

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: 29 November 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 ORAL MOTION TO AMEND THE 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. Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") contends that Defendant Oracle America, Inc. ("Oracle") violated EO 11246 and associated regulations by engaging in widespread sex and race discrimination at its headquarters facility. Hearing is set to begin on December 5, 2019. During the telephonic pre-hearing conference on November 26, 2019, OFCCP made an oral motion to amend the complaint to include an Affirmative Action Plan violation. Oracle opposes the motion.

For the reasons set forth below, OFCCP's motion to amend 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 in 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. Where a rule is needed and neither 41 C.F.R. Part 60-30.1 nor the Federal Rules supply one, the Rules of Practice and Procedure for Administrative Hearings Before OALJ in 29 C.F.R. Part 18, subpart A apply. *See* Pre-Hearing Order at 2 n.2.

Under the applicable rules, complaints may be amended once "as a matter of course before an answer is filed." 41 C.F.R. § 60-30.5(c). "Other amendments of the complaint or of the answer to the complaint shall be made only by leave of the Administrative Law Judge or by written consent of the adverse party; and leave shall be freely given where justice so requires." *Id.*; *see also* Fed R. Civ. Proc. 15(a)(1)-(2). Leave to amend is "freely given where justice so requires." "This policy is to be

applied with extreme liberality.” *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1102 (9th Cir. 2018) (internal quotation marks omitted) (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003)); see also *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Nation v. DOI*, 876 F.3d 1144, 1173 (9th Cir. 2017); *C.F. v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 985 (9th Cir. 2011); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).

But “[t]he liberal amendment policy prescribed by Rule 15(a) does not mean that leave will be granted in all cases.” Wright and Miller, 6 Federal Practice & Procedure Civ. § 1487 (3d ed.).

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’

Foman, 371 U.S. at 182.

BACKGROUND

This case has been pending at the Office of Administrative Law Judges (“OALJ”) since January 17, 2017, when the original complaint was filed. A lengthy compliance review preceded the litigation. An amended complaint was filed on January 26, 2017. The case was assigned to Judge Christopher Larsen, who ruled on various discovery and other motions. On October 30, 2017, Judge Larsen granted a joint motion to stay the case so that the parties could pursue mediation. The stay was subsequently extended on several occasions. On October 12, 2018, OFCCP filed a motion for reassignment, renewing an earlier motion by Oracle, based on the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and the Supreme Court’s decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). The motion was granted and the case was reassigned to me. I extended the stay until additional Appointments Clause related challenges raised by Oracle could be addressed. The stay ended on January 23, 2019.

After the stay ended, OFCCP indicated that it would be seeking leave to file a Second Amended Complaint, which Oracle opposed. On March 6, 2019, I issued an Order Granting Conditional Leave to File Second Amended Complaint. That Order noted that the proposed complaint was not clear as to whether or not OFCCP was adding a new claim based on substantive compliance with the affirmative action requirements in 41 C.F.R. Part 60-2 and worried that this would be a significant expansion in the scope of the litigation. I ordered OFCCP to clarify the reference. OFCCP filed a revised second amended complaint that omitted the general reference, but included several passages touching on affirmative action plan regulations in a section captioned “Refusal to Produce Relevant Data and Records During Compliance Evaluation.”

Oracle opposed allowing OFCCP to file the Second Amended Complaint because it believed that some of the allegations marked a significant expansion of the scope of the litigation. However, in the March 13, 2019, Order Filing Revised Second Amended Complaint, I overruled this objection, explaining:

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.

Oracle answered on April 2, 2019. Since the end of the stay, this case has been marked by repeated, voluminous, and acrimonious discovery disputes. Fact discovery closed on July 3, 2019. Among the various discovery disputes presented for adjudication, OFCCP sought an order compelling Oracle to produce “compensation analyses” and various related documents. Oracle maintained that these documents were subject to attorney-client privilege and work-product protection. In a September 19, 2019, order, OFCCP's motion was granted in part and denied in part. Based on the detailed privilege log that Oracle was required to submit, I accepted Oracle's claim that the compensation analyses in question were not part of its regulatory compliance and were instead done in anticipation of litigation.¹ But I granted the motion as to several requests for production that were specifically linked to what Oracle did to comply with the regulations. I also made clear that Oracle could not both maintain that the documents in question were privileged and that they represented its compliance with the applicable regulations. An October 7, 2019, order struck one of Oracle's affirmative defenses on this basis.² I also ordered Oracle to state a firm position about how it complied with 41 C.F.R. § 60-2.17(b)(3). Oracle filed a position statement on October 3, 2019.

Oracle's Affirmative Action Plan compliance was subsequently discussed in the briefing and disputation over the cross-motions for summary judgment. In an November 25, 2019, order denying both motions for summary judgment and granting Oracle partial summary judgment, I made clear that the case did not include a claim involving substantive affirmative action compliance, but that OFCCP was free to pursue arguments contending that some affirmative action plan deficiency supported the properly pled claims for compensation or steering discrimination.

¹ Notably, the timing and frequency was inconsistent with any regular process of general compliance and tracked what one would expect as the compliance review progressed closer to litigation.

² OFCCP describes this order as “the Court specifically permitted Oracle to rescind its affirmative defense.” PHS at 62. To the contrary, I ordered Oracle to show cause why the affirmative defense should not be struck and it agreed that the defense could not be sustained. Oracle does not need my permission to rescind an affirmative defense. They are Oracle's defenses and they can be abandoned at any time.

The parties filed a Joint Pre-Hearing Statement (“PHS”) on November 21, 2019. In an “Additional Information” section, OFCCP requested “the opportunity to orally move at the pre-hearing conference to amend the Complaint, or to be permitted another opportunity to brief the Court before trial.” PHS at 61. The text of the potential amendment was not provided. Oracle opposed any amendment, pointing to the impending hearing and the late date of the request. *Id.* at 66. During the November 26, 2019, pre-hearing conference, OFCCP was permitted to make an oral motion and requested that it be permitted to amend the complaint to include an allegation that Oracle did not comply with the Affirmative Action Plan regulations generally found in 41 C.F.R. §§ 60-2.1 *et seq.* OFCCP did not have exact text prepared, but elaborated that the amendment would involve allegations that Oracle violated the various sub-sections of 41 C.F.R. § 60-2.17. Oracle orally opposed the motion.

- During the pre-hearing conference, I informed the parties that I was initially not favorably disposed to an amendment little more than a week before the hearing, but would take the matter under advisement and consider the arguments presented. I also instructed counsel to provide any case citations supporting the proposed amendment by noon on Wednesday, November 27, 2019. Just before noon on November 27, 2019, OFCCP and Oracle filed packets of cases supporting their position, along with brief descriptions of the relevant holdings. OFCCP points me to the following: Pre-Hearing Orders not containing deadlines for amendments
- Various procedural rules
- *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 278-81 (4th Cir. 1987)
- *Howey v. United States*, 481 F.2d 1187 (9th Cir. 1973)
- *Arias v. Mutual Central Alarms Servs. Inc.*, 182 F.R.D. 407, 418 (S.D.N.Y. 1998)
- *Jacobs Silver K Farms v. Taylor Produce LLC*, 101 F. Supp. 3d 962, 974 (D. Idaho 2015)
- *Sprint Commc’ns Co., L.P. v. Time Warner Cable, Inc.*, No. 11-2686-JWL, 2013 WL 6589564, at *2 (D. Kan. Dec. 16, 2013)
- *Phoenix Technologies, Inc. v. TRW, Inc.*, 834 F.Supp. 148, 150-52 (1993)
- *L. Tarango Trucking v. Cnty. of Contra Costa*, 181 F. Supp. 2d 1017 (N.D. Cal. 2001)
- *C.F. v. Capistrano Unified Sch. Dist.*, 656 F. Supp. 2d 1190, 1197-98 (C.D. Cal. 2009)
- *Langbord v. United States Dep’t of Treasury*, 832 F.3d 170, 188-89 (3d Cir. 2016)
- *EEOC v. Michael Cetta, Inc.*, No. 09 Civ. 10601 (BSJ)(RLE), 2011 WL 5117020, at *1-2 (S.D.N.Y. Oct. 27, 2011)³
- *Restoration Indus. Assoc. Inc. v. Themapure*, Nos. 13-03169/4052/8523 JVS, 2014 WL 12603210, at *2 (C.D. Cal. Apr. 7, 2014)

Oracle points me to:

- *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 736-39 (9th Cir. 2013)
- *Royal Ins. Co. of Am. v. Sw. Marine*, 194 F.3d 1009, 1016-17 (9th Cir. 1999)
- *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994)
- *Villanueva v. United States*, 662 F.3d 124, 127028 (1st Cir. 2011) (per curiam)
- *Thompson-El v. Jones*, 876 F.2d 66, 67-68 (8th Cir. 1989)

³ *Michael Cetta, Inc.* is not listed in OFCCP’s cover letter, but is included, with highlighting, in the packet of cases.

- *Tiernan v. Bluth, Eastman, Dillon & Co.*, 719 F.2d 1, 4-5 (1st Cir. 1983)

DISCUSSION

OFCCP is not an ordinary litigant. It has extensive powers to conduct investigations and access a contractor's records and employees before ever filing suit. The regulations provide for sequential process of investigation and enforcement. 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. 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.*

Given OFCCP's extensive investigatory tools and its obligation to engage in reasonable conciliation efforts, by the time a complaint is filed in an enforcement proceeding, OFCCP should already have a clear idea what the case is about and how it will prove its allegations. The pre-hearing discovery process allows OFCCP to sharpen its allegations and, importantly, allows the contractor to procure information and prepare a defense. This case has been somewhat exceptional. It has been pending in litigation for almost three years, the complaint has been amended twice, and the parties have engaged in extensive, prolonged discovery. Discovery has been closed for months and hearing is just over a week away. OFCCP now seeks to amend the complaint again to add alleged violations of the Affirmative Action Plan regulations that, to this point, were not directly at issue in the case.

In the PHS, OFCCP argues that the applicable regulations permit the ALJ to allow amendments of a complaint in the pre-hearing conference. It represents that it is "reluctant to ask to amend the Second Amended Complaint at this stage," but states that "Oracle has repeatedly admitted to this Court violations of its affirmative action program obligations in its misguided bids to avoid production of its compensation analyses and deny its centralized decision making regarding compensation." PHS at 61. It argues that during the audit and litigation, Oracle represented that its "pay analyses" were part of its regulatory compliance. OFCCP recognizes that the determination in the September 19, 2019, order was that they were not done for that purpose, but points to language in the order finding Oracle's position ambiguous and unclear. *Id.* at 62. OFCCP contends that in the October 3, 2019, position statement and subsequent documents Oracle made statements that "compel the conclusion—without any additional discovery—that Oracle flatly failed to comply with its Affirmative Action [o]bligations." *Id.* OFCCP claims that under the applicable rules, amendment is proper even after hearing to conform to proof and declares that "Oracle cannot be permitted to benefit" from its change in position and "retraction" of its affirmative defense. *Id.*

Oracle argues that amendment is inappropriate this close to trial, contending that OFCCP is now trying to "morph" the case from one about widespread intentional discrimination to one about affirmative action compliance. It complains that it has prepared its defense against the case pursued over the last several years, not one on a different issue, and accuses OFCCP of a "multi-year delay in seeking to bring such an amendment." PHS at 66. Oracle contests OFCCP's timeline, arguing that OFCCP has been aware of the potential for an affirmative action claim since the audit when Oracle provided information about its affirmative action compliance. It avers that there is no excuse for

OFCCP waiting until the eve of hearing, pointing out that when the Second Amended Complaint was filed, orders made clear that affirmative action violations were not part of the case and that future amendments would be viewed unfavorably. Oracle contends that the September 19, 2019, order, and subsequent position statement, merely confirmed Oracle's position all along that compliance with the regulations was distinct from the pay equity analyses it did as requested by its attorneys. *Id.* at 67-68. Oracle adds that this is not simply conforming allegations to evidence, but the addition of new and different substantive claim that would "severely prejudice" Oracle and require an amended answer, discovery, motion practice, and different trial preparation. *Id.* at 69.

During the pre-hearing conference, the parties largely repeated and expanded upon these arguments. OFCCP stressed that it was unaware of the deficiency until the September 19, 2019, order, the October 3, 2019, position statement, and subsequent briefing of the cross motions for summary decision. It argued that no discovery was necessary because a violation could be found based on the material already filed. OFCCP also complained that Oracle was seeking a "safe-harbor" by admitting affirmative action violations in this case since they were not at issue and asserted that Oracle should be held accountable for its choice of position regarding its affirmative action compliance. Oracle argued that it would be unfair and prejudicial to add a new and different claim shortly before hearing, stating that OFCCP had the opportunity to pursue these claims all along but chose not to do so.

In the PHS, OFCCP points to 29 C.F.R. § 18.44 as license to amend the complaint during the pre-hearing conference. It provides that at a pre-hearing conference, the judge "may consider and take appropriate actions" including "[a]mending the papers that had framed the issues before the matter was referred for hearing." 29 C.F.R. § 18.44(d)(2). This is little support for the request. The permissibility of amendment is governed by 41 C.F.R. § 60-30.5(c) and Fed. R. Civ. P. 15(a). OALJ's procedural rules apply, but only in the manner of local rules, not as substitutes for provisions addressed in the proceeding specific rules of the Federal Rules. Moreover, the language of 29 C.F.R. § 18.44(d)(2) is discretionary. OALJ's rules are designed to facilitate the adjudication of a wide variety of different types of cases that come to the agency for adjudication. Many of these cases involve informal proceedings with relaxed rules of procedure and evidence. *See, e.g.*, 33 U.S.C. § 923(a). The sorts of flexibility that is appropriate for a simple ERISA civil monetary penalty case or a workers' compensation claim might be unworkable in a multi-year litigation alleging widespread discrimination at a major United States contractor with hundreds of millions of dollars of alleged damages.

"In assessing whether leave to amend is proper, courts consider 'the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment.'" *United States ex. Rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001) (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989)); *see also Caswell v. Calderon*, 363 F.3d 832, 837 (9th Cir. 2004) (relevant factors are bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the pleadings were previously amended). "These factors however, are not given equal weight. 'Futility of amendment can, by itself, justify the denial of a motion for leave to amend.'" *SmithKline*, 245 F.3d at 1052 (internal citation omitted) (citing and quoting *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)). In weighing factors, "it is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital*, 316 F.3d at 1052 (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185 (9th Cir. 1987)). "Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under

Rule 15(a) in favor of granting leave to amend.” *Id.* (emphasis in original) (citing *Foman*, 371 U.S. at 182; *Lowery v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 245 (5th Cir. 1997)). An adjudicator’s “discretion to deny leave to amend is particularly broad where [the] plaintiff has previously amended the complaint.” *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989).

The various cases submitted by the parties for my review reach different results, but they embody the same general rules. In cases where the court determines that the moving party has acted promptly on discovering the grounds for the amendment, there will be no substantial delay of the litigation, and the non-moving party will not be prejudiced, leave to amend is permitted, even in the late stages of a case.⁴ *Langbord*, 832 F.3d at 188-89 (affirming allowance of amendment despite long delay when the amendment did not introduce new factual issues and involved matters already at issue in the complaint, creating no prejudice on the nonmovant and no burden on the court); *Island Creek Coal*, 832 F.2d at 278-80 (delay not grounds for denial where there is a reasonable justification for the delay and no prejudice); *Howey*, 481 F.2d at 1190-91 (long pendency of case not grounds for denial when “there is a lack of prejudice,” the amendment is not frivolous, and was not made in an attempt to delay); *Restoration Indus.*, 2014 WL 12603210 at *4 (allowing amendment despite slightly missing the scheduling deadline (due to nonmovant’s delay of meet and confer) where there was no bad faith, the amendment streamlined the proceedings, and it would cause no delay to the schedule and calendar for the case); *Sprint*, 2013 WL 6589564 at *2 (allowing relief from scheduling order regarding time for amendment when factual basis arose after the deadline movant was diligent, and non-movant’s change of position created new claim); *Michael Cetta, Inc.*, 2011 WL 5117020, at *1-2 (allowing amendment to temporal scope of class where there was no undue delay, bad faith, or undue prejudice); *C.F.*, 656 F. Supp. 2d at 1197-98 (granting relief from scheduling order to file an amended answer when the proposed additional defense raised a question of law to be decided on the already developed factual record); *Arias*, 182 F.R.D. at 418 (amendments allowed after scheduling order deadline when they “would require no additional discovery” and “they really raise nothing new”); *Phoenix Techs.*, 834 F. Supp. at 150-51 (allowing amendment when it did not make significant changes and party moved as quickly as possible to amend the complaint after learning facts underlying the amendment).

