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Issue Date: 13 March 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 FILING REVISED
SECOND AMENDED COMPLAINT

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. On January 22, 2019, OFCCP filed a Motion for Leave to File a Second Amended Complaint. On March 6, 2019, I issued an order Granting Conditional Leave to File a Second Amended Complaint, but requiring that OFCCP make several technical adjustments before the complaint would be deemed filed. OFCCP filed its revised Second Amended Complaint on March 8, 2019. After review, the Second Amended Complaint addressed the points in need of clarification. However, Oracle filed a letter raising two objections/points about the revised Second Amended Complaint on March 12, 2019.

Oracle first objects to the addition of ¶ 47. This addition is the result of one of the clarifications required in the March 6, 2019, order. In the original proposed Second Amended Complaint, OFCCP included a reference to an Affirmative Action Program violation in a subsidiary clause of a paragraph that primarily concerned failure to collect and maintain certain information. As discussed in the prior order, I found the amendment to the claims regarding proper collection and maintenance of information proper, but worried that this somewhat casual reference to an Affirmative Action Plan *might* be raising a very new claim that would significantly expand or alter this litigation. I thus asked OFCCP to remove the reference to an Affirmative Action Program or to separate and clarify its Affirmative Action Program allegation.

In its revised Second Amended Complaint, ¶ 47 follows this second option, alleging that:

> Oracle failed to maintain and make available to OFCCP documentation of its compliance with its obligation to develop and maintain an Affirmative Action

> Program by failing to maintain and make available documentation of its organizational profile, job group analysis, placement of incumbents in job groups, determination of availability, comparing incumbency to availability, placement goals, and internal audits of its employment processes….

Oracle objects that this is a new and entirely different claim that is beyond the scope of the original complaint. It contends that it would expand the complaint in a new and unforeseen direction, going well beyond the focus of the compliance review and requiring discovery into additional areas.

Based upon my understanding of the claim made by OFCCP in ¶ 47, Oracle's objection is overruled and the amendment is allowed. I do not understand OFCCP to be attempting to take this litigation in the direction envisioned by Oracle. In the March 6, 2019, order, I was concerned about whether or not OFCCP was attempting to amend the complaint and assert that based on a substantive analysis of the Affirmative Action Program developed and maintained by Oracle, it is deficient in some way because it is inconsistent with the substantive regulatory requirements of an Affirmative Action Program. That sort of amendment would be problematic because it would take the litigation in a new and different direction, requiring assessing compliance with a broad swathe of requirements that were not at issue in the compliance review or in this case up to this point. Oracle's objection focuses on the reference to the various aspects of the required documentation, which viewed alone could seem to be implicating a deficiency claim. But the verbs describing Oracle's alleged violation are more important—in sequence OFCCP alleges a failure to "maintain and make available," to "develop and maintain," and to "maintain and make available." I read and understand this as another compliance claim, which is also consistent with OFCCP's emailed communication to Oracle about ¶ 47 attached to Oracle's letter. I do not understand this to be a "deficiency" claim that would require examining the substantive merits of the Affirmative Action Program. Therefore, I will allow this proposed amendment.

Next, Oracle indicates that although it wishes to avoid unnecessary motion practice, it is also concerned to ensure that the issues it raised about the futility of the amendments are preserved for appeal. Oracle expresses the same concern as to the objection to the addition of ¶ 47 in its letter. It asks that I issue an order "confirming" that those "dispositive legal issues" are preserved for appeal. OFCCP does not oppose this request. To be clear, though I expressed in the prior order that I wanted the parties to litigate efficiently and not engage in unnecessary motion practice, I am in no way forbidding Oracle or OFCCP from filing dispositive or other motions as they find it necessary.

As requested, I will "confirm" as follows: in its earlier opposition to the motion for leave to amend and in its current letter, Oracle argued that amendment is futile because the amendments are legally deficient due to the failure to conciliate. These arguments turn on the scope and meaning of the conciliation requirement and the scope of the amendment provisions in the regulations. Those arguments were raised before the trial court and considered fully, including in the context of an Affirmative Action Program claim. An appellate body will make its own determination about whether or not an issue has been preserved, but from my perspective, they are fully preserved as potentially dispositive legal issues in the case and need not be raised again in the same posture.

OFCCP's Motion for Leave to File a Second Amended Complaint is granted. It is noted that Oracle has made and preserved its arguments regarding the futility of amendment based on legal deficiencies. The Second Amended Complaint dated March 8, 2019, is hereby filed as of March 13, 2019. That complaint is now the operative complaint in this matter. Oracle's time to answer under 41 C.F.R. § 60-30.6 will run from the date of this order.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge