U.S. Department of Labor

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

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

Issue Date: 08 August 2019

CASE NO.: 2017-OFC-00006

In the Matter of

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
U.S. DEPARTMENT OF LABOR,
Plaintiff,

v.

ORACLE AMERICA, INC.,
Defendant.

ORDER REGARDING POTENTIAL CORRECTIVE NOTICE

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, ("EO 11246") and associated regulations at 41 C.F.R. Chapter 60. It has been pending at the Office of Administrative Law Judges ("OALJ") since January 17, 2017, and involves Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") and Defendant Oracle America, Inc. ("Oracle"). Hearing is set to begin on December 5, 2019.

On June 26, 2019, I issued an Order Regarding Communications with Oracle Employees ("OCOE"). Part of the OCOE addressed a potential corrective notice to be issued to some Oracle employees who had received an April 4, 2019, letter from OFCCP informing them about the case and asking them to contact OFCCP to provide information. Oracle contended that the letter was misleading. In the OCOE, I determined that OFCCP's letter was misleading in certain ways, but not to the degree that Oracle argued. I declined to order any corrective notice, but directed the parties to further meet and confer verbally to attempt to come to an agreement, since both parties appeared interested in issuing a corrective notice at that time.

The OCOE ordered the parties to file a joint status update within 14 days stating the outcome of their meet and confer. I concluded that "[t]here is no reason the parties should be unable to work out a mutually agreeable course of action given the guidance above. After I review the joint status update, I will determine what further compelled action, if any, is necessary." On July 10, 2019, the parties filed a Joint Status Report stating that they had engaged in some meet and confer, but had not yet reached a resolution. They believed progress was possible. On July 11, 2019, I ordered the parties to file a further joint status report within 14 days. I specified that "[t]he status report should state that the parties have a mutually agreeable resolution or specify why exactly such a resolution was not possible and the likelihood that further time will resolve the matter. If the

matter is not resolved, each party should submit a draft copy of its proposed corrective notice, if any."

On July 25, 2019, the parties filed a second Joint Status Report ("JSR"). Though they resolved some disputes, "a mutually agreeable version has not been established" and "[t]he Parties do not believe that additional time, absent guidance from the Court, will resolve their disputes." JSR at 1. The parties remain mutually interested in issuing some corrective notice, but request "guidance on the remaining three issues." *Id.* They present three areas of dispute:

1. Which employees should receive the corrective notice?

2. What is the appropriate language regarding the Parties respective positions on remedies in this case?

3. From OFCCP's perspective, is Oracle's contact information required in a corrective notice from OFCCP? From Oracle's perspective, should the corrective notice include Oracle's contact information as well as OFCCP's?

Id. at 1-2. As ordered, the parties provided statements of position on each issue. *Id.* at 2-6. The meet and confer correspondence is attached as Exhibit A. OFCCP's and Oracle's proposed corrective notices are attached as Exhibits B and C, respectively.[1]

1. Which employees should receive the corrective notice?

OFCCP alleges that Oracle has engaged, and continues to engage, in widespread discrimination against women, Asians, and African Americans or Blacks in terms of compensation at its headquarters facility. More particularly, it alleges compensation discrimination against female employees in the Product Development, Support, or Information Technology job functions, Black employees in the Product Development job function, and Asian employees in the Product Development job function. On September 11, 2017, during an earlier phase of this case, Judge Christopher Larsen ordered Oracle to provide OFCCP with the names and contact information for current and former employees in those job functions at Oracle's headquarters facility. The April 4, 2019, letter was sent to a sub-set of these employees who OFCCP believed to be in the groups it had alleged suffered discrimination. The dispute now is over whether or not a corrective notice should be sent to those current and former employees or if it should be sent to a broader group of employees, specifically including employees in those groups who were hired after the period covered in the earlier production of contact information.

Having considered the filings, any *corrective* notice should be sent to the individuals who were sent the April 4, 2019, letter that is being corrected and no others. An individual's right to contact the government with concerns is not at all relevant. Whether or not any corrective notice is sent, that right remains. While I agree that any employee who wishes to contact OFCCP should be allowed to do so regardless of the purpose of the corrective notice, it would be inequitable to turn what is supposed to be a correction into a wider solicitation, especially where the other party in interest is opposed.

[1] The briefing and papers in Exhibit A touch on issues that have either resolved or are not necessary to resolve to provide the guidance requested. *See, e.g.*, JSR at 4, 6. I do not address or comment on, one way or another, these ancillary issues.

The attempt to broaden the list of recipients appears to be an attempt to broaden the solicitation and procure additional contact information. I do not reach the question of whether OFCCP might have been entitled to further contact information. The point, rather, is that the appropriate way to procure that contact information and ensure wider distribution of a letter would have been to file a motion at the appropriate time so that the issue could have been appropriately adjudicated. OFCCP choose not to do that, so it is not entitled to the additional disclosures. A notice that is supposed to correct OFCCP's misleading statements is not a backdoor to a wider solicitation.

2. *What is the appropriate language regarding the Parties respective positions on remedies in this case?*

The parties also disagree about the precise language in the corrective notice related to potential remedies. Each party submitted its proposed version of a corrective notice, and seek guidance from the court regarding a few discrete issues. *See* JSR at 2-3; Ex. B; JSR at 3; Ex. C. Having considered the submissions and arguments, I find nothing overly objectionable in the second sentence in OFCCP's third paragraph that would render it preferable to Oracle's second sentence. To remove some of the transactional sense of the sentence, it would be preferable to use words like "prevail" and "compensation discrimination." OFCCP's version accurately conveys that any payment to the recipient requires both liability and damages findings. To address Oracle's point that OFCCP might prevail and have damages awarded to Oracle employees, but *not* the employee who is a recipient of the letter, the sentence could simply add a reference to "including you" or the like to signal the contingency. I note, however, that Oracle's version has the same deficiency.

I see no reason to include the next sentence, "If Oracle wins those portions of the lawsuit, current and former employees will not be awarded money (wages) for the alleged discrimination against employees." Both proposed corrective notices are already over-long and this sentence adds no information that Oracle employees cannot garner on their own. Further, this is not a point to highlight—a point I thought was clear from the OCOE—and is not necessarily true: the face of the operative complaint seeks cancellation of contracts and debarment and OFCCP has not filed papers abandoning those aspects of its prayer for relief. I see no reason to create the impression that assisting OFCCP will lead to personal financial benefit, especially when that may well not be true. Finally, Oracle's version of the last sentence of the paragraph is more than sufficient to make the point. Oracle employees are more than capable of figuring the point out and making their own decisions about their own interests.

3. *From OFCCP's perspective, is Oracle's contact information required in a corrective notice from OFCCP? From Oracle's perspective, should the corrective notice include Oracle's contact information as well as OFCCP's?*

The last issue concerns whether or not Oracle's contact information should be included in the corrective notice. Having considered the filings and arguments, I offer the following guidance. As previously noted, OFCCP is not under order to issue a corrective notice. The OCOE found that parts of the April 4, 2019, letter were misleading, but that they were not as misleading as Oracle alleged. Both parties at that time seemed keen on issuing a corrective order and both had good reason to do so. To facilitate that process, the OCOE provided guidance and directed the parties to meet and confer further. That has led to the current status report and request for more guidance.

As to whether Oracle's contact information should be provided in any corrective notice that is dispatched, at this point it should be neither or both. This is a corrective notice, not another solicitation. I see no need to include the contact information for either party. But if OFCCP is intent on including its contact information, both sides should have their information included. Oracle employees may choose to assist the government and they may choose to assist their employer. They are required to do neither. OFCCP already sent its solicitation. A corrective notice is supposed to convey a sense of balance and *correct* the misleading imbalances in the first communication.

CONCLUSION

The OCOE directed the parties to meet and confer about a corrective notice and report the result. It did so because it appeared both parties were interested in sending a corrective notice in some form, but there was no order for a corrective notice. The parties have now requested further guidance, which was provided above. The prior order as to whether or not to send a corrective notice remains unchanged.

Given the guidance above, the parties are ordered to further meet and confer to determine whether they can agree on a corrective notice that they both wish to send to the recipients of the April 4, 2019, letter. The time for quarreling is long past. The parties must either agree to something and send it or fail to agree and leave the issues created by the misleading communication remaining for hearing. The parties must file a joint status report within 14 days of this order relating the result of the meet and confer. If agreement was reached and the letter has been distributed, a copy should be attached as an exhibit.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge