



Issue Date: 04 December 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 CLARIFYING ISSUES FOR HEARING

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. Plaintiff Office of Federal Contract Compliance Programs (“OFCCP”) filed the operative Second Amended Complaint (“SAC”) on March 13, 2019. Defendant Oracle America, Inc. (“Oracle”) answered on April 2, 2019. Hearing is set to begin on December 5, 2019.

On November 21, 2019, the parties filed a Joint Pre-hearing Statement (“PHS”) as well as other pre-hearing filings. On November 26, 2019, I held a telephonic pre-hearing conference with the parties. The conference was not recorded. In the Joint Pre-hearing Statement, the parties provided competing extensive lists of issues. *See* PHS at 1-6. I combined and condensed the issues for hearing provided by the parties, and read the reformed statement of issues to the parties during the pre-hearing conference. During the conference, the parties raised no objections and proposed no additions to the list of issues, but asked to be able to review the re-stated issues in writing. I told the parties that the re-stated issues would be included in a subsequent order, and asked them to inform me expeditiously if they had any objections.

An Order Following Pre-Hearing Conference (“PHO”) was issued on November 29, 2019. It stated the issues as follows:

1. Whether Oracle breached its federal contracts by engaging in sex and racial discrimination in violation Section 202 of Executive Order and 41 C.F.R. § 60-1.4(a).
2. Whether Oracle violated Section 202 of Executive Order and 41 C.F.R. § 60-1.4(a) by engaging in compensation discrimination against female, Asian and African American employees at its Redwood Shores headquarters, as follows:

- a. Whether Oracle engaged in assignment, job classification, position, or steering discrimination at its headquarters facility during the relevant time period against female employees in the Product Development, Information Technology, and Support job functions in violation of 41 C.F.R. § 60-20.4(b).
 - b. Whether Oracle engaged in assignment, job classification, position, or steering discrimination at its headquarters facility during the relevant time period against Asians and African American employees in the Product Development job function in violation of 41 C.F.R. § 60-20.4(b).
 - c. Whether Oracle engaged in intentional compensation discrimination (wage-rate, salary, or total compensation) at its headquarters facility during the relevant time period against female employees in the Product Development, Information Technology, and Support job functions in violation of 41 C.F.R. § 60-20.4(b).
 - d. Whether Oracle engaged in intentional compensation discrimination (wage-rate, salary, or total compensation) at its headquarters facility during the relevant time period against Asians and African American employees in the Product Development job functions in violation of 41 C.F.R. § 60-20.4(b)
3. Whether Oracle had a policy or practice at its headquarters facility during the relevant time period of relying on prior pay in salary setting; and whether that policy or practice had an adverse disparate impact on female employees in the Product Development, Information Technology, and Support job functions and against Asians and African American employees in the Product Development job function; and whether that policy is not shown to be job-related and consistent with business necessity.
 4. Whether OFCCP issued its Show Cause Notice (“SCN”) without “reasonable cause” to believe Oracle discriminated against women in its Product Development, Information Technology, or Support job functions, or Asians or African Americans in its Product Development job function, contrary to 41 C.F.R. § 60-1.28.
 5. Whether OFCCP failed to engage in “reasonable efforts” to conciliate as required by 41 C.F.R. § 60-1.20(b).
 6. Whether OFCCP must establish a violation during the 2013-2014 audit period as a prerequisite for attempting to prove a continuing violation.
 7. If OFCCP prevails, it seeks the following relief:
 - a. *Back Pay*: For Oracle to come into compliance by providing make-whole formula back wage relief for victims of Oracle's discriminatory conduct from 2013 to the present date and implementing immediate pay equity adjustments and alterations of its compensation policies to ensure that Oracle ceases engaging in gender and racial compensation discrimination prospectively.
 - b. *Prospective Relief*: OFCCP requests that Oracle be ordered to make corrective prospective relief, including necessary pay adjustments and career level adjustment for all members of the victim class, through objective evidence that eliminate the compensation disparities identified through Dr. Madden's analyses. Oracle should also be ordered to revise its compensation policies and practices to the satisfaction of this Court to ensure there is no re-occurrence of systemic racial and gender disparities in setting compensation.

- c. *Injunctive Relief*: Oracle should be enjoined against further violations of the Executive Order. Oracle should be ordered to provide training subject to OFCCP's advanced approval, and certify that it provided training, to all persons at its Redwood Shores headquarters regarding compensation discrimination. In addition, Oracle should be required to post information about compensation discrimination and notify all employees annually that they have the right to contact OFCCP should they be concerned that they are the victim of compensation discrimination.
 - d. *Reporting*: Oracle should be ordered to report to OFCCP on its progress and all aspects of the relief required for a period of at two years from the date it first comes into compliance by implementing the pay equity adjustments, changes to its compensation policies, and paying the back wages due.
8. If Oracle prevails, it seeks the following relief:
- a. A final administrative order be issued in Oracle's favor on all claims;
 - b. OFCCP's Second Amended Complaint be dismissed with prejudice; and
 - c. Oracle be awarded its costs of suit.
 - d. In the event the Court finds any relief is warranted, any such relief be limited to the remedies sought by OFCCP in its Second Amended Complaint.

PHO at 2-4. During the pre-hearing conference, OFCCP made an oral motion to amend the complaint to include an additional issue related to Oracle's Affirmative Action Plan compliance. That motion was denied in a separate order issued on November 29, 2019.

On December 2, 2019, Oracle filed a Response to the Issues for Hearing Contained in the Court's Order Following Pre-Hearing Conference ("DR"). Oracle objects to the statement of Issues #1 and #2. Oracle contests "the framing of Issue Number 1 as a breach of contract issue" on the grounds that the SAC "does not allege a breach of contract claim." DR at 1. Additionally, it objects to the reference to 41 C.F.R. § 60-1.4(a) on the grounds that it does not specify that violation is breach of contract. *Id.* at 1-2. It worries that it is "unclear" what damages might arise in a breach of contract claim. *Id.* at 2. As to Issue #2, Oracle again objects to the citation to 41 C.F.R. § 60-1.4(a) on the grounds that it does not specify that a contractor that violates the regulation commits a breach of contract. *Id.* Oracle also objects to the citations to 41 C.F.R. § 60-20.4(b) on the grounds that the current version post-dates the beginning of the relevant period and on its face only applies to gender discrimination. *Id.* Oracle does not object to any of the other issues and proposes no additions.

OFCCP filed a Response to Oracle's Objections to Issues for Hearing ("PR") on December 3, 2019. OFCCP objects to Oracle's filing, complaining that it was done without leave of court and without a meet and confer. It asserts that the filing represents a "last minute reversal of position" that would "radically change the legal landscape of these proceedings on the eve of trial."¹ PR at 1-2. As to Issue #1, OFCCP replies that Oracle is engaged in "rhetorical hair splitting" since the regulations insert the equal opportunity obligation clause into government contracts, and when a

¹ OFCCP requests that if I consider Oracle's response, I also consider OFCCP's substantive response and permit it additional time to provide more briefing. PR at 2. I have considered both responses. I see no need for more briefing since OFCCP vastly overstates what is at stake in the particular statement of the issues, as discussed below.

contractual provision is breached, the resulting action is for breach of contract. *Id.* at 2. It points out that the remedies for such a claim have already been spelled out. *Id.* For Issue #2, OFCCP contends that Oracle is now shifting its position on the applicable law, which “would be highly prejudicial to OFCCP and would throw these proceedings into turmoil.” *Id.* It argues that Oracle has relied on the regulations in question and has waited until the last minute to raise these new objections. *Id.* at 2-4. On that basis OFCCP contends that Oracle is judicially estopped from contesting the applicability of the regulations in question. *Id.* at 4-5. Moreover, OFCCP contends that Oracle’s new argument is incorrect on the merits since the regulations in question were clarifying regulations that re-stated already applicable principles. *Id.* at 5-6.

The point of identifying issues for hearing is to narrow the areas that are in dispute and come to some agreement about what needs to be decided—and derivatively, what doesn’t need to be decided. I attempted to produce a shorter list of issues that the parties could agree on. I allowed for responses after the parties could see those issues in writing, so Oracle’s filing is not improper in the way that OFCCP suggests. Moreover, the statement of the issues merely establishes a baseline. It does not (and could not) alter the applicable law or resolve areas of dispute between the parties.

Upon further consideration, I find that Issue #1 is redundant and can be deleted entirely. EO 11246 applies to government contracts. An employer becomes subject to the requirements in EO 11246 and the implementing regulations when it voluntarily decides to become a government contractor. If a business does not want to adhere to EO 11246 and the regulations, or be subject to the jurisdiction of OFCCP, it can simply refrain from contracting with the government. To allege a violation of EO 11246 and the implementing regulations is to allege a breach of the relevant contractual provisions; to allege the breach of the relevant contractual provisions is to allege a violation of EO 11246 and the implementing regulations.

To frame the issues for hearing, I look to the SAC. It frames the complaint as containing allegations of discrimination resulting in violations of the executive order. SAC at pp. 1, 16, ¶ 11-12. It does not frame the issues in terms of breach of contract. Regardless of how the issue is framed, the underlying dispute is the same—I must determine whether Oracle is subject to EO 11246 because it entered into a contract making it subject to EO 11246 and, if so, whether Oracle violated EO 11246 by discriminating in the ways OFCCP has specified. The parties agree that Oracle is a government contractor, so only the second question needs to be answered. That question, as it relates to the undecided disputes, is contained within current Issues #2 and #3, with current Issue #1 simply getting at the same underlying issue from a different angle. This is unnecessary, so I will delete Issue #1.

OFCCP has more substantive objections to Oracle’s proposed alterations of current Issue #2. As currently stated, the issue contains explicit references to the regulations. Oracle wants these removed; OFCCP worries that this will throw the case into turmoil. OFCCP stridently argues that Oracle is committed to the application of the regulations in question and that substantively they apply. But OFCCP overstates the importance of the framing. The phrasing of the issues does not alter the underlying applicable law, the prior case history, or positions the parties may be committed to for other reasons. If Oracle is committed to the application of the regulations or if as a matter of law they apply, that is so regardless of whether or not the issues stated as the baseline for hearing make the references explicit.

Worries that removing the explicit reference to the regulations in the formal statement of issues will throw proceedings into turmoil are unfounded. The removal is *not* a determination that they do not apply or an indication that there is even a colorable argument that they do not apply. It merely reflects the way the dispute was framed by the agreement of the parties about what had to be decided. Reviewing the SAC, the relevant sections stated discrimination allegations generally, without making explicit reference to 41 C.F.R. § 60-20-4(b). *See* SAC at ¶¶ 11-32. As such, I agree with Oracle's proposed change of wording, though to be clear, this alteration implies no determination or comment on the applicable law.

Two other changes to the issues are necessary. At the time of the pre-hearing conference and the subsequent order, briefing was outstanding on an order to show cause why OFCCP should not be granted summary judgment on Oracle's procedural defenses related to the Show Cause Notice and conciliation. These were identified as Issues #4 and #5, respectively. On December 3, 2019, I issued an order granting OFCCP summary judgment on those issues. As a result, those two issues are no longer in need of adjudication at hearing and will be removed.

Finally, in a December 2, 2019, Order Regarding Motions in Limine, I granted Oracle's Motion in Limine #13 insofar as it requested bifurcating the hearing into a liability and damages phase. Two of the issues involve the relief sought by the parties. I will retain both as issues for hearing, but the hearing beginning on December 5, 2019, will decide liability, with the damages to be awarded, if appropriate, decided at a later date.

For the reasons stated above, the issues for hearing are:

1. Whether Oracle violated Section 202 of Executive Order 11246 and the implementing regulations at 41 C.F.R. Part 60 by engaging in compensation discrimination against female, Asian and African American employees at its Redwood Shores headquarters, as follows:
 - a. Whether Oracle engaged in assignment, job classification, position, or steering discrimination at its headquarters facility during the relevant time period against female employees in the Product Development, Information Technology, and Support job functions;
 - b. Whether Oracle engaged in assignment, job classification, position, or steering discrimination at its headquarters facility during the relevant time period against Asian and African American employees in the Product Development job function;
 - c. Whether Oracle engaged in intentional compensation discrimination (wage-rate, salary, or total compensation) at its headquarters facility during the relevant time period against female employees in the Product Development, Information Technology, and Support job functions;
 - d. Whether Oracle engaged in intentional compensation discrimination (wage-rate, salary, or total compensation) at its headquarters facility during the relevant time period against Asian and African American employees in the Product Development job functions.
2. Whether Oracle had a policy or practice at its headquarters facility during the relevant time period of relying on prior pay in salary setting; and whether that policy or practice had an adverse disparate impact on female employees in the Product Development,

- Information Technology, and Support job functions and against Asian and African American employees in the Product Development job function; and whether that policy is not shown to be job-related and consistent with business necessity.
3. Whether OFCCP must establish a violation during the 2013-2014 audit period as a prerequisite for attempting to prove a continuing violation.
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 - a. *Back Pay*: For Oracle to come into compliance by providing make-whole formula back wage relief for victims of Oracle's discriminatory conduct from 2013 to the present date and implementing immediate pay equity adjustments and alterations of its compensation policies to ensure that Oracle ceases engaging in gender and racial compensation discrimination prospectively.
 - b. *Prospective Relief*: OFCCP requests that Oracle be ordered to make corrective prospective relief, including necessary pay adjustments and career level adjustment for all members of the victim class, through objective evidence that eliminate the compensation disparities identified through Dr. Madden's analyses. Oracle should also be ordered to revise its compensation policies and practices to the satisfaction of this Court to ensure there is no re-occurrence of systemic racial and gender disparities in setting compensation.
 - c. *Injunctive Relief*: Oracle should be enjoined against further violations of the Executive Order. Oracle should be ordered to provide training subject to OFCCP's advanced approval, and certify that it provided training, to all persons at its Redwood Shores headquarters regarding compensation discrimination. In addition, Oracle should be required to post information about compensation discrimination and notify all employees annually that they have the right to contact OFCCP should they be concerned that they are the victim of compensation discrimination.
 - d. *Reporting*: Oracle should be ordered to report to OFCCP on its progress and all aspects of the relief required for a period of at two years from the date it first comes into compliance by implementing the pay equity adjustments, changes to its compensation policies, and paying the back wages due.
 5. If Oracle prevails, it seeks the following relief:
 - a. A final administrative order be issued in Oracle's favor on all claims;
 - b. OFCCP's Second Amended Complaint be dismissed with prejudice; and
 - c. Oracle be awarded its costs of suit.
 - d. In the event the Court finds any relief is warranted, any such relief be limited to the remedies sought by OFCCP in its Second Amended Complaint.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge