with the Manual's requirements. In this vein, the ALJ noted that OFCCP's selection of Defendant was unconstitutionally arbitrary and based, in part, on the testimony which revealed a premise that banks are notorious" for having the worst record of affirmative action." Consequently, the ALJ concluded that OFCCP's selection process was undocumented and unexplained such that Defendant's motion for summary judgment was granted and the complaint was dismissed.

On appeal, the ARB determined that the *EEDS Manual* did not confer any rights on private parties and "OFCCP, therefore, had no obligation to BOA to utilize on EEDS procedures for selecting contractors for compliance reviews." However, the ARB remanded the case for further proceedings because "genuine issues of material fact" existed with regard to (1) what plan with criteria actually applied to selecting the Charlotte facility, (2) whether the plan actually was implemented in Charlotte's selection, and (3) whether the plan and its application met Fourth Amendment requirements."

The ARB did find that the criteria used by OFCCP to "narrow down the list" of potential facilities to be reviewed in Charlotte were not arbitrary on their face. These criteria were that the "facility must be the headquarters of a corporation on the Fortune 500 or 1,000 list; that the corporation have at least 4,000 to 5,000 employees; that the corporation must be a multi-establishment company; that the facility must not have been previously reviewed." Moreover, the "company must have been one of the top five in the region, and there must have been significant opportunities for affirmative action at the facility."

On remand, in ***OFCCP v. Bank of America, N.A.***, Case No. 1997-OFC-16 (ALJ Aug. 11, 2004), a different ALJ issued a *Recommended Decision and Order on Cross-Motions for Summary Judgment* finding that Defendant voluntarily consented to Plaintiff's warrantless search. Citing to ***United States v. Cotnam***, 88 F.3d 487, 495 (7th Cir. 196), *cert. denied*, 519 U.S. 942 (1996), the ALJ concluded that "BOA failed to demonstrate any indicia of reluctance to cooperate with OFCCP." Specifically, the ALJ found that "BOA did not raise objections or refuse to comply, but submitted each document requested (by OFCCP in its scheduling letter), along with many other correspondences, without a single objection." In this vein, the ALJ noted that OFCCP's scheduling letter was not misleading or coercive. In addition, the ALJ noted that when:

> . . . OFCCP officials arrived at BOA's . . . facility . . . to conduct its onsite investigation, BOA did not refuse access to its facility, but BOA representatives permitted OFCCP officials to proceed with their inspection without a single objection.

Having concluded that Defendant voluntarily consented to the warrantless search, the ALJ determined that "OFCCP's actions are removed from the requirements of the Fourth Amendment" and the parties were advised that a hearing on the merits of OFCCP's compliance action would be held.

In ***OFCCP v. First Alabama Bank of Montgomery***, Case No. 1980-OFCCP-32 (Sec'y Dec. 5, 1980), the Secretary concluded that the government's request for access to Defendant's premises during normal business hours to conduct a compliance review was not violative of Defendant's Fourth Amendment rights. The Secretary noted that the purpose of the compliance review was to ensure that the contractor was in compliance with the non- discrimination and affirmative action regulations. As a part of the government's enforcement responsibilities, the government was entitled to such access. The Secretary further noted that Defendant's objections to the search were raised after an administrative complaint was issued. In particular, Defendant did not raise the search warrant objection until after commencement of the debarment proceedings, while it had specifically consented to a search of its records earlier.

In ***OFCCP v. Beverly Enterprises, Inc.***, Case No. 1999-OFC-11 (ALJ July 22, 1999), Defendant, a corporation which operated nursing homes for veterans, argued that OFCCP's investigation violated the Fourth Amendment because the government did not select Defendant pursuant to a neutral administrative plan. Citing to ***United States v. Mississippi Power & Light Co.***, 638 F.2d 899 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981), the ALJ concluded that Defendant's Fourth Amendment rights had not been violated and stated the following:

> In the instant case, OFCCP developed a written plan for conducting CMRs (corporate management reviews). Utilizing computer tapes containing the data provided by employers filing Form EEO-1, OFCCP developed a list of all federal contractors that had 4000 total employees and were corporate headquarters. These contractors were assigned a random number and then sorted by random number within each district office. Mr. Maltbia then followed the dictates of the written plan and Beverly was thereafter recommended for a CMR.

Slip op. at 6-7. Defendant maintained that OFCCP failed to establish through witness testimony the intricate details of the computer code used to generate" the list. The ALJ concluded that such testimony was unnecessary. Management witnesses for OFCCP credibly testified that the program code was written to reflect the neutral plan and tests were run to ensure the instructions regarding the criteria were met . . . ." The ALJ ordered that Defendant was enjoined from refusing to comply with the requirements of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974. He further recommended that Defendant be debarred until it established compliance with the foregoing laws.

The ALJ's recommended decision was reviewed by the ARB in ***OFCCP v. Beverly Enterprises, Inc.***, ARB Case No. 99-112, Case No. 1999-OFC-11 (ARB Sept. 1, 1999). Defendant continued to assert that it had not been selected for a compliance review pursuant to a neutral administrative plan. The ARB initially noted that the Fourth Amendment privacy interest in data compiled by commercial enterprises is diminished when the data is compiled pursuant to federal requirements. Moreover, citing to ***Donovan v. Lone Steer, Inc.***, 464 U.S. 408 (1984), the ARB stated that the reasonableness of an agency's demand for access to records is governed by much less stringent standards than an agency's demand to enter the premises. Indeed, the inspection of a commercial enterprise's data requires, under the Fourth Amendment, that the agency's selection be the product of a neutral administrative plan that is definite

and regular, clearly limited in scope." The ARB cited to ***United States v. Mississippi Power & Light***, 638 F.2d 899,

907-08 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981) to hold that OFCCP's selection of a company for a compliance review must meet the requirements set forth in ***Marshall v. Barlow's, Inc.***, 436 U.S. 307 (1978):

> A warrantless inspection satisfies the Fourth Amendment if it is: (1) authorized by statute; (2) properly limited in scope; and (3) initiated in a neutral fashion. An OFCCP search, as a matter of law, meets the first two elements; that is, it is statutorily authorized and is properly limited in scope. As to the third element, OFCCP's decision to initiate a particular search is deemed reasonable if based either on: (1) specific evidence of an existing violation; or (2) a showing that the search was initiated pursuant to an administrative plan containing specific neutral criteria. An agency must show not only that its selection plan is neutral, but also that the plan is 'actually applied neutrally.' (citation omitted).

Slip op. at 6. In applying the Fourth Amendment criteria to the facts of the case, the ARB concluded that OFCCP utilized a neutral administrative plan where its witness testified that each year he reviewed all the computer codes to ensure that the resulting program (was) consistent with the new year's requirements." Slip op. at 8. The ARB held that OFCCP is not required to produce documentary evidence or testimony from an official with personal knowledge of every aspect of the OFFCP selection system." The ARB concluded that the Fourth Amendment did not impose such stringent requirements on the government. It was determined that the compliance review plan was neutrally applied. In light of Defendant's failure to cooperate with OFCCP's investigation, the ARB concluded that the company would have 30 days to comply with OFCCP's requests and, its failure to do so, would result in termination of federal contracts and debarment.

On appeal, in ***Beverly Enterprises, Inc. v. Herman***, Civil Action No. 99-2408 (RMU) (D.D.C. Aug. 24, 2000), the district judge entered summary judgment against Beverly Enterprises. The court concluded that the company's Fourth Amendment rights against unreasonable searches and seizures were not violated. Turning to the legal standard for asserting Fourth Amendment challenges, the court cited to ***Marshall v. Barlows***, 436 U.S. 307, 320 (1978) to state that a valid administrative search under the Fourth Amendment requires probable cause. Probable cause is established where there is specific evidence of an existing violation or where a particular company was selected for review according to "reasonable legislative or administrative standards."

Citing to ***Uniroyal, Inc. v. Marshall***, 482 F. Supp. 364, 368 (D.D.C. 1979), the court held that the administrative search was conducted to enforce compliance with affirmative action programs as authorized by Executive Order 11246, which has a force of law. Moreover, the court found that Beverly Enterprises did not contest that the search was properly limited in scope. The issue, as noted by the judge, was whether the search was initiated in a proper manner. The court noted that it is the government's burden to demonstrate that selection of Beverly Enterprises for a compliance review was based on specific evidence of a violation or it was selected pursuant to an administrative plan containing specific neutral criteria. Under the facts presented before him, the district judge concluded that Beverly Enterprises was properly selected for a review. Computer generated lists were used and the district judge held that "in order to prove that a company was properly selected for a compliance review from a computerized list, the employees of the agency need only attest that the target of the search was selected under the

agency's normal procedures." *See* ***National Eng'g & Contracting co. v. OSHA***, 45 F.3d 476, 480 (D.C. Cir. 1995). Therefore, the court concluded that Beverly Enterprise's Fourth Amendment rights were not violated.

On the most recent appeal of the case to the ARB, the parties submitted a consent decree which was approved. ***See OFCCP v. Beverly Enterprises, Inc.***, ARB Case No. 02- 009, 1999-OFC-11 (ARB Apr. 30, 2002). The consent decree provided, in part, Beverly Enterprises would open its headquarters and homes for review by the Department. The consent decree further provides that OFCCP may initiate a "corporate management review" at Beverly headquarters at any time after two months and that Beverly will open 10 of its nursing homes that had been scheduled for compliance actions between 1999 and 2001.

c. OFCCP's "threshold indicator test" and issues of "vindictive" prosecution

In ***United Space Alliance LLC v. Solis***, Case No. 11-00746, based on a complaint filed on April 19, 2011 with the federal district court of the District of Columbia, United Space challenges OFCCP's authority to require that the company produce detailed compensation data or risk termination of federal funding and debarment despite the fact that its "threshold indicator test" did not produce gender-based pay discrepancies. By decision in ***OFCCP v. United Space Alliance LLC***, Case No. 2011-OFC-2 (ALJ Feb. 28, 2011), the Administrative Law Judge found that, even though a "threshold indicator test" conducted by OFCCP revealed no indicators of pay discrimination based on gender, it was within OFCCP's discretion to request additional information from United Space and conduct two additional tests—a "pattern analysis" test and a "30 and 5" test. Despite argument to the contrary, the Administrative Law Judge declined to find that OFCCP engaged in "vindictive" prosecution as United Space did not present "strong evidence of motive."

C. Fifth Amendment

In view of the size and scope of Defendant's corporation, which consisted of 258 offices in 186 locations with 7,800 employees, requiring an expenditure of $25,000 to $30,000 for establishing an affirmative action program as well as $60,000 to $70,000 for annual data gathering and reporting, is not an unreasonable burden and does not violate Defendant's Fifth Amendment rights to due process. ***Dep't of Labor v. Coldwell Banker & Co.***, Case No. 1978-OFCCP-12 (ALJ June 8, 1979).

In ***Beverly Enterprises, Inc. v. Herman***, Civil Action No. 99-2408 (RMU) (D.D.C. Aug. 24, 2000), Beverly Enterprises alleged that its Fifth Amendment due process rights were violated because of the government's use of the expedited hearing procedures. Citing to ***Mathews v. Eldridge***, 424 U.S. 319, 333 (1976), the court noted that Beverly Enterprises must demonstrate the following factors in support of a Fifth Amendment violation: (1) it has a constitutionally protected life, liberty, or property interest; and (2) the procedures employed deprived Beverly Enterprises of that interest without constitutionally adequate procedures. Initially, the court held that Beverly Enterprises has constitutionally protected interests such that it must be determined whether its rights were violated in the context of each of those interests. Because Beverly Enterprises was a commercial entity with federal contracts, the court concluded that the company had a "weakened expectation of privacy" in protecting its documents from an administrative inspection. The judge determined that it was within the ALJ's discretion to decline discovery of the testimony of Solicitor of Labor Henry Solano where the testimony would "only repeat information that was included with other evidence." The court determined that the expedited procedures served the government's interest in expeditious enforcement of the anti-discrimination laws. As a result, the judge concluded that Beverly Enterprise's Fifth Amendment rights were not violated.

In ***OFCCP v. First Alabama Bank of Montgomery***, Case No. 1980-OFCCP-32 (Sec'y Dec. 5, 1980), the Secretary held that, pursuant to its administrative and investigative powers, the government's request for access to Defendant's premises, in order to inspect books, records, accounts, and affirmative action programs, did not deprive Defendant of its property without due process of law.

In ***USDOL, OFCCP v. Frito-Lay, Inc.***, ARB No. 10-132, ALJ No. 2010-OFC-2 (ARB May 8, 2012), the ARB found that policy stated in the federal contract compliance manual does not generally create due process rights. OFCCP's Federal Contract Compliance Manual (FCCM) is "an internal manual that courts generally consider 'non-binding statements of general policy' that do not provide due process rights in the public, except in unusual circumstances." ***USDOL, OFCCP v. Frito-Lay, Inc.***, ARB No. 10-132, ALJ No. 2010-OFC-2 (ARB May 8, 2012), USDOL/OALJ Reporter at 6, n.23 (citing *United Space Alliance, LLC v. Solis* , __ F.Supp. 2d __ (D.D.C. Nov. 14, 2011)).

D. Expedited hearing procedures

In ***OFCCP v. The Boeing Co.***, Case No. 1999-OFC-14 (ALJ Aug. 16, 1999), the ALJ issued an *Order Granting Motion to Remove from Expedited Hearing Procedures, Granting Document and Other Discovery, and Notice of Hearing*. Defendant challenged the selection of its Wichita facility for a compliance review under the Fourth Amendment to state that it was not chosen "through random selection criteria or specific complaints of discrimination" at the facility. Indeed, Defendant argued that the OFCCP investigation was "a means of exerting pressure on Boeing to settle two other pending matters." Boeing cited "a temporal nexus of approximately one to two months between the collapse of settlement negotiations and the commencement of the Wichita compliance review." In addition, Defendant asserted that OFCCP solicited interviews with Boeing employees as a pretext for an improper investigation. Contrary to OFCCP's contention that an ALJ does not have authority to remove a case from the expedited hearing procedures and permit limited document discovery under 41 C.F.R. § 60-30.33(c), the ALJ held otherwise. He noted that Boeing's rights under the Fourth Amendment required application of the modification or waiver provisions at § 60-30.2 as "no party is prejudiced" and the "ends of justice would be served."

In ***OFCCP* v. *University of North Carolina***, Case No. 1984- OFC-20 (Sec'y Jan. 27, 1987), the Secretary held that, although complaint was filed under expedited hearing procedures, neither the ALJ nor the parties treated the case as though it were entitled to expedited handling. As a result, the Secretary concluded that the ALJ's Recommended Decision would be reviewed under the regular hearing procedures.

X. Government contractor

A. Federal contracts

For an additional discussion of the burdens involved in establishing a government contractor or "working-on-the-contract," *see* Chapters III and V.

1. Generally

a. Apply to all operations absent obtaining a waiver

In ***OFCCP v. Beverly Enterprises, Inc.***, 1999-OFC-11 (ALJ Nov. 5, 2001), the ALJ concluded that the subsidiaries of Beverly Enterprises are considered a "single entity" and, as a result, the subsidiaries "may be sanctioned for the actions of the parent." The ALJ based his holding on the fact that Employer failed to respond to interrogatories and document production requests which related to "whether Defendant and its subsidiaries are a single entity." Employer's failure to respond to these discovery requests resulted in the conclusion, pursuant to 29 C.F.R. § 18.6(d)(2)(i) and 41 C.F.R. § 60-30.15(j), that the "requested responses, if given, would have been adverse to the Defendant on the single entity/single employer issue." Slip op. at 3. In particular, based on adverse inferences drawn from Employer's failure to respond to discovery requests, the ALJ concluded that the parent and its subsidiaries had common ownership and the same directors and/or officers. Moreover, the parent company and its subsidiaries emanated from a common source, they were dependent on each other, and the parent had *de facto* control over the subsidiaries. Slip op. at 8-9. On appeal to the ARB, the parties submitted a consent decree which was approved by the Board. ***See OFCCP v. Beverly Enterprises, Inc.***, ARB Case No. 02-009, 1999-OFC-11 (ARB Apr. 30, 2002).

In ***Trinity Industries, Inc. v. Herman***, 173 F.3d 527 (4th Cir. 1999) (Case No. 1997-OFC-14), the circuit court held that the affirmative action reporting requirements applied to all of Trinity's facilities despite the fact that the company argued that one of the facilities was autonomous and did not perform federal government contract work. The case arose under Section 503 of the Rehabilitation Act of 1973, Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and Executive Order 11246. The court noted that the Executive Order requires that a contractor who employs 50 or more employees and contracts with the United States for payment of $50,000 or more must develop an affirmative action program. Moreover, the Executive Order and Rehabilitation Act provide that the Secretary of Labor "may" waive the affirmative action requirement for an independent facility of the contractor. However, the court noted that no waiver was accorded Trinity in this case as the company never filed a request for approval of a waiver with the appropriate government official. Trinity argued that the facility under investigation did not have a federal contract and the facility:

> . . . is autonomous in organization, function, and management; and . . . it makes its own decisions concerning hiring, firing, discipline, discharges, promotions, and pay increases.

The court held that, while these facts may indeed support waiver, there was no express waiver from the Secretary of Labor in the record. The court noted that Trinity unsuccessfully argued similar issues before another circuit court in ***Trinity Industries, Inc. v. Reich***, 33 F.3d 942 (8th Cir. 1994) which "suggests that the company is well-informed of the need to obtain a waiver, and of the proper method for doing so."

In ***OFCCP v. Yellow Freight Systems, Inc.***, Case No. 1989-OFC-40 (ALJ May, 17, 1994), OFCCP alleged that Yellow Freight discriminated against a truck driver, Mr. Wilson, in contravention of Section 503 of the Rehabilitation Act of 1973. Initially, Defendant argued that there was no evidence of record that the driver hauled freight pursuant to a federal government contract such that the Rehabilitation Act did not apply. The ALJ disagreed to state:

> To the extent that the government contracting sector of the trucking industry as a whole may tend to assign loads to drivers on a random basis, OFCCP's proof is more than sufficient . . . when, as here, it demonstrates that employees occupying jobs in the category sought by the handicapped applicant perform government contract work on a

> random basis. Under these circumstances, the qualified handicapped individual is as likely as any other similarly employed individual to work on a government contract job.

Slip op. at 18.

In ***OFCCP v. Burlington Industries, Inc.***, Case No. 1990-OFC-10 (ALJ Nov. 1, 1991), the government sought cancellation of Burlington's federal contracts as well as debarment from future contracts pending Defendant's compliance with Executive Order 11246. Initially, the ALJ rejected Burlington's argument that the particular plant which was the subject of OFCCP's investigation, did not have any federal government contracts. The ALJ held that Burlington had government contracts at its other plants and that all contracts with the government contain an Executive Order 11246 non-discrimination provision which is, in turn, applicable to all of the company's operations. Because the government contracts with Burlington were valued in excess of $50,000, the employer's entire workforce was covered. As support for this holding, the ALJ cited to a decision of the Secretary of Labor in ***OFCCP v. Preister***, Case No. 1978-OFC-12 (Sec'y Feb. 27, 1983). The ALJ held that "[i]t is not necessary for OFCCP to establish a link between a particular plant suspected of discrimination and a government contractor." Citing to ***University of North Carolina v. Dep't. of Labor***, 917 F.2d 812 (4th Cir. 1990), the ALJ concluded that "[a] contract between the corporate owner of the plant and the government is enough . . .." Slip op. at 15.

A federal contractor's affirmative action clause obligations are not limited solely to federal contract jobs, but extend to any position for any of its operations. ***E.E. Black, Ltd.* v. *Marshall***, 497 F. Supp. 1088 (D. Hi. 1980).

b. Does not apply to all operations; waiver regulations are inconsistent with the Act

In ***Washington Metropolitan Area Transit Authority v. DeArment (WMATA)***, 55 Empl. Prac. Dec. 40,505 (D. D.C. 1991), the district judge held that the waiver provisions at 41 C.F.R. § 60-741.3(a)(5) are inconsistent with the statute. In particular, the court stated the following:

> All employees of the contractor are not swept in, which is basically what Labor is trying to do by their waiver provision. The Act itself says, employing persons to carry out such (federal) contract are the people who are covered and Labor's reading is far too broad.

Slip op. at 1. *See also* ***Cissell Mfg. Co. v. Dep't of Labor***, 101 F.3d 1132 (6th Cir. 1996). It is noted that, in ***OFCCP v. Keebler Co.***, ARB Case No. 97-127, Case No. 1987-OFC-20 (ARB, Dec. 21, 1999), the ARB noted several flaws in the district court's analysis in ***WMATA***.

2. Obligation to ensure that subcontractor complies

In ***OFCCP v. First Federal Savings Bank of Indiana***, Case No. 1991-OFC-23 (Sec'y Oct. 26, 1995), the Secretary held that First Federal had an obligation to assure that its subcontractors complied with the requirements of Section 503 of the Rehabilitation Act, as implemented at 41 C.F.R. § 60-741.4(f). In so holding, the Secretary rejected the ALJ's conclusion that Defendant did not violate Section 503 by failing to assure that the lessor of office space to Defendant provide parking spaces for handicapped employees. The Secretary concluded that the building owner is a subcontractor because it supplies services necessary to the performance of Defendant's government contracts. 41 C.F.R. § 60-4; ***OFCCP v. Coldwell, Banker and Co.***, Case No. 1978-OFC-12, slip op. at 7-8 (Sec'y Aug. 14, 1987). Since the owner of

the building provided handicapped parking spaces before the hearing in the case at Defendant's request, the Secretary did not reach the question of what action would have been required if the building owner had not promptly complied with Defendant's request.

3. Federal government may be a purchaser or seller

For the purposes of coverage under the Act, it does not matter whether the federal government is the purchaser or seller. ***OFCCP* v. *Ozark Air Lines, Inc.***, Case No. 1980-OFCCP-24 (ALJ Dec. 7, 1982), *aff'd* (Dep'y Under Sec'y June 13, 1986).

4. Waiver for independent facilities

The North Carolina statute and regulations establishing and governing the University of North Carolina (UNC) make it clear that the UNC is a single agency of which UNC-A and NCSA are only parts. It is not necessary, therefore, to make a finding of privity of contract to establish coverage. ***OFCCP* v. *University of North Carolina***, Case No. 1984-OFC-20 (Sec'y Jan. 23, 1989), *aff'd*, ***Board of Governors of the University of North Carolina* v. *United States Department of Labor***, 917 F. 2d 812 (4th Cir. 1990), *cert*. *denied*, 500 U.S. 916 (1991). In so holding, it was determined that the rationale of the Supreme Court's decision in ***Pennhurst State School and Hospital* v. *Halderman***, 451 U.S. 1 (1981) was not applicable to Section 503 coverage of the University of North Carolina constituent institutions, because the equal opportunity clause was presumably included in each contract required to include it and, if it was not, the clause would have been incorporated by operation of law. The exemption in 41 C.F.R. § 60-1.5(a)(4) did not cover the constituent campuses of UNC because they were not considered separate state agencies. The exemption applies only to agencies separate and distinct from the agency holding the contract. In so holding, it was noted that, under North Carolina General Statutes Chapter 116, Article 1, the University of North Carolina at Asheville and the North Carolina School of the Arts are not separate agencies and, therefore, are not entitled to the exemptions contained at 41 C.F.R. §§1 60-1.5(a)(4), 60-250.3(a)(4), and 60-741.3(a)(4).

In ***Trinity Industries, Inc. v. Herman***, 173 F.3d 527 (4th Cir. 1999) (Case No. 1997-OFC-14), the circuit court held that the affirmative action reporting requirements applied to all of Trinity's facilities despite the fact that the company argued that one of the facilities was autonomous and did not perform government contract work. The case arose under Section 503 of the Rehabilitation Act of 1973, Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and Executive Order 11246. The court noted that the Executive Order requires that a contractor who employs 50 or more employees and contracts with the United States for payment of $50,000 or more must develop an affirmative action program. Moreover, the Executive Order and Rehabilitation Act provide that the Secretary of Labor "may" waive the affirmative action requirement for an independent facility of the contractor. However, the court noted that no waiver was accorded Trinity in this case as the company never filed a request for approval of a waiver with the appropriate government official. Trinity argued that the facility under investigation did not have a federal contract and the facility:

> . . . is autonomous in organization, function, and management; and . . . it makes its own decisions concerning hiring, firing, discipline, discharges, promotions, and pay increases.

The court held that, while these facts may indeed support waiver, there is no express waiver from the Secretary of Labor in the record. The court noted that Trinity unsuccessfully argued similar issues before

another circuit court in ***Trinity Industries, Inc. v. Reich***, 33 F.3d 942 (8th Cir. 1994) which "suggests that the company is well-informed of the need to obtain a waiver, and of the proper method for doing so."

A contractor with a federal contract of over $2,500 at any facility must utilize the waiver provisions at 41 C.F.R. § 60-741.3(a)(5) in order to avoid the Act's affirmative action obligations at any of its other facilities on all work performed on contracts of over $2,500. ***OFCCP* v. *W.S. Hatch Trucking Co.***, Case No. 1984-OFCCP-15 (ALJ June 5, 1986) (denial of summary judgment). Requiring a contractor to be an affirmative action employer at its government contract facility, as opposed to the non-government contract facilities, would result in disparate treatment of handicapped persons.

The regulatory provisions at 41 C.F.R. § 60-741.3(a)(5) provide that a federal contractor's facilities are covered, unless a waiver was requested and granted. Defendant did not request a waiver for its coal car shop and, therefore, it was a covered facility.

OFCCP* v. *Norfolk and Western Railway Co., Case No. 1988-OFC-4 (ALJ, June 28, 1989).

A federal contractor's affirmative action clause obligations are not limited solely to federal contract jobs, but extend to any position at its operations. ***E.E. Black. Ltd.* v. *Marshall***, 497 F. Supp. 1088 (D. Hi. 1980). Even if a particular contract has no connection with any of the contractor's federal contracts, it is a covered contract (if over $2,500), unless there is a specific waiver.

B. Federal contract defined

1. Established

a. Depository of federal funds

In ***OFCCP v. First Federal Savings Bank of Indiana***, Case No. 1991-OFC-23 (Sec'y Oct. 26, 1995), the Secretary rejected Defendant's argument that it was not a government contractor covered by Executive Order 11246. Defendant argued that its agreements to act as an issuing agent for United States Savings Bonds and a depository for federal funds did not constitute government contracts within the meaning of the Order and regulations. The Secretary rejected this assertion, noting that DOL regulations explicitly provide that government contract means any agreement . . . between any contracting agency and any person for the furnishing of supplies or services and that [t]he term services . . . includes . . . fund depository." *See* 41 C.F.R. § 60-1.3. *See also* ***OFCCP v. USAA Federal Savings Bank***, Case No. 1987-OFC-27 (Sec'y Mar. 16, 1995).

a. Bills of lading

Bills of lading supply coverage. ***OFCCP* v. *Southern Pacific Transportation***, Case No. 1979-OFC-10A (ALJ Nov. 9, 1982), *remanded on other grounds* (Ass't Sec'y Feb. 24, 1994). A tariff constitutes only an offer until the government shipper avails itself of the terms through a bill of lading, at which time it is a contract. All the terms of the contract do not have to be spelled out in a single formal document. The value of the federal contract is the crucial matter, not how it is divided among those who enter into the federal contract. *See also* ***OFCCP v. Yellow Freight Systems, Inc.***, 1979-OFCCP-7 (Ass't Sec'y Aug. 24, 1992).

b. Contract for use of federal property and services

A contract for the use of federal property and services provides coverage under the Act. ***OFCCP* v. *Ozark Air Lines, Inc.***, Case No. 1980-OFCCP-24 (Dep'y Under Sec'y June 30, 1986).

c. Blanket purchase agreement

A blanket purchase agreement, rather than the orders placed under it, constitutes the federal contract for purposes coverage under Section 503 of the Rehabilitation Act. The blanket purchase agreement at issue, although it did not state specific prices, provided that the price for each purchase would be set at a published market rate. The annual value of orders under the blanket purchase agreement exceeded $50,000 each year since 1981 and, thus, was sufficient to establish coverage. ***OFCCP* v. *Bruce Church, Inc.***, Case No. 1987-OFC-7 (Sec'y June 13, 1987).

d. Subcontractor performs "necessary" services for the federal contract

A subcontractor is subject to the requirements of 41 C.F.R. § 60-741.2 when the type of service it provides is necessary to the contractor's performance of its agreement with the federal government, even though this specific subcontractor's service may not be necessary. ***OFCCP* v. *Monongahela Railroad Co.***, Case No. 1985-OFC-2 (ALJ Apr. 2, 1986), *aff'd* (Dep'y Under Sec'y Mar. 11, 1987).

Defendant, a bulk power supplier, was covered under the provisions of Section 503 because it was a corporate sibling to a government contractor and operated to supply electricity to service companies which, in turn, supplied electricity to the government. To allow a government contractor to elude coverage by maintaining a subsidiary supplier would be inconsistent with Section 503's purpose. ***OFCCP v. Texas Utilities Generating Co.***, Case No. 1985-OFC-13 (ALJ Mar. 2, 1988), *remanded on other grounds* (Ass't Sec'y Aug. 25, 1994).

Defendant had an obligation to assure that its subcontractors complied with the requirements of Section 503 of the Rehabilitation Act and 41 C.F.R. § 60-741.4(f) and, by failing to make an effort to obtain handicapped parking spaces, Defendant violated that obligation. ***OFCCP v. First Federal Savings Bank of Indiana***, Case No. 1991-OFC-23 (Sec'y Nov. 20, 1995).

In ***OFCCP v. UPMC Braddock, et al.***, 2007-OFC-1, 2, and 3 (ALJ Jan. 16, 2008), *aff'd*, ARB Case No. 08-048 (ARB May 29, 2009) (on appeal with D.C. Circuit Court as *UPMC Braddock v. Solis,* D.D.C. Case No. 1:09-cv-01210), Respondent hospitals challenged OFCCP's authority to conduct a compliance review under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 on grounds that they did not have a direct, contractual relationship with the United States government.

The judge agreed that the Respondents, which were non-stock, non-profit entities each employing more than 50 people, did not have a direct contractual relationship with the United States government. However, he concluded that OFCCP did have authority to conduct a compliance review. In support of this holding, the ALJ held that Respondents, as contracting hospitals with an HMO, met the definition of subcontractors at 41 C.F.R. § 60-13:

> Arguably, fee-for-service organizations, or strictly insurance providers, are not subcontractors under *Bridgeport*, as such organizations are charged with providing reimbursement to their members for health care expenses without concern over who actually provides the health care. However, an HMO by its nature arranges and provides for the medical services through the medical

Id.

providers such as the Defendant hospitals with which it contracts. Thus, the hospitals and other medical providers are clearly necessary for the fulfillment of UPMC's contract with OPM and are subcontractors under 41 C.F.R. § 60-1.3. The ARB decision in *Bridgeport* does not preclude a finding that Defendant hospitals are subcontractors under 41 C.F.R. § 60.13.

In affirming the ALJ's decision on appeal, the ARB held that the "equal opportunity" clauses of the Rehabilitation Act, VEVRAA, and Executive Order 11246 at 41 C.F.R. §§ 60- 1.4(e), 60-250.5(e), and 60-741.5(e) are incorporated by operation of law "whether or not (the equal opportunity clause) is physically incorporated in each such contract and whether or not the contract between the agency and the contractor is written." Moreover, the ARB rejected Respondents' argument that the equal opportunity clause "applies only to prime contractors who voluntarily enter into a contract with the government"; rather, the ARB cited to the plain language of the regulations, which require that the clause is considered part of every contract *and subcontract*.

See also ***OFCCP v. Fla. Hosp. of Orlando***, Case No. 2009-OFC-2 (ALJ Oct. 18, 2010).

e. "Subcontractor" defined

In ***OFCCP v. UPMC Braddock***, ARB No. 08-048, Case Nos. 2007-OFC-1, 2, and 3 (ARB May 29, 2009) (on appeal with D.C. Circuit Court as *UPMC Braddock v. Solis,* D.D.C. Case No. 1:09-cv-01210), Defendants argued that they were not "subcontractors" and, therefore, were not required to comply with equal opportunity laws set forth at 41 C.F.R. §§ 60-1.4(e), 60-250.5(e), and 60-741.5(e). In support of their position, Defendant hospitals maintained that they had HMO contracts with the University of Pittsburgh Medical Center (UPMC), which, in turn, had a contract with the Office of Personnel Management (OPM) to provide medical products and services to U.S. government employees. Notably, the contracts between UPMC and OPM expressly excluded the Defendant hospitals from the definition of "subcontractors" in the contracts. Moreover, Defendant hospitals argued that they are not subcontractors under the definitions set forth in the Federal Acquisition Regulations (FAR) at 48 C.F.R. § 1602.170-14. The ALJ and ARB agreed with Defendants on these points but held that equal opportunity laws at issue could not be invalidated by contractual arrangements between UPMC and OPM, nor was the definition of a "subcontractor" in the FAR controlling in this case. The ARB held that the ALJ "refused to apply the Part 1602 definition because he found that it conflicted with federal law." The ARB further stated:

> Recognizing that provisions in a government contract that violate to conflict with a federal statute are invalid or void, (the ALJ) reasoned that an interpretation that would exclude subcontractors like the Defendant hospitals from compliance with the three laws would be invalid as contrary to the three laws giving the Secretary of Labor authority in these matters. We agree. The Secretary has promulgated regulations implementing the Executive Order. These regulations do not exclude providers like the Defendants from the definition

> of 'subcontractor.' Furthermore, these regulations have the force and effect of law. Because the FAR regulation that the Defendants ask us to apply directly contradicts the Secretary's regulations, it is invalid, and we decline to apply it.

Slip op. at 8. Turning to the definitions of "subcontract" set forth at 41 C.F.R. §§ 60-1.3, 60-741.2, and 60-250.2(l) as well as the FAR definition of "non-personal services" at 48 C.F.R. § 37.101, the ARB agreed with the ALJ that the Defendants met the definition of "subcontractors" as they provided "necessary" services for UPMC to meet its contractual obligations and, consequently, Defendants were obliged to comply with the equal opportunity laws.

See also ***OFCCP v. Fla. Hosp. of Orlando***, Case No. 2009-OFC-2 (ALJ Oct. 18, 2010).

2. Not established

a. Lease of space in a government building

The lease of space in a federal office building is a government contract within the meaning of 41 C.F.R. § 60-1.3. ***Dep't of Labor v. Coldwell Banker & Co.***, Case No. 1978-OFCCP-2 (Sec'y June 8, 1979).

b. Subcontractor not perform "necessary" services for federal contract

In ***OFCCP v. Bridgeport Hospital***, Case No. 1997-OFC-1 (ALJ Jan. 21, 2000), *rev'd in part*, ARB Case No. 00-034 (ARB Jan. 31, 2003), the sole issue before the ALJ was whether Defendant was a covered subcontractor under Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act. Citing to the definition of a subcontractor at 41 C.F.R. § 60-1.3, the ALJ entered summary judgment in favor of Defendant after concluding that Defendant was not a covered subcontractor. In particular, Defendant hospital was not covered because it did not provide services to the contractor (Blue Cross/Blue Shield), which was "necessary" to the contractor's performance of its prime contract with the federal government. The ALJ reasoned as follows:

> Bridgeport's agreement with Blue results in Bridgeport being either a Preferred or a Member hospital. In either case Blue pays a higher percentage of the cost of its members' treatment than if no agreement existed. Clearly, a consequence of the agreement between Blue and Bridgeport is less cost to Blue members, less cost to Blue and thus an overall less costly Federal Employees Health Benefits Program. Conversely, however, the lack of the reimbursement agreement would not preclude Blue from being able to offer medical benefit insurance to its federal employee members, and would not preclude Blue from paying insurance benefits to those treated at Bridgeport as the federal employees members would be reimbursed in accord with the provisions for treatment at non-member hospitals.
>
> DOL's argument that the Bridgeport reimbursement agreement is 'necessary' to Blue's contract with OPM apparently stems from the fact that the agreement lowers costs to Blue and its members. However, under such reasoning, any concern that does business with Blue, and whose business potentially affects Blue's costs, such as public utilities, advertising, real estate costs, space rental, etc., would be considered 'necessary.' Such an

> expansive interpretation of the definition of a subcontractor would read the modifier 'necessary' out of the definition as all third party contracts would be considered necessary.

Slip op. at 8-9. In support of his holding, the ALJ further noted that, pursuant to the contract between OPM and Blue Cross, providers of direct medical services, such as Defendant, were not considered subcontractors. The ARB reversed the ALJ's decision and held the following:

> Unlike the ALJ, . . . we do not reach the question of whether Blue's non- existent obligation to deliver medical services to Blue enrollees did or did not constitute partial performance by Bridgeport of Blue's contract with OPM or was 'necessary to performance' of the prime contract. This is because the first premise of OFCCP's argument fails – Blue has no commitment to OPM to provide its policyholders with medical care. Therefore, questions concerning the terms 'necessary to' or 'part performance of' do not arise in this appeal.

c. Federal grant monies not constitute federal contracts

In ***Partridge et al. v. Reich***, 141 F.3d 920 (9th Cir. 1998), OFCCP declined to prosecute alleged acts of discrimination on grounds that it lacked jurisdiction because the employer was not a federal contractor. Specifically, employees of the Clark County Fire Department alleged discrimination in violation of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 at 38 U.S.C. § 4212. It was noted that the Act applied only to procurement contracts valued at $10,000 or more. In this vein, the court found that 41 C.F.R. § 60-250.2 did not provide that federal grants were included in the definition of procurement contracts. The court cited to the Federal Grant and Cooperative Agreement Act at 31 U.S.C. §§ 6301-6305 in further support of its holding. Plaintiffs argued that the fire department and Clark County should be considered one entity in support of jurisdiction. Said differently, since Clark County received federal contracts and the fire department was part of the County, a basis for jurisdiction existed. In support of their position, Plaintiffs cited to ***Bd. of Governors of the University of North Carolina v. U.S. Dep't. of Labor***, 917 F.2d 812 (4th Cir. 1990) wherein the circuit court held that "all UNC campuses were subject to compliance laws regardless of their individual lack of contracts with the federal government." However, the court noted that the Fourth Circuit narrowly interpreted 41 C.F.R. § 60-1.5(a)(4) and relied on a state statute which specifically identified the University of North Carolina as one state agency. The *Partridge* court declined to read the Fourth Circuit's decision more broadly and held that Clark County's contracts with the federal government could not be imputed to the fire department so as to give rise to OFCCP jurisdiction.

3. Term of contract

In ***OFCCP v. Keebler Co.***, ARB Case No. 97-127, Case No. 1987-OFC-20 (ARB Dec. 21, 1999), a case arising under Section 503 of the Rehabilitation Act of 1973, the ARB analyzed the contract clause at Section 503 and stated "we are able to see that a contract clause serves as a temporal limit on coverage and that Congress intended to protect all employees of federal contractors from disability discrimination during the life of the contract." Slip op. at 15.

XI. Compliance Review

A. Generally

1. Desk audit not required to precede on-site review

The three-step procedure in Part 60-60 for compliance reviews suggests that the desk audit precede the on-site review. However, the regulations do not require that the audit be completed first if good reason exists for an immediate on-site review. ***OFCCP v. Prudential Insurance Co.***, Case No. 1980-OFCCP19 (Sec'y July 27, 1980).

2. Follow-up "on-site review" permitted

After an on-site investigation of Defendant's affirmative action plan, OFCCP concluded that Defendant discriminated against women and minorities in hiring for entry level jobs in ***OFCCP v. Georgia-Pacific Corp.***, Case No. 1990-OFC-25 (Dep'y Sec'y Dec. 28, 1990). The affected class totaled 24 minorities and three women. Defendant denied the existence of an affected class and, for the first time after the first on-site investigation, it put forth alleged additional reasons for not hiring 11 of the named class members, including alcoholism, obesity, and poor work history. OFCCP, therefore, sought an additional on-site investigation which was denied by Defendant on grounds that OFCCP is entitled to only one on-site investigation. The Deputy Secretary disagreed and concluded that OFCCP was entitled to a second on-site review of records where, as in this case, "particular circumstances warrant a follow-up review."

3. OFCCP's authority to request AAP data post-dating desk audit scheduling letter

In ***USDOL, OFCCP v. Frito-Lay, Inc.***, ARB No. 10-132, ALJ No. 2010-OFC-2 (ARB May 8, 2012), OFCCP commenced a desk audit of the Respondent in 2007. After the Respondent produced Affirmance Action Plan (AAP) data for 2005, 2006 and 2007, OFCCP found a "statistically significant disparity" in the data, and to further investigate the perceived disparity, requested data for 2008 and 2009. The Respondent refused asserting that such data fell outside the scope of the desk audit scheduling letter. OFCCP invoked the expedited hearing procedure seeking compliance with the data request. The ALJ recommended summary decision in favor of the Respondent, essentially on the ground that there was a temporal scope to the 2007 desk audit. On appeal, the ARB reversed the ALJ's recommended dismissal and ordered the Respondent to produce the data.

The ARB found that OFCCP had the discretion to request the AAP data covering activity occurring after the date of the scheduling letter under the specific circumstances of the case - specifically where OFCCP was conducting a disparate impact analysis under E.O. 11246 as amended, based on an objectively determined finding of a statistically significant disparity in the prior years' data. The ARB noted that request for 2008 and 2009 data was narrow, was motivated by the statistically significant disparity finding, and was focused only on AAP plans and data for two years. The ARB ruled that "this is not a case where OFCCP simply extended a desk audit; it is a case where a deficiency motivated the request for more information." USDOL/OALJ Reporter at 6.

The ARB noted that it was not reaching the question of whether OFCCP has the ability to ask for post-Scheduling Letter data in all desk audits or where OFCCP has not objectively identified a concern about compliance.

The ARB also rejected arguments based on inferences drawn from internal OFCCP guidelines and comments to regulatory amendments that desk audits have an inflexible temporal limitation. The ARB ruled that such arguments could not overcome the discretion provided by the regulations themselves.

B. Reporting requirements

The purpose of the reporting requirements are to ensure compliance by government contractors of the affirmative action requirements of Executive Order 11246 and to ensure equal opportunity for all persons without regard to race, color, sex, religion, or national origin. ***HUD v. S.T.C. Construction Co.***, Case No. 1977-OFCCP-5 (ALJ May 22, 1978).

C. Establishing affirmative action plans

Where Defendant had 258 offices in 186 locations world-wide, it was not required to establish separate affirmative action plans for each office. Rather, the ALJ determined that a more reasonable interpretation of the regulations was to require establishment of an affirmative action plan on a regional or national basis. ***Dep't of Labor v. Coldwell Banker & Co.***, Case No. 1978-OFCCP-12 (ALJ June 8, 1979).

For additional discussion of affirmative action plans, *see* Chapters X and XI.

XII. The Rehabilitation Act

For a discussion of applicable jurisdictional issues, including collateral estoppel under the Rehabilitation Act, *see* Chapter III, Jurisdiction.

A. Generally

1. The Americans With Disabilities Act of 1990

The Americans With Disabilities Act of 1990, as amended by the Americans With Disabilities Amendments Act of 2008, contain useful guidance in determining whether an individual's disability substantially limits a major life activity, or whether an individual is "regarded as" having a disability. Therefore, this Desk Reference contains citations to the ADA and ADA Amendments Act.

2. Disability could cause harm to individual's health

The United States Supreme Court has held that a regulation by the Equal Employment Opportunity Commission authorizing an employer's refusal to hire a worker because the worker's disability would cause harm to his own health if hired for the job was valid. Under the facts of ***Chevron U.S.A., Inc. v. Echazabal***, 122 S. Ct. 2045 (2002), a worker's physical examination revealed that he suffered from Hepatitis C and Employer's physicians opined that the worker's condition would be aggravated by continued exposure to toxins at Employer's factory. As a result, Employer properly refused to hire the disabled worker.

3. ADA Amendments Act of 2008—Congressional disagreement with Supreme Court interpretations

In 2008, Congress amended the ADA based on its disagreement with certain Supreme Court holdings. One of the Court's decisions addressed whether a worker's carpal tunnel syndrome rendered her "substantially limited" in performing major life activities. Here, the Supreme Court held that the Court

of Appeals erred in focusing on whether the condition left the worker unable to perform manual tasks associated with her job. In ***Toyota Motor Mfg. Kentucky, Inc. v. Williams***, 122 S. Ct. 681 (2002), an assembly line worker sued Employer for failing to make reasonable accommodations for her when carpal tunnel syndrome precluded her from performing her job. The Court held that, instead of focusing only on the manual tasks performed by the worker on the assembly line, it must be determined whether the worker's "impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives." To establish disability under the ADA, it is insufficient to merely submit a medical diagnosis of an impairment. The Court stated:

> In this case, repetitive work with hands and arms extended at or above shoulder levels for extended periods, the manual task on which the Sixth Circuit relied, is not an important part of most people's daily lives. Household chores, bathing, and brushing one's teeth, in contrast, are among the types of manual tasks of central importance to people's daily lives, so the Sixth Circuit should not have disregarded respondent's ability to do these activities.

Id. at 692-94.

Congress expressed its disagreement with this decision in the ADA Amendments Act of 2008.

First, the definition of "major life activity" was amended. The Americans With Disabilities Act Amendments of 2008 specifically broadened the scope of coverage of the 1990 Americans With Disabilities Act by revising the definition of "major life activity" as follows:

> IN GENERAL.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

MAJOR BODILY FUNCTIONS.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Moreover, the 2008 Amendments set forth mandatory "Rules of Construction Regarding the Definition of Disability" as follows:

> (A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
> (B) The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
> (C) An impairment that substantially limits a major life activity need not limit other major life activities in order to be considered a disability.
> (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
> (E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as –

(I) medication, medical supplies equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
(II) use of assistive technology;
(III) reasonable accommodations or auxiliary aids or services; or
(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

Finally, with the 2008 Amendments addressed the use of "Qualification Standards and Tests Related to Uncorrected Vision" and state the following:

> . . . a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.

42 U.S.C. § 12112(c).

4. Types of adverse actions

In ***OFCCP* v. *Western Electric Co.***, Case No. 1980-OFCCP-29 (ALJ Mar. 4, 1981), *rev'd and remanded on other grounds* (Dep'y Under Sec'y Apr. 24, 1985), the ALJ held that a decision to refuse to hire, to layoff, to terminate, or to put a worker on disability are actions that come under the purview of Section 503 of the Rehabilitation Act.

"Constructive" discharge assumes that the employee was not formally discharged, the issue being whether he was forced to resign or whether he quit voluntarily. A finding of constructive discharge requires proving that working conditions were rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign, *i.e.*, that the resignation was involuntary. ***OFCCP* v. *Mt. Bell Telephone Co.***, Case No. 1987-OFC-25 (Ass't Sec'y Aug. 25, 1994).

5. Affirmative action--requires more than obligation not to discriminate

In ***OFCCP* v. *American Airlines, Inc.***, Case No. 1994-OFC-9 (Ass't Sec'y Apr. 26, 1996), the Assistant Secretary held, that as a matter of logic, the concept of "affirmative action" must include a duty not to discriminate against members of the class protected by Section 503. Nondiscrimination is the starting point; the first step required of any contractor in fulfilling its affirmative action obligation. If a contractor could freely discriminate against employees and applicants for employment on the grounds that they are disabled, and without regard to their ability to perform the job, the contractor could avoid any responsibility for affirmative action. It was noted that the term "affirmative action" is not defined in the Rehabilitation Act but, if it has any "plain meaning," the phrase must clearly prohibit discrimination. Even if the meaning of the term "affirmative action" is unclear, there can be no question that the Secretary's interpretation of it in the Section 503 regulations as prohibiting discrimination and requiring all covered contracts to include an affirmative action clause is reasonable. The Assistant Secretary held that OFCCP may enforce Section

503 through compliance reviews, since affirmative action requires significantly more than simple nondiscrimination and the regulations specify, in considerable detail, the steps required of contractors to meet that obligation. The Assistant Secretary reasoned that, because individual complaints are unlikely to raise issues beyond the narrow question of a contractor's treatment of one person, without an investigation it would be impossible to determine whether a contractor is in compliance with all of its commitments under the affirmative action clause. In addition, it was noted that the affirmative action mandate is broader than a nondiscrimination mandate--the affirmative action requirement of section 503 includes an obligation not to discriminate.

At a minimum, "affirmative action" in favor of handicapped individuals means to avoid discrimination against them. ***OFCCP* v. *Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ Nov. 9, 1982), *remanded on other grounds* (Ass't Sec'y Feb. 24, 1994). An employer's affirmative action obligation includes notifying the discriminatee of the existence of the affirmative action obligations and plan (either directly or indirectly), and how the discriminatee may obtain additional information about that plan. A prospective employer who denies employment has a duty under this law to inform the rejected applicant of the basis for the rejection and to give information on the existence either of alternative employment with it. Moreover, the employer must advise of other possible assignments for which the individual discriminatee might be considered or how the discriminatee may obtain information about other employment opportunities with the employer.

The Rehabilitation Act requires federal contractors to take affirmative action in employing qualified handicapped individuals, including a contractual pledge of non-discrimination. ***OFCCP* v. *Exide Corp.***, Case No. 1984-OFC-11 (Ass't Sec'y Apr. 30, 1991), *vac'd on other grounds*, ***Exide Corp.* v. *Martin***, Civil Action No. 91-242 (E.D. Ky. 1992).

In ***Exxon Corp. v. U.S. Dep't. of Labor***, 2002 WL 356517 (N.D. Tex. Mar. 5, 2002) (Memorandum Opinion and Order), the court concluded that Mr. Strawser was not a "disabled individual" under the Rehabilitation Act because OFCCP was collaterally estopped from litigating the issue as EEOC had unsuccessfully litigated the same issue under the Americans With Disabilities Act before the same court in a case involving the same employer and the same allegedly discriminatory policy. However, the holdings of the ALJ and ARB may be instructive. *See* ***OFCCP v. Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd in part,* (ARB Oct. 28, 1996). Because the regulations require (1) that contractors take affirmative action to employ and advance qualified handicapped individuals, and (2) actual recruitment of handicapped individuals, it is clear that Section 503 obliges a contractor to more than non-discrimination. ***OFCCP* v. *Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd* (ARB Oct. 28, 1996). Under the facts of the case, the ALJ found that Defendant's decision to transfer the worker to a non-safety sensitive job, based on its policy of excluding all recovering alcoholics from safety-sensitive jobs, was unlawful and violated Section 503. Because the policy did not differentiate between those employees who successfully rehabilitated themselves and those who had not, the policy ran afoul of Section 503's mandate of affirmative action and non-discrimination.

6. Employer's knowledge of disability at time of adverse action required

In ***OFCCP v. Goodyear Tire & Rubber Co.***, ARB Case No. 97-039, Case No. 1994-OFC-11 (ARB Aug. 30, 1999), the ARB dismissed OFCCP's complaint on grounds that Defendant did not know of the employee's disability when it discharged him. Under the facts of the case, the employee sustained a brain injury in an automobile accident, but was released to work without restrictions. While on the job, and during the 30 day probationary period, the employee worked as a tire builder. However, the training

coordinator for the position noted that the employee would “wander outside of his work area" and could not remember the job instructions. The employee mentioned to management that he had been in an automobile accident, but he did not state that he had any disabilities. The employee's work was below the required production level and he was discharged. The ARB noted that a person is substantially limited in a major life activity if he is disqualified from employment in his or her chosen field.

Citing to ***EE. Black Ltd. v. Marshall***, 497 F. Supp. 1088 (D. Hi. 1980), the Board noted that three factors must be considered in determining whether a person is disqualified from employment: (1) the number and types of jobs from which the impaired individual is disqualified; (2) the geographical area to which the individual has reasonable access; and (3) the individual's job expectations and training. In this vein, the ARB noted that "[w]here a person is disqualified only from one particular position, but still is able to work in many, if not most, other positions in his chosen field, the employee is not substantially limited in working." Consequently, the ARB held that the employee's disqualification as a tire builder was insufficient to demonstrate that he was substantially limited in working. However, the ARB did find that, based upon a review of the employee's educational and vocational history, the employee's chosen field was manufacturing and he was substantially limited in this major life activity. In this vein, the ARB reasoned that the evidence of record revealed that the employee could perform only two out of 17 jobs at the Goodyear plant. Experts testified that the employee was disqualified from performing "assembly tasks requiring speed, manual dexterity or piecework with production standards." The ARB stated:

> In keeping with the remedial nature of the Rehabilitation Act, we decline to require a plaintiff to provide a detailed job analysis of many jobs in the employee's chosen field, as the ALJ did. Rather, we find that the testimony of Barnes and Dr. Long meets the preponderance of the evidence standard: it is more likely than not that White cannot perform, without accommodation, any assembly line and piecework manufacturing jobs requiring manual dexterity, speed, or production standards.

Although the ARB concluded that OFCCP demonstrated that the employee was limited in a major life activity due to his brain injury, the complaint was dismissed because, at the time the employee was discharged, Defendant did not know about his impairment. The ARB concluded that "[t]he regulations implementing the Rehabilitation Act are clear that an employer has a duty to accommodate only for *known* physical or mental limitations." (emphasis in original).

7. Sovereign immunity of states

In ***Reickenbacker v. Foster, et al.***, 274 F.3d 974 (5th Cir. 2001), the Fifth Circuit held that the "accommodation obligation" imposed by Title II of the Americans With Disabilities Act and Section 504 of the Rehabilitation Act "far exceeds that imposed by the Constitution” and does not apply to states. The court concluded that it was improper for the statutes to require that public entities make "'reasonable modifications'" for handicapped persons as an abrogation of the states' sovereign immunity. Specifically, it concluded that Congress did not validly act through its Fourteenth Amendment § 5 power to abrogate state sovereign immunity. Moreover, because the issue was not raised before the district court, the Fifth Circuit declined to rule on whether the state of Louisiana "waived its sovereign immunity under the Rehabilitation Act by accepting federal monies."

B. Qualified handicapped individual; “substantially limited in a major life activity"

1. Burdens

a. Generally

In order to establish a *prima facie* case of discrimination under Section 503, OFCCP must demonstrate that (1) an individual with a disability, (2) who was "qualified," (3) for a job covered by the Act, (4) was denied an employment opportunity or advantage, (5) on the basis of his or her disability. ***OFCCP v. Holly Farms Foods, Inc.***, Case No. 1991-OFC-15 (ALJ Oct. 24, 1991) (order). *See also* ***Exide Corp. v. Martin***, Civil Action No. 91-242 (E.D. Ky. 1992) (in order to prevail in a Section 503 case, OFCCP must establish a *prima facie* that an "otherwise qualified handicapped" person was rejected for employment under circumstances which give rise to an inference that his rejection was based solely on his mental or physical handicap; if this burden is carried, then Defendant has the burden of proving either that the complainant was not an "otherwise qualified handicapped" person or that he was rejected for reasons other than his mental or physical handicap).

In ***OFCCP* v. *Ford Motor Co.***, Case No. 1980-OFCCP-12 (ALJ Oct. 4, 1985) (editor's note: the ALJ issued a supplemental recommended decision on March 20, 1987), the ALJ held that proof that Defendant has medical guidelines which arbitrarily restrict epileptics to ground level work constitutes a *prima facie* case of employment discrimination. Once OFCCP establishes a *prima facie* case, Defendant has the burden of proving that the individual is not a qualified handicapped individual, or that the person's rejection from work was for reasons other than his handicap.

In ***OFCCP v. Keebler Co.***, ARB Case No. 97-127, Case No. 1987-OFC-20 (ARB Dec. 21, 1999), a case arising under Section 503 of the Rehabilitation Act of 1973, the ARB dismissed the complaint on grounds that OFCCP failed to establish that Defendant's employee was a "qualified handicapped individual" capable of performing the job of production attendant with or without reasonable accommodation. Under the facts of the case, OFCCP alleged a violation of 41 C.F.R. § 60-741(a) based on Defendant's failure to take affirmative action on the employee's behalf and, in particular, Defendant adhered to "physical job qualification requirements which screened out DeAngelis (a production attendant) as a qualified handicapped individual but were not job related or consistent with business necessity or the safe performance of the job, and . . . by failing to make reasonable accommodation to DeAngelis' physical limitations." The ARB held that OFCCP had the burden of production and persuasion to establish, by a preponderance of the evidence, that Keebler committed the violations alleged. The testimony of DeAngelis' co- workers and supervisors persuaded the ARB that the epileptic seizures placed her "in obviously helpless states near moving conveyor belts, in the path of a tow motor, (and) with her hand inches from 300 (degree) plus liquid glue." Slip op. at 30. In allocating the burdens of proof, the ARB stated:

> OFCCP had the burden to produce credible evidence that DeAngelis' on-the- job seizures did not impair her ability to perform her work safely with or without accommodation. If Keebler did not rebut OFCCP's showing with credible evidence that the production attendant position jeopardized DeAngelis' safety, then OFCCP would win (assuming business necessity was not an issue in play).

Slip op. at 31. Moreover, the ARB stated that, if the evidence was in equipoise, OFCCP would lose.

The issue presented to the Board was whether DeAngelis' continued work posed a "'reasonable possibility of substantial harm.'" The factors to be considered in determining this issue are: (1) duration

of the risk; (2) nature and severity of the potential harm; (3) likelihood that the potential harm will occur; and (4) imminence of the potential harm. Slip op. at 32. The ARB noted that the employee never sought accommodation for her epilepsy; rather, she argued that she could perform the job of a production attendant and "her epilepsy was irrelevant to her job performance." Slip op. at 34. However, the ARB concluded that, because the employee's epileptic seizures placed her at high risk of serious harm but the employee argued that the condition was irrelevant to her work performance, Keebler did not commit a violation of the Act in firing her from the position of production attendant. Moreover, the ARB declined to find a violation based on OFCCP's argument that Defendant inadequately investigated the employee's medical and work history prior to firing her. The Board concluded that OFCCP failed to establish that DeAngelis was a qualified handicapped individual based on her own testimony that she was not handicapped.

b. Dual motives

In order to invoke the protection of the Rehabilitation Act, OFCCP must demonstrate that the employee is a qualified handicapped individual within the meaning of 41 C.F.R. § 60-741.2. ***OFCCP* v. *Norfolk and Western Railway Co.***, Case No. 1990-OFC-1 (ALJ June 26, 1991). In this vein, OFCCP has the burden of proving that worker's handicap prevents him or her from performing the demands of a particular job and that it forecloses, generally, the type of employment involved, assuming that all employers offering the job would use the same requirement or screening process.

Under the facts of ***Norfolk and Western***, OFCCP met its burden of proving that the employee's monocular condition substantially limited his ability to find work as a brakeman/conductor or similar employment. Defendant rejected the worker because of his monocular condition and it was properly assumed that all employers offering the job would reject him on that basis. However, on review of the evidence presented, the ALJ determined that legitimate and discriminatory motives were also presented for the adverse employment action. In a dual motive case, an "inference" of discrimination is not sufficient to shift the burden Defendant to demonstrate that it would have discharged the worker, even if he had not been handicapped. Rather, in a dual motive case, the burden shifts to Defendant to prove that it would have discharged the worker, even if he had not been handicapped, only after the trier of fact concludes that the contractor acted for a legitimate reason *and* because the employee was handicapped. Defendant may avoid liability only by establishing that it would have made the same decision because of legitimate management reasons.

c. Worker argued not handicapped; complaint dismissed

In ***OFCCP v. Keebler Co.***, ARB Case No. 97-127, Case No. 1987-OFC-20 (ARB Dec. 21, 1999), a case arising under Section 503 of the Rehabilitation Act of 1973, the ARB dismissed the complaint on grounds that OFCCP failed to establish that Defendant's employee was a "qualified handicapped individual" capable of performing the job of production attendant with or without reasonable accommodation. Under the facts of the case, OFCCP alleged a violation of 41 C.F.R. § 60-741(a) based on Defendant's failure to take affirmative action on the employee's behalf and, in particular, Defendant adhered to Aphysical job qualification requirements which screened out DeAngelis (a production attendant) as a qualified handicapped individual but were not job related or consistent with business necessity or the safe performance of the job, and . . . by failing to make reasonable accommodation to DeAngelis' physical limitations." The ARB concluded that OFCCP failed to establish that DeAngelis was a qualified handicapped individual based on her own testimony that she was not handicapped.

2. Major life activity, defined

Maintaining consciousness, hearing, seeing, and, for employees who lift or perform extended driving, physical strength and spinal health are major life activities necessary for employability. Moreover, when an employer discriminates based on criteria that would disqualify the individual from employment in the entire industry, this constitutes a substantial interference with a major life activity. ***OFCCP* v. *Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ Nov. 9, 1982), *remanded on other grounds* (Ass't Sec'y Feb. 24, 1994). *See* discussion of ADA Amendments Act of 2008, *supra*.

In ***Exxon Corp. v. U.S. Dep't of Labor***, 2002 WL 356517 (N.D. Tex. Mar. 5, 2002) (Memorandum Opinion and Order), the court concluded that Mr. Strawser was not a "disabled individual" under the Rehabilitation Act because OFCCP was collaterally estopped from litigating the issue as EEOC had unsuccessfully litigated the same issue under the Americans With Disabilities Act before the same court in a case involving the same employer and the same allegedly discriminatory policy. However, the holdings of the ALJ and ARB may be instructive. *See* ***OFCCP v. Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd in part,* (ARB Oct. 28, 1996). In ***OFCCP* v. *Exxon Corp.***, Case No. 1992-OFC-4 (ARB Oct. 28, 1996), an impairment may affect a major life activity without significantly limiting it.

Special considerations apply where, as here, the major life activity is "working." In this context, "substantially limits" means being restricted in the ability to perform either (1) a class of jobs, or (2) a broad range of jobs in various classes. A "class of jobs" would include jobs requiring similar training, knowledge, skills and abilities. 29 C.F.R. Part 1630, App. at 403. On the other hand, citing to ***E.E. Black, Ltd.* v. *Marshall***, 497 F. Supp. 1088, 1101-1102 (D. Hi. 1980) (substantial limitation means more than an inability to perform one particular job but less that a general inability to work; evaluation should focus on the number and the type of jobs from which the employee is disqualified), the ARB held that an inability to perform a single job does not qualify as a substantial limitation. The Board also held that major life activities may include activities other than "working" and are those basic activities that the average person in the general population can perform with little or no difficulty, *e.g.*, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, sitting, standing, lifting, reaching, thinking, reading, concentrating and interacting with others.

3. Employee *regarded as* a handicapped individual

Importantly, the ADA Amendments Act of 2008 stressed the importance of broad coverage of its provisions to prohibit discrimination against persons with disabilities. The phrase "regarded as having such an impairment" is defined under the Amendments as:

> (A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
>
> (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

In ***Exxon Corp. v. U.S. Dep't of Labor***, 2002 WL 356517 (N.D. Tex. Mar. 5, 2002) (Memorandum Opinion and Order), the court concluded that Mr. Strawser was not a "disabled individual" under the

Rehabilitation Act because OFCCP was collaterally estopped from litigating the issue as EEOC had unsuccessfully litigated the same issue under the Americans With Disabilities Act before the same court in a case involving the same employer and the same allegedly discriminatory policy. However, the holdings of the ALJ and ARB may be instructive. *See* ***OFCCP v. Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd in part,* (ARB Oct. 28, 1996). Based on case law, legislative history, and the regulations, in ***OFCCP v. Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd* (ARB Oct. 28, 1996), the ALJ concluded that Complainant, a recovering alcoholic, could not be considered an "individual with handicaps" under 29 U.S.C. § 706(8)(B)(ii) because his alcoholism had not substantially limited his major life activities. Nonetheless, the ALJ concluded that Complainant was considered a handicapped individual under 29 U.S.C. § 7(6)(C) (1976), *amended by* 29 U.S.C. § 706(8)(B)((1986) because "individuals may be discriminated against merely because they are *regarded* as handicapped." Slip op. at 26 (citation omitted).

The ARB agreed that an employee may fall under subpart (iii) of the definition of individual with a disability, if s/he has an impairment that does not substantially limit a major life activity, but the impairment is *regarded as* being substantially limiting. Individuals fall into this category if they have an impairment which is substantially limiting only because of attitudes of others toward the impairment. For example, a job applicant's facial scar may be substantially limiting because the prospective employer believes it will dissuade customers. Said differently, an individual with no impairment may be regarded as having a substantially limiting handicap based on an employer's mistaken belief that an individual is physically or mentally impaired or based on genetic information relating to illness, disease or disorders. Citing to ***School Board of Nassau County* v. *Arline***, 480 U.S. 273, 283 (1987), the ARB noted that, by including the "regarded as" criterion, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."

To determine whether a person is handicapped under the statutory definition of being regarded as having such impairment depends upon perceptions of the worker at the time of the employment discrimination rather than the discriminatee's actual physical conditions and capacities. ***OFCCP* v. *Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ, Nov. 9, 1982), *remanded on other grounds* (Ass't. Sec'y., Feb. 24, 1994). *See also* ***E.E. Black, Ltd.* v. *Marshall***, 497 F. Supp. 1088 (D. Hi. 1980); ***OFCCP* v. *Texas Utilities Generating Co.***, Case No. 1985-OFC-13 (ALJ Mar. 2, 1988), *remanded on other grounds* (Ass't Sec'y Aug. 25, 1994) (applicants were qualified individuals with disabilities where Defendant denied them employment because of its perception that they were handicapped based on back x-ray results, whether or not the impairment actually existed); ***OFCCP* v. *Central Power & Light Co.***, Case No. 1982-OFC-5 (ALJ Mar. 30, 1987).

In ***OFCCP* v. *Louisville Gas & Electric Co.***, Case No. 1988-OFC-12 (ALJ Jan. 29, 1990), *aff'd,* (Ass't Sec'y Jan. 14, 1992), the Assistant Secretary held that, under ***Jasany* v. *U.S. Postal Service***, 755 F.2d 1244 (6th Cir. 1985), the burden is on Plaintiff to establish, as part of its *prima facie* case, the existence of an impairment that substantially limits a major life activity. The burden then shifts Defendant to demonstrate that challenged criteria are job related, required by business necessity, and reasonable accommodation is not possible. Under the facts of *Louisville Gas*, the Assistant Secretary held that Plaintiff must establish that the employee with perceived lumbar lordosis was a qualified handicapped individual. It was determined that Defendant failed to gather sufficient information as required under ***Mantolete* v. *Bolger***, 767 F.2d 1416 (9th Cir. 1985), to make a reasoned judgment on whether the employee's perceived impairment (lumbar lordosis) prevented him from performing the essential requirements of the job without a reasonable probability of substantial harm to himself or others. Thus, Defendant failed to carry its burden and establish that employee was not a qualified handicapped individual.

4. Ability at the time of employment decision relevant

a. Generally

Defendant is entitled to make its employment determination on the basis of the worker's condition at the time of the testing with regard to the job requirements and it is not required to delay a hiring decision on the possibility that an applicant may become qualified. ***OFCCP* v. *Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ, Nov. 9, 1982), *remanded on other grounds* (Ass't Sec'y Feb. 24, 1994).

Evidence regarding complainant's physical condition after the time he was placed on disability pension is not relevant as it did not form the basis for Defendant's action regarding the complainant. ***OFCCP v. American Telephone and Telegraph Co. (AT&T)***, Case No. 1992-OFC-5 (ALJ Apr. 23, 1995).

a. Employer must reconsider decision on request if condition has changed

An employer should not be allowed to shield itself in perpetuity from its obligations under Section 503 by arguing that past circumstances rendered the employee disqualified. Thus, on request, an employer is required to reconsider its employment decision after the passage of time when the employee's handicap is subject to change over time. ***OFCCP v. CSX Transportation, Inc.***, Case No. 1988-OFC-24 (Ass't Sec'y Oct. 13, 1994).

5. Assessment of disability must be based on mitigated condition

The 2008 Americans With Disabilities Act Amendments set forth mandatory "Rules of Construction Regarding the Definition of Disability" as follows:

> (A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
> (B) The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
> (C) An impairment that substantially limits a major life activity need not limit other major life activities in order to be considered a disability.
> (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
> (E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as –
>
> > (I) medication, medical supplies equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
> > (II) use of assistive technology;
> > (III) reasonable accommodations or auxiliary aids or services; or
> > (IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

The foregoing amendments were enacted by Congress to broaden the scope of coverage of the ADA and to expressly depart from certain U.S. Supreme Court decisions related to determining whether a person has a "disability." The following cases were issued prior to the ADA Amendments.

a. Myopia

In ***OFCCP v. Delta Airlines, Inc.***, Case No. 1994-OFC-8 (ALJ Mar. 20, 1996), OFCCP argued that Defendant's vision standard for flight officers violated Section 503 of the Rehabilitation Act and that the vision condition at issue in the instant case--myopia-- constituted "an impairment under the Act because it is a refractive error that without correction prevents a pilot from receiving a first or second class medical certificate from the FAA to fly commercial airlines, thereby substantially limiting a myopic pilot's employability." Slip op. at 6. The ALJ recommended a finding that myopia is not an impairment under the Act because the condition is an average characteristic shared by many people. Alternatively, the ALJ found that even if myopia is an impairment, it is not disabling because it does not substantially limit an individual's employability." Slip op. at 7-8 (citing ***Welsh v. City of Tulsa, Oklahoma,*** 977 F.2d 1145, 1419 (10th Cir. 1992)).

The ALJ observed that, if OFCCP's position were accepted, a large percentage of Americans would be considered disabled. It was noted that the courts focus on whether eyesight could be improved or corrected when determining whether an individual is disabled. Consequently, the ALJ found that myopic pilots are only disqualified from working as pilots for the Delta Airlines or for the military. He rejected OFCCP's contention that it must be assumed that all airlines have the same requirements for their flight officers. *See* ***E.E. Black, Ltd. v. Marshall,*** 497 F. Supp. 1088 (D. Haw. 1980). Thus, the ALJ found that ion 503 of the Rehabilitation Act of a commercial airline pilot for Defendant did not prove that the individual is disabled within the meaning of the Act. The ALJ also found that myopic pilots are not regarded by Defendant as having an impairment, noting that Delta Airlines: (1) only disqualified new hires for myopia; (2) retained pilots whose vision deteriorated during their tenure; and (3) Defendant did not question the applicants' ability to obtain employment in the airline industry (in fact, the applicants were working as flight officers for other commercial airlines). The ALJ compared the facts in the instant case to those facts presented in ***Tudyman v. United Airlines***, 608 F. Supp. 739 (D.C. Cal. 1984) (overweight flight attendants).

In sum, the ALJ held that "[m]yopia is simply a commonplace characteristic that does not pose a disadvantage to individuals affected by it in their search for employment. Likewise, even if myopia is considered an impairment, it is not a disability because it does not substantially limit the complainant pilots' employability. As their vision is correctable to 20/20, neither [applicant is] disqualified from any position except that of a flight officer with [Defendant]." Slip op. at 11-12.

The ARB dismissed the complaint on appeal in ***OFCCP v. Delta Airlines, Inc.***, ARB Case No. 96-088, Case No. 1994-OFC-8 (ARB Sept. 28, 1999). The ARB noted that Delta Airlines would not hire two pilots who had less than 20/20 vision. Although the complainant pilots were myopic, their vision could be corrected to 20/20 or better with lenses. Citing to ***Sutton v. United Air Lines, Inc.***, 119 S. Ct. 2139 (1999), a case arising under the Americans With Disabilities Act, it was noted that the Court held that a "'determination of whether an individual is disabled should be made with reference to measures that

mitigate the individual's impairment, including . . . eyeglasses and contact lenses.'" The *Sutton* Court held that, because the position of global airline pilot is a single job, the allegation that the Defendant regards the pilots' poor vision as precluding them from holding a global airline pilot's position does not support a claim that the pilot has a substantially limiting impairment. OFCCP agreed that the ARB should dismiss its complaint based on the indistinguishable holding in *Sutton*.

b. Radial keratomy

In ***OFCCP v. United Airlines, Inc.***, ARB Case No. 97-024, Case No. 1994-OFC-1 (ARB July 25, 2000), a case arising under Section 503(a) of the Rehabilitation Act at 29 U.S.C. § 793(a), the ARB affirmed the ALJ's dismissal of OFCCP's complaint which alleged that an airline pilot was *"*an individual with a disability*"* who was discriminated against when the airline prohibited him from flying a 747 commercial aircraft. The pilot had undergone radial keratomy surgery on both eyes, which returned his vision to normal. However, he was disqualified from serving as a pilot, several years later after United Airlines acquired certain routes from PanAm, because of the scarring left by the surgery. OFCCP argued that the pilot was disabled under the Act because his uncorrected vision was so poor as to preclude him from flying a plane. However, the ARB disagreed and stated the following:

> The record in this case shows that even if (the pilot's) allegedly impaired vision had been severe enough to disqualify him from commercial aircraft piloting positions generally, (the pilot) could still have flown other aircraft and served as a pilot instructor.
>
> . . .
>
> (The pilot's) disqualification from a single job cannot be cast into a larger mold by, as OFCCP suggests, called is a disqualification from a profession.

As a result, the ARB concluded that the pilot was not substantially limited in a major life activity. Citing to the Supreme Court's decision in ***Sutton v. United Air Lines, Inc.***, 527 U.S. 471, 477 (1999), the ARB noted that the pilot's impairment *"*must be judged in its mitigated state," *i.e.* after corrective surgery. The ARB agreed that OFCCP had the burden to establish a *prima facie* case that the pilot's impairment substantially limited his major life activities, which OFCCP failed to do. The ARB found that it was the pilot's scars, and not his myopia, which disqualified him from serving as a pilot for safety reasons. As a result, the ARB dismissed "OFCCP's unexplained position here that there need be no causal connection between the recorded disability and the employer's adverse action" as this untenable position would effectively "prohibit employers from disqualifying individuals based on a non- disabling condition whenever the worker can show he or she had a disability some time in the past." Slip op. at 10.

C. Business necessity for job requirements

1. Defendant's burden to establish

In ***OFCCP v. Central Power & Light Co.***, Case No. 1982-OFC-5 (ALJ Mar. 30, 1987), if OFCCP demonstrates that Defendant used physical job qualifications that resulted in screening out qualified handicapped individuals, Defendant has the burden of proving that its job qualifications were "directly connected with, and substantially promote business necessity and safe (job) . . . performance." *See also* ***Bentivegna v. U.S. Dep't of Labor***, 694 F.2d 619, 622 (9th Cir. 1982); ***E.E. Black, Ltd. v. Marshall***, 497 F. Supp. 1088, 1103 (D. Hi. 1980) (the regulations place the burden of proof as to business necessity on

Defendant). The ALJ further held that Defendant's argument that there was a possibility that persons with radiographic spinal anomalies would develop future chronic back problems was not sufficient to meet its burden of showing that the job qualifications, which rejected all applicants with such conditions, were job related and consistent with business necessity and safe performance.

In ***OFCCP* v. *Texas Industries, Inc.***, Case No. 1980-OFCCP-28 (Ass't Sec'y Jan. 27, 1995), the Assistant Secretary held that, since Defendant admittedly rejected an employee because of her disability, the issue was not whether there was an intent to discriminate, but whether the contractor's qualification standard, which was discriminatory, was justified as being job related and consistent with business necessity and safety. Where Defendant establishes the presence of the likelihood, seriousness and imminence of injury to a sufficient degree, then it has met its burden of proving job relatedness and consistency with business necessity and safe performance.

In ***OFCCP* v. *Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ Nov. 9, 1982), *remanded on other grounds* (Ass't Sec'y Feb. 24, 1994), it was held that a general requirement of the business necessity exception is that a factual basis must exist for believing that generally all or substantially all members of the discriminatee class would be unable to perform the duties. Moreover, the job requirement which the handicapped worker is unable to perform must be of extremely high and crucial importance. The standard for determining the presence of business necessity requires a comparative analysis of the impact on employment opportunities, national productivity, and public safety. Where the public safety risk is very high, the other two considerations must yield; where it is not, they prevail.

If Defendant admits that its decision to terminate the complainant's employment was based on a handicapping condition, Defendant has the burden of proving that its discriminatory action is consistent with business necessity and the safe performance of the duties of the complainant's job. ***OFCCP* v. *American Commercial Barge Line***, Case No. 1984-OFC-13 (ALJ Sept. 30, 1986), *rev'd on other grounds*, (Ass't Sec'y Apr. 15, 1992).

DEFENDANT MUST ESTABLISH THAT A SUBSTANTIAL CORRELATION EXISTS BETWEEN SAFETY AND ITS EXCLUSION OF THE COMPLAINANT FROM EMPLOYMENT

In ***OFCCP v. Yellow Freight Systems, Inc.***, Case No. 1982-OFC-2 (ALJ Sept. 30, 1986), *remanded on other grounds* (Ass't Sec'y Oct. 6, 1993), the ALJ noted that the Act does not proscribe pre-employment physical examinations and it does not prohibit the use of the results of such examinations to exclude from employment qualified handicapped individuals. However, he stated that, if physical requirements exclude such persons from employment, these requirements must be consistent with business necessity and safe job performance. Once OFCCP has established a *prima facie* claim of discrimination, then the burden of proof shifts to Defendant to rebut this inference by either (1) establishing that the physical requirement is job related and consistent with business necessity and safe job performance, or (2) demonstrating that the decision was based on prior poor performance.

Under ***Jasany* v. *U.S. Postal Service***, 755 F.2d 1244 (6th Cir. 1985), once it is established that a worker suffers from an impairment that substantially limits a major life activity, the burden shifts to Defendant to demonstrate that requisite qualifications for the job are job related and required by business necessity, and that reasonable accommodation is not possible. ***OFCCP* v. *Louisville Gas & Electric Co.***, Case No. 1988-OFC-12 (ALJ Jan.29, 1990), *aff'd* (Ass't Sec'y Jan. 14, 1992).

It is Defendant's burden under the regulations to establish the "business necessity" exception to accommodating a qualified handicapped individual. In this vein, the contractor is obligated to have scheduled reviews of job requirements to determine which requirements are necessary for job performance, business necessity, or safe performance of the job. ***E.E. Black, Ltd.* v. *Marshall***, 497 F. Supp. 1088, 1103 (D. Hi. 1980).

2. Defendant must adequately research employee's condition

a. Defendant has right to medical records/releases

Defendant had the right to seek more detailed medical records from a manic depressive employee to enable it to make an employment decision consistent with business necessity and the safe performance of the job. ***OFCCP v. American Commercial Barge Line Co.***, Case No. 1984-OFC-13 (Ass't Sec'y Apr. 15, 1992).

A contractor may impose "qualification requirements" on employees, even if they tend to screen out qualified handicapped individuals, provided that the requirements are job related and consistent with business necessity and safe performance of the job. Thus, the court held that Defendant did not violate Section 503 by requesting that an employee, who claimed to be epileptic, produce a release from his doctor stating that he could work on dangerous equipment and under dangerous conditions. Defendant had the legal right to demand that complainant meet the job requirements, such as obtaining a release to ensure that he could safely return to the admitted hazardous conditions in the plant. ***Exide Corp. v. Martin***, Civil Action No. 91-242 (E.D. Ky. 1992).

b. Failure to gather sufficient information

In ***OFCCP* v. *Louisville Gas & Electric Co.***, Case No. 1988-OFC-12 (ALJ Jan. 29, 1990), *aff'd*, (Ass't Sec'y Jan. 14, 1992), the Assistant Secretary held that, under ***Jasany* v. *U.S. Postal Service***, 755 F.2d 1244 (6th Cir. 1985), the burden is on Plaintiff to establish, as part of its *prima facie* case, the existence of an impairment that substantially limits a major life activity. The burden then shifts Defendant to demonstrate that challenged criteria are job related, required by business necessity, and reasonable accommodation is not possible. Under the facts of ***Louisville Gas***, the Assistant Secretary held that Defendant failed to gather sufficient information as required under ***Mantolete* v. *Bolger***, 767 F.2d 1416 (9th Cir. 1985), to make a reasoned judgment on whether the employee's perceived impairment (lumbar lordosis) prevented him from performing the essential requirements of the job without a reasonable probability of substantial harm to himself or others. Thus, Defendant failed to carry its burden and establish that employee was not a qualified individual with a disability.

3. "Business necessity" established

The business necessity defense was established when Defendant demonstrated that the creation of a suitable accommodation would disrupt normal operations, violate Defendant's collective bargaining agreement, and disrupt its relationship with the union and its employees. ***OFCCP* v. *American Airlines***, Case No. 1979-OFCCP-2 (ALJ June 30, 1980), *aff'd* (Dep'y Under Sec'y May 2, 1985).

4. "Business necessity" not established

INDIVIDUALIZED INQUIRY REQUIRED

In ***Exxon Corp. v. U.S. Dep't of Labor***, 2002 WL 356517 (N.D. Tex. Mar. 5, 2002) (Memorandum Opinion and Order), the court concluded that Mr. Strawser was not a "disabled individual" under the Rehabilitation Act because OFCCP was collaterally estopped from litigating the issue as EEOC had unsuccessfully litigated the same issue under the Americans With Disabilities Act before the same court in a case involving the same employer and the same allegedly discriminatory policy. However, the holdings of the ALJ and ARB may be instructive. *See* ***OFCCP v. Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd in part,* (ARB Oct. 28, 1996). In ***OFCCP* v. *Exxon Corp.***, Case No. 1992-OFC-4 (ARB Oct. 28, 1996), the ARB affirmed the ALJ's finding that the complainant was an individual with a disability because Defendant regarded him as having an impairment which substantially limited a major life activity. The ARB stated that it must be determined whether the worker's "disability" poses a direct threat to property or safety. The phrase "direct threat" has been defined under the American with Disabilities Act ("ADA") to mean a significant risk of substantial harm to health or safety that cannot be eliminated or reduced by reasonable accommodation. Such a determination requires an individualized assessment of the person's present ability to perform the essential function of the job safely. Factors germane to determining whether an individual poses a "direct threat" include the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur and the imminence of harm. *See* 29 C.F.R. § 1630.2(r).

According to the ARB, the complainant did not come within the statutory exemption of alcoholics whose current use posed a direct threat, because the record demonstrated that alcohol use or abuse did not affect his employment. Indeed, the record evidenced that Complainant made a strong recovery and his risk of relapse was low. Complainant's records of prior alcohol consumption, of public drunkenness, of adverse marital effects, and diagnosis and history of medical treatment for alcoholism constituted a sufficient record of a substantially limiting impairment to satisfy the definition of individual with a disability.

The ARB overruled the ALJ's conclusion and found Complainant to be an individual with a disability under 29 U.S.C. § 706(8)(B)(ii) in that he has a record of an impairment that substantially limited major life activities other than "working." The ARB further observed that "the nature of the disease of alcoholism requires that there be a continuum of treatment and that the alcoholic be permitted some opportunity for failure in order to come to the acceptance of his disease which is the critical element of his cure." Congress excluded from coverage only those alcoholics whose current use of alcohol prevented them from performing the duties of the job or whose employment, because of current alcohol abuse, posed a direct threat to others. 29 U.S.C. § 706(8)(C)(v).

5. Likelihood and imminence of injury

a. Generally

To successfully raise a risk of future injury defense under Section 501, Defendant must establish that there is a reasonable probability of substantial harm, not merely an elevated risk of harm. The standard under Section 503 is the same. ***OFCCP* v. *Keebler Co.***, Case No. 1987-OFC-20 (ALJ July 20, 1995), *aff'd* (ARB Sept. 4, 1996). In *Keebler*, it was noted that the Secretary of Labor adopted the two-part test for dual motive discharge cases set forth in ***Mt. Healthy City School District* v. *Doyle***, 429 U.S. 274 (1977). Specifically, once Plaintiff has established that the protected activity played a role in Defendant's adverse

decision, the burden shifts to Defendant to persuade the court by a preponderance of the evidence that it would have discharged the plaintiff even if the protected activity had not occurred.

In ***OFCCP* v. *Central Power & Light Co.***, Case No. 1982-OFC-5 (ALJ Mar. 30, 1987), Defendant's evidence that there is a possibility that persons with radiographic spinal anomalies will develop future chronic back problems was insufficient to meet its burden of establishing that its job qualifications, which required rejecting all applicants with those conditions, were job related and consistent with business necessity and safe performance.

In ***E.E. Black, Ltd.* v. *Marshall***, 497 F. Supp. 1088 (D. Hi. 1980), the court held that the possibility of future injury may, in some cases, properly be used to screen out qualified handicapped individuals. However, the fact that a complainant's impairment may impose a risk of worker's compensation claim is not, standing alone, an acceptable justification for imposing a particular job requirement. The court held that consideration of the significance of the worker's condition and the nature of the evidence presented in the administrative proceedings would be required.

b. Defendant's burden to establish

1. Generally

Under Section 503 of the Rehabilitation Act, Defendant must establish a reasonable probability of substantial harm to establish a business necessity defense. ***OFCCP* v. *Norfolk and Western Railway Co.***, Case No. 1988-OFC-4 (ALJ June 28, 1989), *stipulated dismissal* (ALJ Nov. 13, 1991). The fact that neither physician who testified could specify how imminent the danger of stroke or congestive heart failure would have been for the complainant, had she been hired, was not dispositive. Rather, the appropriate standard of reasonable probability of substantial harm must be considered in light of the fact that congestive heart failure and stroke are life threatening. In this vein, an employer meets the burden of demonstrating a reasonable probability of substantial harm when evidence is offered that a physician concludes that the complainant was at risk of a stroke or congestive heart attack in the short term. *See also* ***OFCCP v. Texas Industries, Inc.***, Case No. 1980-OFCCP-28 (Sec'y June 7, 1988) (the fact-finder must determine whether the worker's condition would result in a "reasonable probability of substantial harm"; Defendant's preference is insufficient to carry this burden; work and medical histories must be evaluated in conjunction with physical requirements for the job).

2. Failure to gather sufficient information

In ***OFCCP v. Louisville Gas & Electric Co.***, Case No. 1988-OFC-12 (ALJ Jan. 29, 1990), *aff'd*, (Ass't Sec'y Jan. 14, 1992), the ALJ held that Defendant failed to gather sufficient information, as required under ***Mantolete* v. *Bolger***, 767 F.2d 1416 (9th Cir. 1985), to make a reasoned judgment regarding whether an employee's perceived impairment (lumbar lordosis) prevented him from performing the essential requirements of the job without a reasonable probability of substantial harm to himself or others. Thus, Defendant failed to carry its burden in establishing that the employee was not a qualified handicapped individual. It was further determined that, if Defendant had demonstrated that the employee was not qualified to perform the essential functions of the job without a reasonable probability of substantial harm, then the fact-finder would have been required to determine whether reasonable accommodation could be made, without undue hardship, which would enable the applicant to perform the essential requirements of the job without a reasonable probability of substantial injury.

In ***OFCCP v. Yellow Freight Systems, Inc.***, Case No. 1984-OFC-17 (ALJ Nov. 6, 1986), *aff'd* (Ass't Sec'y July 27, 1993), the ALJ held that the factors to be considered in determining whether there is a reasonable probability of substantial harm are the likelihood and imminence of injury. This determination should not be based merely on Defendant's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. Defendant must also consider the individual's work history and comprehensive medical history.

The automatic use of x-ray results to disqualify applicants because of potential back injuries, without sufficient examination of the individuals' actual medical histories and capabilities to perform the job in question, is a violation of Section 503 of the Rehabilitation Act. ***OFCCP* v. *Texas Utilities Generating Co.***, Case No. 1985-OFC-13 (ALJ Mar. 2, 1988), *remanded on other grounds* (Ass't Sec'y Aug. 25, 1994).

c. Factors to be considered; individualized consideration required

i. Generally

In ***Exxon Corp. v. U.S. Dep't of Labor***, 2002 WL 356517 (N.D. Tex. Mar. 5, 2002) (Memorandum Opinion and Order), the court concluded that Mr. Strawser was not a disabled individual" under the Rehabilitation Act because OFCCP was collaterally estopped from litigating the issue as EEOC had unsuccessfully litigated the same issue under the Americans With Disabilities Act before the same court in a case involving the same employer and the same allegedly discriminatory policy. However, the holdings of the ALJ and ARB may be instructive. *See* ***OFCCP v. Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd in part,* (ARB Oct. 28, 1996).

Pertinent considerations in determining whether there is a "reasonable probability of substantial harm" include the nature, duration and severity of risk as well as the probability that the risk would cause varying degrees of harm. Exxon's categorical exclusion of all individuals treated previously for alcohol abuse does not meet this individualized examination standard. ***OFCCP* v. *Exxon Corp.***, Case No. 1992-OFC-4 (ARB Oct. 28, 1996). Because OFCCP established that the complainant, a recovering alcoholic, was a qualified individual with a disability who was transferred because of that disability, Defendant must demonstrate that the worker's continued employment in the designated position would pose a "reasonable probability of substantial harm" and "not merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports." ***Mantolete* v. *Bolger***, 767 F.2d 1416, 1422-1423 (9th Cir. 1985).

Citing to ***E.E. Black, Ltd.* v. *Marshall***, 497 F. Supp. 1088, 1103 (D. Hi. 1980) (non-imminent risk of future injury . . . does not make an otherwise capable person incapable"), the ARB held that, absent imminent risk of injury, the only material question is whether the individual is capable of performing the duties of the job. Under the facts of the case before it, the ARB concluded that the complainant would pose an imminent risk only if he currently abused alcohol or if he were at high risk of relapse. Neither of these conditions was established by Defendant. In addition, the ARB reaffirmed the likelihood, imminence, and severity of injury as pertinent considerations for assessing the reasonable probability of substantial harm. The ARB concurred with the ALJ's determination that, in assessing the probability and severity of potential harm, Defendant's "tenuous prediction" of an accident resulting in substantial loss of human life and/or severe environmental damage was contingent upon an emergency and a relapse to drinking occurring simultaneously. As the probability of an emergency and a relapse occurring separately was low, the probability of the two occurring together to result in inappropriate action and catastrophe was "exponentially lower."

Moreover, the ALJ found that the probability of harm was reduced even further if Defendant monitored the complainant's condition through periodic medical examination and random testing. Therefore, in determining whether employment of an individual would pose a reasonable probability of substantial harm, the Rehabilitation Act requires an examination of the *individual's* medical and employment histories. Determinations may not be premised on general medical reports except in cases of the most apparent nature. Thus, substitution of categorical exclusion for individual evaluation requires that all or substantially all individuals with the disability be unable to perform the job safely.

The ARB rejected Defendant's argument that a relapse is almost impossible to predict and concurred with the ALJ, who observed that "[t]he evidence establishes that alcoholics, unlike epileptics and diabetics, experience warning signs before they relapse; that the longer an alcoholic remains sober, the less likely he is to relapse; that job problems are the last to appear when an alcoholic relapses, and thus a progression toward alcoholic drinking can be detected long before any job problems appear." *Id.* at 15. The ARB concurred with the ALJ and held that Exxon's policy of categorical exclusion of all individuals who have had a substance abuse problem from 1800 designated positions, offered a disincentive for "self-identifying" and seeking treatment.

The Board noted that there was no incentive under the policy for individuals who (1) are in current need of rehabilitation, (2) have "self-reformed," or (3) have undergone rehabilitation in the past, to come forward and identify themselves. Moreover, it was noted that the most reliable predictor of how Complainant would perform his job tomorrow was how he performed his job over the past nine years. The ARB held that "categorical exclusion [of all rehabilitated] alcoholics [from positions designated safety-critical] is an expedient means of avoiding risk where individualized assessment would distinguish between those persons who have rehabilitated themselves successfully and those who have not." At bottom, Exxon's "never-ever" policy was based on a judgment that rehabilitated alcoholics were forever disposed to relapse, certainly a "myth, fear or stereotype" associated with alcoholism. In the instant case the reality was the contrary -- for an individual like complainant who maintained sobriety for years, any fear of relapse was not well-grounded. Defendant's "across-the-board policy prohibiting rehabilitated individuals from holding designated position" was "impermissibly inflexible" because it "[did] not differentiate between those who have been successful in rehabilitating themselves and those who have not." It thus violated the Section 503 "mandate of affirmative action and non-discrimination in employment" and, absent application of the policy "on a case-by case basis," Exxon risked future violation.

ii. Risk of higher premiums

In ***E.E. Black, Ltd.* v. *Marshall***, 497 F. Supp. 1088 (D. Hi. 1980), the court held that the possibility of future injury may, in some cases, properly be used to screen out qualified handicapped individuals. However, the fact that the complainant's impairment may impose the risk of a worker's compensation claim is not, standing alone, an acceptable justification for imposing a particular job requirement. On the other hand, it is noteworthy that, in ***OFCCP* v. *Shuford Mills Inc.***, Case No. 1980-OFCCP-30 (ALJ May 26, 1981), *dismissal aff'd without opinion* (Dep'y Under Sec'y Sept. 17, 1985), a complainant, who was fired because he may have exposed Defendant to the risk of higher premiums for worker's compensation insurance if he re-injured himself upon undertaking a more strenuous position, was not discriminated against.

d. Circumstances at time of decision considered

In determining whether Defendant's decision to reject Complainant was justified because his disability posed a reasonable probability of substantial harm, the court would consider the facts as they existed at the time the decision to reject was made and the reasonableness of the decision in light of the facts. ***OFCCP v. CSX Transportation, Inc.***, Case No. 1988-OFC-24 (Ass't Sec'y Oct. 13, 1994).

e. Complainant's actions

Complainant posed a significant risk in the workplace because, by his own admission and as evidenced by his medical records, the worker *never* maintained proper control of his blood sugar level during the almost twenty years he suffered from diabetes. ***OFCCP v. United Airlines, Inc.***, Case No. 1986-OFC-12 (ALJ Feb. 3, 1989), *remanded on other grounds* (Ass't Sec'y Dec. 22, 1994). The ALJ held that, because Complainant posed a significant risk of injury or harm in the workplace and reasonable accommodation could not eliminate that risk, then he was not "otherwise qualified for the job, and United Airlines was not obligated to place him in the workplace." The ALJ reasoned that, given its hazardous work environment, United's employment policy was reasonably related to maximizing safety in the workplace. The policy did not allow an employee with a significant medical risk of either unconsciousness or decreased consciousness to perform certain critical jobs in the company. Consequently, the ALJ concluded that an insulin dependent diabetic presented a significant risk of safety while working on the airport ramp.

In ***OFCCP v. Norfolk and Western Railway Co.***, Case No. 1990-OFC-8 (ALJ July 9, 1991), based on credible witness testimony, the ALJ dismissed the complaint because Complainant stated that he used a substitute for his pre-employment medical examination and he intended to injure himself on-the-job in order to collect a large settlement from Defendant. The ALJ concluded that such reasons for dismissal offered by Defendant were not pre-textual and constituted sufficient grounds for dismissal. Therefore, the ALJ concluded that, even if Complainant's eye condition was a factor in his dismissal, Defendant met its burden of showing that it would have dismissed him solely for stating that he (1) had used a substitute for his pre-employment medical examination, (2) intended to injure himself on-the-job in order to collect a large settlement from his employer, and (3) for failing to attend a meeting with his supervisor about the alleged statements.

D. Accommodation

1. Defendant's burden to establish undue hardship

a. Generally

In ***OFCCP v. American Airlines***, Case No. 1979-OFCCP-2 (Dep'y Under Sec'y May 2, 1985), Defendant has the burden of demonstrating that accommodation for a qualified handicapped individual would present an undue hardship on the conduct of its business.

In ***OFCCP* v. *Ozark Air Lines, Inc.***, Case No. 1980-OFCCP-24 (Dep'y Under Sec'y June 13, 1986), the Deputy Under Secretary held that, under 41 CFR § 60-741.6(c)(2), Defendant has the burden to establish that the handicapped individual's employment would have resulted in harm to himself or others. Moreover, Defendant has the burden to establish that accommodation for the physical or mental limitations of the individual is not reasonable.

Defendant has the burden of demonstrating that accommodation for a qualified handicapped individual would constitute an undue hardship on the conduct of its business. ***OFCCP v.***

American Airlines, Case No. 1979-OFCCP-2 (ALJ June 30, 1980), *aff'd*, (Dep'y Under Sec'y May 2, 1985). *See also* ***OFCCP v. Ozark Air Lines, Inc.,*** Case No. 1980-OFCCP-24 (Dep'y Under Sec'y June 13, 1986).

b. Must gather information to make determination of reasonable accommodation

i. Generally

In ***OFCCP v. Louisville Gas & Electric Co.***, Case No. 1988-OFC-12 (ALJ Jan. 29, 1990) *aff'd*, (Ass't Sec'y Jan. 14, 1992), if Defendant proves that the worker is not qualified to perform the essential functions of the job without a reasonable probability of substantial harm, the fact-finder must determine whether reasonable accommodation may be made, without undue hardship, which is sufficient to enable the applicant to perform the essential requirements of the job without a reasonable probability of substantial injury. Evidence that a lifting requirement is essential to the job of janitor is insufficient, standing alone, to demonstrate that Defendant could not reasonably accommodate the employee's perceived back condition.

The obligation to accommodate is an affirmative one and requires an employer to gather information from the applicant and from qualified experts in order to determine what accommodations are necessary; a good faith belief is insufficient. Moreover, Defendant has a duty to suggest reasonable accommodations and to test an applicant's performance with them prior to Defendant's decision not to hire the applicant. Under the facts presented, the Assistant Secretary concluded that Defendant failed to establish that it gathered sufficient information concerning the applicant's perceived handicap (lumbar lordosis) to enable it to make a determination as to reasonable accommodation. In particular, the contractor made no study or attempt to accommodate the applicant and did not consult with a single expert as to the feasibility of reasonably accommodating someone with lumbar lordosis. Defendant's duty under Section 503 is not to eliminate the essential functions of a job in order to accommodate a worker, but Defendant must take steps to reasonably accommodate a handicapped individual so that s/he may perform the essential functions of the job.

In ***OFCCP v. East Kentucky Power Cooperative Inc.,*** Case No. 1985-OFC-7 (ALJ Mar. 17, 1988), the ALJ determined that Defendant failed to gather sufficient information to enable it to make a determination as to reasonable accommodation for the complainant prior to terminating the complainant, where Defendant did not consult experts or heed the expert advice of Complainant's optometrist.

2. Undue hardship

a. Established

It is unreasonable to expect Defendant to accommodate an individual by assigning him to a specific light duty position, when all employees are rotated on a regular basis among various jobs. ***OFCCP v. Yellow Freight Systems, Inc.,*** Case No. 1984-OFC-17 (Ass't Sec'y Dec. 22, 1993).

It would be unreasonable to require contractor to provide handicapped employee in senior staff geologist job with training necessary to elevate his skills to an acceptable level, where (1) such training would require years of on-the-job training, (2) Defendant employed only experienced geologists at higher salaries than other employees, and (3) Defendant employed such geologists in only one department.

OFCCP* v. *Texas Eastern Transmission Corp., Case No. 1988-OFC-30 (ALJ Apr. 30, 1991). In this vein, it is noted that Defendant has no duty to train or transfer a handicapped employee as an accommodation, where the employee's handicap was not a factor in Defendant's determination that inadequate job performance warranted termination.

b. Conflict with seniority rules

In ***U.S. Airways, Inc. v. Barnett***, 122 S. Ct. 1516 (2002), the Supreme Court held that, if an employer demonstrates that an employee's requested accommodation conflicts with seniority rules, this generally constitutes sufficient grounds upon which to find that the requested accommodation is unreasonable. However, the Court also stated that an employee may establish the presence of special circumstances which makes an exception to the seniority rule reasonable under particular facts. In the case, a disabled worker, who had suffered a back injury as a cargo handler, was transferred to a physically undemanding mailroom position. However, the worker then lost the job to a more senior employee who "bid" on the job under the company's seniority rules. The Court held that, in determining whether accommodation for an injured worker is reasonable, or does not work an undue hardship on the employer, in a majority of cases "it would not be reasonable . . . to trump the rules of a seniority system." Moreover, the Court noted that this is true regardless of whether the seniority system is "collectively bargained" or whether the system is unilaterally imposed by management." It reasoned that "to require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment expectations upon which the seniority system's benefits depend."

As a result, the Court concluded that "the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient" to conclude that the accommodation is unreasonable and poses an undue hardship. The Court did leave open the possibility that an injured employee may establish that the requested accommodation is reasonable even though it adversely affects a seniority system. As an example, the Court stated that an employee "might show . . . that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed to the point where one more departure, needed to accommodate the individual with a disability, will not likely make a difference."

c. Not established

In ***OFCCP v. Texas Utilities Generating Co.***, Case No. 1985-OFC-13 (Ass't Sec'y Aug. 25, 1994), the Assistant Secretary concluded that Defendant violated Section 503 by failing to make a reasonable accommodation to workers who were, at most, minimally impaired in their ability to lift and who would have required only slight accommodation to perform the jobs.

In ***Exxon Corp. v. U.S. Dep't of Labor***, 2002 WL 356517 (N.D. Tex. Mar. 5, 2002) (Memorandum Opinion and Order), the court concluded that Mr. Strawser was not a "disabled individual" under the Rehabilitation Act because OFCCP was collaterally estopped from litigating the issue as EEOC had unsuccessfully litigated the same issue under the Americans With Disabilities Act before the same court in a case involving the same employer and the same allegedly discriminatory policy. However, the holdings of the ALJ and ARB may be instructive. *See* ***OFCCP v. Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd in part,* (ARB Oct. 28, 1996).

In ***OFCCP* v. *Exxon Corp.***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd* (ARB Oct. 28, 1996), the ARB held that, part of establishing discrimination under Section 503, OFCCP must demonstrate that the employee is qualified for a position with Defendant with or without reasonable accommodation. Defendant then has the burden to demonstrate that the accommodation would pose an undue burden on the contractor's business. Assuming that complainant (a recovering alcoholic) needed accommodation to enable him to perform a safety-sensitive job, Defendant could have provided a reasonable accommodation without undue hardship by randomly testing the employee for alcohol use, and by requiring him to continue attending AA meetings.

Other factors which may be considered in determining whether accommodation would present an undue hardship to Defendant included business necessity and financial cost. The ARB held that Exxon's transfer of complainant to a non-safety critical position, pursuant to Exxon's Drug and Alcohol Policy which prohibits any employee who has or had a substance abuse problem from working in a safety designated position, was discrimination, not "accommodation." Exxon regarded Complainant as being disabled whereas, in reality, he was able to perform the job as well as any unimpaired individual with the requisite training and experience. These circumstances "are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristics."

The ARB held that the issue of whether the discrimination includes an employer's failure to make reasonable accommodation arises only where the disability "interferes with the individual's ability to perform up to the standards of the workplace . . . ." It determined that the key consideration where accommodation may be required is that "each case [must] be individually assessed to determine what type of monitoring would be necessary." As a result, Exxon's policy of blanket exclusion of all individuals who have had a substance abuse problem, from 1800 designated positions, does not achieve this result. Moreover, the Board stated that it is the disabled individual's responsibility to inform his or her employer that accommodation is necessary. The ARB held that, because Exxon was not required to make any modifications or adjustments "in its ordinary work rules, facilities, terms, and conditions of employment to enable complainant to work, . . . [E]xxon was not entitled to choose the means of accommodation, i.e., involuntary transfer, because complainant did not require any accommodation."

Even assuming that accommodation was required, involuntary transfer was not appropriate in this case. Section 503 contemplates accommodation in the particular job held by the employee unless business necessity or financial costs and expenses dictate otherwise. 41 C.F.R. § 60-741.6(d). Section 503 presupposes an interactive process in arriving at suitable accommodation. The ARB agreed with the ALJ that Exxon failed to demonstrate that "accommodation" in the form of testing, supervisor evaluation, and continued Alcoholics Anonymous attendance would constitute an undue hardship. Consequently, complainant would not be subject to transfer since reassignment should be considered only when accommodation in the current assignment would pose undue hardship.

d. Not at issue; worker capable of performing job without accommodation

Reasonable accommodation is not an issue in determining whether an applicant is a qualified handicapped individual because the applicant (despite having a back impairment) is physically capable of performing the job of cement truck operator without restrictions. ***OFCCP* v. *Texas Industries, Inc.***, Case No. 1980-OFCCP-28 (Ass't Sec'y Jan. 27, 1995).

In ***OFCCP* v. *Norfolk and Western Railway Co.***, Case No. 1990-OFC-1 (ALJ June 26, 1991), the ALJ held that, because Defendant failed to demonstrate that employment of a worker with monocular vision

would pose a reasonable probability of substantial harm, it was unnecessary to address the issue of accommodation.

e. Use of transfer as accommodation

i. Generally

In ***OFCCP v. United Parcel Service, Inc.,*** Case No. 1987-OFC-17 (Dep'y Ass't Sec'y Nov. 22, 1991), OFCCP failed to sustain its burden for accommodation when it failed to establish that Complainant applied for a transfer to an available position and that contractor rejected her for that position. It is noteworthy that the Deputy Assistant Secretary declined to rule on whether the duty to make reasonable accommodation under Section 503 includes an obligation to transfer or assign a handicapped employee who can no longer perform his or her present job. However, in the event such a duty exists, OFCCP must demonstrate the presence of available jobs into which complainant could transfer. Moreover, assuming OFCCP established that complainant applied for a transfer to an available job and was rejected, OFCCP failed to show that the complainant was rejected because of her handicap, in light of evidence that other employees, who must be presumed not to have been handicapped, had been denied such transfers in the past.

In ***OFCCP v. United Parcel Service, Inc.***, Case No. 1987-OFC-17 (ALJ Mar. 22, 1989), *rev'd on other grounds* (Dep'y Ass't Sec'y Nov. 22, 1991), the ALJ held that Defendant has the burden of establishing that a worker's transfer to another position to accommodate his or her impairment would constitute an unreasonable accommodation.

ii. Not constitute accommodation; lower pay

Transferring an asthmatic employee to an alternative position constituted a partial accommodation to her condition, but the concurrent reduction in income was not consistent with reasonable accommodation. ***OFCCP* v. *Mountain Bell Telephone Co.***, Case No. 1987-OFC-25 (ALJ Nov. 3, 1989), *remanded on other grounds* (Ass't Sec'y Aug. 25, 1994).

E. Employee has duty to mitigate damages

DEFENDANT'S BURDEN TO ESTABLISH EMPLOYEE'S LACK OF DUE DILIGENCE

In ***OFCCP* v. *WMATA***, Case No. 1984-OFC-8 (Ass't Sec'y Aug. 23, 1989), *vac'd on other grounds*, ***WMATA* v. *DeArment***, 55 EPD 40,507 (D.D.C. 1991), the Assistant Secretary held that it is Defendant's burden to establish that the handicapped worker did not exercise reasonable diligence in finding other suitable employment. Defendant may satisfy that burden only if it demonstrates that (1) substantially equivalent positions were available, and (2) the employee failed to use reasonable care and diligence in seeking such positions.

In ***OFCCP v. Exide Corp.***, Case No. 1984-OFC-11 (Ass't Sec'y Apr. 30, 1991), *vac'd on other grounds*, ***Exide Corp.* v. *Martin***, Civil Action No. 91-242, (E.D. Ky. 1992), the Assistant Secretary held that it is Defendant's burden to establish that the worker failed to exercise reasonable diligence in mitigation. To meet this burden, Defendant must demonstrate that (1) there were substantially equivalent positions

which were available; and (2) the claimant failed to use reasonable care and diligence in seeking such positions.

XIII. Retaliation

A. Protected activity, generally

Where the asserted protected activity consists of internal opposition to allegedly unlawful practices, "the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare." ***OFCCP v. The Cleveland Clinic Foundation***, Case No. 1991-OFC-20, slip op. at 4 (ARB July 17, 1996) (*citing* ***Hochstadt v. Worcester Foundation for Experimental Biology***, 545 F.2d 222, 233 (1st Cir. 1976). Under some circumstances, an employee's means, manner, or conduct in expressing an otherwise protected complaint is so extreme and disruptive as to fall outside the protection of the statute or regulations. The internal complaints in *The Cleveland Clinic Foundation*, which included writing letters to the employer's Board of Governors alleging racial discrimination and harassment, were not so disruptive or insubordinate to lie outside the protection provisions. *See* ***Dunham v. Brock***, 794 F.2d 1037, 1041 (5th Cir. 1986) (expressing complaint verbally in a loud and abusive manner, which disrupted and workplace and employee's own ability to perform his or her work, did not constitute protected activity); ***EEOC v. Crown Zellerbach Corp.***, 720 F.2d 1008, 1014-16 (9th Cir. 1983) (employee's letter to one of employer's most important customers was a reasonable and protected form of opposition). In *The Cleveland Clinic Foundation*, the ARB rejected Defendant's argument that the employee's letter was not protected. Defendant alleged the following: (1) the employee persisted in asserting allegations of race discrimination and harassment which were determined to be unfounded; and (2) he made blatantly false and malicious statements regarding his manager which made it impossible for him to function effectively. The ARB noted, to the contrary, that the employee's performance evaluation, issued within days of his suspension, demonstrated that he was fully capable of performing his duties and that his expressions of allegations of discrimination did not interfere with his effective working relationship with his superiors. Any impediment to his effectiveness in performing his job could, according to the ARB, only come from the hostility of his supervisors.

B. Burdens of persuasion and production

1. Generally

To establish a *prima facie* claim of retaliation under the Rehabilitation Act, OFCCP must demonstrate that: (1) the employee engaged in an activity protected by the Act; (2) Defendant acted in a manner which adversely affected the employee; and (3) a causal connection existed between the employee's protected activity and Defendant's adverse employment action. ***OFCCP* v. *Yellow Freight Systems, Inc.***, Case No. 1982-OFC-2 (ALJ Sept. 30, 1986), *remanded on other grounds* (Ass't Sec'y Oct. 6, 1993). *See also* ***OFCCP* v. *Keebler Co.***, Case No. 1987-OFC-20 (ALJ July 20, 1995), *aff'd* (ARB Sept. 4, 1996); ***OFCCP* v. *Yellow Freight Systems, Inc.***, Case No. 1982-OFC-2 (ALJ Sept. 30, 1986), *remanded on other grounds* (Ass't Sec'y Oct. 6, 1993) (the Title VII standard of proof of retaliation is applicable to cases decided under the Rehabilitation Act).

2. Types of protected activity

An employee's letter to Defendant's Board of Governors alleged discriminatory practices and the submission of the letter constituted protected activity such that the employee's termination for the

content of that letter constituted direct evidence of retaliation. ***OFCCP v. The Cleveland Clinic Foundation***, Case No. 1991-OFC-20, slip op. at 7 (ARB July 17, 1996).

Although the anti-retaliation provision of Executive Order 11246 does not include specific language protecting "opposition" to unlawful practices, its language is sufficiently similar to other employee protection statutes administered by the Department of Labor under which the Secretary has held, and courts have affirmed, that internal complaints constitute protected activity. ***OFCCP v. The Cleveland Clinic Foundation***, Case No. 1991-OFC-20, slip op. at 3 (ARB July 17, 1996).

When a case has been fully tried on the merits, the task of the fact finder is to decide whether the defendant intentionally discriminated against the employee or, in other words, which party's explanation of the employer's motivation it believes. ***OFCCP v. United Parcel Service, Inc.,*** Case No. 1987-OFC-17 (Dep'y Ass't Sec'y Nov. 22, 1991). It was determined that, because OFCCP failed to show that the complainant sought to return to her former position after her disability leave or that contractor rejected her for that job, OFCCP failed to establish a *prima facie* case of handicap discrimination. However, assuming that OFCCP did establish a *prima facie* case, the record demonstrated, at most, that there was a serious misunderstanding between the complainant and Defendant regarding how the heavy lifting duties of the job would be met. As a result, OFCCP did not demonstrate by a preponderance of the evidence that the contractor discriminated against Complainant because of her handicap. Moreover, because OFCCP failed to show that Complainant applied for a transfer to an available position and that Defendant rejected her for that position, OFCCP failed to establish burden of proof and production concerning complainant's request for a transfer. Finally, OFCCP failed to establish that Defendant's asserted reason for terminating Complainant -- that she lied in order to obtain additional disability benefits from the company -- was pre-textual, in light of testimony from three officials of the company who testified that the termination decision was made prior to the time Defendant became aware of Complainant's inability to engage in heavy lifting. If Defendant terminated complainant in good faith belief that she acted dishonestly in obtaining disability benefits, then Section 503 of the Rehabilitation Act would not have been violated.

3. Defendant's burden to put forth non-discriminatory reasons for its action

To establish a *prima facie* case of discriminatory discharge, Complainant need only show that he was discharged under circumstances which give rise to unlawful discrimination. ***OFCCP* v. *American Commercial Barge Line Co.***, Case No. 1984-OFC-13 (Ass't Sec'y Apr. 15, 1992). OFCCP bears the ultimate burden of persuading the adjudicator that Defendant intentionally discriminated against the worker. In analyzing a discriminatory discharge case, the proper focus of inquiry is Defendant's motivation at the time of the termination decision. In this vein, the Assistant Secretary held that it was error for the ALJ to conclude that a manic depressive employee was discharged because he created a risk of liability under Defendant's view of maritime law; rather, the Assistant Secretary found that the employee was discharged because he failed to provide medical records necessary for Defendant to determine whether he created risk of liability. On the other hand, Defendant met its burden of demonstrating that manic depressive employee's termination was for a non-discriminatory reason, *i.e*., his failure to release to his employer his psychiatric records held by the VA Hospital. Moreover, it was determined that OFCCP failed to show that manic depressive employee actually and seriously re-applied for an available position after he was terminated. Thus, the fact that Defendant did not re- employ him even after he released his medical records did not establish that the stated reason for discharge (failure to release medical records) was a pretext for discrimination.

4. Dual motives

In ***OFCCP* v. *Norfolk and Western Railway Co.***, Case No. 1980-OFCCP-14 (Dep'y Under Sec'y Dec. 8, 1986), it was held that the burdens of proof set forth in ***Texas Department of Community Affairs* v. *Burdine***, 450 U.S. 248 (1981), are inapplicable in dual or mixed motive cases. Rather, the burdens of proof to be applied in a dual or mixed motive case are those enunciated in ***Mt. Healthy City School District Board of Education* v. *Doyle***, 429 U.S. 274 (1976). Under *Mt. Healthy*, if OFCCP proves by a preponderance of evidence that the protected conduct was a motivating factor in Defendant's action, then Defendant must prove by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

When there is an even balance of evidence as to whether the employee was discharged for legitimate or illegitimate reasons, the burdens of proof for a mixed motive case should be applied. The Deputy Under Secretary concluded that, once a plaintiff raises an inference that the protected conduct or condition was a contributing factor in the decision to discharge, the burden of proof shifts to the defendant to demonstrate that it would have reached the same decision, even in the absence of the protected conduct or condition.

Under the dual motive discharge rule, once OFCCP has established a *prima facie* case, Defendant must produce evidence of legitimate non-discriminatory reasons for its adverse action. The trier-of-fact may then conclude that: (1) OFCCP has failed to meet its burden of proving discrimination; (2) the contractor's proffered reasons are pre-textual; or (3) the contractor was motivated by both legitimate and illegitimate reasons. ***OFCCP* v. *Norfolk and Western Railway Co.***, Case No. 1990-OFC-8 (ALJ July 9, 1991). Under the facts of the case, the ALJ concluded that, even if the complainant's eye condition was a factor in his dismissal, Defendant met its burden of establishing that it would have dismissed Complainant solely for stating that he had used a substitute for the pre-employment medical examination and that he intended to injure himself on-the-job in order to collect a large settlement from Defendant. The ALJ further noted that Complainant failed to attend a meeting with his supervisor about the alleged statements

XIV. Relief

A. Generally

In ***OFCCP* v. *Yellow Freight Systems, Inc.***, Case No. 1982-OFC-2 (ALJ Sept. 30, 1986), *remanded on other grounds*, (Ass't Sec'y Oct. 6, 1993), the ALJ held that the remedies of debarment, contract termination, and denial of contract payment are viable methods of relief only when Defendant has not voluntarily chosen to obey the mandates of the Rehabilitation Act. None of these three remedies will advance the employment of handicapped persons. It was further determined that a back pay award is the proper remedy for a complainant who was denied employment.

B. Back wage award

1. Purpose

An award of back pay is designed to restore the injured employee to the position s/he would have been in had the discrimination never occurred. ***Albermade Paper Co. v. Moody***, 422 U.S. 405 (1975).

In ***OFCCP v. American Airlines,*** Case No. 1994-OFC-9 (ALJ Sept. 19, 1995), Defendant contended that, as in effect at the time of the alleged violations, Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (since amended), only mandated affirmative action and did not prohibit discrimination or provide for individual remedies for the victims of discrimination. The ALJ held in his recommended decision that "an affirmative action mandate is broader than a nondiscrimination mandate, that discrimination in hiring practices and decisions is inconsistent with the affirmative action obligation of section 503, and that the affirmative action requirement of section 503 implies an obligation not to discriminate." *See* ***Mantolete v. Bolger***, 767 F.2d 1416, 1422 (9th Cir. 1985); ***Shirley v. Devine****,* 670 F.2d 1188, 1201 (D.C. Cir. 1982); ***Fisher v. City of Tucson***, 663 F.2d 861 (9th Cir. 1981)." In addition, the ALJ noted that "[t]he Assistant Secretary has long held that section 503 encompasses the authority to order payment of back wages by contractors who have violated the Act, and that such a remedy is proper because the purpose of the Act is to increase employment opportunities for handicapped individuals by eradicating discrimination and to make victims of such discrimination whole for injustices suffered." *See also* ***OFCCP v. Ozark Airlines, Inc.***, Case No. 1980-OFC-4 (Dep'y Sec'y June 13, 1986); ***OFCCP v. Louisville Gas and Electric***, Case No. 1988-OFC-12 (Sec'y Jan. 14, 1992).

2. May be awarded

a. Generally

Back pay is an appropriate remedy under the Rehabilitation Act. ***OFCCP v. Texas Industries Inc.***, Case No. 1980-OFCCP-28 (Ass't Sec'y June 7, 1988); ***OFCCP v. Texas Utilities Generating Co.***, Case No. 1985-OFC-13 (ALJ Mar. 2, 1988), *remanded on other grounds*, (Ass't Sec'y Aug. 25, 1994); ***OFCCP* v. *Firestone Tire and Rubber Co.***, Case No. 1980-OFCCP-4 (ALJ Feb. 6, 1980); ***OFCCP* v. *Burlington Northern Railroad***, Case No. 1979-OFCCP-23 (ALJ Feb. 8, 1982) (order approving settlement); ***OFCCP* v. *Ozark Air Lines, Inc.***, Case No. 1980-OFCCP-24 (ALJ Dec. 7, 1982), *aff'd* (Dep'y Under Sec'y June 13, 1986) (back pay is an appropriate remedy since it is acceptable in Title VII and Executive Order 11246 proceedings; the Rehabilitation Act authorizes the Secretary to take such action as the facts and circumstances warrant, and the purpose of the Act is to eradicate discrimination and make victims whole).

Section 503 of the Rehabilitation Act parallels Executive Order 11246 with respect to the agency's authority to order payment of back wages to make victims of discrimination whole. ***OFCCP* v. *American Airlines, Inc.***, Case No. 1994-OFC-9 (Ass't Sec'y Apr. 26, 1996).

Although complainants have no private right of action under Section 503 of the Rehabilitation Act, it does not follow, as Defendant contends, that there is no basis for OFCCP to seek reinstatement or back pay. The regulations may not expressly provide for these remedies, but they do not foreclose them. If Defendant has violated the Act in breach of its contract, the OFCCP is warranted in seeking reinstatement and back pay. ***OFCCP v. Yellow Freight System, Inc.***, Case No. 1979-OFCCP-7 (ALJ Aug. 26, 1988), *remanded on other grounds*, (Ass't Sec'y Aug. 24, 1992). The Assistant Secretary stated that, because the employee who has been the subject of discrimination has no private avenue of recourse under Section 503, a remedial vacuum would exist if OFCCP was barred from seeking back wages, *i.e.*, there would be a wrong without a remedy.

b. Burdens

OFCCP HAS THE INITIAL BURDEN TO SHOW THE GROSS AMOUNT OF BACK PAY DUE; THE BURDEN THEN SHIFTS TO THE RESPONDENT TO ESTABLISH INTERIM EARNINGS OR LACK OF DILIGENCE TO MITIGATE DAMAGES

In ***OFCCP, USDOL v. Bank of America***, ARB No. 13-099, ALJ No. 1997-OFC-16 (ARB Apr. 21, 2016), the Respondent contended on appeal that the ALJ erred in holding that the Respondent had the burden of proving interim earnings that offset back pay liability. The Respondent argued that "the OFCCP's burden to prove damages includes the earnings or back pay that the victims of discrimination would be owed absent, or but for, the discrimination minus the actual interim earnings the victims were paid. Only then, [the Respondent] asserts, does the burden shift to the defendant to 'further' establish that the damages were less than what the OFCCP claimed because the amount of interim earnings the victims earned were actually more than the OFCCP claimed or due to the victims' lack of diligence to mitigate damages by seeking or accepting other employment." USDOL/OALJ Reporter at 25.

The ARB reviewed appellate court authority interpreting Title VII and NLRB cases, and found that they have ruled that "the plaintiff has the initial burden to show the 'gross' amount of back pay due and then the burden of producing sufficient evidence to establish the amount of interim earnings, or lack of diligence to mitigate damages by seeking or accepting other employment, shifts to the defendant." *Id*. at 26. The ARB thus rejected the Respondent's argument that it the OFCCP's burden to prove damages also includes proving interim earnings.

c. Subject to mitigation

In ***OFCCP v. Louisville Gas & Electric Co.***, Case No. 1988-OFC-12 (ALJ Jan. 29, 1990), *aff'd* (Ass't Sec'y Jan. 14, 1992), it was held that the payment of back wages, subject to mitigation, is a type of relief authorized by law. *See also* ***OFCCP* v. *East Kentucky Power Cooperative, Inc.***, Case No. 1985-OFC-7 (ALJ Mar. 17, 1988).

In ***OFCCP* v. *Mt. Bell Telephone Co.***, Case No. 1987-OFC-25 (Ass't Sec'y Aug. 25, 1994), the Assistant Secretary held that, in determining whether employment is comparable, the ALJ must examine more than compensation. Considerations such as job duties and responsibilities, promotion potential, working environment, and benefits also may be relevant. Moreover, unless constructively discharged, a complainant is not eligible for post-resignation damages and back pay or for reinstatement. The Assistant Secretary held that a finding of failure to mitigate damages requires proving that an award of back pay or damages should be reduced because of an employee's lack of reasonable diligence in mitigating the damage caused by an unlawful discharge. To comport fully with the "make whole" objective of Section 503, a remedy formula which provides back pay equal to the complaint's projected salary should be adjusted upward to reflect merit pay increases that the complainant reasonably would have received had she continued at commensurate pay under a program to afford her reasonable accommodation. The complainant is also due an award of prejudgment interest.

For further discussion of mitigation of damages under the Rehabilitation Act, *see* Chapter X.

3. Payment not tolled because of delay in adjudication

In ***OFCCP v. Texas Industries, Inc.,*** Case No. 1980-OFCCP-28 (Ass't Sec'y Jan. 27, 1995), a case involving a seven-year lapse between the ALJ's recommended decision and Assistant Secretary's Final Order, Defendant requested that the back pay award be tolled. The Assistant Secretary reasoned that

tolling the back pay period did not accomplish the purpose of the back pay award which was to "make whole" the employee or applicant who suffered economic loss as a result of an employee's illegal discrimination. Consequently, the length of time a Rehabilitation Act case is pending does not relieve a discriminating employer of its obligation to assume the full cost of the back pay due. The cost of delay should not be borne by the employee because the wronged employee is at least as much injured by delay in collecting back pay as is the wrong-doing employer and the employer knowingly created the risk by his own wrong-doing.

4. Not barred by collective bargaining agreement

Collective bargaining agreements do not constitute a bar to back pay, reinstatement, promotion, hiring and award of retroactive seniority. ***OFCCP v. Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ Nov. 9, 1982), *remanded on other grounds*, (Ass't Sec'y Feb. 24, 1994).

5. Not offset by unemployment compensation

In ***OFCCP v. Central Power & Light Co.***, Case No. 1982-OFC-5 (ALJ Mar. 30, 1987), denying back pay to victims of illegal discrimination would frustrate the purpose of the Act, which requires that a discriminatee be made whole. As a result, rejected applicants were awarded back pay less actual earnings on a year-by-year basis, with pre-judgment interest applied at the rate specified in 26 U.S.C. § 6621, and without subtraction of unemployment compensation.

6. Factors to consider in calculating back pay award

Back pay calculations should include performance and attendance bonuses, profit sharing, holiday and vacation pay, pension benefits, and fringe benefits such as health plans, insurance programs, and legal services plans. ***OFCCP* v. *Ford Motor Co.***, Case No. 1980-OFCCP-12 (ALJ Mar. 20, 1987). Indeed, it was proper, in the calculation of the complainant's back pay, to compare his quarterly earnings with those of the three workers closest in seniority to him. Complainant had higher seniority that the three other workers such that it was proper to assume he would have made the highest earnings. Appropriate relief should place the rejected applicant in the position he would have been in had he not been the victim of illegal discrimination.

By unpublished decision in ***Lawrence Aviation Industries, Inc. v. Reich***, 182 F.3d 900 (2d Cir. 1999) 900 (2d Cir. 1999) (unpub.), the court held that female applicants were discriminated against for placement in entry level blue collar jobs. Specifically, the court noted that Lawrence Aviation hired 175 out of 849 male applicants and none of the 28 female applicants. The court disagreed, however, with OFCCP's calculation of the back wages owed because "[t]he agency began with the presumption and women and men would have been hired at the same rate, in the absence of discrimination." The court found that OFCCP calculated the back pay owed based on an average length of employment of 61.29 weeks for male applicants who were laid off, whereas Lawrence Aviation maintained that the proper measure is the median length of time that successful male applicants remained on the job, whether they left voluntarily . . . or involuntarily as a result of layoffs." The court noted that Lawrence Aviation's method of calculating back pay would result in an average of 12.5 weeks. The court declined to rule on the appropriate method of calculating back pay, but remanded the case to the Secretary of Labor to re-evaluate the evidence presented. The court did, however, approve of accrued interest being assessed on the back pay award.

In ***OFCCP v. Greenwood Mills, Inc.***, Case No. 1989-OFC-39 (ALJ Feb. 24, 2000), the ALJ was specifically directed to determine a back pay award on remand. Under the facts of the case, Defendant engaged in unlawful discrimination when it hired only one woman, as compared to 30 men, to work in certain laborer positions at "Job Group 8A." The duties involved for Job Group 8A positions included the manual transportation of materials at the plant and cleaning the plant and its machinery. Citing to ***Lawrence Aviation Indust. v. Reich***, 182 F.3d 900 (2d Cir. 1999) (unpub.) and ***Berger v. Iron Workers Reinforced Rodmen, Local 201***, 170 F.3d 1111 (D.C. Cir. 1999), the ALJ held that attrition must be considered in determining the appropriate back wage award. In this vein, he noted that "[t]he employment history of both the female applicants and the 8A hires indicates a substantial likelihood that the female applicants, if hired, would not have remained at Greenwood any longer than the 8A hires." The ALJ then determined that the average tenure for the 8A workers was 3.74 years, which would be factored into the damage award. The ALJ then calculated damages and concluded that the female applicants were entitled to an award of $376,603.46, plus pre-judgment interest. (Editor's note: by Errata Order dated February 29, 2000, the ALJ stated that he misstated the damage award and noted that it should have been $376,603.46 instead of the total of $345,082.21 set forth in his original decision.

OFFCP INTENTIONAL DISCRIMINATION COMPLAINT; WHEN USE OF CLASS-WIDE METHOD OF CALCULATING BACK PAY DAMAGES IS APPROPRIATE

In ***OFCCP, USDOL v. Bank of America***, ARB No. 13-099, ALJ No. 1997-OFC-16 (ARB Apr. 21, 2016), the ARB approved the ALJ's decision to use a class-wide method of calculating back pay damages rather than a calculation based on a person-by-person, individual assessment. Using Title VII caselaw as a guide, the ARB found that "[i]f the case is complex, the class is large, or the illegal practices continued over an extended period of time, a class-wide approach to measure back pay may be necessary." USDOL/OALJ Reporter at 20 (citations omitted). The ARB found that under the facts of this case, the ALJ's decision to use a class-wide method was reasonable. There had been at least 1,147 potential victims of intentional racial discrimination in hiring; there was no way to determine which individuals would have been hired absent the discrimination; records were missing; the Respondent's disqualifying codes were ambiguous and highly subjective; the liability hearing occurred more than a decade after the violations due to protracted litigation prompted by the Respondent's attempts to end OFCCP's compliance review. The ARB stated: "While formula or class-wide relief may generate a windfall for some employees who would have never been hired even if the jobs had been filled on a nondiscriminatory basis and may undercompensate the genuine victims of discrimination by forcing them to share the award with some undeserving recipients, it is the best that can be done under the circumstances." *Id*. at 21 (citation omitted).

C. Costs incurred by employee as result of adverse action

In ***Exxon Corp. v. U.S. Dep't of Labor***, 2002 WL 356517 (N.D. Tex. Mar. 5, 2002) (Memorandum Opinion and Order), the court concluded that Mr. Strawser was not a "disabled individual" under the Rehabilitation Act because OFCCP was collaterally estopped from litigating the issue as EEOC had unsuccessfully litigated the same issue under the Americans With Disabilities Act before the same court in a case involving the same employer and the same allegedly discriminatory policy. However, the holdings of the ALJ and ARB may be instructive. *See* ***OFCCP v. Exxon Corp***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd in part,* (ARB Oct. 28, 1996). In ***OFCCP* v. *Exxon Corp***, Case No. 1992-OFC-4 (ALJ June 15, 1993), *aff'd*, (ARB Oct. 28, 1996), the ALJ held that Defendant was liable for losses incurred by Complainant on the sale of his home, where the sale was the direct result of Defendant's discriminatory actions. Moreover, Defendant was properly held liable for the costs of relocating Complainant to his previous

job location, where Defendant violated Section 503 by unlawfully transferring Complainant to another city.

The ARB affirmed the ALJ's recommended remedy that complainant be offered reinstatement to the position of "field foreman at the LaBarge facility. . . . with seniority and the pay he would have received had he not been transferred, and that Exxon reimburse him [consequential damages] for moving costs and the loss realized on the sale of his house." On the other hand, the ARB affirmed the ALJ's rejection of OFCCP's argument for lost wages for his wife, caused by the involuntary transfer.

In ordering Defendant to discontinue its policy of categorical exclusion, the ARB agreed with OFCCP and held that the Rehabilitation Act authorizes the Department of Labor to "take such action" on any complaint of noncompliance "as the facts and circumstances warrant, consistent with the terms of [Defendant's] contract and the laws and regulations applicable thereto." 29 U.S.C. § 793(b). As a result, it was determined that an order directing Exxon to discontinue a policy that violates the affirmative action/nondiscrimination mandate of Section 503 is an "action" which is "consistent with" the Rehabilitation Act.

D. Employee voluntarily leaves work; no relief

An employee who was discriminated against, but left her final work assignment for reasons of personal preference and choice (and not because of constructive discharge) is not entitled to compensation for any period after she left employment. ***OFCCP* v. *Mountain Bell Telephone Co.***, Case No. 1987-OFC-25 (ALJ Nov. 3, 1989), *remanded on other grounds*, (Ass't Sec'y Aug. 25, 1994).

E. Pre-judgment and post-judgment interest

An award of pre-judgment interest is permitted is discrimination actions. ***OFCCP v. Greenwood Mills, Inc.***, Case No. 1989-OFC-39 (ALJ Feb. 24, 2000) (citing to ***Lawrence Aviation Indus. v. Reich***, 182 F.3d 900 (2d Cir. 1999) (unpub.)). *See also* ***OFCCP* v. *Mt. Bell Telephone Co.***, Case No. 1987-OFC-25 (Ass't Sec'y Aug. 25, 1994) (a complainant may be awarded pre-judgment interest on a back pay award).

In ***OFCCP v. Ford Motor Co.***, Case No. 1980-OFCCP-12 (ALJ Mar. 20, 1987), the ALJ held that prejudgment interest on back pay award should be assessed to *"*make Complainant whole.*"* Moreover, Defendant was ordered to pay post-judgment interest from the date of the original ALJ's decision finding liability on the complainant's back pay award pursuant to 28 U.S.C. § 1961.

PREJUDMENT INTEREST ON OFCCP BACK PAY DAMAGES IS BASED ON IRS RATE FOR UNDERPAYMENT OF TAXES AND NOT THE THREE YEAR TREASURY BILL RATE

In ***OFCCP, USDOL v. Bank of America***, ARB No. 13-099, ALJ No. 1997-OFC-16 (ARB Apr. 21, 2016), the Respondent contended on appeal that the three month U.S. Treasury bill rate should have been used as the appropriate interest rate for determining the amount of prejudgment interest on the back pay award. The ARB summarily rejected this contention noting that the regulations provide for the use of the IRS rate for the underpayment of taxes, 41 C.F.R. § 60-1.26(a)(2), and that as an agency appellate authority, it does not have authority to review the validity of that regulation.

F. Compensatory damages not precluded by FECA

In ***Karnes v. Runyon***, 1995 U.S. Dist. LEXIS 19863 (S.D. Ohio 1995), a case involving Title VII and Rehabilitation Act claims, the court followed the decision of the Sixth Circuit in ***DeFord v. Secretary of Labor***, 700 F.2d 281 (6th Cir. 1983) to hold that FECA does not preclude recovery of compensatory damages under 42 U.S.C. § 5851. Specifically, the court found that FECA does not preclude recovery for injuries caused by illegal discrimination under Title VII or the Rehabilitation Act.

G. Violation of conciliation agreement

1. Enforcement by third-party beneficiaries not permitted

In ***Dean, et al. v. The Boeing Co.***, 170 L.R.R.M. (BNA) 2318, 88 Fair Empl. Prac. Cas. (BNA) 1791, 2002 WL 1299772 (D. Kan. 2002), the district court held that third-party beneficiaries to a conciliation agreement between the Department of Labor and Boeing; namely women who were subjected to discriminatory practices by Boeing were not authorized under Executive Order 11246 to take enforcement action for an alleged breach or violation of the agreement. Rather, the court stated that the Department of Labor's regulations specifically provide that OFCCP is responsible for securing government contractor compliance with the provisions mandated by the Executive Order." *See also* ***Brace v. Ohio State Univ.***, 866 F. Supp. 1069, 1073-74 (S.D. Ohio 1994) (in a conciliation agreement based on an alleged violation of Rehabilitation Act rights, recognizing a third-party beneficiary theory would circumvent administrative remedies and would amount to creating a private cause of action where none is authorized).

2. Cancellation of contract held not to be proper

In ***OFCCP v. Jacor, Inc.***, Case No. 1995-OFC-17 (ALJ Nov. 8, 1995), the ALJ concluded that cancellation of existing contracts was not an available remedy under Executive Order 11246 for violation of a general conciliation agreement where there was no evidence regarding a failure to comply with the affirmative action requirements of any specific contract, and the conciliation agreement did not refer to any contracts.

3. Debarment

In ***OFCCP v. Disposable Safety Wear, Inc.***, Case No. 1992-OFC-11 (Sec'y Sept. 29, 1992), the Secretary concluded that debarment of Defendant for violation of a conciliation agreement was appropriate because, by entering into the conciliation agreement, the contractor had the opportunity to demonstrate compliance for almost four years, yet failed to do so. As a result, the Secretary ordered debarment of Defendant for a period of 90 days based upon its repeated violations of the conciliation agreement. During this period of time, the contractor agreed to correct affirmative action plan violations under the Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans Readjustment Assistance Act. Upon expiration of the 90 days, Defendant could petition for reinstatement in accordance with 41 C.F.R. § 60-1.31.

H. Debarment

1. Generally

In ***OFCCP v. The Cleveland Clinic Foundation***, Case No. 1991-OFC-20, slip op. at 8 (ARB July 17, 1996), the ARB found that an order requiring the employer to pay back pay with interest was insufficient. The Secretary concluded that the order should have included a provision requiring Defendant to comply with Executive Order 11246 or face debarment from federal contracting. Without inclusion of this provision, the ARB stated that Defendant would have no incentive to comply.

Once a final administrative decision has been issued, the threat of debarment, should contractor fail to comply with the final order, is the established means for obtaining enforcement under Section 503 of the Rehabilitation Act. ***OFCCP* v. *Louisville Gas & Electric Co.***, Case No. 1988-OFC-12 (Ass't Sec'y Jan. 14, 1992).

2. Conduct warranting debarment

a. Failure to submit written affirmative action program

In ***OFCCP* v. *Bruce Church, Inc.***, Case No. 1987-OFC-7 (Sec'y June 30, 1987), the Secretary held that the sanction of debarment is an appropriate remedy for failure to submit a written affirmative action program.

In ***OFCCP* v. *Disposable Safety Wear, Inc.***, Case No. 1992-OFC-11 (ALJ Aug. 20, 1992), *rev'd on other grounds* (Sec'y Sept. 29, 1992), a case arising under Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act, Defendant's violations did not constitute a mere a failure to comply with "paperwork" rules or to file routine reports on time; rather, Defendant's conduct was a deliberative, complete violation of substantive equal employment opportunity law. The personnel data compiled and correlated for an affirmative action plan is not mere paperwork; it was a practical necessity which was needed for self-evaluation by an employer. Because of Defendant's deliberative violations of its affirmative action obligations as well as its violation of a conciliation agreement, the Secretary ordered debarment for a period of 90 days to enable the contractor to correct its violations. Upon expiration of the 90 day period of time, the contractor could petition for reinstatement in accordance with 41 C.F.R. § 60-1.31.

In ***OFCCP v. Goya De Puerto Rico, Inc.***, Case No. 1998-OFC-8 (ALJ June 22, 1999), *aff'd* ARB No. 99-104 (ARB Mar. 21, 2002), the ALJ concluded that Defendant violated the provisions of Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and Section 503 of the Rehabilitation Act of 1973 for failing to develop and maintain a written affirmative action program. Defendant maintained that it was entitled to an exemption from debarment because (1) the government's business with Defendant was beneficial to the government, (2) it was impossible for Defendant to implement an affirmative action plan because the Puerto Rican population, where Defendant conducted business, was 99.9 percent Hispanic, and (3) debarment would "'mean the closing of many businesses in Puerto Rico.'" The ALJ noted that an exemption from debarment under the Acts and regulations was proper only where national security or special national interests would be affected. The ALJ concluded that Defendant's proffered reasons for failing to implement an affirmative action plan did not rise to the level required to support finding it exempt from debarment.

b. Denial of access to premises

Defendant was ordered to provide OFCCP with access to its premises for the purpose of conducting compliance reviews. If the University of North Carolina (UNC) failed to comply, then UNC government contracts would be canceled and UNC would be debarred from future government contracts. ***OFCCP v. University of North Carolina***, Case No. 1984-OFC-20 (ALJ Jan. 23, 1989), *aff'd* (Sec'y Apr. 25, 1989) (order denying stay), *aff'd* ***Board of Governors of the University of North Carolina v. U.S. Department of Labor,*** 917 F. 2d 812 (4th Cir. 1990), *cert*. *denied*, 500 U.S. 916 (1991).

c. Violation of conciliation agreement

In ***OFCCP* v. *Disposable Safety Wear, Inc.***, Case No. 1992-OFC-11 (Sec'y Sept. 29, 1992), it was held that the Secretary has authority to order debarment and cancellation of contracts under Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Veterans' Readjustment Assistance Act. Moreover, it was noted that, although the Secretary's usual practice is to give a contractor a reasonable period of time in which to come into compliance before imposing sanctions, the Secretary has imposed immediate sanctions where the facts are not in dispute and the law is settled. Debarment of Defendant for violation of the conciliation agreement was appropriate because, by entering into the conciliation agreement, Defendant had the opportunity to demonstrate compliance for almost four years, yet failed to do so.

Moreover, it was appropriate to impose sanctions where a clear violation of Executive Order 11246 occurred. The Secretary rejected Defendant's argument that she should not impose the debarment sanction due to possible impact on Defendant's business and the jobs of its current employees. In determining the propriety of the sanctions, the Secretary held that cases arising under the Service Contract Act are not analogous to Executive Order 11246, Section 503 of the Rehabilitation Act, or the Vietnam Era Veterans' Readjustment Assistance Act because of significant differences in those laws regarding the scope of the Secretary's discretion to impose sanctions after a violation has been found. However, the Secretary did note that cases arising under the Fair Labor Standards Act are analogous and it was determined that financial hardship by Defendant caused by an administrative order is not a valid basis on which to deny employees their remedy or to allow a wrong against the public to go uncorrected. In this vein, Defendant bears the burden of establishing that sanctions would so adversely affect its business as to threaten its existence.

The purpose of debarment is to encourage compliance and immediate imposition of sanctions can be an appropriate step in achieving that purpose. Effective enforcement of the laws depends on voluntary compliance and meaningful sanctions when voluntary compliance is not forthcoming. Under the law, the Secretary orders debarment of contractor for a period of 90 days for contractor's repeated violations of a conciliation agreement in which contractor agreed to correct AAP violations under the Executive Order, Section 503 of the Rehabilitation Act, and the VEVRA. After 90 days, contractor may petition for reinstatement in accordance with 41 CFR § 60-1.31.

3. Conduct not warranting debarment automatically

DE MINIMUS VIOLATION; DEFENDANT AFFORDED ADDITIONAL OPPORTUNITY TO COMPLY

In ***OFCCP v. Jacor, Inc.***, Case No. 1995-OFC-17 (Sec'y Jan. 19, 1996) (interim order), the Secretary addressed the question of "whether a contractor that has exceeded the goals for employment of minorities and has made significant efforts to recruit and employ women construction workers should be debarred and have its current contracts terminated because it has not complied with each and

every specification of the regulations." Under the facts presented, the Secretary characterized the complaint as essentially boiling down to whether Defendant should be debarred and have its current contracts cancelled because recruitment letters did not specify the number of workers in particular trades, both journeymen and apprentices, who were being sought at the time the letters were sent.

The Secretary discussed whether debarment and contract cancellation were appropriate, but stopped short of deciding that Defendant would not be debarred and saved from contract cancellation. The Secretary further declined to adopt the ALJ's recommendation to dismiss the case. Rather, the Secretary instructed Defendant "to work with OFCCP to develop affirmative steps to notify recruitment sources of specific vacancies today and as it is awarded contracts for the spring construction season." *See* 41 C.F.R. § 60-4.3(a)7.b. Defendant was ordered to comply with all other affirmative action steps in the regulations and the conciliation agreement, while OFCCP was ordered to file a statement concerning Defendant's compliance and whether it would continue to seek debarment and contract cancellation. The Secretary rejected OFCCP's position that the Executive Order and its implementing regulations permit no flexibility in assessing a contractor's good faith efforts.

To the contrary, the Secretary took into consideration all the other steps taken by Defendant, such as specific requests to unions for women applicants, telephone requests for women to a state employment and training agency and the state Indian Council, and instructions to its supervisors to recruit minorities and women. The Secretary also considered the Defendant's successful efforts to increase employment of minorities and its having substantially exceeded that goal, and the Defendant's current compliance status (the notification of alleged non-compliance was issued in November 1992, but the administrative complaint under the expedited hearing procedure was not issued until August 31, 1995).

Finally, the Secretary considered that the sanction sought by OFCCP (a 180-day debarment and cancellation of existing contracts until Defendant established that it has undertaken efforts to remedy its prior noncompliance and is currently in compliance) would put Defendant out of business. The Secretary stated that he had:

> . . . serious doubt how a contractor that has gone out of business can demonstrate compliance or rectify past noncompliance for the type of violations alleged here. Equally important, it is not clear how putting [the Defendant] out of business will achieve the primary objective of the Executive Order -- increased employment opportunities for minorities and women. Its only result would be to throw [the Defendant's] current employees out of work.

The Secretary distinguished decisions in which the defendants exhibited recalcitrance in attempting to achieve affirmative action goals or ignored the administrative enforcement process.

I. Sanctions

1. Due process required

Sanctions are imposed under each of the contract compliance programs administered by OFCCP only after a finding that a contractor has violated the relevant law and has been given an opportunity to remedy its noncompliance. ***OFCCP v. American Airlines, Inc.,*** Case No. 1994-OFC-9 (Ass't Sec'y Apr. 26, 1996).

2. Attorney misconduct

There is no provision in Department of Labor regulations governing administrative proceedings under Section 503 of the Rehabilitation Act "[for] an appeal of an ALJ order imposing or denying sanctions for alleged misconduct of an attorney." The only provision for review of ALJ orders in Section 503 cases permits any party to file exceptions to an ALJ recommended decision after the hearing. ***OFCCP v. Mississippi Power Co.***, Case No. 1992-OFC-8 (Ass't Sec'y July 19, 1995). The Assistant Secretary held, however, that neither an ALJ nor the Secretary has the authority, absent an explicit grant by statute, to impose the personal sanctions provided for in the Federal Rules of Civil Procedure, *e.g.*, requiring payment of attorneys' fees and costs or holding an individual in contempt for failure to comply with a subpoena. In this vein, it was determined that the ALJ had no authority to issue the sanctions order, rather, his or her authority to regulate discovery and the conduct of parties and their representative is limited to that provided in the regulations. It was noted that debarment could be ordered for refusal to comply with the discovery regulations. *See also* ***OFCCP v. Jacobi-Lewis Co.***, Case No. 1988-OFC-18 (Sec'y Mar. 2, 1995) (Fed. R. Civ. P. 11 is inapplicable).

J. Equal Access to Justice Act (EAJA) inapplicable

In ***OFCCP v. Jacobi-Lewis Co.***, Case No. 1988-OFC-18 (Sec'y May 2, 1995), the issue was presented whether, as a condition for dismissal under Rule 41(a)(2) of the Federal Rules of Civil Procedure, Defendant was entitled to an award of attorneys' fees and costs pursuant under the Equal Access to Justice Act at 5 U.S.C. § 504 (EAJA). The Secretary held that the EAJA does not apply to proceedings under the Rehabilitation Act. In order to apply the EAJA, the statute involved must intend to require full agency adherence to the Administrative Procedure Act (APA) whereas the Rehabilitation Act does not expressly invoke the APA. While the Department regulations provide some of the protections afforded by the APA, there is no indication that the Department intended to be subjected to the entire EAJA. Indeed, the EAJA amounts to a partial waiver of sovereign immunity and renders the United States liable for fees only when the party seeking to obtain them has been subjected by the agency to an "adversary adjudication" and has prevailed against the agency. The Secretary concluded that, absent some other explicit authority for assessing fees against the government, the request for fees must be disallowed.

The ALJ held that, absent a violation of a court order compelling responses to OFCCP's discovery requests and given that American's opposition to the requests is substantially justified, OFCCP's request for an award of expenses and attorney's fees incurred by OFCCP in seeking discovery would be denied. ***OFCCP v. American Airlines, Inc.***, Case No. 1994-OFC-9 (ALJ Jan. 19, 1995) (discovery order).

XV. Types of dispositions

A. Consent decree

1. Generally

In ***OFCCP v. American Airlines, Inc.***, Case No. 1994-OFC-9 (ALJ Aug. 10, 2000), the ALJ issued an *Order Approving Consent Decree* pursuant to 41 C.F.R. § 60-30.13(b) in a case involving alleged violations of Section 503 of the Rehabilitation Act of 1973 at 29 U.S.C. § 793. *See also* ***OFCCP v. Holly Sugar Corp.***, Case No. 1998-OFC-13 (ALJ, Dec. 13, 1999) (a case arising under Executive Order 11246); ***OFCCP v. Wagner***

Electric Corp., Case No. 1980-OFCCP-20 (ALJ Jan. 21, 1981) (without admitting to violations alleged in the complaint, Defendant agreed to comply with the Rehabilitation Act's affirmative action requirements, pay Complainant, and adjust Complainant's seniority date).

In ***OFCCP v. Beverly Enterprises, Inc.***, ARB Case No. 02-009, 1999-OFC-11 (ARB Apr. 30, 2002), the Board approved of the parties' consent decree which resolved outstanding issues and permitted OFCCP to conduct compliance reviews of the Defendant's headquarters and nursing homes. One noteworthy paragraph provided the following:

> Enforcement proceedings for violation of this Decree may be initiated at any time after the 20-day period in § 60-33 has elapsed . . . upon filing with the Administrative Review Board a motion for an order of clarification or enforcement and/or sanctions. The Administrative Review Board may, if it deems appropriate, schedule an evidentiary hearing on the motion or remand the matter to the Office of Administrative Law Judges for that purpose. The issues in a hearing on the motion shall relate solely to the issues of the factual and legal claims in the motion.

2. Not subject to ARB review

In ***OFCCP v. Cambridge Wire, Inc.,*** Case No. 1994-OFC-12 (ARB Nov. 26, 1996), a matter appealed by the union intervenor, the ARB held that, pursuant to 41 C.F.R. § 60-30.13(d), an ALJ's decision on an agreement containing consent findings is the final administrative order of the Department of Labor and is not subject to review by the ARB. In so holding, the ARB rejected the union's argument that the jurisdictional bar applied only to "uncontested contest decrees" and that the case should be remanded for a "fairness hearing" on the union's objections. Slip. op. at 4.

3. May be amended by the ALJ

In ***OFCCP v. SKF USA, Inc.***, ARB Case No. 00-023, 1997-OFC-17 (ARB Mar. 30, 2001), OFCCP and Defendant submitted consent findings in a case where Defendant failed to hire qualified women applicants for entry-level machine operator positions in violation of Executive Order 11246. The ALJ issued a decision approving of the consent findings and, thereafter, OFCCP learned that one of the individuals named in the consent findings was a man and was not, therefore, entitled to relief. As a result, OFCCP moved that the ALJ amend the consent findings to correct the error.

The ALJ, in turn, denied OFCCP's motion to state that he had no authority to amend the decision approving consent findings. On appeal, the ARB concluded that, pursuant to 41 C.F.R. § 60-13(d), the ALJ's decision based on consent findings constituted the "final administrative order" such that the ARB lacked jurisdiction over the appeal. Although the ARB subsequently dismissed the appeal, it noted the following in a footnote:

> Although we must dismiss this appeal for lack of jurisdiction, we nevertheless feel compelled to point out that an amendment of a Consent Order may not be beyond the ALJ's authority. The fact that there is no Department rule governing the amendment of a Consent Order does not necessarily preclude the parties from obtaining relief from what is an obvious mistake. We note that 41 C.F.R. § 60-30.1 provides, in pertinent part, '[i]n the absence of a specific provision, procedures shall be in accordance with the Federal

> Rules of Civil Procedure.' Fed. R. Civ. P. 60 permits the court to relieve a party from an order or judgment for, among other things, clerical mistakes, mistakes, or inadvertence.

Slip op. at 2, n. 1.

4. May not be blocked by intervener

It is well-settled that an intervener may not block approval of a proposed consent decree by withholding its consent. ***International Ass'n of Firefighters v. City of Cleveland***, 478 U.S. 501, 529 (1986) (Title VII discrimination case; an intervener may not block approval of a consent decree but "an intervener is entitled to present evidence and have its objections heard at the hearing on whether to approve a consent decree"); ***Black Firefighters Ass'n of City of Dallas***, 805 F. Supp. 426, 428 (N.D. Tex. 1992) (Title VII discrimination case).

In ***OFCCP v. U.S. Airways, Inc. and Air Line Pilots' Ass'n, et al***, Case No. 1988- OFC-17 (ALJ Feb. 14, 2002), the ALJ noted that an intervener generally cannot block a proposed consent decree between the parties to a case. However, the ALJ held that an intervener has the right to be heard regarding its objections to a proposed consent decree. Moreover, under the special circumstances of the case before him, the intervener union had a right to block the consent decree because it violated its collective bargaining agreement with the defendant airline. In particular, OFCCP sought to impose retroactive seniority through the consent decree for an individual, which it alleged was discriminated against by the defendant. The intervener argued that it was improper to approve of a consent decree awarding retroactive seniority because there was no decision on the merits or summary decision wherein the ALJ specifically found that the defendant engaged in discrimination in violation of Executive Order 11246. In support of his holding, the ALJ cited to a number of circuit court cases, including ***United States v. City of Hialeah***, 140 F.3d 968 (11th Cir. 1998) and ***United States v. City of Miami***, 614 F.2d 1322 (5th Cir. 1980), *rev. and rem. in part* 664 F.2d 435 (5th Cir. 1981).

On appeal, in ***OFCCP v. U.S. Airways, Inc. and Air Line Pilots' Ass'n, et al***, ARB Case No. 02-063, 1988-OFC-17 (ARB Sept. 18, 2002), the Board remanded the case at the request of the parties "to an ALJ for the opportunity to seek entry of a revised Supplemental Consent Decree pursuant to 41 C.F.R. § 60-30.13." The Board further noted that, under 41 C.F.R. § 60-30.13(d), an ALJ's approval of a consent decree constitutes the final administrative order" and the Secretary of Labor does not have jurisdiction to review the ALJ's decision.

5. Factors to be considered

In ***OFCCP v. Sysco Food Services of Portland, Inc.***, Case No. 1997-OFC-21 (ALJ Apr. 28, 1998), the ALJ issued a decision and order approving of the parties' consent decree. Citing to ***OFCCP v. Caroling Freight Carriers Corp.***, Case No. 1993-OFC-15 (ALJ Oct. 20, 1993), ***Williams v. Vukovich***, 720 F.2d 909 (6th Cir. 1983), and ***OFCCP v. Cambridge Wire, Inc.***, Case No. 1994-OFC-12 (ALJ Dec. 18, 1995), the ALJ noted that there are three steps in considering the adequacy and propriety of a consent decree: (1) the consent decree should be preliminarily approved so long as the compromise embodied within the decree is not illegal or tainted with collusion; (2) the decree should be evaluated to determine whether it is fair, adequate, and reasonable; and (3) the ALJ must consider whether the consent decree is consistent with public interest.

B. Conciliation required under the Rehabilitation Act

1. Generally

In ***OFCCP* v. *Southern Pacific Transportation Co.***, Case No. 1979-OFC-10A (ALJ Nov. 9, 1982), *remanded on other grounds*, (Ass't Sec'y Feb. 24, 1994), it was held that the regulations at 41 C.F.R. §§ 60-741.26(g)(2) and 60-741.28(a) are mandatory and require that some sort of conciliatory effort be made. There are no rigid guidelines for how to conciliate and the regulations do not demand that mediation be under the guidance of a third party. Rather, the general concept of conciliation appears to contemplate first an investigation of the facts to determine the merits of what violation, if any, has occurred. The agency attempts conciliation by notifying the violator of its findings, conclusions and demands or desires. Next, the agency will communicate to the violator the opportunity to come into compliance with the law voluntarily without litigation and attempt to initiate a dialogue on this subject. The details of the method in each case will depend on the facts. The agency is not required to inform the violator that, if voluntary compliance fails, litigation will follow. To conciliate means to reconcile, compromise, placate, or otherwise satisfy the grievance of the complainant. Consequently, to attempt conciliation means to take some affirmative action or to make some reasonable effort to resolve the differences. The agency's refusal to back down from its position, particularly in the absence of signs of reciprocation, does not prove lack of good faith.

2. Sufficiency of conciliation efforts

In ***OFCCP v. Central Power & Light Co.,*** Case No. 1982-OFC-5 (ALJ Mar. 30, 1987), OFCCP's efforts to conciliate were sufficient even though the meeting to discuss appropriate remedies for Defendant's violations lasted only 15 minutes. The fact that the parties quickly reached an impasse because Defendant refused to consider back pay for rejected applicants does not negate OFCCP's good faith attempt to conciliate. The requirement at 41 C.F.R. § 60-741.26(g)(2), that OFCCP conciliate violations, is not a jurisdictional prerequisite. OFCCP may be granted relief for individuals who were not identified during the investigation nor discussed during conciliation if it is established that these persons are victims of the same improper practices.

Conciliation efforts consisting of several telephone conversations and one face-to-face meeting, though minimal, were sufficient to satisfy the requirements at 41 C.F.R. § 60-741.26(g)(2). ***OFCCP* v. *East Kentucky Power Cooperative, Inc.***, Case No. 1985-OFC-7 (ALJ Mar. 21, 1988).

3. Amended complaint; effect on conciliation

In ***OFCCP v. Jefferson County Board of Education***, Case No. 1990-OFC-4 (ALJ Nov. 21, 1990), the ALJ permitted OFCCP to amend its complaint to broaden time period in which allegations occurred, even though no conciliation occurred with respect to earlier time period. In so holding, the ALJ concluded that the regulations do not require that amendments to complaints be preceded by separate conciliation efforts. However, the ALJ did note that compliance with the regulations governing conciliation might require that further conciliation be undertaken prior to amending a complaint, if the amended complaint asserted an entirely different type of violation from that asserted in the original complaint.

4. Distinction between conciliation and letter of commitment

In ***OFCCP v. First Federal Savings Bank of Indiana***, Case No. 1991-OFC-23 (Sec'y Oct. 26, 1995), Defendant did not develop a written affirmative action plan on becoming a covered government contractor and did not submit an acceptable affirmative action plan as requested by OFCCP. Defendant corrected the deficiencies in its affirmative action plan before a show cause order was issued. As a result, OFCCP did not seek debarment; rather, it sought an order enjoining future violations and requiring Defendant to submit periodic reports for two years. OFCCP, however, initiated enforcement proceedings because the parties could not agree on the form of a settlement document. Defendant offered to sign a letter of commitment, while OFCCP would only enter into a conciliation agreement. The difference between the two types of documents lies in enforcement; a conciliation agreement does not require a show cause period on the finding of violation before an enforcement action may be commenced whereas a show cause period would be required for a violation of a letter of commitment. The Secretary held that nothing in the regulations give a defendant the right to insist that a settlement take the form of a letter of commitment.

C. Dismissal

1. Upon compliance with consent decree

In ***OFCCP v. The Boeing Co.***, Case No. 1999-OFC-13 (ALJ Jan. 3, 2000), the ALJ issued an order of dismissal at OFCCP's request where Defendant had complied with the terms of the consent decree.

2. Complaint is moot

In ***OFCCP v. Kaiser Foundation Health Plan of Massachusetts, Inc.***, Case No. 1998-OFC-5 (ALJ Jan. 26, 2000), the ALJ dismissed the complaint on grounds that the case was moot. The complaint alleged violations of Executive Order 11246 at Kaiser Foundation's Massachusetts operations center for failure to develop a written affirmative action plan. However, Kaiser subsequently closed its Massachusetts operations center which, in turn, rendered the cause of action moot.

3. Settlement

In ***OFCCP* v. *K. Monkiewicz, Inc.***, Case No. 1981-OFCCP-20 (ALJ June 30, 1982), *aff'd* (Dep'y Under Sec'y Sept. 14, 1982), a complaint against Defendant was properly dismissed where the parties reached an agreement in the case. *See also* ***OFCCP v. Wyeth, Inc.***, 2003-OFC-7 (ALJ, June 4, 2004) (the ALJ issued a *Decision and Order Approving Settlement Agreement* pursuant to 41 C.F.R. § 60-30.13(b) and (d)).

4. Factors to be considered

In ruling on a motion to dismiss or for summary judgment based on the timeliness of an action a court must construe the pleadings, affidavits, and record in the light most favorable to OFCCP. ***OFCCP* v. *CSX Transportation, Inc.***, Case No. 88-OFC-24 (ALJ Mar. 23, 1990), *rev'd and remanded on other grounds*, (Ass't Sec'y Oct. 13, 1994). Moreover, in order to prevail on a motion to dismiss or motion for summary judgment, there must be an absence of conflicting inferences to be drawn from the subsidiary facts and Defendant must establish beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would justify relief.

5. Types of dismissal

a. With prejudice

Dismissal with prejudice is a severe sanction, condoned only when the responding party would face dire consequences or substantial legal prejudice. ***OFCCP* v. *Jacobi-Lewis Co.***, Case No. 1988-OFC-18 (Ass't Sec'y May 2, 1995).

b. Voluntary

In ***OFCCP v. USAir, Inc.,*** Case No. 1995-OFC-3 (Ass't Sec'y Sept. 28, 1995), the parties filed a stipulation for voluntary dismissal with the ALJ, who then issued a Recommended Order of Dismissal. The Acting Director of the Office of Administrative Appeals issued a Notice of Case Closing in which he found that the case should be closed pursuant to Fed. R. Civ. P. 41(a)(1)(ii). The regulatory provisions at 41 C.F.R. § 60-30.1 provide that Rule 41 is applicable because "in the absence of a specific provision, procedures shall be in accordance with the Federal Rules of Civil Procedure." The rules at 41 C.F.R. Part 60-741 do not provide for voluntary agreements for dismissal, nor is there such a provision in 41 C.F.R. Part 60-30, which is incorporated in 41 C.F.R. Part 60-741. Therefore, it was proper to apply Fed.R.Civ.P. 41(a) and permit voluntary dismissal of the complaint. *See also* ***OFCCP* v. *Jacobi-Lewis Co.***, Case No. 1988-OFC-18 (Ass't Sec'y May 2, 1995).

6. Dismissal versus summary judgment

The rules of practice and procedure applicable to Section 503 of the Rehabilitation Act at 41 C.F.R. Part 60-30 do not contain a provision regarding motion to dismiss. Therefore, pursuant to 41 C.F.R. § 60-30.1, Rule 12(b) of the Federal Rules of Civil Procedure is applicable. ***OFCCP* v. *CSX Transportation, Inc.***, Case No. 1988-OFC-24 (Ass't Sec'y Oct. 13, 1994). The Assistant Secretary held that a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), which relies on facts beyond the complaint, may not be granted. As a result, it was determined that an ALJ's consideration of facts outside of the pleadings as part of his decision to grant a motion to dismiss constituted reversible error. If matters outside the pleadings are presented to support a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and the matters are not excluded by the adjudicator, then the motion shall be treated as one for summary judgment under 41 C.F.R. Part 60-30, which sets forth the specific procedures for such a motion. Summary judgment must be denied where there are outstanding issues of material fact. The duty of an adjudicator in deciding a motion for summary judgment is to determine whether any disputed material facts exist, not to resolve them.

D. Summary judgment

The moving party on a motion for summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. ***OFCCP* v. *Holly Farms Foods, Inc.***, Case No. 1991-OFC-15 (ALJ Oct. 24, 1991). In the case before him, the ALJ concluded that, because Defendant challenged the handicap status and qualifications of the class members, OFCCP failed to show an absence of genuine issues of material fact and, thus, the motion for summary judgment was denied.

In ***OFCCP* v. *Graves Truck Lines, Inc.***, Case No. 1980-OFCCP-2 (ALJ Apr. 16, 1980), the ALJ denied a motion for summary judgment because there were genuine issues of material fact in dispute, including whether complainant was a qualified handicapped person and whether accommodating him would have been an unreasonable burden upon Defendant.

In ***OFCCP* v. *Burlington Northern Railroad***, Case No. 1981-OFCCP-21 (ALJ Feb. 2, 1982), a motion for summary judgment was denied because there was a material fact in dispute as to whether Defendant was a covered government contractor.