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# In-House Judges Jeopardized in New DOL Contractor Watchdog Suit

By Rebecca Rainey and Rebecca Klar

Deep Dive

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- Discrimination claims similar to common law contract breach
- Loss in the courts wouldn't fully sideline OFCCP enforcement

A contractor is raising constitutional questions over the in-house judges at the Office of Federal Contract Compliance Programs, marking a new strategy for challenging the legality of the agency tasked with enforcing federal contractors' civil rights responsibilities.

ABM Industry Groups LLC, a janitorial and cleaning services contractor, recently filed a suit against the Labor Department arguing the OFCCP's administrative law judge system violates its Seventh Amendment right to a jury trial. The company pointed to the US Supreme Court's ruling this year in *SEC v. Jarkesy*, claiming the DOL is engaging in an enforcement action that is seeking money damages and is essentially a "common law" breach of contract claim that warrants a jury trial.

ABM's Sept.9 lawsuit is only the latest challenge attacking the DOL's use of administrative law judges following the high court's ruling. But the suit raises fresh questions about the legal authority underpinning the OFCCP, which management-side firms and companies have tried to undercut before.

"It's not surprising at all that we're seeing this with the OFCCP, especially given that this is not new when it comes to the OFCCP, but I think that there may be more traction this time than there had been in the past, given this change in the legal landscape," said Dan Altchek, a management-side attorney with Saul Ewing LLP.

If the challenge is successful, it would hit the OFCCP's in-house judge system and not the agency's overall power to investigate contractors for discrimination violations and litigate over those claims.

Craig Leen, a former director of the OFCCP and partner at K&L Gates LLP, declined to comment on the ABM lawsuit directly, but said the Supreme Court in the *Jarkesy* decision, along with decisions in *Loper Bright v. Raimondo* and *Corner Post v. Board of Governors*, put guardrails and restraints on the administrative state.

The way *Jarkesy* is being implemented shows how the "quasi-judicial power of the department has been greatly reduced," Leen said.

"Now many of these cases will have to be brought in a federal court before a jury," Leen said.

### Past Legal Questions

ABM's lawsuit hearkens back to arguments made in comment letters and lawsuits by the conservative Cato Institute, the New Civil Liberties Alliance, as well as software company Oracle: that the OFCCP doesn't have the legal authority to operate at all.

The agency was established decades ago via executive orders to enforce anti-discrimination and affirmative action obligations for federal contractors.

Oracle sued the OFCCP in 2019 in response to pay discrimination allegations levied by the agency, arguing that the OFCCP was unconstitutional. That suit focused on Article III separation of powers claims, as opposed to the Seventh Amendment claims at issue in *Jarkesy* and ABM's case.

In *SEC v. Jarkesy* the high court said defendants have a constitutional right to make their case to a federal jury when the commission is seeking financial penalties, as opposed to before an in-house administrative judge. Companies have been bringing these claims at other agencies like the DOL in cases involving statutory claims that provide money damages and have parallels to common law.

Oracle's suit contended that the agency lacked clear authorization from Congress to create an entire administrative system to adjudicate claims of employment discrimination involving federal contractors.

"The case raises a constitutional challenge to the authority of an agency to create an administrative trial system wherein agency officials prosecute and adjudicate discrimination claims against government contractors and then award broad injunctive and compensatory relief if the agency finds violations," Oracle's complaint said.

The company later dropped the federal lawsuit after the agency agreed not to appeal an ALJ decision siding with the company in the discrimination case.

There's likely to be additional challenges to the structure of the OFCCP, as well as to other federal agencies, said Meredith Gregston, a senior attorney at Hunton Andrews Kurth LLP.

### Agency Impacts

If ABM is able to convince a court that the OFCCP's ALJ system was unconstitutional, attorneys say it may not hobble the agency entirely.

The federal contractor watchdog largely monitors compliance through audits of randomly selected companies, most of which do not result in findings brought before in-house courts.

Christy Kiely, a partner at Seyfarth Shaw LLP, said that such a ruling won't "have much impact on audits day to day, the agency is still going to be able to investigate contractors and issue its information requests and come on site and do all the things it does now."

Cases, such as ones where an agency is trying to get access to an affirmative action program, could still remain before an administrative law judge, according to Leen.

Resolving OFCCP disputes in federal court may cut down on the time spent getting through the procedural levels of review when using an administrative law judge, a process that can take years, Kiely and Leen said.

"What it could do is level the playing field a little bit in the sense that contractors won't be held hostage to the OFCCP's internal process anymore," she said. "Right now, they really don't have much of a choice if the OFCCP is pursuing a discrimination claim. They either have to stay mired in the agency's process for years on end until they finally can get to a court, or they have to cave and settle."

Brent Skorup, a legal fellow at the Cato Institute, said he is already hearing from lawyers that agencies are responding to *Jarkesy* by readdressing how they handle enforcement.

"My general impression is agencies are pulling back somewhat on in-house enforcement," he said.

Those changes will also mean the OFCCP needs to retrain internally, Gregston said.

"It's definitely something the OFFCP is having to grapple with," she said.

The case is ABM Indus. Grp. LLC v. DOL, S.D. Tex., No. 4:24-cv-03353.

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