Where the moving party has not acted diligently after discovering the grounds for the amendment, proceedings will be significantly delayed, or there is prejudice to the non-moving party, courts tend not to permit amendment, especially in the late stages of a case. *W. States Wholesale*, 715 F.3d at 738-39 (affirming denial of leave to amend when the moving party had previously amended the complaint and the facts underlying the proposed amendment had been known earlier); *Villanueva*, 662 F.3d at 127-28 (denial of leave to amend proper even though only four months passed between complaint and proposed amendment where the facts were previously known and the nonmovant would be unduly prejudiced); *Royal Ins. Co. of Am.*, 194 F.3d at 1016-17 (affirming denial of third amended complaint when it was an attempt to revive an old theory of liability based on previously known facts); *Kaplan*, 49 F.3d at 1370 (affirming denial of leave to amend two months before trial where amendment would cause prejudice since the parties had undergone voluminous and protracted discovery, the complaint had already been amended twice, and the facts underlying

⁴ Some of the cases provided do not speak directly to the issues. *Jacobs Silver K Farms*, 101 F. Supp. 3d at 974 gives a nice statement of the standard, but the result turns on futility. *L. Tarango Trucking*, 181 F. Supp. 2d at 1028-29, 1038 also contains a nice statement of the standard and some dicta helpful to OFCCP, but the result is a denial of the amendment on futility grounds.

the proposed amendment had been previously known); *Thompson-El*, 876 F.2d at 67-69 (affirming denial of leave to amend when made two weeks before trial after the close of discovery and summary judgment motions, where the moving party had not been diligent in developing the claims underlying the amendment, and there were indications that the motion was filed with a dilatory purpose of continuing trial); *Tierman*, 719 F.2d at 4-5 (denial of leave to amend proper when sought two years after the complainant and a month and half from trial, no suitable justification for the delay was provided, and the amendment would involve new issues and facts). The question, then, is how the facts in this case comport with the rule.

OFCCP is correct that amendments of pleadings to conform to proof is permissible both during and after trial. Fed. R. Civ. P. 15(b). Amendment is “freely” permitted “when doing so will aid in presenting the merits” and no undue prejudice is shown. *Id.* But such amendments are not permitted if, for example, there has been undue delay or allowing amendment would cause undue prejudice. *Id.*; *FilmTex Corp. v. Hydraunautics*, 67 F.3d 931, 935 (Fed. Cir. 1995). The purpose of the rule is to avoid the “tyranny of formalism.” *Deere & Co. v. Johnson*, 271 F.3d 613, 622 n.7 (5th Cir. 2001). But this cannot be allowed to compromise due process. *Id.* at 622. There are important differences between amending the theories contained in formal pleadings to conform to the proof and amending the pleadings to add different causes of action not previously at issue. For instance, a strictly pled compensation discrimination case might be amended shortly before, during, or after trial to allege a different mechanism of discrimination, such as steering discrimination, without undue prejudice when the evidence presented leads to that conclusion. That is different, however, from adding an entirely different cause of action—for instance, pleading a Title VII discrimination case but then shortly before trial adding a wrongful discharge/breach of contract cause of action.

The newly presented affirmative action complaint is not entirely divorced from the issues raised in the Second Amended Complaint. But it is much more like a new cause of action than a new theory of liability. The affirmative action regulations are separate and apart from the employment discrimination issues and involve a different set of requirements, considerations, and inquiries. While the employment discrimination case set to be tried next week follows Title VII precedent, an affirmative action component would add new issues from a different context and likely involving different affirmative defenses. Shifting the focus of this case by adding an affirmative action compliance complaint would require consideration of new issues and facts that to this point have been only peripheral. I agree with Oracle—this is not merely a run of the mill conformance of pleadings to proof, it is an attempt to shift the nature of the complaint on the eve of trial.

I make no findings of bad faith by OFCCP or futility of amendment. But I do find that there would be substantial prejudice to Oracle. Significant resources have been devoted to preparing this case for hearing. Litigation and discovery have gone on for years and since the end of the stay it has been on track for a December 5, 2019, hearing date. Granting leave to amend now would derail the schedule in this case and the court’s calendar. This case has been prepared as an employment discrimination case, not a case about compliance with the affirmative action regulations. If the complaint is amended, a continuance will be necessary to permit Oracle to engage in discovery and prepare for hearing. OFCCP’s claim that Oracle doesn’t need discovery because it has conceded a violation in the filings already made is not well-taken. In these proceedings, Oracle is entitled to—and will receive—a full and fair opportunity to defend itself against the allegations. OFCCP cannot declare Oracle’s liability as a basis to prevent it from developing a defense to contest liability. Even if OFCCP is confident of its case, the proposed amendment brings new issues into

focus and Oracle would need to be permitted to explore those issues and prepare a defense. Unlike many cases where leave to amend is granted, the factual basis for the allegations differ.

