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Issue Date: 24 September 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 MODIFYING PRE-HEARING SCHEDULE AND DENYING CONTINUANCE REQUEST

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") alleges that Defendant Oracle America, Inc. ("Oracle") engages in "widespread" discrimination at its headquarters facility against "women, Asians, and African Americas or Blacks in compensation." Hearing is set to begin on December 5, 2019. It has been pending at the Office of Administrative Law Judges ("OALJ") since January 17, 2017. It was preceded by a lengthy compliance review. Due to medical issues relating to OFCCP's expert, the parties seek modification of the pre-hearing schedule, though they cannot agree on the modification to be made. OFCCP also seeks to have the hearing continued. The issue was discussed at a September 12, 2019, status conference in which I ordered the parties to meet and confer further and file a joint status report by September 19, 2019, based on updates regarding the medical condition of OFCCP's expert and any agreements that the parties could reach. OFCCP and Oracle filed a Joint Status Report ("JSR") as directed on September 19, 2019, but have been unable to reach an agreement.

The hearing schedule is modified as set forth below. OFCCP's motion to continue the hearing is denied, and the hearing date is confirmed.

I. BACKGROUND

Hearing in this is set for 10 court days between December 5, 2019, and December 19, 2019. It has been on the calendar since early February 2019. The parties negotiated a pre-hearing schedule, which was approved in a March 6, 2019, order. They later negotiated a modification of the schedule (and an extension of the page limits), which was approved in an August 8, 2019. The revised schedule provides as follows:

EVENT	DUE DATE:
Close of Expert Discovery	9/13/2019
Deadline for Dispositive and *Daubert* Motions	9/25/2019
Deadline for Opposing Dispositive and *Daubert* Motions	10/11/2019
Deadline for Reply in Support of Dispositive and *Daubert* Motions	10/21/2019
Motions in Limine	10/28/2019
Pre-Trial Filings, including Pre-Hearing Statement, Joint Exhibits/Exhibit Index, Oppositions to Motions in Limine, Joint Witness List, Request for Telephonic Testimony (See Order)	11/8/2019
Pre-Hearing Conference	11/21/2019 10:00 a.m.
Hearing	12/5, 12/6, 12/10-12/13, 12/16-12/19, 2019, 9 a.m.-4:30 p.m.

Due to unforeseen medical issues, OFCCP's expert became unavailable prior to her scheduled deposition. OFCCP cancelled the deposition, and Oracle in turn cancelled the deposition of its expert. The parties agree that the expert discovery deadline must be adjusted to allow both depositions to proceed, once OFCCP's expert is medically able to sit for a deposition. Based on the most recent information and doctor's note provided, OFCCP's expert is unable to travel and will be able to resume normal activity in two weeks, with normal recovery. That would be October 2, 2019, after which the expert would be able to prepare for and sit for a deposition. The expert has resumed teaching as normal, but explains that this does not involve the sort of work and intensity as sitting for a deposition.

On this basis, OFCCP proposed modifying the schedule and the parties presented argument and suggested dates in the September 19 JSR. OFCCP states that it is willing to make its expert available for deposition on October 6, 2019, but that it favors a later closing for expert discovery in order to build in a "cushion" in case there are unforeseen complications. JSR at 2-4. It favors building in a more extended schedule more generally, and delaying the hearing by almost three months, so that pre-hearing matters can be fully briefed and decided without prejudice to OFCCP. It argues that there is no prejudice to Oracle and states that it would also be amenable to a hearing date in late February 2020. *Id.* at 4-8.

Oracle questions how unavailable OFCCP's expert truly is, but agrees that modifications are necessary. JSR at 9. It opposes continuing the hearing and proposed dates listed below. Oracle is willing to conduct the remaining depositions in Philadelphia in order to accommodate OFCCP's expert's travel limitations. *Id.* at 14. In the alternative, Oracle proposes to extend the expert discovery deadline

until November 1, 2019, but to retain the other deadlines in the schedule. *Id.* at 14. Oracle argues that it has accommodated OFCCP's scheduling needs and is sympathetic to the expert's situation, but that continuing the hearing is not necessary in this circumstance. It contends that it would be materially prejudiced by further delays given that it has been under investigation or a target of litigation for five years and seeks resolution. *Id.* at 11-15.

EVENT	**OFCCP PROPOSED DATES:**	**ORACLE PROPOSED DATES:**
Close of Expert Discovery	10/25/2019	10/8/2019
Deadline for Dispositive and *Daubert* Motions	11/1/2019	10/16/2019
Deadline for Opposing Dispositive and *Daubert* Motions	11/22/2019	10/28/2019
Deadline for Reply in Support of Dispositive and *Daubert* Motions	12/31/2019	11/4/2019
Motions in Limine	1/27/2020	11/11/2019
Pre-Trial Filings, including Pre-Hearing Statement, Joint Exhibits/Exhibit Index, Oppositions to Motions in Limine, Joint Witness List, Request for Telephonic Testimony (See Order)	2/10/2020	11/18/2019
Pre-Hearing Conference	2/24/20	11/27/2019 10:00 a.m.
Hearing	3/2-3/13, 2020, 9 a.m.-4:30 p.m.	12/5, 12/6, 12/10-12/13, 12/16-12/19, 2019, 9 a.m.-4:30 p.m.

II. DISCUSSION

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.[1] 41 C.F.R. § 60-30.1. Under Federal Rule of Civil Procedure 16(b), "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Good cause exists when the scheduling order "cannot reasonably be met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16 Advisory Committee Note to the 1983 Amendment to Subdivision (b).

The parties agree that good cause exists for modification of the scheduling order, but disagree about the amount of modification justified. Oracle's alternative proposal contains the least alteration to the current schedule—it only changes the date for the close of expert discovery. However, Oracle's

[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.

proposal is impractical because the deadline for dispositive motions and especially *Daubert* motions should reasonably be after the close of expert discovery, not before.

On the other hand, OFCCP has not shown good cause for moving the hearing in the manner suggested. Given the current submissions, OFCCP's expert should be ready to resume normal activities on October 2, 2019, and can engage in some substantive activities, like teaching, at present. This represents a needed extension of roughly 3 weeks from the current discovery deadline, yet OFCCP is proposing a three month delay in the trial which appears unrelated to any need to extend expert discovery. The current schedule, which both parties agreed to, gives the parties 16 days to file oppositions to dispositive/*Daubert* motions and 10 days to file reply briefs. OFCCP seeks to make both periods 21 days. It seeks to change the gap between the end of dispositive motion briefing and filing motions in limine from 7 days to 45 days.

OFCCP has been investigating and gathering evidence for five years and has been litigating this case since January 2017. Expert depositions remain a missing piece, but OFCCP has otherwise shown no good reason that the case cannot move forward quickly once that piece is in place. OFCCP points to proceedings in a state case, *Jewett*, in which matters have been delayed as similar complex issues are litigated. But *Jewett* is an entirely different case and I do not see the connection between the scheduling there and this matter. OFCCP's arguments focus on the complexity of the issues and the significant amount of legal work required to conduct the briefing. But it had to know about the complexities and difficulties long ago, when it agreed to the current schedule. Moreover, the burdens imposed by a demanding briefing schedule are born by both parties and do not give one or the other advantage. If the complexities in this case later present other unanticipated circumstances, adjustments might be warranted, but the hypothetical prospect of good cause to continue the hearing later is not good cause to continue the hearing now. I do not doubt that the issues presented here require OFCCP and Oracle to invest significant litigations resources, but both have done and continue to do so.

The medical issues that have arisen regarding OFCCP's expert are good cause for some modifications to the pre-hearing schedule, proportionate to the delays necessitated by those issues. They are not good cause for a continuance of the hearing. As prior orders in this case have stated, if OFCCP is correct, and there is widespread discrimination at Oracle, it needs to be stopped, and the sooner the better. If OFCCP is mistaken, Oracle deserves to have this extended investigation/litigation end so that it can move on, and the sooner the better. The medical issues of OFCCP's expert warrants extending and modifying the schedule, but this must be balanced against the strong interests in moving this matter towards resolution.

Therefore, based upon the submissions of the parties, the remaining prehearing schedule is modified as indicated below. The new schedule changes the date for the telephonic prehearing conference and adds a separate date for oppositions to motions in limine. Although the new schedule slightly tightens the briefing periods from the original schedule, there is no reason that the parties cannot have already prepared or be in the process of preparing their arguments and briefs. Expert depositions remain necessary, but there should be no surprises at this point given the amount of information already known about the expert evidence. The prehearing schedule shall be:

EVENT	**DUE DATE:**
Close of Expert Discovery	10/11/2019
Deadline for Dispositive and *Daubert* Motions	10/21/2019

EVENT	DUE DATE:
Deadline for Opposing Dispositive and *Daubert* Motions	11/1/2019
Deadline for Reply in Support of Dispositive and *Daubert* Motions	11/8/2019
Deadline for Motions in Limine	11/15/2019
Pre-Trial Filings, including Pre-Hearing Statement, Joint Exhibits/Exhibit Index, Joint Witness List, Request for Telephonic Testimony (See Order)	11/21/2019
Deadline for Opposing Motions in Limine	11/25/19 1:00 p.m.
Pre-Hearing Conference	11/26/2019 2:00 p.m.
Hearing	12/5, 12/6, 12/10-12/13, 12/16-12/19, 2019, 9 a.m.-4:30 p.m.

ORDER

1. The joint motion of the parties to modify the pre-hearing schedule is granted and the pre-hearing schedule is modified as set forth above.

2. OFCCP's motion to continue the hearing is denied and the hearing date of December 5, 2019, is confirmed.

3. As requested by OFCCP and agreed to by Oracle, what I take to be the *in camera* submissions related to the medical condition of OFCCP's expert that were part of OFCCP's September 12, 2019, filing and the Joint Status Report will be returned to OFCCP with its copy of this order.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge