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Issue Date: 23 May 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 DENYING OFCCP'S MOTION FOR PARTIAL SUMMARY DECISION ON
ORACLE'S AFFIRMATIVE DEFENSES RE: CONCILIATION**

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 the SAC ("Answer") on April 2, 2019. Hearing is set to begin on December 5, 2019.

On April 17, 2019, the OFCCP filed a Motion for Partial Summary Judgment on Oracle's Affirmative Defenses Re Conciliation (the "Motion") along with a Memorandum of Points and Authorities in support of the Motion ("PMSD") and Statement of Uncontested Material Facts in Support of the Motion ("PSSD"). The Motion also relies upon declarations from Gary Siniscalco ("DGS1") and Shauna Holman-Harries ("DSH") filed by Oracle on April 21, 2017. OFCCP seeks summary judgement on Oracle's Sixth and Thirtieth Affirmative Defense asserted in the Answer. On May 1, 2019, Oracle filed an Opposition to OFCCP's Motion for Partial Summary Judgment ("DOSD") accompanied by a second Declaration from Mr. Siniscalco ("DGS2"). OFCCP filed a Reply in Support of the Motion ("PRSD") on May 10, 2019.

For the reasons set forth below, OFCCP's Motion for Partial Summary Decision on Oracle's Affirmative Defenses Re: Conciliation is denied.

Legal Standard

This proceeding is governed by the “Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30.” 41 C.F.R. § 60-1.26(b)(2). Where the regulations at 41 C.F.R. §§ 60-30.1 *et seq.* do not provide a rule, the Federal Rules of Civil Procedure apply. 41 C.F.R. § 60-30.1. The regulations provide that OFCCP, at any time after 20 days have passed since the commencement of the action, “may move with or without supporting affidavits for a summary judgment of all claims or any part.” 41 C.F.R. § 60-30.23(a). Motions for summary judgment must be accompanied by a “Statement of Uncontested Facts.” 41 C.F.R. § 60-30.23(d). Parties opposing summary decision may file a “Statement of Disputed Facts.” Failure to do so is deemed as an admission of the “Statement of Uncontested Facts.” *Id.*

After receiving the motion and any opposition, “[t]he judgment sought shall be rendered forthwith if the complaint and answer, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” 41 C.F.R. § 60-30.23(e); *see also* Fed. R. Civ. P. 56(a). In a motion for summary judgment, the burden is on the moving party to present evidence that shows “an absence of evidence to support the non-moving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party presents such evidence, the non-moving party “may not rest upon mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

When considering a motion for summary decision, an ALJ does not assess credibility or weigh conflicting evidence, as all evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences made in its favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n.*, 809 F.2d 626, 630-31 (9th Cir. 1987). To prevent summary decision, however, the non-moving party must have more than a mere “scintilla” of evidence supporting its position. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). The non-moving party must designate certain facts in dispute, *Anderson*, 477 U.S. at 250, and “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In ruling on a motion for summary the decision, the ALJ does not weigh evidence or determine the truth of the matter, but evaluates “whether there is the need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson*, 477 U.S. at 249-50.

Discussion

Background

OFCCP submitted a Statement of Uncontested Facts relating the history of the pre-enforcement communications between the parties in this matter. Oracle did not submit a Statement of Disputed Facts, so the basic background is taken from OFCCP’s statement, supplemented by the materials incorporated and submitted with the motion and opposition.

OFCCP initiated a compliance evaluation of Oracle’s headquarters on September 24, 2014. PSSD at ¶ 1; DSH, Ex. A. On March 11, 2016, OFCCP issued a Notice of Violations alleging ten

violations of EO 11246, requesting remedies, and asking Oracle to contact OFCCP to begin conciliation. PSSD at ¶¶ 2-4; DSH, Ex E. OFCCP emailed Oracle on March 29, 2016, proposing a meeting during April 2016. PSSD at ¶ 5; DSH, Ex G. Oracle responded on April 11, 2016, stating that it preferred written communication at that time and attaching 57 questions for OFCCP about its findings. PSSD at ¶ 6; DGS1, Ex. I. OFCCP replied on April, 21, 2016, responding to 40 of Oracle's questions, but refusing to answer the others. PSSD at ¶ 7; DGS1, Ex J. Oracle submitted a position statement on May 25, 2016. PSSD at ¶¶ 8-9; DGS1, Ex. K.

In response, on June 8, 2016, OFCCP issued a Show Cause Notice. PSSD at ¶ 9; DGS1, Ex. L. Oracle objected to this notice on June 29, 2016, arguing, in part, that the parties had not yet conciliated. PSSD at ¶ 10; DGS1, Ex. M. OFCCP responded to this letter on September 9, 2016. In that response, OFCCP offered to meet to conciliate the violations. PSSD at ¶ 11; DGS1, Ex. N. Further communications were exchanged, culminating in a September 23, 2016, letter from OFCCP explaining why it found Oracle's responses and objections insufficient. PSSD at ¶¶ 12-13. The parties met in person on October 6, 2016. OFCCP gave Oracle a "preliminary estimate of potential monetary remedies for conciliation purposes," though it indicated that it was subject to change, and demanded that Oracle reply by the end of the month. PSSD at ¶ 14; DGS1 at ¶¶ 9-11. Oracle replied in writing on October 31, 2016, contesting OFCCP's findings and methodology. It did not make a settlement offer. PSSD at ¶ 15; DGS1, Ex. Q.

OFCCP responded to this letter on December 9, 2016, arguing in support of its findings and stating that the matter would be referred for enforcement. PSSD at ¶ 16; DGS1, Ex. R. The matter was referred to the Solicitor of Labor. On January 9, 2017, OFCCP, through counsel, sent Oracle a letter making an offer to resolve the matter without litigation and instructing Oracle to make a settlement offer by January 17, 2017, or face enforcement proceedings. PSSD at ¶ 17; DGS1, Ex. T. Oracle replied on January 17, 2017, objecting to enforcement proceedings, but not making a firm settlement offer. PSSD at ¶ 18; DGS1, Ex. U. OFCCP initiated enforcement proceedings on January 17, 2017, by filing a complaint at OALJ. PSSD at ¶ 19.

This matter was docketed at OALJ on January 17, 2017. It was initially assigned to Judge Christopher Larsen. On April 21, 2017, Oracle filed a motion for summary decision on the conciliation issue. OFCCP opposed the motion on May 12, 2017, contending that it was undisputed that its conciliation efforts fulfilled the regulatory requirements. Oracle filed a reply on May 26, 2017, and hearing on the motion was held on June 6, 2017. On June 19, 2017, Judge Larsen denied the motion, explaining that he could not determine as a matter of law whether or not OFCCP met its obligation to engage in reasonable conciliation efforts. In so doing, Judge Larsen was explicit in noting that he was not reaching the opposite conclusion and finding that those efforts were reasonable. Subsequently the matter was stayed for an extended period of time while the parties unsuccessfully pursued mediation. Due to an Appointments Clause challenge, the case was assigned to me.

Once the stay ended, OFCCP sought leave to file a second amended complaint. Conditional leave was granted and on March 13, 2019, the SAC was filed. The operative SAC makes various allegations of discrimination post-dating January 1, 2013. *See, e.g.*, SAC at ¶¶ 11-13. The

compensation component of the SAC¹ alleges that during the relevant period (January 1, 2013, and continuing), at its headquarters facility, and in the relevant job functions (Product Development, Information Technology, and Support), Oracle has engaged in compensation discrimination by paying female, Asian, and Black employees less than comparable male or White employees. *Id.* at ¶¶ 12-32. The SAC added a derivative or alternative claim that Oracle engaged in a sort of “job assignment” discrimination, resulting in the disparities in compensation. *See id.* at ¶¶ 19-22. It also added an alleged “mechanism” causing the disparities: “reliance on prior salary in setting compensation for employees upon hire.” *Id.* at ¶ 32.

Oracle filed its Answer to Second Amended Complaint on April 2, 2019. As part of its Answer, Oracle asserted 39 affirmative defenses. Two are relevant here:

6. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that OFCCP has failed to meet its obligation to engage in reasonable conciliation efforts and, on that basis, has violated its own regulations, and denied Oracle substantive and procedural due process.

30. As a separate defense to the Complaint, and to each claim for relief therein, Oracle alleges that OFCCP’s failure to conciliate the numerous new claims in its Second Amended Complaint is contrary to law (including the U.S. Constitution), its regulations, and its policies, and all of these new claims should be dismissed based on that failure.

Answer at 8, 12.

Contentions of the Parties

OFCCP contends that the undisputed evidence establishes that it engaged in “extensive efforts” to conciliate and that these efforts fulfilled its conciliation requirements as a matter of law. It avers that the Supreme Court’s test in *Mach Mining, LCC v. EEOC*, 135 S. Ct. 1645 (2015) applies here, and requires only providing some notice of the violation and engaging in some form of discussion to give the employer an opportunity to remedy the alleged violation—requirements OFCCP holds there is no genuine dispute that it met. PMSD at 1, 5-8; PRSD at 1, 3-8. OFCCP further argues that it was not obliged to separately conciliate the allegations in the SAC and that Oracle’s affirmative defense is “barred by the law of the case” in that in allowing the lodging of the SAC, I rejected Oracle’s claim that amendment was futile for failure to conciliate. PMSD at 1-2, 8-10; PRSD at 1-2, 8. OFCCP seeks summary judgement on these two defenses in order to “streamline the issues and promote efficiency in discovery and at trial.” PMSD at 2, 10-11.

Oracle responds that partial summary judgment cannot be granted because there is at the least a dispute of fact about the reasonableness of OFCCP’s conciliation efforts. DOSD at 1. It argues that OFCCP’s conciliation requirements are “more exacting” than those articulated in *Mach Mining* in that OFCCP’s efforts must be reasonable, both in substance and degree.² *Id.* at 1-2, 7-12.

¹ The SAC also included various recruitment/hiring discrimination complaints and related record-keeping/compliance complaints. That aspect of this matter was resolved via consent findings adopted in an April 30, 2019, order.

² Oracle contends that a more robust conciliation requirement is in place following an August 2, 2018, “Bill of Rights” issued by OFCCP, which emphasizes transparency. ROSD at 2 n.1. As Oracle recognizes, this guidance is not

Oracle contends that in this case OFCCP's efforts were not reasonable. *Id.* at 2-3, 10-12. Oracle also contends that OFCCP did not conciliate its additional allegations in the SAC. It argues that the "law of the case" doctrine has no application here and even if it did, an order allowing a pleading does not equate to a grant of summary decision. *Id.* at 1, 3, 12-16.³ Oracle also asks, in the alternative, that it at least be afforded the opportunity to conduct more discovery. *Id.* at 3, 16. OFCCP deems this request "meritless." PRSD at 2.

OFCCP's Conciliation Requirement

EO 11246 mandates that contractors with the federal government agree to certain non-discrimination and affirmative action requirements, which are set forth in the regulations. *See* 41 C.F.R. § 60-1.4(a). OFCCP is empowered to enforce these contractual provisions. The regulations envision a sequential process. First, OFCCP engages in a compliance evaluation, which can include a compliance review (with desk audit or on-site review), off-site records review, a compliance check, and/or a focused review.⁴ 41 C.F.R. § 60-1.20(a). "Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion." *Id.* at § 60-1.20(b); *see also* EO 11246 § 209(b). If those fail, OFCCP may pursue enforcement proceedings, including administrative proceedings before OALJ. 41 C.F.R. § 60-1.26(a)-(b); *see also id.* at §§ 60-30.1 *et seq.*

Oracle's sixth and thirtieth affirmative defenses concern conciliation and the contentions that 1) OFCCP did not meet its conciliation requirements before initiating enforcement proceedings on January 17, 2017; and 2) OFCCP did not conciliate the new claims in the SAC, as it was allegedly required to do. OFCCP's pending motion claims that it is entitled to summary judgment on both defenses. The basic facts, related above, are not in dispute. The parties disagree, however, over the nature of OFCCP's conciliation requirements and whether there is any reasonable dispute over whether OFCCP fulfilled those requirements.

The dispute begins with *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), a case that considered judicial review of EEOC's Title VII conciliation requirement. Under Title VII, aggrieved parties may file charges with the EEOC, which then notifies the employer and makes an investigation. "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). If conciliation does not secure an agreement acceptable to the EEOC, it may pursue enforcement action. *Id.* at § 2000e-5(f)(1).

Mach Mining rejected the EEOC's position that its conciliation obligation was not subject to judicial review. The language in the statute is "mandatory, not precatory." 135 S. Ct. at 1651-52. Though EEOC was afforded a great deal of discretion in how it conciliated, the statute did impose a requirement that courts could review in that it required an "endeavor," listed informal methods, and

retroactive. The question here is only whether the conciliation that OFCCP did engage in satisfied the legal requirements—not if it satisfied current practices, or best practices, etc.

³ In the alternative, Oracle asks that it be afforded the opportunity to conduct more discovery. ROSD at 3, 16; *see also* DGS2 at ¶ 5. OFCCP deems this request "meritless." PRSD at 2; *see also id.* at 9. Given the determinations below, this alternative argument is moot.

⁴ OFCCP is also charged with processing and investigating complaints. *See* 41 C.F.R. §§ 60-1.21 – 60-1.24. No complaints are at issue in this matter.

gave the object of the endeavor—the elimination of the unlawful employment practice. *Id.* at 1652. As to the *scope* of review, the statute required “that the EEOC afford the employer a chance to discuss and rectify a discriminatory practice—but goes no further.” *Id.* at 1653. Courts properly examined the substance of whether there was conciliation. *Id.* But the Court rejected a “deep dive” approach to policing conciliation, observing that the statutory scheme “smacks of flexibility” in allowing EEOC to determine how much or how little conciliation to attempt and which methods to use. *Id.* at 1653-54. There was no set list of steps or considerations EEOC needed to engage in and it was improper for courts to impose extra procedural steps beyond those embodied in the law. *Id.* at 1654-55. EEOC was required only to “inform the employer about the specific allegation” and then “try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice.” *Id.* at 1655-56.

Oracle argues that *Mach Mining* does not control because the OFCCP’s conciliation requirement is more rigorous because it requires “reasonable efforts” rather than a mere “endeavor.” DOSD at 7-9. It points to cases from other contexts in which courts have declined to apply *Mach Mining* to the conciliation requirements of other agencies.⁵ *Id.* at 9-10. OFCCP contends that *Mach Mining* is “directly on point” and holds that

an agency satisfies its [conciliation] obligation by (1) providing notice of the violations—telling the employer “what the employer has done and which employees (or what class of employees) have suffered as a result”; and (2) trying “to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice.”

PMSD at 5 (quoting *Mach Mining*, 135 S. Ct. at 1655-56).

But this isn’t what *Mach Mining* actually holds. *Mach Mining* considered EEOC’s conciliation requirement and held that EEOC, not “an agency”, fulfills its conciliation requirement when it does these things. *Mach Mining* did not rely on general principles or abstract musings about conciliation—it turned on the text: rejecting EEOC’s proposed “no review” reading on the grounds that “the statute provides certain concrete standards,” *id.* at 1652, and rejecting “deep dive” review as inconsistent with the statutory language, *id.* at 1654. Rather, “the proper scope of judicial review matches the terms of Title VII’s conciliation provision.” *Id.* at 1655. And judicial review was meant to “ensure[] that the Commission complies with the statute.” *Id.* at 1656.

Oracle’s point is initially compelling—EEOC and OFCCP are different agencies that operate under different legal regimes. The *Mach Mining* Court was tightly focused on the conciliation requirements imposed by the operative text. OFCCP has a different operative text. Thus, insofar as *Mach Mining* might define, or inform, OFCCP’s conciliation requirements it must derive from similarities in the language of the requirement—or at least the absence of important differences.

OFCCP relies on an ALJ order in a recent case applying the *Mach Mining* standard to OFCCP’s conciliation requirements, *OFCCP v. Analogic Corp.*, No. 2017-OFC-00001 (ALJ Aug. 16,

⁵ *Hyatt v. U.S. Patent & Trademark Office*, 797 F.3d 1374 (Fed. Cir. 2015) (holding Patent Office to higher standard of scrutiny based on different statutory language); *Rhode Island Comm’n for Humans First v. Graul*, 120 F. Supp. 3d 110, 120 (D.R.I. 2015) (holding agency to lower standard of scrutiny based on more flexible conciliation language in the Fair Housing Act).

2017). OFCCP also points to two older Secretary's opinions noting the similarities between EEOC's and OFCCP's conciliation requirements: *OFCCP v. Washington Metro. Area Transit Auth.*, No. 84-OFC-8 (Sec'y Mar. 30, 1989) and *OFCCP v. Nat. City Bank of Cleveland*, No. 80-OFC-31 (Sec'y Sept. 9, 1982). And it points to older ALJ decisions finding that its conciliation duties are minimal: *OFCCP v. Central Power & Light Co.*, No. 82-OFC-5, 1987 WL 774235 at *2 (ALJ Mar. 30, 1987) and *OFCCP v. East Kentucky Power Cooperative, Inc.*, No. 1986-OFC-7, (ALJ Mar. 21, 1988). PMSD at 5-8; PRSD at 3-4.

Oracle distinguishes each of these cases, DOSD at 10-11, and I agree that none answer the dispute presented here. *Washington Metro.* draws parallels between EEOC and OFCCP as to conciliation requirements, but—crucially—in the context of rejecting an argument that a local statute of limitations barred the complaint, in part on the grounds that the requirement of conciliation meant that some delay in filing was necessary. No. 84-OFC-8, HTML at ~13-14. This very limited parallel in no way indicates that the conciliation requirements are co-extensive. *Nat. City Bank of Cleveland* only stands for the proposition that OFCCP has considerable discretion in deciding what to include within a conciliation agreement. No. 80-OFC-31, slip op. at 7-8. *Central Power* is both factual and legally different. It involved a case under the Rehabilitation Act and whether OFCCP had complied with the conciliation requirement imposed by the applicable regulations. 1987 WL 774235 at *2. At the time, those regulations, as quoted by the ALJ, stated that when an investigation indicated that there had been a violation, “efforts shall be made to secure compliance through conciliation and persuasion with a reasonable time.” 41 C.F.R. § 60-741.26 (1986). There is a significant difference between an “effort” and a “reasonable effort,” so *Central Power* cannot inform the determination here.⁶ *East Kentucky Power* has the same defect. No. 1986-OFC-7, HTML at ~14-15.

In its reply, OFCCP adds reference to *OFCCP v. Priester Construction Co.*, No. 78-OFC-11, 1983 WL 411026, at *13 (Sec'y Feb. 23, 1983). PRSD at 4. Although OFCCP is correct that the efforts in that case—exchanging letters, being open to answer any questions, and a meeting with a compromise offer—were found sufficient, *Priester* actually points away from the legal proposition OFCCP advocates. It states that “OFCCP has the burden on showing that an effort was made to conciliate” and makes explicit that “the regulations require ‘reasonable efforts’ at conciliation”; in applying that standard the Secretary rejected a complaint that the offer was “a take it or leave it” offer on the grounds that this was merely the employer’s “characterization.” Importantly, the Secretary did *not* simply state that there was no basis to inquire into the reasonableness of OFCCP’s efforts at all.

The most persuasive case for OFCCP—and the case it relies on most heavily—is *Analogic*. Oracle persuasively argues that the underlying facts in *Analogic* were importantly different in that OFCCP had provided more information to the contractor about the nature and basis of the allegations. DOSD at 10. But OFCCP’s reliance on *Analogic* is broader—it invokes *Analogic* for the appropriate legal standard and scope of review, not just the application of the standard to the facts in the case. *See* PMSD at 5, 8. The ALJ in *Analogic* rejected an argument to the effect that OFCCP’s conciliation requirement was importantly different from EEOC’s because it used “reasonable

⁶ The current version of the Rehabilitation Act regulations provide that “[w]here deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion...” 41 C.F.R. § 60-741.60(b).

efforts” rather than “endeavor.” No. 2017-OFC-00001, slip op. at 13-15. That is the same issue in this case.

Analogic’s relevant reasoning contains two facets. One stresses similarities between OFCCP and EEOC and relies on *Mach Mining* for the point that EEOC is afforded considerable flexibility in deciding its conciliation efforts. This strand downplays the use of “endeavor” in understanding the implications of *Mach Mining* and has some persuasive value. *Id.* at 14. There are similarities and even if “reasonable efforts” and “endeavor” do not define the same scope of review, OFCCP *still* is afforded a great deal of flexibility and discretion in its conciliation efforts. That was enough to decide the issue in *Analogic* and to lead to the conclusion that “a limited scope of judicial review applies to whether OFCCP met its requirement to conciliate...” *Id.* at 14-15. But it is *not* the point that OFCCP advocates here: the standard articulated in *Mach Mining* for EEOC also *defines* the standard for OFCCP.

Another strand in *Analogic* observes that “there is little difference between a requirement to make ‘reasonable efforts’ to conciliate and the Title VII requirement that the EEOC ‘endeavor’ to conciliate.” *Id.* at 14. A note adds the explanation:

Endeavor is defined as “strive to achieve,” “make an effort,” and “a serious determined effort.” Webster’s Third New International Dictionary (Unabridged) at 748. Black’s Law Dictionary defines “endeavor” as “[a] systematic [sic] or continuous effort to attain some goal.” Black’s Law Dictionary ([10th] ed. 2014). Reasonable is defined as moderate, not extreme, well balanced, or fair. Webster’s Third New International Dictionary (Unabridged) at 1892.

Slip op. at 14 n.20. This facet of the order is not as persuasive. There is an important, though perhaps subtle, difference in these definitions: an effort can be “serious,” “determined,” “systematic,” and “continuous” but without being “moderate, not extreme, well balanced, or fair.” A zealous advocate or litigant enthralled in the righteousness of a cause can make strenuous efforts to achieve a goal, and thus more than “endeavor” to do so, without those efforts being in the least bit reasonable.

An “endeavor” is a sort of “effort,” perhaps more concerted, but not necessarily so.⁷ To “endeavor” to achieve some goal is to try to achieve that goal. So to “endeavor” to eliminate the alleged violation through certain means is simply to try to achieve that goal through those means. A “reasonable effort” adds something small but quite important—one’s “try” or “effort” or “endeavor” must also be reasonable—i.e. sensible, not excessive, fair, within the bounds of common sense, calculated in the circumstances to achieve the stated result.⁸ Many different sorts of efforts or endeavors may be reasonable, but not all endeavors are reasonable efforts because not all endeavors are reasonable.

⁷ To “endeavor” is “[t]o attempt (fulfillment of a responsibility or an obligation, for example) by employment or expenditure of effort” or “[t]o work with a set of specified goal or purpose.” An “effort” is “[t]he use of physical or mental energy to do something; exertion” or “[a] usually earnest attempt.” American Heritage Dictionary (5th ed., 2011).

⁸ See “reasonable” in Black’s Law Dictionary (10th ed. 2014) and American Heritage Dictionary (5th ed., 2011).

OFCCP criticizes Oracle for not citing a case incorporating its more “exacting” standard of review, PRSD at 4-5, but Oracle’s argument is based on the plain text of the regulations, not a prior case. As OFCCP recognizes, only one case, *Analogic*, has considered this question. *Id.* at 3. It did so on different facts and taken to stand for the proposition OFCCP asserts, it is not persuasive. Neither party has pointed me to an on-point, persuasive decision and I am aware of none. “Reasonable efforts” are context dependent, and may vary with the sort of claim. The prior authority and regulatory language show that OFCCP has a good deal of flexibility and discretion. But they do not establish that the conciliation requirement is as minimal as OFCCP contends.

Mach Mining holds that judicial review of conciliation requirements must follow from the language of the requirements. Since in Title VII the EEOC “shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion,” 42 U.S.C. § 2000e-5(b), courts appropriately examine whether, in fact, EEOC *did* endeavor to eliminate the alleged violation through informal methods. *How* EEOC endeavored to do so, both the extent and substance of such endeavors, is left to the EEOC. But even here there are bounds—the purported “endeavor” could be so lacking that it isn’t really an endeavor, isn’t an endeavor to eliminate the alleged violation, or isn’t an endeavor involving the informal methods.

OFCCP’s conciliation requirement is similar, but adds a crucial qualifier: “*reasonable* efforts shall be made to secure compliance through conciliation and persuasion.” 41 C.F.R. § 60-1.20(b) (emphasis added). An “effort” is an “endeavor.” So as with EEOC, OFCCP will not have fulfilled its conciliation requirement if it makes no genuine effort at all, if the effort was not an effort to secure compliance, or if the effort did not involve informal methods of conciliation and persuasion. These are largely subjective inquiries into what the agency was doing, which is why a “sworn affidavit from the EEOC stating that it has performed the obligations noted above but that its efforts have failed will usually suffice to show that it has met the conciliation requirement.” *Mach Mining*, 135 S. Ct. at 1656.

This still leaves OFCCP with a wide range of discretion about the pacing, extent, and substance of its conciliation efforts. A great variety of efforts may be “reasonable” in a given circumstance and an effort that qualifies as reasonable may still be far from ideal, let alone ideal with the benefit of hindsight. But not all “efforts” are “reasonable efforts.” The use of “reasonable” adds an “objective” element to the review. It signals that while the agency retains a great deal of discretion in its conciliation efforts, that discretion is cabined and adjudicators can and should consider whether or not the conciliation effort was “reasonable” in the circumstances. What constitutes “reasonable efforts” is likely to be a case-specific determination.

Is OFCCP Entitled to Summary Decision on Oracle’s Affirmative Defense Six?

OFCCP contends that it is undisputed that it engaged in extensive conciliation efforts over 10 months, with multiple communications, and the efforts “more than satisfy” the conciliation requirements. PMSD at 7. It stresses that it is not the role of judicial review to second guess the agency’s strategic decisions or the kind and extent of discussions involved. *Id.* It again points to *Analogic* as support for its claim to have fulfilled its conciliation requirements. *Id.* at 8. OFCCP describes its efforts as follows:

First, OFCCP provided notice of the violations through the NOV and SCN, identifying the type of discrimination alleged, the employees affected, and the

Agency's proposed remedies. Second, OFCCP engaged in extensive written and verbal discussions in an effort to provide Oracle an opportunity to remedy the violations. This included the exchange of multiple emails and letters, an in-person meeting, a discussion of potential remedies for purposes of conciliation, and invitations to Oracle to make a settlement offer. By the time OFCCP filed the Complaint in January 2017, OFCCP had spent nearly ten months attempting to conciliate the violations.

Id. at 7.

Oracle's perspective on OFCCP's conciliation efforts is starkly different:

That OFCCP went through the motions of essentially notifying Oracle that it would be bringing claims is not conciliation, let alone reasonable conciliation. OFCCP took a confrontational, adversarial approach to this compliance review from the entrance conference. And rather than conciliate as required, OFCCP took a my-way-or-the-highway approach, in which it steadfastly refused to provide Oracle with essential information about the nature of, and bases for, alleged violations . . . OFCCP also refused to provide Oracle with any proposed conciliation agreement or other specific demand for monetary and non-monetary relief, despite Oracle's repeated requests. Rather, OFCCP's purported efforts to conciliate amounted to little more than its repeated demands that Oracle respond to OFCCP's allegations by providing "rebuttal statistical analysis," which Oracle had no obligation to do. Then, just as these nominal conciliation discussions were beginning, OFCCP abruptly called them off. Indeed, the timing of events strongly suggests OFCCP rushed to commence this litigation before the change in administrations.

DOSD at 2; *see also id.* at 3-5.

OFCCP contends that these "accusations" are both incorrect and irrelevant because OFCCP has discretion to behave in the manner it chooses in conciliation and Oracle has no basis to complain about the tone OFCCP adopted, the extent of the efforts, and its decisions to share information about its evidence and demands for relief because these are all matters of conciliation strategy solely in the discretion of OFCCP. PRSD at 5-6. I agree that OFCCP enjoys significant discretion in its conciliation strategy, but I have not accepted OFCCP's claim for nearly unfettered discretion based on a reading and application of *Mach Mining*. Rather, based on the regulatory language, OFCCP must actually make "efforts," those efforts must be made "to secure compliance," they must be "through conciliation and persuasion," and those efforts must be "reasonable efforts." 41 C.F.R. § 60-1.20(b).

I have reviewed the uncontested facts, the declarations incorporated or submitted, and the various documents attached to those declarations. This is summary decision, so I view the submissions in the light most favorable to the nonmoving party and draw reasonable inferences in its favor.

Viewing the submissions in the light most favorable to Oracle, a reasonable fact-finder *could* conclude that OFCCP gave only general indications of the violations and steadfastly refused to provide basis or explanation of its allegations. It required Oracle to somehow rebut the allegations,

but unilaterally declared most points (such as errors in OFCCP's evidence/analysis, OFCCP's procedural improprieties, and alleged misunderstandings of Oracle's compensation scheme) off the table. A reasonable fact-finder *could* conclude that OFCCP's rebuttal requirement, which was at times made a condition of conciliation, was impossible to fulfill since Oracle was not permitted to know anything about the basis for the conclusory allegations OFCCP levied. A reasonable fact-finder *could* conclude that OFCCP ignored Oracle's arguments and provided non-answers to its questions, relying on an artificial rebuttal burden that Oracle could not possibly have met to prevent conciliation from proceeding.

Moreover, a reasonable fact-finder *could* conclude that OFCCP never defined what Oracle had to do to come into compliance. The forward-looking remedies were to cease discriminating and provide unspecified training. But OFCCP was apparently uninterested in effecting any concrete programmatic changes to Oracle's policies or practices that would bring it into compliance. Given the only generally stated violations, compliance could only mean eliminating all disparities that OFCCP found objectionable, but since OFCCP would not share its basis or method, Oracle was in no position to even reverse engineer a crude compensation system that would have satisfied OFCCP's analysis. Back pay of some sort was specified as a remedy, but a reasonable fact-finder *could* conclude that OFCCP never gave Oracle any adequate idea of what was required. At the most, it orally specified a range of numbers that were subject to change and that were premised on secret evidence and analysis, or none at all. Oracle was tasked with providing an offer, but since it was not permitted to gain an adequate understanding of the allegations and their basis, it could not possibly complete this task.