Nor is OFCCP's claim that liability is obvious compelling. The regulations say what they say in abstract, and given the papers filed, the parties have different interpretations of what they require on the ground. In particular, OFCCP seems to believe that the regulations compel a centralized compensation analysis in the form of a statistical study. Oracle reads the regulations to allow much more flexibility, including a decentralized approach consistent with how the compensation system functions at the contractor. OFCCP may be correct—but Oracle may be correct as well. The regulations are not nearly so clear as OFCCP pretends and agency declaration of regulatory intent in a litigation position cannot substitute for the text of the regulations. There are disputed issues here, both of law and fact. Allowing amendment would take the case in a new direction, requiring further discovery, pleadings, motion practice, and hearing preparation. That is a significant prejudice for Oracle. It has prepared for hearing and litigated this case based on the claims that OFCCP chose to bring, only to have OFCCP attempt to change course significantly at the last minute.

I also find that there has been undue delay. The September 19, 2019, order did find that Oracle had been somewhat unclear and ambiguous about its affirmative action compliance, but it also found that Oracle had been consistent about its assertions of privilege. Oracle has been consistent about its stress on the decentralization of compensation decisions as well. The order and subsequent position statement pinned Oracle down on exactly what it believed constituted compliance. But contrary to OFCCP's assertions, it was not new information. Oracle is correct that based on the papers submitted, it has been making these claims for quite a while. That was part of the reason for sustaining the claim of privilege—Oracle had been making a distinction that OFCCP was refusing to see. The lack of clarity was the result of Oracle making a variety of other claims as well, such as making laundry list objections to discovery requests and pleading an exhaustive list of affirmative defenses.

This is something, however, that lawyers do, for better or worse. OFCCP and its attorneys are more than capable of sifting through the scattershot defensive tactics to determine the different claims that *might* be at issue. One of those claims was an affirmative action violation. If there was uncertainty, OFCCP could have diligently pursued the investigation further prior to an enforcement action. It could also have brought the affirmative action compliance in the original complaint. OFCCP could have pressed to add it in March 2019 when it filed the second amended complaint. Moreover, it certainly could have moved to amend it in September or October 2019, when even on OFCCP's reconstruction it should have been fully aware of Oracle's position and the potential issue. Rather than doing so, OFCCP waited until the pre-hearing statement to request an opportunity to make a motion, and the pre-hearing conference to actually make the motion.

OFCCP argued at the pre-hearing conference that not allowing amendment would give Oracle "safe-harbor" on the alleged violation and argued that Oracle should have to answer for its litigation choices. But Oracle is not being given safe-harbor. Oracle took a position in this litigation and was compelled to state that position unequivocally on the record. It would face hurdles in reversing its position entirely in subsequent litigation in an attempt to procure a later advantage, since doing so would create the perception that it misled the judge in this proceeding. *Cf. Ah Quin v. County of Kauai DOT*, 733 F.3d 267, 270 (9th Cir. 2013). Oracle continues to be a federal contractor and may be subject to future compliance reviews. If OFCCP decides that the manner of Oracle's compliance with the affirmative action regulations is an issue because of the choices Oracle has been

forced to make here, it is an issue that it can explore further in other actions after it follows the proper procedures of investigation, conciliation, and then litigation.

This case has been pending since mid-January 2017 and OFCCP has been pursuing this compliance review and enforcement process for far longer. As I have stated before, if Oracle is discriminating against its employees, that needs to end, and the sooner the better. If it is not doing so, Oracle should be allowed to move on. The regulations do not provide for a permanent compliance review/investigation/enforcement process with an evolving set of allegations and evidentiary basis. OFCCP made choices about what allegations it chose to bring and how it chose to pursue the case after a lengthy compliance and discovery period. There is no justification to make an overly-late and prejudicial amendment to the complaint that would delay hearing on the central allegations yet again.

ORDER

1. OFCCP's motion to amend the complaint is denied.
2. This case will proceed to hearing on December 5, 2019.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge