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Issue Date: 02 May 2017

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 MOTION TO DISMISS

Background and Procedural History

This case is akin to a subpoena enforcement proceeding. Among OFCCP's duties are the evaluation and review of federal contractors' compliance with certain employment non-discrimination and affirmative action requirements.¹

The General Services Administration gave Google a contract in June 2014. Applying neutral criteria, OFCCP selected Google for a compliance review.² It notified Google of the review in September 2015. Google complied with OFCCP's initial demands for information and for an onsite inspection. When OFCCP required considerable additional information, the parties reached an impasse. This action followed.

Google now moves to dismiss. It contends that: (1) OFCCP has reached a determination that Google is in violation of the Executive Order; (2) OFCCP could not have reached this determination unless it had completed its compliance review; and (3) OFCCP is not entitled to additional information from Google because its compliance review is complete.

¹ See Executive Order No. 11246; Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 41; the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 4211 and 4212; and implementing regulations at 41 C.F.R. §§ 60-1.20(a), 60-30, 60-250, and 60-741. Discrimination is prohibited if based on race, color, religion, sex, sexual orientation, gender identity, or national origin. 41 C.F.R. § 60-1.20(a).

² No complaint or charge of discrimination is required for OFCCP to open a compliance review, and there was no complaint or charge in this case.

The facts underlying the motion arose on the first day of an expedited hearing on April 7, 2017. While the hearing was in progress, the Regional Solicitor who represents OFCCP answered questions from a reporter at the *Guardian*. The *Guardian* published an article to the internet that day.

Google discovered the article during the hearing. At a sidebar conference, it asserted then, as it does now, that the Regional Solicitor's statements to the *Guardian* demonstrate that OFCCP has reached a determination that Google is in violation. I adjourned the hearing to allow the parties to brief a motion. Google filed the current motion, which OFCCP opposes.

Facts

The Guardian's article. The *Guardian's* article reports excerpts from the hearing testimony of OFCCP's Regional Director Janette Wipper. It quotes her as saying: "We found systemic compensation disparities against women pretty much across the entire [Google headquarters] workforce." "We want to understand what's causing the disparity." The article paraphrased Wipper as saying that "the Department found pay disparities in a 2015 snapshot of salaries and said officials needed earlier compensation data to evaluate the root of the problem . . ."³ It does not appear that the *Guardian* interviewed Wipper.

Before publishing, the *Guardian* obtained a response from Google: "Google strongly denied the accusations of inequities, claiming it did not have a gender pay gap." "The company has recently claimed that it has closed the gender pay gap globally and provides equal pay across races in the U.S." The reporter quotes an unnamed Google source as stating: "We vehemently disagree with [Wipper's] claim. Every year we do a comprehensive and robust analysis of pay across genders and we have found no gender pay gap. Other than making an unfounded statement which we heard for the first time in court, the DoL hasn't provided any data, or shared its methodology."

The *Guardian* contacted the Department of Labor for a response to Google's comments. The reporter was referred to Regional Solicitor Janet Herold. Ms. Herold has appeared as one of the government's attorneys representing OFCCP. As she is one of the Department's highest ranking career attorneys, it is unclear how involved she is personally in the litigation: the Solicitor of Labor and a Regional Solicitor are routinely listed on pleadings when the Solicitor's office is representing a DOL agency. For purposes of the hearing on April 7, 2017, the Department had designated Herold as the person to respond to any press inquiries.

Herold took the call and spoke to the reporter. The reporter quoted her as stating: "The investigation is not complete, but at this point the department has received compelling evidence of very significant discrimination against women in the most common positions at Google headquarters." "The government's analysis at this point indicates that discrimination against women in Google is quite extreme, even in this industry." The department "seeks additional information to ensure the accuracy of the department's findings, because if the findings are

³ The article also contains short quotes from the opening statements of both counsel for OFCCP and counsel for Google. The substance is not relevant to the present motion.

confirmed, this is a troubling situation.” Herold does not dispute the accuracy of the *Guardian*’s quotes.⁴

Herold’s declaration. Herold states in a declaration that she told all of the reporters who reached her that the investigation was not complete and that she confirmed Wipper’s testimony “regarding systemic discrimination against women in compensation revealed by OFCCP’s preliminary analyses.”⁵

Wipper’s testimony at the hearing. Although five witnesses testified at the hearing on April 7, 2017 before it adjourned at about 4:15 p.m.,⁶ Regional Director Wipper’s testimony occupied more than half of the time during which witnesses were on the stand.⁷ In its article, the *Guardian* quoted Wipper accurately, but it obviously had to make narrowly limited selections from her hours of testimony.

Some of Wipper’s testimony that the *Guardian* did not report (or reported only partially) included the following statements:

Usually after you find a disparity in pay level, *the second question you want to answer is the cause of the disparity.* So, what you’ll do is look back at every decision that impacted pay, from starting salary to every change going forward. This is something that not only we do, but Google itself says it does when they do pay equity analysis.

Tr. 41:1-7 (emphasis added).

JUDGE BERLIN: Did OFCCP give any consideration to making the breadth of the request less than the entire work force? Was that something you even considered?

THE WITNESS: Yes. If the indicators . . . were limited to a certain sector, we would consider limiting it. But in this case, that wasn’t what we were seeing at this point. We saw indicators that were consistently adverse to women and we also saw policies that were impacting -- potentially impacting. [¶] *Now, without looking at the history, we cannot pinpoint exactly where the disparities are, you know, stemming from.* But we did see a widespread-enough issue that it wasn't -- there wasn’t a need to narrow it.

Tr. 131:19-132:7 (emphasis added).

⁴ Decl. of Herold (Apr. 25, 2017). The only exception is that Herold does not recall using the word “findings” in the quote: “The department ““seeks additional information to ensure the accuracy of the department’s findings, because if the findings are confirmed, this is a troubling situation.”” She believes the word she used was “analyses.” *Id.*

⁵ *Id.*, ¶5.

⁶ The fifth witness did not complete his testimony before the adjournment.

⁷ Wipper’s testimony fills 79 of the 190 pages of the transcript.

The thrust of this testimony is that OFCCP's investigation has revealed pay disparity, but there is insufficient information for OFCCP to determine what is causing the disparity.

In addition, Wipper testified that the information collected was generally limited to one particular date in 2015, and that OFCCP needed information for an earlier date to determine if pay disparity by sex was occurring at that earlier time. As Wipper testified:

And so we requested a 2014 snapshot. We typically do that when we review and analyze the current year's snapshot and we find systemic compensation disparities. And so in order to determine whether there's a continuing violation, we will look back for the entire review period. So we ask for that prior year's snapshot to determine whether the systemic compensation disparities we found in the current year existed in the prior year.

Tr. 40:16-24.⁸

Contentions of the Parties

Google contends that Solicitor Herold's comments to the press reveal that OFCCP has completed the compliance review; otherwise, it could not assert that it has "compelling" evidence of "discrimination" so "very significant" as to be "extreme." Google asserts that OFCCP is making demands for extensive additional information – not to complete an investigation that in fact it has already completed – but to enhance its preparation for upcoming litigation on the merits.

Google asserts that OFCCP wants to use the broad investigative authority it is accorded in compliance reviews to circumvent the more constrained access to Google's information it will get in formal discovery. The argument relies on OFCCP's previous assertions that its investigative authority is not limited by the constraints that apply in formal discovery, such as, for example, the requirement that discovery demands must be proportional to the matters at issue.

Google finally asserts, as a policy matter, that allowing the case to go forward would place this Office's imprimatur on the government's attorney's ethically questionable conduct under California Rule of Professional Conduct 5-120.

OFCCP opposes. First, it argues that nothing in Herold's statements to the press show that OFCCP's investigation is done. Second, it argues that, even when an investigation is complete and civil litigation has begun, an agency's administrative subpoena will be enforced.⁹ Third, it

⁸ Consistent with this, Wipper testified that OFCCP only requested the 2014 data after analyzing the 2015 data. Tr. 128:2-11.

⁹ OFCCP fails to recognize that it has no subpoena authority. The parties agree and I accept that, for purposes of a Fourth Amendment analysis, OFCCP's requests for information are more akin to an administrative subpoena than to an administrative warrant. But OFCCP's requests are not, in fact, subpoenas.

The cases on which OFCCP relies focus narrowly on the language in various statutes authorizing agencies to issue administrative subpoenas. Different language leads to different results. But here, there is no language authorizing a subpoena. Nothing in the Executive Order, the other two statutes, or the implementing regulations suggests that

argues that OFCCP's motives for requesting more information from Google are irrelevant and unreviewable; OFCCP is entitled to the material irrespective of its motives.¹⁰ OFCCP addresses the ethical issue in general terms but does not address the particular rule to which Google refers.

I reject all of OFCCP's arguments, but I will deny Google's motion for other reasons, to which I now turn. In addition, I find no ethical violation but urge the Department's representatives to take greater care when making public statements about this litigation while it remains pending.

Discussion

I. As OFCCP Has Not Concluded Its Compliance Review, Google's Motion Lacks Foundation and Must Be Denied.

The scope of the investigation OFCCP must undertake. Regional Director Wipper's testimony is consistent with an ongoing investigation aimed at the applicable legal standards. First, a finding of wage disparity correlated to gender, standing alone, is not legally sufficient to entitle OFCCP to a remedy for a violation of the Executive Order. Second, a showing of wage disparity on a particular date, without more, cannot be generalized to cover the two-year scope of the OFCCP's investigation. That is why OFCCP must continue its compliance review if it is to reach a determination consistent with the applicable legal standards.

In particular, OFCCP has not advanced a theory that Google has intentionally discriminated against women. Rather, OFCCP's theory appears to be that (1) Google has, at certain times (perhaps only in the past) had practices that – while neutral on their face – had an adverse impact based on sex, resulting in lower pay for women; and (2) the adverse impact has continued to affect female employees' pay during the period under investigation.

To achieve a remedy based on such a theory, OFCCP must show, not simply that there is pay disparity correlated to sex; it likely will also have to show a particular employment practice that caused the disparate impact. *See, e.g.*, 42 U.S.C. § 2000e-2(k) (adverse impact under Title VII). The reason that a particular employment practice generally must be identified is that an employer is not liable for adverse impact discrimination if the employer shows that its practice was job-related and consistent with business necessity. *Id.*

At a minimum, that requires OFCCP to identify the practice that it contends is causing the disparity, and to consider whether the practice is job-related and consistent with business necessity. *See, e.g., Rizo v. Yovino*, ___ F.3d ___, 2017 WL 1505068, Case No. 16-15372 (9th

OFCCP may continue to demand information in a compliance review after it has completed the review and proceeded into litigation.

¹⁰ OFCCP has asserted repeatedly that various aspects of its authority are unreviewable. As I have previously held, the Fourth Amendment limits OFCCP's investigative powers. By agreeing in its contract with GSA that it would comply with the Executive Order, Google was not waiving all Constitutional rights. The contract does not state what specific items OFCCP will seek in a compliance review; the waiver therefore is limited. OFCCP is entitled to items that are within its authority, that are relevant to the compliance review (with substantial deference to OFCCP), and that are not unreasonably burdensome. When a compliance review is being conducted for an improper purpose, it creates an unreasonable burden.

Cir. Apr. 27, 2017), slip op. at 7-10 (in Equal Pay Act and Title VII case, even when use of employee's pay at prior employment caused a pay disparity adversely affecting women, liability would not attach if the practice effectuated a non-discriminatory business purpose and was reasonable in light of the stated purpose), citing *Kouba v. Allstate Ins. Co.*, 691 F.3d 873, 876-77 (9th Cir. 1982).¹¹

Thus, OFCCP's investigation is incomplete if it stops with a finding of pay disparity linked to sex. It must determine what caused (or is causing) the disparity and whether that factor is job-related and consistent with business necessity.¹² If the employer no longer is engaging in the practice, OFCCP must look to whether another policy has continued the adverse effects into the period under investigation and whether that practice is job-related and consistent with business necessity.

Adverse impact cases require the parties to gather extensive statistical data. Generally, experts analyze the data, applying such tools as multiple regression analyses, to determine what is causing any disparity. Given the time and resources required, OFCCP began with a search for disparity in 2015. Having found disparity at that time, it requested similar information for 2014.

Both OFCCP's search for the cause of disparity and OFCCP's expansion of the database to include an earlier point in time are consistent with an ongoing investigation. Neither suggests a sham or stratagem.

Herold's statements to the Guardian go beyond Wipper's testimony; they may be read to imply that OFCCP's investigation is complete – or at least should be. Regional Solicitor Herold's statements to the *Guardian* complicate the issue. When a government agency with enforcement authority (such as OFCCP) has investigated and found "compelling evidence of very significant discrimination" that is "extreme," it is difficult to imagine what more is needed for the agency to move on to an enforcement process.¹³

OFCCP argues that Herold's caveats about an ongoing investigation refute an inference that that OFCCP has reached ultimate findings. But Herold's statements readily align with Google's argument that OFCCP is keeping the investigation officially open while having reached a determination that Google is in violation. That would explain why Herold repeats that the investigation is ongoing and yet at the same time states that the government has obtained "compelling evidence" of "very significant discrimination" that is "extreme."

¹¹ In adverse impact litigation on the merits, job-relatedness and business necessity are generally affirmative defenses on which the employer bears the burden. But, if the government is to complete a compliance review, it must take into account the facts going to that defense and determine whether litigation based on the totality of the evidence is likely to yield a remedy to the affected workers.

¹² For example, a review of a particular business might reveal disparity in hiring that correlates with race, color, religion, sex, or national origin. The hiring is for a job that involves access to company funds and accounts. Additional information reveals that the cause of the disparity is that the business has a policy of not hiring people for this job who, within in the past ten years, were convicted of embezzlement. A government investigator could conclude that the policy is not a violation of non-discrimination requirements because it is job-related and consistent with business necessity.

¹³ See 41 C.F.R. §§ 1.26, *et seq.*

From these statements, it may be inferred that the government wants it both ways: the investigation is still ongoing with no final conclusions reached and no discovery rules to limit further demands for information, and yet the Department can announce findings of discrimination to the press. The Department does this, while keeping Google in the dark about what its analytical process has been and what exactly its findings are. It asserts that it is entitled to do this because Google is not entitled to information about OFCCP's process until OFCCP finishes the compliance review, and that Google is not entitled to discovery until and unless OFCCP files litigation on the merits.

I make no finding that Ms. Herold was involved in a duplicitous stratagem or any stratagem. Her declaration states that she was trying to endorse Wipper's testimony while reminding reporters that the investigation was ongoing.

But, whatever Herold's purpose was, it remains that she is saying both that the investigation is still open and that OFCCP has already gathered compelling evidence of very significant discrimination that is extreme. If OFCCP has reached that level of confidence, it is difficult to understand why OFCCP needs further investigation to complete the compliance review.

Findings. That said, to determine whether OFCCP has completed its investigation – or should be held to have done so – I must decide the weight to be assigned the evidence on the record. For this purpose, I will apply (without adopting) Google's view of Ms. Herold's statements to the *Guardian*. I find those statements – construed as Google argues – inconsistent with Director Wipper's testimony.

Director Wipper testified that the investigation reveals widespread pay disparities by gender, but that OFCCP lacked sufficient information to determine the cause. The implication was that, only with additional information and further analysis might OFCCP conclude that Google was in violation of the Executive Order. Wipper did not testify that OFCCP had found discrimination or an actionable violation. Herold went considerably further, stating explicitly that there was compelling evidence of very significant discrimination.

Resolving the inconsistency, I give substantially more weight to Director Wipper's testimony than to Solicitor Herold's statement to a reporter. Wipper gave extensive, detailed testimony under oath for nearly half of the reported hearing on April 7, 2017. She submitted to cross-examination by skilled and experienced counsel. She has been directly involved with the case in her capacity as Regional Director of OFCCP. She consistently – both on direct and on cross-examination – explained why OFCCP needed more information – not despite there being substantial evidence of wage disparity by sex on a particular date – but because of it. That finding was an initial step that required additional investigation. Had OFCCP found no indicators of pay disparity after the first document review and the onsite inspection, it likely would have closed the compliance review with a determination favorable to Google. But it found indicators suggesting discrimination and therefore concluded that it must look further.¹⁴

¹⁴ I do not mean to suggest that OFCCP is entitled to the additional information it seeks. That question requires scrutiny of OFCCP's requests under Fourth Amendment criteria and consideration of Google's employees' privacy rights.

In contrast, the Regional Solicitor gave interviews to multiple reporters on that day, including the reporter from the *Guardian*. The interviews were not in a formal setting, not under oath, not subject to procedural rules, not subject to cross-examination, and not detailed. They were not given in a setting in which witnesses are made aware that they have a serious legal responsibility to be accurate, precise, and complete. It is not even certain how familiar Herold was with the specifics of the case – as opposed to being the designated press contact.¹⁵

Conclusion. Accordingly, I find that OFCCP has not completed its investigation and has not determined that Google has violated the Executive Order or other legal provisions that OFCCP investigates and enforces. As OFCCP has not completed its investigation, Google’s argument for dismissal fails.

II. There Has Been No Ethical Violation.

I now turn to Google’s argument that a denial of its motion could be seen as an endorsement of the Solicitor’s statements to the press, which Google argues could have been inconsistent with California Rule of Professional Conduct 5-120.¹⁶ That rule provides:

A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Cal. Rules Prof. Conduct 5-120(A). Google also argues that OFCCP’s public statements appear to punish Google for asserting good faith, constitutionally-based defenses and for defending the privacy of its employees.

I find no ethical violation, but I question any extrajudicial statement that a Department attorney makes to the press while the matter is pending, if the statement goes beyond the public record in the pleadings and evidence adduced. The Department should be cautious not to create the appearance of chilling the constitutional rights of those who – lawfully and in good faith – choose to challenge its authority in the manner provided by law.

¹⁵ I am aware that, in “our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.” *Link v. Wabash Railway Co.*, 370 U.S. 626, 634 (1952); *see also, In re Price*, 871 F.2d 97 (9th Cir. 1989). Technically, Ms. Herold represents OFCCP; her name is on the pleadings because of her high-ranking position. Nonetheless, I find that for this purpose she was acting as the Department’s designated press agent, not as OFCCP’s attorney. Even if she was acting on behalf of OFCCP, her statement is no more binding on OFCCP than the statements of the others who represent OFCCP, including Ms. Wipper. I give more weight to those other statements.

¹⁶ Google does not allege that any attorney representing OFCCP violated applicable ethical rules. Ms. Herold, Mr. Eliasoph, and Mr. Pilotin, all of whom have appeared for OFCCP, are admitted to practice in California. Ms. Wipper, who has been present at the hearing as the client representative (not as counsel) for OFCCP, is also an attorney admitted to practice in California. There is no allegation of misconduct made against her either.

As to the ethical concern, the requirement in Rule 5-120 of a substantial likelihood of material prejudice to the adjudicative proceeding is constitutionally required. Given First Amendment protections, it is the obstruction of or prejudice to the administration of justice that permits a sanction for the extrajudicial statement. *Standing Comm. on Discipline of the United States Dist. Court v. Yagman*, 55 F.3d 1430, 1442 (9th Cir. 1995), citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074-75 (1991). “The prejudice to the administration of justice must be highly likely before speech may be punished.” *Yagman* at 1442.

The California rule is based on Model Rule of Professional Conduct 3.6. In their comments, the drafters of the Model Rule stated that the curtailment of publically disseminated information is most necessary in jury cases. The curtailment is more important in criminal cases than civil cases. The risk of prejudice is the least in non-jury hearings and arbitrations.¹⁷ Examples of prejudicial statements in civil cases are: (1) a statement as to “the character, credibility, reputation or criminal record of a party, and (2) “information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial.”¹⁸

Thus, media comments by a lawyer outside a nonjury proceeding will pose a significant and direct threat to the administration of justice . . . only in extreme situations. Accordingly, concern has focused mainly on prejudicial trial comment that has a substantial likelihood of contaminating a jury. A second compelling state interest is preventing pretrial and trial comment that will influence a prospective witness, such as by inducing reluctance to testify out of fear of retaliation.

RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 109 (2000).

The drafters’ comment on the California Rule includes:

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

Rule 5-120 (*Discussion*).

¹⁷ MPRC 3.6, Comment [1].

¹⁸ MPRC 3.6, Comment [6].

Perhaps because of the First Amendment considerations, the courts have consistently rejected assertions that an attorney has violated Rule 5-120.¹⁹

The only attorney's extrajudicial statement at issue here is Solicitor Herold's statement to the press.²⁰ I find that Ms. Herold's statement does not have a substantial likelihood of materially prejudicing this proceeding. The case is being adjudicated in an administrative forum with no jury. Ms. Herold's statement contained no evidence – admissible or not; it was a conclusory legal statement characterizing the extent of the evidence already gathered. It thus was not an attempt to put otherwise inadmissible evidence before the ALJ. Even if Herold's statements included evidence that was relevant and somehow also inadmissible,²¹ administrative law judges must receive such evidence just to rule it inadmissible; that routine process is not prejudicial.

Finally, the subject of Herold's statement went to whether OFCCP has evidence that Google has engaged or is engaging in discriminatory pay practices. But that question is not before me. That would only be a question after the conclusion of this present case, OFCCP's compliance review, OFCCP's post-review determination that Google is in violation (if that is OFCCP's determination), and a failure of conciliation.²² At that point, OFCCP could bring an enforcement action on the merits at which evidence of discrimination would be relevant. Thus, a statement that Google is engaged in discrimination – though ill-advised (*see below*) – is not prejudicial to the issues pending here.

In all, I am confident that nothing in Ms. Herold's comments to the press on April 7, 2017, will affect the outcome of this case. I therefore find no violation of California Rules of Professional Conduct 5-120.²³

¹⁹ See *Hollywood v. Superior Court*, 43 Cal. 4th 721 (2008) *People v. Marshall*, 13 Cal. 4th 721 (1996); *Argentieri v. Zuckerberg*, 8 Cal. App. 5th 768, 772-74 (2017); *Ramirez v. Trans Union LLC*, 2013 U.S. Dist. LEXIS 39120, *8-*13 (N.D. Cal. 2013); *Caso v. Hartford Cas. Ins. Co.*, 2007 U.S. Dist. LEXIS, 91248, *3-*6 (E.D. Cal. 2007); *Berndt v. Cal. Dep't of Corrections*, U.S. Dist. LEXIS 15896, *11-*12 (N.D. Cal. 2004).

²⁰ The press coverage quotes or reports statements various other attorneys made at the hearing; these are not extrajudicial statements.

²¹ Formal rules of evidence do not apply to the expedited procedure in cases of this kind. “The hearing shall be informal in nature, and the Administrative Law Judge shall not be bound by formal rules of evidence.” 41 C.F.R. § 60-30.34(b). Thus, little evidence that is relevant will be held inadmissible.

²² The timing of the statement in the middle of the hearing is unfortunate. But the *Guardian* initiated the contact, not Ms. Herold, and it did so because it was covering the hearing.

²³ OFCCP argues that Ms. Herold's statement was an appropriate response to Google's statements to the reporter. Rule 5-120(C) addresses this argument. To come within the exception stated there, Ms. Herold would have to show that she needed to “make a statement that a reasonable [attorney] would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity” and that the statement made was “limited to such information as is necessary to mitigate the recent adverse publicity.” *See id.*

The record fails to support such a conclusion. The information that the reporter was going to publish was a balanced discussion of Director Wipper's views and those of Google. OFCCP did not need protection against undue prejudice and did not need Ms. Herold to assert compelling evidence of extreme discrimination just to mitigate Google's comments to the reporter. Ms. Herold could readily have declined to comment on a pending matter or could have stated that the hearing was in progress and that Ms. Wipper's testimony states OFCCP's views.

Nonetheless, the Regional Solicitor's comments to the *Guardian* raise concerns. I have commented on how they can appear to burden Google's good faith assertion of a constitutional defense. They also seem inconsistent with the regulatory scheme under the Executive Order. Conciliation is a cornerstone of the regulatory scheme. The confidentiality of information gathered during a compliance review is another cornerstone.²⁴ Public statements such as those here could create obstacles to conciliation, especially when they are unnecessary to protect OFCCP against prejudice and when the language is escalated.

In short, OFCCP insists that it has made no findings adverse to Google. Its public statements, if any, must be consistent with that.²⁵

Order

Google's motion to dismiss is DENIED.

Based on the record on this motion, neither Janet Herold nor any other attorney has engaged in unethical conduct.

This Order will be served on the Solicitor and on counsel for Google by facsimile or email. All other service is by U.S. mail.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

²⁴ See 41 C.F.R. § 60.1-20(g) ("OFCCP will treat information obtained in the compliance evaluation as confidential to the maximum extent the information is exempt from public disclosure under [FOIA]").

²⁵ See 29 C.F.R. § 18.22(d) (representatives may not make misleading statements, assertions, or representations about a material fact or law related to a proceeding).