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Office of Administrative Law Judges
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Issue Date: 05 August 2013

Case No.: 2011-OFC-00006

In the Matter of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

VF JEANSWEAR LIMITED PARTNERSHIP,

Defendant.

RECOMMENDED DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause of action is filed pursuant to Executive Order 11246 (30 Fed. Reg. 12319), as amended by Executive Order 11375 and Executive Order 12086 ("Executive Order") and is governed by the implementing Regulations found at 41 C.F.R. Chapter 60. On May 18, 2011, the Office of Federal Contract Compliance Programs, U.S. Department of Labor ("OFCCP" or "Plaintiff") filed an administrative complaint against VF Jeanswear Limited Partnership ("VF" or "Defendant").

The complaint alleged that during calendar year 2005 the Defendant violated the Executive Order by discriminating against non-Asian applicants when hiring into Operative Job Group 070 positions. In accordance with the procedural rules at 41 CFR §60-30.23, the parties have submitted motions for summary judgment and briefs in opposition to each other's motions.

BACKGROUND

VF manufactures clothing that is sold under various brand names. During the time period covered by the complaint it manufactured apparel at a facility in Winston-Salem, North Carolina that has since been closed. Its business during that time included federal contracts that brought it within the coverage of the Executive Order. Job Group 070 was a group within the Winston-Salem facility that included entry level positions for laundering jeans, pressing, sewing, or tacking labels onto pockets and waistbands, and inspecting the finished jeans. Employees in the job group were paid at piecework rates, rather than an hourly wage.

The plant used an employee referral program, in addition to taking referrals from the North Carolina Employment Security Commission (NCESC). It received more referrals from the employee referral program than from the NCESC. When job openings were announced current employees could submit names of potential applicants. The current employees were not compensated for providing referrals and management had no control or influence over which employees would submit referrals. More applications were typically received than there were positions available. The Human Resources Representative only interviewed applicants who had a referral either from a current employee or from the NCESC. Neither the company nor its employees had any control over referrals from the NCESC. VF gave equal weight and consideration to every employee referral, regardless of the race of the employee or the applicant who was referred.

As part of its affirmative action plan, the Defendant provided Spanish or Vietnamese interpreters, as appropriate, for interviews and published statements of company policies in both of those languages as well as in English. English proficiency was not required in order to perform any of the jobs in Job Group 070.

OFCCP issued a Notice of Violation to VF on April 15, 2009. This Notice stated that during calendar year 2005,

> . . . from a qualified pool of 342 Non-Asian applicants, VF Jeanswear hired 54 (15.8%) into Operative 070 job group positions. During the same period, from a qualified pool of 168 Asian applicants, VF Jeanswear hired 73 Asians (43.5%) into Operative 070 job group positions. This disproportionate hiring pattern is statistically significant at the level of 6.79 standard deviations and a shortfall of 31.
>
> Accordingly, OFCCP finds that VF Jeanswear discriminated against 288 qualified Non-Asian applicants (hereinafter Class Members) not hired in positions in the Operative job group because of their race in violation of 41 CFR [§]60-1.4(a)(1).

The last sentence quoted makes explicit the premise on which OFCCP's case rests, and on which the present motions have been argued. That is the assertion that "non-Asian" is a "race" for purposes of enforcement of the Executive Order.

OFCCP retained David Crawford, Ph.D., a labor economist, to perform a statistical analysis of the Defendant's hiring practices during the time period at issue. Dr. Crawford testified that his analysis revealed a disparate impact between the hiring of Asian and non-Asian job applicants. He further testified (Crawford Deposition, pp. 29-30) that he saw no evidence of disparate treatment of applicants.

As noted, VF used employee referrals to screen which applicants to interview. Because of this, Dr. Crawford analyzed the statistics not only for overall hiring, but for the separate stages of selecting applicants to interview and selecting interviewees to hire.

Dr. Crawford's report noted that there were 182 Asian applicants and 367 non-Asian applicants during the time period at issue. 87 Asian applicants were selected for an interview. He calculated that the expected number of non-Asian applicants to be selected for an interview if the selection was race neutral was 115.6. The actual number of non-Asian applicants who were selected for an interview was 86, for a shortfall of 29.6 Crawford Report, Table 7b.

Dr. Crawford noted that these statistical results were consistent with facts to which a VF representative had testified:

a. Applicants referred by employees were given priority in selection for interviews;
b. Asian employees were much more likely to use the referral system;
c. Asian employees made the most referrals; and
d. Asian employees were highly likely to refer Asian applicants when making referrals.

Crawford Report, paragraph 35.

Turning to the post-interview stage, Dr. Crawford found that 87 Asian and 82 non-Asian applicants were interviewed. Of those, 84 Asian applicants and 66 non-Asian applicants were offered positions. The expected number of non-Asian applicants to be offered jobs, based on Dr. Crawford's analysis, was 72.8 for a shortfall of 6.8. (Crawford Report, Table7c).

Dr. Crawford's report included racial identification data for the region in the occupational category of "Production Operatives" from the 2000 census. The percentages for the four largest groups were White (61.5%), African-American (24.3%), Hispanic (10.2%), and Asian (2.4).[1] The percentages for VF's Job Group 070 were White (7.7%), African-American (23.6%), Hispanic (18.9%), and Asian (44.9%).

Crawford Report, tables 2 and 3.

OFCCP commissioned Dr. Crawford for a study of the employment statistics of Asian and non-Asians. "Non-Asian" is not a category recognized in the regulations implementing the Executive Order, and Dr. Crawford had not previously been commissioned to study such a negatively defined group. He arrived at figures for non-Asians by aggregating those for Whites, African-Americans, and Hispanics. African-Americans were represented in Job Group 070 at very nearly their percentage of the regional population. Relative to the regional labor force Hispanics were substantially over-represented in the Job Group and Whites substantially under-represented.

[1] Figures are for the Greensboro--Winston-Salem--High Point Metropolitan Statistical Area. The percentages do not total 100% because of the presence of smaller groups, including Native Americans and persons identifying themselves as belonging to more than one race. Dr. Crawford's report uses the term "African-American," while the Code of Federal Regulations sections quoted below use the term "Black."

VF retained Morton McPhail, Ph.D., an industrial psychologist, who prepared a report describing a number of factors bearing on the demographics of its workforce. He noted that the Asian workers were Vietnamese refugees, a group that had migrated in significant numbers to the Winston-Salem region in recent years. He described cultural factors that affected the likelihood of employees from that group referring friends and family members for openings. In addition, he noted that a job that does not require English proficiency, and an employer that accommodates both Spanish and Vietnamese speakers, is attractive to speakers of those languages. As noted earlier, Asian and Hispanic workers are the ethnic groups statistically over-represented in Job Group 070. Dr. McPhail's observations are among the contested factual issues that would be relevant in a contested case on the merits, but are not at issue on these motions for summary judgment.

DISCUSSION

Section 60-33 A of the Uniform Guidelines on Employee Selection Procedures, titled "Discrimination defined", provides that:

> *Procedure having adverse impact constitutes discrimination unless justified.* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of **any race, sex, or ethnic group** will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 of this part are satisfied.

41 C.F.R. §60-33 A. [emphasis added]

The terms "race" and "ethnic group" are defined as follows:

> *Applicable race, sex, and ethnic groups for recordkeeping.* The records called for by this section are to be maintained by sex, and the following races and ethnic groups: **Blacks** (Negroes), **American Indians** (including Alaskan Natives), **Asians** (including Pacific Islanders), **Hispanic** (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), **whites** (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), of this part.

41 C.F.R. §60-34 B [emphasis added].

Dr. Crawford was not requested to analyze the impact on any of these enumerated groups, and the Plaintiff does not argue that there has been disparate treatment of or impact on any of those groups. Instead he analyzed, and the Plaintiff has argued, exclusively in terms of a group, non-Asians, that was apparently custom-designed for this case.

This "non-Asian" group is not found in the regulations and is not ordinarily included in discussions of United States demographics. In terms of the comparison of Job Group 070 to the regional labor force, the "non-Asian" group was derived by combining one group that was over-represented (Hispanics), one group that was under-represented (Whites) and one group that was closely proportional to the regional percentage (Blacks).

It is not unheard of to aggregate several ethnic groups. For example, OFFCP's fact sheet for employers (Defendant's Brief, Tab J) states that "American Indian or Alaskan Native, Asian or Pacific Islander, Black, and Hispanic individuals are considered minorities for purposes of the Executive Order." OFCCP Facts on Executive Order 11246—Affirmative Action, Para B.

This definition of "minorities" combines four of the five ethnic groups identified in Section 60-34 B, so it could have been designated with the term "non-white" rather than "minorities." Similarly, the regulations could presumably have combined groups to create categories such as "non-American Indian," "non-Hispanic," and so forth for purposes of analysis and enforcement, but they did not do so.

The fact sheet cited above provides that:

C. Executive Order Affirmative Action Requirements

i. **For Supply and Service Contractors**

> Non-construction (service and supply) contractors with 50 or more employees and government contracts of $50,000 or more are required, under Executive Order 11246, to develop and implement a written affirmative action program (AAP) for each establishment. The regulations define an AAP as a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The AAP is developed by the contractor (with technical assistance from OFCCP if requested) to assist the contractor in a self-audit of its workforce. The AAP is kept on file and carried out by the contractor; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review.
>
> The AAP identifies those areas, if any, in the contractor's workforce that reflect utilization of women and minorities. The regulations at 41 CFR 60-2.11 (b) define under-utilization as having fewer minorities or women in a particular job group than would reasonably be expected by their availability.

> When determining availability of women and minorities, contractors consider, among other factors, the presence of minorities and women having requisite skills in an area in which the contractor can reasonable [sic] recruit.
>
> Based on the utilization analyses under Executive Order 11246 and the availability of qualified individuals, the contractors establish goals to reduce or overcome the under-utilization. Good faith efforts may include expanded efforts in outreach, recruitment, training and other activities to increase the pool of qualified minorities and females. The actual selection decision is to be made on a non-discriminatory basis.

OFCCP Facts on Executive Order 11246—Affirmative Action, Para. C.i.

The parties' motions for summary judgment address the theories of disparate treatment and disparate impact. The Plaintiff has moved for summary judgment on a disparate impact theory on the issue of liability to be followed by an evidentiary hearing on the issue of damages. In raising the motion on that ground, the Plaintiff did not waive the option to proceed on a disparate treatment theory in the event that the case proceeds to a hearing on the issue of liability. The Defendant has moved for summary judgment on both disparate treatment and disparate impact theories.

The U.S. Supreme Court has long recognized the distinction between disparate impact, and disparate treatment in discrimination cases. "'Disparate treatment' … is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977). The Plaintiff did not move for summary judgment on the basis of disparate treatment, but argues that the Defendant's motion on that basis should be denied because there is a genuine issue of material fact. In making that argument, the Plaintiff describes the use of the employee referral system to select applicants for interviews, and ultimately for employment, as "the actual discriminatory practice at issue" in this case.

The employee referral program is a facially neutral practice. It was open to all employees, and VF had no control over which employees would participate, nor of the ethnicity of any applicants who would be referred by current employees. In addition, it was supplemented as a source of applicants by referrals from the NCESC, and neither VF nor its incumbent employees had any input into those referrals. In light of the decision below on the issue of group designation it is not necessary to reach the issue of whether the Plaintiff has established a genuine issue of material fact on the issue of disparate treatment.

To make a case of disparate impact a plaintiff need not show intent to discriminate. It may make its case by showing that a facially neutral employment practice caused a statistically significant disparity with respect to a protected class. "[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). In moving for summary judgment on the basis of disparate impact, OFCCP asserts that VF's employee referral program was such a practice.

The parties' fundamental disagreement as to the nature of this case is succinctly demonstrated by an exchange in their motion briefs. In its March 25, 2013 motion brief VF listed in its statement of facts that "Dr. Crawford's analysis compares Asians to the group 'Non-Asians.' Dr. Crawford did not compare Asians to any other identifiable racial group, except for Whites. (Crawford Dep. 87-89)" In its May 3, 2013 Reply Brief, OFCCP responded that it could not agree or disagree with the second sentence because "it is unknown what Defendant means by 'identifiable racial group.'"

This objection raises a valid point. It would be problematic to rely on the subjective definition that VF, or anyone else, might use. Different people have different perceptions of ethnicity. Therefore, rather than speculating on what VF or anyone else means when referring to racial groups, it is far preferable to use the definition set out in the regulations that implement the Executive Order.

The Uniform Guidelines prohibit the use of selection procedures with an adverse impact on "any race, sex, or ethnic group." 41 C.F.R. §60-33 A. Section 60-34 B defines five races or ethnic groups for purposes of the regulation. "Non-Asian" is not among them. It is an aggregation of three of those ethnic groups. As noted, the ethnic groups comprising this custom-made group consisted of one each that was over-represented, under-represented, and proportionally represented in relation to the local labor force. Dr. Crawford did not apply the statistical tools of his profession to any of those three recognized ethnic groups because he had not been asked to do so. Rather, he was commissioned to apply statistical analysis to the aggregate group that had been created for purposes of this complaint.

It would be possible for a government contractor to discriminate against, or to manifest a statistically significant disparate impact upon, an ethnic group not listed among the five broad racial categories enumerated in the regulations. However, such a case would still involve treatment of or impact upon an ethnic group, rather than the aggregation of ethnic groups that is involved in this case.

The regulations put government contractors on notice of what is required of them in order to comply with the Executive Order. They are prohibited from employee selection procedures with a disparate impact on a "race" or "ethnic group." The "non-Asian" category upon which the Plaintiff has proceeded is neither a race nor an ethnic group, either by regulatory definition or as used in common parlance.

ORDER

The Plaintiff's motion for summary judgment is **DENIED**. The Defendant's motion for summary judgment is **GRANTED**.

Digitally signed by Kenneth Krantz
DN: CN=Kenneth Krantz,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Newport News, S=VA, C=US
Location: Newport News VA

KENNETH A. KRANTZ
Administrative Law Judge

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NOTICE OF APPEAL RIGHTS: The administrative law judge's Recommended Decision and Order, along with the record, will be forwarded to the Administrative Review Board ("Board") for a final administrative order. *See* 41 C.F.R. § 60-30.27.

You may file exceptions with the Board within 14 days of the date of receipt of the administrative law judge's recommended decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave NW, Washington, DC 20210. Any request for an extension of time to file the exceptions must be filed with the Board, and copies served simultaneously on all other parties, no later than 3 days before the exception are due. *See* 41 C.F.R. § 60-30.28.

On the same date you file exceptions with the Board, a copy of the exceptions must be served on each party to the proceeding. Within 14 days of the date of receipt of the exceptions by a party, the party may submit a response to the exceptions with the Board. Any request for an extension of time to file a response to the exceptions must be filed with the Board, and copies served simultaneously on all other parties, no later than 3 days before the response is due. *See* 41 C.F.R. § 60-30.28.