OFCCP characterizes the alleged shortcomings as merely not sharing every piece of evidence or document demanded and stresses that it engaged in months of written and verbal negotiation efforts. In so doing, it blames Oracle for any deficiencies in the discussions. PRSD at 6-7. However, this is summary judgment, not a decision on the merits. When I view the evidence in the light most favorable to Oracle and make inferences in its favor, matters are far more alarming than OFCCP merely refusing to share every piece of evidence or every document. Rather, the evidence viewed in a light most favorable to Oracle would indicate that OFCCP failed to clearly state the violation, allow the contractor to understand the basis for the violation, provide any sense of how to remedy the alleged violation, or make any offer that could possibly resolve the only generally stated violations premised on secret evidence, methods, and legal theories. OFCCP, not Oracle, had the burden to engage in reasonable conciliation efforts prior to litigation. A reasonable factfinder could determine that a failure to explain the alleged misconduct or produce any basis for assertions of massive wrongdoing coupled with no presentation of a manner in which the alleged violation could be remedied would not constitute "reasonable efforts" at conciliation.

Relying on *Analogic*, OFCCP contends that failure to grant summary decision here would lead to the unnecessary exercise of a sort of mini-trial about its efforts to conciliate. PRSD at 7. I do not agree. In most cases, but not all, the reasonableness of the conciliation efforts will be evident from their face and summary judgment may be appropriate based on little more than an affidavit from an agency official.⁹ Here, OFCCP didn't even provide an affidavit that would lead to the

⁹ Compare *Arizona ex. Rel. Home v. Geo Group, Inc.*, 816 F.3d 1189, 1199-1200 (9th Cir. 2016). The Ninth Circuit had no difficulty concluding that EEOC met its limited conciliation requirements when it had informed the employer of the allegation and provided a settlement proposal with concrete remedies. It summarily dismissed complaints about EEOC's negotiation condition. OFCCP's conciliation efforts must also be "reasonable," but as described, there would

conclusion that the efforts were at least in the realm of the reasonable—there is no evidence *explaining* conduct that viewed in the light most favorable to Oracle is very troubling and calls OFCCP’s conciliation efforts into serious question.

Some contractors might reach a “settlement” at this stage—agreeing to admit guilt, make whatever changes OFCCP wished, cooperate in a news release for the agency’s credit, and pay unknown sums of money to people to be determined at a future date. The alternative is protracted investigation and litigation—expensive litigation—coupled with the reputational harm that comes when an authority proclaims and publicizes a finding of guilt when it initiates and engages in enforcement proceedings. But a reasonable fact-finder *could* conclude that, even if this could be considered “secur[ing] compliance,” it would have been the result of coercion, not “reasonable efforts” involving “conciliation and persuasion”¹⁰ 41 C.F.R § 60-1.20(b). If during this phase Oracle had agreed to do whatever OFCCP wanted whenever OFCCP saw fit to explain what exactly that was, this would not have been because it had been persuaded of anything. Viewing the evidence in the light most favorable to Oracle, it was still guessing at the underlying nature of what it was being accused of and was given no basis to agree that it had done wrong. Nor, in this light, was it likely that these efforts would “secure compliance” because OFCCP either didn’t know or wouldn’t say what “compliance” could mean in anything but the most general terms. On a forward looking basis, Oracle was essentially to agree to stop discriminating. But it had already agreed to do that.

To be clear: I *do not find* that OFCCP did not fulfill its conciliation requirements. The narrative above is *not* a finding—a reasonable fact-finder could see the evidence in a very different light and draw very different conclusions. OFCCP’s motion for partial summary decision is premised on the assertion that there is no reasonable dispute that it fulfilled its conciliation requirement. Since viewing the facts in the light most favorable to Oracle and making all reasonable inferences in its favor leads to the opposite conclusion, the motion for partial summary decision must be denied. Based on the current submissions, summary judgment either way on the issue would not be appropriate.

Is OFCCP Entitled to Summary Judgment on Oracle’s Affirmative Defense Thirty?

OFCCP argues that the order conditionally granting leave to file a second amended complaint resolved the question of whether or not OFCCP had any obligation to conciliate additional claims included, and therefore it should be granted summary judgment on Oracle’s thirtieth affirmative defense based on the “law of the case” doctrine. PMSD at 8-9. OFCCP further argues that the issue was correctly decided, citing to prior decisions reaching similar results. *Id.* at 9-10. Oracle again disagrees. It argues that the “law of the case” doctrine does not apply here because the order granting conditional leave to amend did not decide the issue here and that in any event the doctrine does not restrict a trial court in reconsidering orders at any time prior to final judgment.

be no question that the efforts in *Geo Group* would have been sufficient to qualify as reasonable. The crucial difference in this case, in the light most favorable to Oracle, is that it was never given a proper understanding of the allegations or the actual remedies it needed to undertake to avoid litigation.

¹⁰ To “persuade” is “[t]o cause (someone) to accept a point of view or to undertake a course of action by means of argument, reasoning, or entreaty.” American Heritage Dictionary (5th ed., 2011.) To “coerce” is “[t]o pressure, intimidate, or force (someone) into doing something.” *Id.* “Conciliation” is “[t]he settlement of a dispute in an agreeable manner.” Black’s Law Dictionary (10th ed. 2014).

ROSD at 13-14. It stresses that different standards are at issue and that “allowing leave to amend under the liberal amendment standard[] does not equate to a decision that there is no dispute of material fact regarding conciliation.” *Id.* at 15. In Oracle’s view, the SAC adds new, un-conciliated claims and its affirmative defense remains viable, even though OFCCP was allowed to plead the claims. *Id.* at 12-13.

The “law of the case” doctrine generally pertains to prior *final* actions by a court, trial or appellate, in a case, or the actions of a “higher” court deciding certain issues in the case. *E.g. Gonzalez v. Ariz.*, 677 F.3d 383, 389 n.4 (9th Cir. 2012); *see generally* Wright and Miller, 8 Fed. Prac. & Proc. Civ. § 4478 (3d ed.). A trial court may amend previous findings so long as a motion is filed no later than 28 days after the entry of judgement. *See* Fed. R. Civ. P. 52(b); *see also* Fed. R. Civ. P. 54(b). “Interlocutory orders are not subject to the law of the case doctrine and may always be considered prior to final judgment.” *Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997); *see also* *Moses H. Cone memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (observing “that every order short of a final decree is subject to reopening at the discretion of the district judge”); *City of L.A. v. Santa Monica BayKeeper*, 254 F.3d 882, 885, 888 (9th Cir. 2001); *see generally* Wright and Miller, 8 Fed. Prac. & Proc. Civ. § 4478.1 (3d ed.). OFCCP’s argument is better framed as the claim that the order conditionally allowing the SAC made certain findings, those findings were correct, and those findings should lead to a resolution of the point in contention here, Oracle’s thirtieth affirmative defense.¹¹

Regardless of whether “law of the case” is appropriate to invoke, I find summary judgment inappropriate. The affirmative defense, as stated, invokes considerations well beyond those raised in the motion for leave to amend. More importantly, the prior order concerned what OFCCP would be allowed to plead. In allowing OFCCP to add allegations that were not in earlier complaints and had not been part of the case when it was conciliated, I adopted one reasonable understanding of what those additional allegations were and how they would fit into the overall case. I am mindful that OFCCP gets to decide which legal theories to pursue and how the substance of the allegations in question are filled in as the case develops. Details remain somewhat unclear at this stage, but it is not unreasonable to imagine that the new material could expand beyond the scope of the complaint and raise a legitimate question as to whether additional conciliation is required.

Oracle’s affirmative defense on this point focuses on “new” claims. However, I allowed pleading by OFCCP because I determined they were not entirely new. Once discovery is completed and this case proceeds towards disposition, it may well turn out that they are new.¹² Oracle’s

¹¹ In its reply brief, PRSD at 8, OFCCP points to a Ninth Circuit case suggesting some doubt as to whether “law of the case” could apply to trial court rulings before final judgment. *See Mark H. v. Lemahieu*, 513 F.3d 922, 932 n.8 (9th Cir. 2008). But the only discord noted in *Lemahieu* was a criminal case in which the Ninth Circuit applied the doctrine to a previously decided motion to suppress in the defendant’s favor when the first trial ended in a mistrial, the case was assigned to a new judge, and there were no changes in the law or circumstances. *See United States v. Alexander*, 106 F.3d 874, 876-77 (9th Cir. 1997). That situation implicates difficulties and considerations that are not relevant in this instance.

¹² Papers recently filed with this office on another motion contain the statement that “It is, and was, OFCCP’s position that the compliance review is largely irrelevant to the claims alleged.” OFCCP’s Opposition to Oracle America Inc.’s Motion to Compel OFCCP to Produce Documents and Further Respond to Interrogatories, filed May 17, 2019, at 5. It is not entirely clear how this fits into the context of that filing and it would seem that it was the language used is the result of overbroad drafting. This entire case is the result of the compliance review and while I have permitted amendment and countenanced the development of additional evidence and theories, I am aware of no authority that would allow OFCCP to entirely discard a compliance review and *replace* it with allegations emerging solely from what was

thirtieth affirmative defense targets that possibility. The earlier order examined the question what could be pled, and to understand the pleadings I made inferences in favor of OFCCP. But on OFCCP's motion for summary decision I make inferences in favor of Oracle. It would be improper to grant summary decision based on one understanding of what was pled in the complaint, only to have the understanding presented at hearing depart significantly from that.

Moreover, summary judgment on this affirmative defense would not serve any narrowing or efficiency purpose. There is no factual dispute about the conciliation aspect—OFCCP did not conciliate anything new before filing the SAC. The open question remains what exactly OFCCP will argue at hearing. That will require additional discovery, but it is discovery the parties will need regardless of whether or not Oracle's thirtieth affirmative defense remains part of the case.

ORDER

OFCCP's Motion for Partial Summary Judgment on Oracle's Affirmative Defenses Re Conciliation is denied.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

supposed to be an enforcement action premised on the results of a compliance review, rendering the evidence from the compliance review "largely irrelevant" in the enforcement action. I do not find that this is the dynamic in this case—I do not know at this stage—I merely find it appropriate to permit Oracle to continue with its affirmative defense relevant to the point.