



August 6, 2020

VIA EMAIL: Leen.Craig@dol.gov

Craig E. Leen
Director
Office of Federal Contractor
Compliance Programs
U. S. Department of Labor
Frances Perkins Building,
200 Constitution Ave., NW
Washington, DC 20210

Re: Request from The Institute for Workplace Equality Re Violations in Mphasis Conciliation Agreement

Dear Director Leen:

Thank you for your response and explanation which we will share with our members.

Unfortunately, the Agency did not address the key concern, which is that the violation that alleged that the contractor should have developed and maintained affirmative action goals for Whites in accordance with 60-2.16.

The conciliation agreement reads as follows:

4. AFFIRMATIVE ACTION VIOLATIONS

4.1 ESTABLISHMENT OF SEPARATE GOALS

- A. STATEMENT OF VIOLATIONS. Mphasis – San Jose did not establish separate utilization goals for particular minority groups or for men or women of a particular minority group when establishing placement goals.
- B. OFCCP’S SPECIFIC FINDINGS. Specifically, OFCCP alleges that for the period of January 1, 2014 through May 31, 2017, Mphasis - San Jose failed to establish goals for white applicants in the Computer Systems Analyst job group when there was a substantial disparity in their utilization as required by 41 CFR § 60-2.16.
- C. REMEDY. In the event of a substantial disparity in the utilization of a particular minority group or in the utilization of men or women of a particular minority group, Mphasis – San Jose will establish separate goals for such groups. The method used in establishing those goals will be the same that Mphasis - San Jose uses in determining availability for the rest of Mphasis – San Jose’s workforce pursuant to 41 CFR § 60-2.14 and 41 CFR§ 60-2.15.

This violation states that Mphasis should have developed and maintained a goal and implemented affirmative action for Whites *prior to any finding of a violation*. Specifically, the Agency alleges that the contractor's affirmative action plan that was effective January 1, 2014 should have proactively identified that Whites were underutilized and established a goal for Whites. This is materially different from imposing a remedy **following** a finding of discrimination against Whites.

As you are aware, OFCCP regulations at 41 C.F.R. §60-4.3 (d) specifically define a minority as follows:

d. "Minority" includes:

(i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);

(ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);

(iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

(iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

The regulations do not include "White" in the definition of "Minority." Therefore, "Whites" should not be included in the aggregate of minority and subsequently would not be covered under the regulations for the establishment of affirmative action goals under 41 C.F.R. §60-2.16. As a result, the violation included in the recent Conciliation Agreement with Mphasis, even with the benefit of OFCCP's after the fact clarification, cannot be reconciled with the Agency's regulation in 41 C.F.R. § 60-2.16.

The Institute members and clients of our individual firms, of course, are well aware that Whites and males are a federally protected class and intentional discrimination against either is a violation of the Executive Order 11246. In addition, we understand that as part of a conciliation agreement a remedy could include an agreement that the contractor would ensure that Whites and/or males would have equal access and equal treatment in regard to recruitment and selection or that appropriately tailored affirmative action was undertaken. Such a remedy under those circumstance is consistent with OFCCP historical practices.

At this point, now that the Mphasis conciliation agreement is becoming more widely known, federal contractors including Institute members and our clients are inquiring as to whether they proactively should establish goals for Whites and men in their AAPs. We have responded, based on the Agency's regulation and published guidance, and notwithstanding the

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violation stated in the Mphasis conciliation agreement, that federal contractors absolutely should not include Whites and males in their goals. Frankly, such a course would totally upend well-settled expectations and subject OFCCP to criticism for watering down the highly successful and respected placement goal processes for the benefit of minorities and women. Such a result would seem particularly out of step during the current racial reforms that federal contractors are addressing in responding to the Black Lives Matter movement.

If the Agency disagrees with our response, or intends to change its regulation and published interpretation, then we respectfully request that the Agency go through notice and comment to make the regulatory change. In addition, if the Agency would be willing, we would like to invite a representative to speak to our members at our next round table discussion to further address these matters.

Again, thanks for the response and we will keep our members updated on these matters.

Respectfully,

The Institute for Workplace Equality



David B. Cohen



David S. Fortney



Mickey Silberman