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CASE NO. 2017-OFC-00004

In the Matter of

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEPARTMENT OF LABOR,
Plaintiff,

v.

GOOGLE INC.,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This case is akin to a subpoena enforcement proceeding. OFCCP is charged to evaluate federal contractors' compliance with certain employment non-discrimination and affirmative action requirements. *See* Executive Order No. 11246; the Rehabilitation Act of 1973, and the Vietnam Era; 41 C.F.R. § 60-1.20(a). Federal contracts contain mandatory terms requiring the contractor to comply with these requirements as well as with OFCCP's requests for records and information in connection with its evaluations.

The General Services Administration awarded Google a particular contract on June 2, 2014. OFCCP alleges that, as of December 29, 2016, GSA had paid Google $600,000 on the contract. Complaint, ¶ 4. Among the contract terms were these standard government contract requirements described above. *See also*, 41 C.F.R. § 60-1.12(c). OFCCP notified Google on September 30, 2015, that it was initiating a compliance evaluation. The process has taken the regulatory form of a "compliance review." *See id.*

OFCCP began with requests for considerable records and information; Google complied. OFCCP next required an onsite inspection that included interviews of more than twenty Google managers. Google again complied. OFCCP then requested additional information, including extensive data for some 20,000 employees.[1] After some conciliation efforts on these last

[1] The three-step information gathering process is consistent with the regulatory scheme. *See* 41 C.F.R. § 60-1.20(a).

requests, the parties reached an impasse, and Google declined to produce the additional information requested. OFCCP then brought the current action.

OFCCP filed its complaint on January 4, 2017, requesting an order (1) requiring Google to comply with the Executive Order, the statutes listed above, and their implementing regulations; (2) directing Google to provide OFCCP with the requested items; and (3), in the event Google fails to comply, imposing certain sanctions. In its answer, Google denies the material allegations of the complaint and asserts various affirmative defenses.

The implementing regulations provide a permissive expedited procedure for cases of this kind. 41 C.F.R. §§ 60-30.31 through 60-30.37 ("Expedited hearings may be used, *inter alia*, when a contractor or subcontractor . . . has refused to give access to or to supply records or other information as required by the equal opportunity clause"). OFCCP moved to apply the expedited procedures, a motion that I granted over Google's objections. Order, Feb. 21, 2017.

OFCCP's complaint recites the specific items that it seeks:

> a compensation snapshot as of September 1, 2014;
>
> job and salary history for employees in a September 1, 2015 compensation snapshot that Google had produced and the requested September 1, 2014 snapshot, including starting salary, starting position, starting "compa-ratio," starting job code, starting job family, starting job level, starting organization, and changes to the foregoing; and
>
> the names and contact information for employees in the previously-produced September 1, 2015 snapshot and the requested September 1, 2014 snapshot.

Complaint, ¶9.

The "snapshot" includes for each employee working at the subject facility, Google's headquarters in Mountain View, California, data falling into at least 38 categories plus "Any other factors related to Compensation." D.Ex. B at 3.

On February 7, 2017, OFCCP moved for summary judgment. The motion must be denied, as the implementing regulations establishing the expedited procedures do not permit such motions. Even were I to reach the merits, I would deny the motion.

The regulations establishing the expedited procedures aim at focusing the parties narrowly on preparation for a relatively informal hearing on a sharply foreshortened schedule. These regulations incorporate by reference certain specified portions of the regulatory process generally applicable in an ordinary, non-expedited case. For example, the expedited procedures expressly incorporate by reference the pleading requirements applicable to routine cases. 41 C.F.R. § 60-30.32. They incorporate by reference the ordinary procedures for requests for admission. 41 C.F.R. § 60-30.33(a).

In several ways, however, the expedited procedures differ from those applicable in a routine case. In a routine case, this Office's rules of evidence apply; in an expedited hearing, no formal rules of evidence apply. *Compare* 41 C.F.R. §§ 60-30.18 and 60-30.34(b). In an ordinary case, parties may propound and must answer interrogatories, requests for admission, requests for production, and questions at oral depositions. 41 C.F.R. §§ 60-30.9 through 60-30.11. Each of these discovery devices has attendant procedures, and motions may be filed for failure to comply with a discovery demand. *Id.* In an expedited hearing, however, discovery is limited to requests for admission and, only with the permission of the administrative law judge, depositions; other discovery is not permitted. 41 C.F.R. § 60-30.33.

As to motion practice in an ordinary proceeding, pre-hearing and post-hearing motions are permitted, with 10 days to file an opposition; moving papers and supporting briefs must be submitted in writing unless the motion is made at a hearing. 41 C.F.R. § 60-30.8. By comparison, the expedited procedures include no provision for pre-hearing or post-hearing motions except for permission to take depositions or to address an opposing party's failure to respond to requests for admission. 41 C.F.R. § 60-30.33 (a), (c). The expedited procedures allow for this limited motion practice by expressly incorporating by reference the implementing regulation from the ordinary, non-expedited procedures.

Turning to motions for summary judgment, the regulations in an ordinary case establish detailed requirements. 41 C.F.R. § 60-30.23. The motion must be filed "at least 15 days before the time fixed for the hearing on the motion. The adverse party or parties may serve opposing affidavits prior to the day of hearing [on the motion]." *Id.* § 60-30.23(e). There are detailed briefing requirements similar to those found in some federal district courts.[2] *Id.* § 60-30.23(d), (e). The administrative law judge may grant partial summary judgment. *Id.* § 60-30.23(f).

But the expedited procedures include no provision that allow motions for summary judgment. There is no reference – express or implied – to the procedures established for such motions in ordinary cases (41 C.F.R. § 60-30.23).

As the implementing regulations for expedited hearings are aimed at a short, streamlined process and expressly incorporate by reference the portions of the ordinary procedures that will apply in an expedited case, the absence of any provision for summary judgment in the expedited procedures excludes such motions from the process. This reflects that, in an expedited proceeding, the parties (and the administrative law judge) have little time to prepare for the hearing on merits and cannot devote resources to the kind of extensive briefing that the parties filed here.[3]

Accordingly, OFCCP's motion for summary judgment is denied.

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[2] *E.g.*, the moving party must file and serve a "Statement of Uncontested Facts," and the opposing party must file and serve a "Statement of Disputed Facts." 41 C.F.R. § 60-30.23(d).

[3] Plaintiff OFCCP's opening brief is 23 pages long. It is supported by a declaration of counsel and over 200 pages of exhibits. After Google filed a 9-page opposition brief with 12 supporting exhibits, I granted OFCCP's request to file a reply. OFCCP filed a 28-page reply brief. If OFCCP requires 51 pages of briefing at a time when the parties are supposed to be preparing for a hearing on a very short schedule, OFCCP's motion is inconsistent with the expedited process that OFCCP requested and that I allowed.

Even were I to reach the merits of the motion, I would deny it.

The parties agree that OFCCP's request for information is akin to an administrative subpoena. The Fourth Amendment applies to administrative subpoenas. *See, See v. City of Seattle*, 387 U.S. 541, 543-44 (1967). The touchstone of the Fourth Amendment is "that the disclosure sought shall not be unreasonable." *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946).

As the Supreme Court observed:

> "It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

Donovan v. Lone Steer Inc., 464 U.S. 408, 415 (1983) (quoting *See*, 387 U.S. at 544); *see U.S. v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950) ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is in the requirement . . . that the disclosure sought shall not be unreasonable'") (citation omitted).)

The scope of judicial review in an administrative subpoena enforcement proceeding is "quite narrow."[4] But the government must still answer some questions. "The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *Id.* An administrative subpoena may not be "too indefinite or broad." *Peters v. United States*, 853 F.2d 692, 699 (9th Cir. 1988). Even if other criteria are satisfied, "a Fourth Amendment 'reasonableness' inquiry must also be satisfied." *See Reich v. Mont. Sulphur & Chem. Co.*, 32 F.3d 440, 444 n. 5 (9th Cir. 1994).

For purposes of an OFCCP compliance evaluation, reasonableness has been held to require that the data sought is "'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'" *United Space Alliance*, 824 F. Supp. 2d at 93, citing *Lone Steer*, 464 U.S. at 415.[5]

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[4] *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (*en banc*), *overruled on other grounds as recognized in Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

The parties here agree that OFCCP's current request for information is akin to an administrative subpoena. OFCCP is not demanding an intrusion into Google's offices or access to its personnel, a demand that could be viewed as an administrative warrant. (Indeed, OFCCP completed a two-day onsite review to which Google consented). For an administrative subpoena, the government meets Fourth Amendment demands by showing only reasonableness; it need not show probable cause. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984); *United Space Alliance*, 824 F. Supp. 2d at 92.

[5] I reject OFCCP's argument that Google's agreement to the contract terms described above is a complete waiver of its Fourth Amendment rights. "Fourth Amendment waiver is only to specific items sought at the time of the waiver; otherwise, it must meet standards required for an administrative subpoena – There has been a waiver of some Fourth Amendment rights, but not all; it doesn't give the government carte blanche to access anything." *U.S. v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1113 (9th Cir. 2012).

To determine whether the demands of an administrative subpoena are unduly burdensome, some courts have looked to whether satisfying the demands would threaten normal operation of the business. But the Eleventh Circuit has cogently explained that, while this is one formulation, it cannot be followed as a rigid rule. *EEOC v. Royal Caribbean*, 771 F.3d 757, 763 (11th Cir. 2014). As the court held:

> A district court is authorized to "weigh such equitable criteria as reasonableness and oppressiveness" and that "this rubric impl[ies] a balancing of hardships and benefits." The use of "such ... criteria" and the plural of "hardship" and "benefit" clearly indicates that a district court may consider a number of factors in this analysis, rather than requiring specific types of evidence on a single factor. *See also [EEOC v.] United Air Lines*, 287 F.3d [643] at 653 [7th Cir. 2002] (noting that cases such as *Bay Shipbuilding* have suggested a party must show that compliance would threaten normal business operations but explaining "that scenario is more illustrative than categorical" and "[w]hat is unduly burdensome depends on the particular facts of each case and no hard and fast rule can be applied to resolve the question" (internal quotation marks omitted)); *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994) ("Essentially, this court's task is to weigh the likely relevance of the requested material to the investigation against the burden to Ford of producing the material.").

EEOC v. Royal Caribbean, 771 F.3d at 763 (citation omitted).

OFCCP argues that, as I evaluate the burden on Google, I should consider that Google has huge resources. OFCCP asserts that Google's parent corporation's market value is over $500 billion and that it reported revenues in 2016 of $90 billion. But none of this is relevant.

Google has no access to its parent corporation's assets. Even if it did, market capitalization is the value of the shares that shareholders hold; it is not an asset of the corporation. It reflects such factors as the investing public's expectations for future growth of the corporation. That factor is often more important in Silicon Valley and other growing companies than factors such as current assets, liabilities, profits, and losses. Revenue has meaning only when compared to expenditures. For example, in 2007, General Motors had revenue of $180 billion (twice the revenue of Google's parent in 2016), but it reported a net loss of $43.3 billion and was soon in bankruptcy.

Moreover, Google has obligations other than complying with OFCCP demands. The federal government had estimated revenues for fiscal 2016 of about $3.5 trillion. For that fiscal year, the U.S. Department of Labor had a discretionary budget of about $13.2 billion. But I do not expect that OFCCP could spend a significant portion of either federal revenues or the DOL budget on a single OFCCP compliance review.

I am focused more on OFCCP's allegation in its complaint (signed on December 29, 2016) that, as of that date, GSA had paid Google $600,000 on this contract in two and one-half years. Google contends that compliance with just OFCCP's demand for a compilation of interview

notes on about 54,000 job interviews will cost Google over $1 million.[6] And this is only one of the items OFCCP is demanding. If Google is correct and if OFCCP is entitled to an order requiring Google to comply with the full extent of its demands, it begins to appear that the GSA contract had a poison pill that would rob Google of the benefits of the contract: namely, compliance with OFCCP's demands will far exceed all of Google's gross revenue under the contract.

I must consider that a compliance review is only that: an investigation to determine whether the contractor has complied with its anti-discrimination and affirmative action obligations. There has been no finding of wrongdoing. This is not litigation that the government is prosecuting based on investigative findings. And even if it were, proportionality is now a cornerstone of discovery and could be a basis for a protective order limiting discovery.[7]

Based on this record, I cannot conclude as a matter of law that OFCCP's requests in their entirety are both relevant to the compliance review and not unreasonably burdensome. OFCCP's proof falls short on the following items, which I offer by way of example and not as a necessarily complete list:

The employee records sought ("including starting salary, starting position, starting 'compa-ratio,' starting job code, starting job family, starting job level, starting organization, and changes to the foregoing") are unlimited as to time. Google was incorporated in 1998. The government contract was agreed to in June 2014. Although a worker's starting salary – and later adjustments to that salary – obviously relate to compensation, OFCCP has not shown how a starting salary 19 years ago – and 16 years before the government contract – is relevant to its proper purpose in a compliance review. To the extent that this information is relevant, when it concerns more than 20,000 employees whose work histories must be searched, it would appear to be unreasonably burdensome, given its extremely limited possible relevance. I cannot decide the question on summary decision.

OFCCP has established that it is entitled to review Google's compliance with its obligations under its affirmative action plan and that its affirmative action plan extends to more than 20,000 employees at its headquarters facility in Mountain View, California. Google could have asked OFCCP to allow it to develop an affirmative action plan that would be based on employees' functions rather than the geographically-based establishment in which they work. That might have limited the breadth of the affirmative action plan. But Google did not do that. OFCCP thus is acting within its authority to define the scope of the compliance review to include Google's entire Mountain View workforce. My review of the scope must be narrow and deferential. And

[6] Perhaps Google will prefer to provide OFCCP access to the raw interview notes and allow OFCCP to do the compilation.

[7] *See* Fed. R. Civ. P. 26(b)(1): "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *See also,* 29 C.F.R. § 18.51(b)(4) (mandating that judges limit discovery when disproportionate).

I am persuaded that OFCCP need not engage in an iterative process with Google, explaining the status of the investigation when it requests further information.[8]

But, given the broad scope of the compliance review OFCCP has elected to do, a problem arises as to whether OFCCP has requested so much material as to be unduly or unreasonably burdensome, when less would be sufficient. The second "snapshot" requires Google to produce for each of over 19,000 employees base salary or wage rate; hours worked in a typical workweek; other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime; additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade; and documentation and policies related to compensation practices, particularly those that explain the factors and reasoning used to determine compensation. To this OFCCP has added: bonus earned, bonus period covered, campus hire or industry hire, competing offer, current compa-ratio, current job code, current job family, current level, current manager, current organization, date of birth, department hired into, education, equity adjustment, hiring manager, job history, locality, long-term incentive eligibility and grants, market reference point, market target, name, performance rating for the past 3 years, prior experience, prior salary, referral bonus, salary history, short-term incentive eligibility and grants, starting compa-ratio, starting job code, starting job family, starting level, starting organization, starting position/title, starting salary, stock monetary value at award date, target bonus, total cash compensation, and any other factors related to compensation.

The data OFCCP requests meet the deferential standard for relevance. But, even accepting that Google has extraordinary capability to search and create databases, OFCCP's request that this extensive information be supplied for a second "snapshot" date requires some showing that it is not unduly burdensome. Had GSA paid Google $600 million on this contract, not $600,000, it would be a different analysis, but that is not the history of this contract.

Moreover, the snapshot OFCCP demands contains one requirement that lacks any specificity: OFCCP demands that, for the thousands of employees, Google add to the requested database "Any other factors related to Compensation." OFCCP must determine what information it wants and describe it with sufficient specificity for OFCCP to know what it must do to comply. OFCCP has interviewed a significant number of Google managers. It should have asked what factors Google considers when setting compensation. OFCCP could also ask Google to prepare a list of factors it considers when setting compensation. But Google is not required to anticipate

[8] On an administrative subpoena, the focus is "on the breadth of the subpoena rather than the motivation for its issuance." *United Space Alliance*, 824 F. Supp. 2d at 91; *see also United States v. Morton Salt Co*., 338 U.S. 632, 652 (1950) (administrative agency may issue an administrative subpoena "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not").

what OFCCP might someday conclude is "related to compensation" and therefore should have been produced.

Order

For the foregoing reasons, OFCCP's motion for summary judgment is DENIED.

SO ORDERED.

Digitally signed by STEVEN BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge