This is a procedural decision, following decision for plaintiff (Treasury Department for OFCCP) before an Administrative Law Judge. I cannot locate the ALJ's opinion. This decision does reference it.

USDOL Reporter

USDOL v. Harris Trust & Savings Bank, 78-OFC-2 (Sec'y May 17, 1983)

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR

WASHINGTON. D.C.

78-OFCCP-2

U.S. DEPARTMENT OF LABOR

Plaintiff

v.

HARRIS TRUST AND SAVINGS BANK

Defendant

WOMEN EMPLOYED

Limited Intervenor

DECISION AND ORDER

BACKGROUND

Defendant Harris Trust and Savings Bank was found in violation of Executive Order 11246 and Department of Labor regulations (41 CFR Chapter 60) by the administrative law judge in this case because it discriminated against certain groups of its women and minority employees. He recommended that the Secretary order the Bank to place each member of the affected classes of women and minorities in the job status and position classification, with full seniority, as comparable white males. He recommended further that the Bank be ordered to pay over $12 million in back pay to members of these affected classes. In addition to these remedies, as a separate and distinct ground for imposing sanctions, the ALJ recommended that Harris Bank be debarred from future government contracts and that all of its current contracts be cancelled for refusal to comply with the ALJ's discovery orders and OFCCP regulations requiring the production of certain statistical studies prepared for the bank and for refusal to make the authors of those studies available for depositions by OFCCP. As a sanction for refusal to

comply with these orders, the ALJ also did not allow Harris Bank to present any affirmative defense on statistics at the hearing on the merits. Because I find that the ALJ improperly ruled that the statistical studies at issue were discoverable, for the reasons discussed below, I will remand this case to the ALJ for further proceedings consistent with this decision.

The Treasury Department (Treasury) filed an administrative complaint against Harris Trust and Savings Bank (Harris Bank or the Bank) under Executive Order 11246 (the Order) on December 7, 1977. 41 CFR 60-30.5(a) (1977). (Prior to the reorganization of civil rights functions in the ***2** Federal Government in 1978 (see E.O. 12086, October 5, 1978), the Department of Labor supervised the administration and enforcement of the Executive order by 11 other federal departments and agencies. Treasury was responsible for Executive Order compliance by banks and other financial institutions. Since Treasury no longer has any responsibility for enforcement of the Executive Order, I have, sua sponte, substituted the Department of Labor as plaintiff.) It alleged that Harris Bank had violated the order by discriminating against certain women and minorities, and by failing to provide relief, including back pay, for these "affected classes". 41 CFR 60-2.1(b).

The administrative complaint grew out of a long investigative history between the Bank and the government, beginning in 1971. Compliance reviews of Harris Bank were conducted by Treasury in 1971 and 1974. (See 41 CFR Part 60-60 (1974) .) Harris was found in compliance in 1971, but Treasury's finding of compliance in 1974 was reversed by OFCCP in a timely fashion in March 1975, under 41 CFR 60-2.2(a)(1). Because of a complaint filed with OFCCP alleging systemic discrimination against women at Harris Bank, and because questions were raised in the Treasury Compliance Review Report about the possible existence of an affected class, OFCCP directed Treasury to obtain and analyze data sufficient to determine whether an affected class of women existed. Treasury was expected to perform the analysis itself, because that was viewed by OFCCP as one of Treasury's reponsibilities under the existing regulations governing compliance reviews, 41 CFR Part 60-60(1975).

OFCCP later learned that Treasury had agreed to permit the Bank to conduct the analysis under Treasury's supervision. The Bank assigned one of its employees, William Spangler, to perform this study. OFCCP reluctantly acquiesced in this arrangement for several months, but on October 16, 1975 OFCCP notified the Bank that OFCCP would conduct the analysis itself and the Bank could discontinue its work on it. OFCCP confirmed that decision in a letter to Senior Vice President John L. Stephens on December 16, 1975. Harris Bank was reminded that it had an obligation under the Executive Order to supply all the raw data necessary for OFCCP to conduct the affected class analysis, which it did.

According to affidavits filed by Harris, Mr. Spangler was directed to continue his work on the affected class study because the Bank and its attorneys were concerned after the October 16,

1975 meeting that an Executive Order enforcement action would be brought against the Bank. The purpose of such a study was to help the Bank prepare its defense to an enforcement action and to determine the range of possible back pay liability.

At approximately the same time that Harris Bank was undergoing the 1974 Treasury Department compliance review, the Bank was notified by the Limited Intervenor in this case, an organization representing women employees of the Bank known as Women Employed (WE), that it had filed Title VII charges against the Bank and was planning a Title VII class action lawsuit. A number of newspaper articles also appeared at the time about WE's accusations against the Bank of sex discrimination. Harris Bank states that "upon counsel's advice" the Bank retained a consultant, Judith Sodini, an expert in statistical analysis of employment practices and head of Equal Employment Opportunity Consultants, Inc., to do a statistical analysis of its workplace to ***3** try to anticipate the investigatory techniques of the Equal Employment Opportunity Commission.

The government was also consulting its battery of experts. Prior to filing this case, Treasury retained two statistical experts, Drs. Shafie and Cabral, "To explore the feasibility of using multiple regression analysis to determine the existence of an affected class of employees in the workforce of Treasury contractors."

Each side, in the due course of discovery, requested that the other produce these statistical studies and make their authors available for deposition. Each side in turn objected, claiming a variety of privileges and exceptions to discovery which will be discussed below. The ALJ ordered all the studies to be produced and ordered that the four statistical experts be made available for deposition. OFCCP complied (although Harris never took Dr. Cabral's deposition). Over more than a year of procedural maneuvering, Harris steadfastly refused to produce Ms. Sodini's study or make efforts to make her available for deposition, even though explicitly ordered to do so by the ALJ. Harris at first also took the same position as to Mr. Spangler and his study, but later did produce those portions completed prior to October 16, 1975. OFCCP did take Mr. Spangler's deposition, but the Bank's counsel objected to and refused to permit him to answer any questions concerning his study, including the pre-October 16, 1975 portions. Harris also refused to make the Spangler and Sodini studies available to the ALJ for in camera inspection. OFCCP made a motion for summary judgment and for imposition of sanctions against Harris for refusal to comply with the ALJ's discovery orders.

ALJ's RECOMMENDED DECISION

At the hearing in September 1979, when Harris continued to refuse to comply with his orders, the ALJ refused to permit Harris to put on any affirmative case consisting of expert testimony and statistical analysis, in defense of the complaint, under his authority in 41 CFR 60-30.15(c) and (j) to order discovery and impose sanctions for disobedience; he permitted the Bank's

experts (who were not Spangler and Sodini) to testify only for the purpose of impeaching the government's experts (who were not Shafie and Cabral) and their studies. In his decision, the ALJ recommended that the Secretary debar Harris Bank for its violation of his discovery orders as an independent ground for the imposition of Executive Order sanctions. OFCCP, however, is not seeking debarment on that ground. After a full hearing on the merits (but with the limitations on Harris just described) the ALJ found that Harris Bank had discriminated against minorities and women in several different job categories, and recommended that the Secretary order relief for these affected classes, including advancement to each individuals' rightful place of job status and position classification, and the payment by Harris of over $12 million in back pay. The ALJ based his finding of discrimination in large part on the testimony and statistical study of OFCCP's expert witness, Dr. Michelson. His calculation of back pay was drawn directly from Dr. Michelson's report.

The ALJ rejected all of Harris Bank's claims of privilege and exceptions from discovery based on the regulations (41 CFR 60-30.10(a)) and the Federal Rules of Civil Procedure (incorporated by 41 CFR 60-30.1) because he found that the statistical studies at issue were prepared in the ***4** ordinary course of business. Under OFCCP regulations on the contents of affirmative action programs (41 CFR Part 60-2), the ALJ held that the Bank had an obligation to analyze its own workforce, to identify problem areas such as underutilization of minorities and women, and to provide remedies for an affected class of minorities and/or women if it existed. (41 CFR 60-2.1(b)); 60-2.11; 60-2.13(d)). Both the Spangler and Sodini studies, the ALJ held, were part of the self - analysis required of all government contractors under the regulations and therefore not privileged or protected from discovery. Moreover, the ALJ thought that, having ordered OFCCP to produce the same kinds of studies (by Drs. Cabral and Shafie) "fair play and equal justice" required Harris to produce its experts' studies. (Recommended Decision pp. 56-60.)

Harris takes exception to this ruling in a number of respects. It was serious error, Harris argues, for the ALJ to have decided this question under rules and regulations for affirmative action programs (41 CFR Part 60-2) and to have completely ignored the Bank's claims of privilege and exceptions to discovery under the Rules of Practice for Administrative Proceedings (41 CFR Part 60-30) and the Federal Rules of Civil Procedure (FRCP). If the ALJ had applied the appropriate regulations and rules, Harris asserts that the studies and their authors would have been protected from discovery by the work product doctrine and the specific provision of the Federal Rules limiting discovery from an expert retained in anticipation of litigation and not expected to be called as a witness at trial. Rule 26(b)(4)(B). OFCCP cannot show "substantial need" under the work product rule, or "exceptional circumstances" under Rule 26(b)(4)(B), the Bank argues, to justify access to the documents or to depose Spangler and Sodini about their contents.

DISCUSSION

This discovery order and sanction by the ALJ were obviously crucial to the outcome of the case before him and was based on an interpretation of the scope of the OFCCP regulations .governing discovery and the Federal Rules of Civil Procedure, that is, whether the statistical studies at issue are subject to discovery or come within exceptions to discovery under the FRCP.

Resolution of this question turns on the meaning of the phrase "in anticipation of litigation" as it is used in Rules 26(b)(3)and 26 (b) (4) (B) of the FRCP. If the Spangler and Sodini statistical studies were prepared "in anticipation of litigation", the OFCCP Rules of Practice and the FRCP would apply, and the studies would be immune from discovery except in very limited circumstances. If, on the other hand, Harris was preparing these studies to meet its affirmative a ction program obligations under 41 CFR Part 60-2, obviously it could not claim any protection for them under Rule 26. "Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by (Rule 26(b)(3))." Notes of Advisory Committee on Rules to the 1970 amendments to the FRCP.

Before considering the meaning of the phrase "anticipation of litigation" however, and its application to the facts in this case, one of Harris' arguments can be dispensed with easily. ***5** It seems clear from the FRCP Advisory Committee Notes and the cases that expert's reports simply do not come under the work product doctrine embodied in Rule 26(b)(3). The Advisory Committee explicitly said that the provisions of Rule 26(b)(4) "reject as ill-considered the decisions which have sought to bring expert information within the work product doctrine. See United States v. McCay, 372 F.2d 174, 176-177 (5th Cir. 1967)." See also Inspiration Consolidation Copper Co. v..Lumbermen's Mutual Casualty Co., 60 F.R.D. 205 (S.D.N.Y. 1975); Grinnell Corp. v. Hackett 70 F.R.D. 326 (D.R.I. 1976); Pearl Brewing Co. v. Schlitz Brewing Co. 415 F. Supp. 1122 (S.D. Tex 1976).

Thus, the focus is on Harris Bank's arguments stemming from Rule 26(b)(4)(B). That Rule provides:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstance under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

The case law and commentary on the meaning of the phrase "anticipation of litigation" have developed some general guidelines or indicia of intent of the party whose experts are the target of discovery:

- documents prepared prior to commencement of litigation may be protected;
- the mere possibility of litigation is not enough to shield documents from discovery;
- litigation must be imminent.

One law review article (discussing the phrase under Rule 26 (b) (3) suggests that the key to analyzing whether something was prepared "in anticipation of litigation" is to ask whether the material would have been prepared at all in its present form but for anticipation of litigation. Work Product Discovery: A Multifactor Approach to Anticipation of Litigation Requirement in Federal Rule of Civil Procedure 26(b)(3), 66 Iowa L. Rev. 1277 (1981). Several factors which can be used to help answer the "but for" question are:

1. The nature of the event that led to the creation of the materials, and whether the event is one likely to lead to litigation;

2. Whether the documents contain legal analysis and opinions or are purely factual (this factor probably applies only to Rule 26 (b) (3) work product and not to 26 (b) (4) (B) expert information);

3. Whether the materials were routinely prepared, and, if so, the purpose of that preparation;

4. The timing of the preparation and whether specific claims were present and negotiation was under way.

***6** The ALJ did not discuss in any detail why he concluded that these documents were prepared in the ordinary course of business. He simply pointed out that OFCCP regulations required contractors to conduct a self analysis, which may be similar, in some respects, to an "affected class analysis", but did not discuss facts which would support an inference that the specific work being done by Spangler and Sodini were intended to fulfill the regulatory requirement and not in anticipation of litigation. Of course, to some degree, the affidavits filed by the Bank in 1979 characterizing the Spangler and Sodini studies as "trial preparation" materials should be discounted as self-serving. However, judged by the criteria listed above as indicative of intent and all the surrounding circumstances, the materials appear to have been prepared in anticipation of litigation.

Certainly, litigation was not a "mere possibility" in late 1974 and early 1975. WE had already filed EEOC charges and had proclaimed in the press and in meetings with Harris officials its intention to sue; Treasury had recommenced its compliance review, after its initial finding of compliance had been reversed by OFCCP with specific directions to analyze possible affected class problems. From the Bank's point of view, it was reasonable to assume litigation, on either or both the Title VII and Executive order claims, was imminent. The fact, pointed out by OFCCP, that the complaint was not filed until December 1977 is irrelevant to determining whether Harris reasonably believed at the time it had the studies done that litigation was imminent. (In view of the conciliation requirements of the Executive Order and the complexity of civil rights litigation, as evidenced by the record in this case, two years is not an inordinate time between a preliminary investigative finding of the existence of affected classes and filing of a formal administrative complaint.)

Harris Bank had already submitted its AAP which contained a self-analysis the Bank claims complied with the requirements of the regulations. After OFCCP reversed Treasury's approval of the AAP, Treasury (against the instructions of OFCCP) told the Bank to conduct an affected class analysis. Harris assigned Mr. Spangler to do so. OFCCP did not consider Mr. Spangler's work to be a re-write of the AAP self-analysis. Quite the contrary, OFCCP thought Treasury was using the Bank to carry out what OFCCP viewed as Treasury's responsibility. OFCCP drew a distinction between an affirmative action program and corrective action for an affected class, and said "... affected class analysis is properly performed by the Compliance Agency.. Letter of December 18, 1975 from Assistant Secretary DeLury to Senior Vice President Stephens. These circumstances indicate that, prior to October 16, 1975 when Harris was told to discontinue the study, Spangler's work was, at most, participation by the Bank with Treasury in fulfilling Treasury's duties as a Compliance Agency. After October 16, 1975 having been told by Treasury to discontinue the Spangler study, and in its own mind having met its AAP self-analysis obligation, the Bank decided to have Spangler continue his work. It was becoming clear by then that the government was focusing on affected class problems and Executive order litigation on that issue was a distinct possibility.

OFCCP points to several facts from which, it argues, a different intent on the part of the Bank should be inferred. Because Assistant Secretary DeLury agreed with the Bank that its "resources should not be improperly taxed in the completion of the required analysis", ***7** OFCCP would infer that the Bank had asked to be relieved of its self-analysis obligation under Revised Order No. 4. This would prove that Spangler's work was part of the self-analysis. In support of this argument, OFCCP claims Harris admitted in its brief that these studies were at one time part of the Bank's AAP self-analysis, but argued that they were transformed into expert trial preparation material by the threat of litigation. I do not find any such admission in Harris' brief. The Bank argues that the studies had no connection to the AAP self-analysis. (Harris

Brief p. 149.) To the contrary, Assistant Secretary DeLury was reassuring the Bank that it would no longer have to "improperly" expend its resources to carry out an analysis which was Treasury's responsibility as a compliance agency. In the same paragraph, he reminded the Bank that it was obligated to provide the government all data necessary for the analysis.

The fact that Senior Vice President John Stephens could not recall, at the hearing in September 1979, several aspects of Spangler's study or whether it was ever completed only shows the limitations of his memory after four years. OFCCP also cites portions of Mr. Spangler's deposition to show that, because he only discussed his report with Vice President Ryser and not with Bank attorneys, it was not prepared in anticipation of litigation. But Mr. Spangler's deposition is inconclusive; it also does not show that his work was part of the Bank's development of its AAP since he did not discuss it with the Bank's EEO coordinator. He simply did not know if the Bank's attorneys ever saw his report.

Similarly, the Sodini study was initiated when Title VII litigation, arising out of essentially the same set of facts and transactions as this Executive Order litigation, seemed imminent. (Documents prepared for one case can be protected in another if the two cases are closely related in parties or subject matter. Hercules v. Exxon, 434 F. Supp 136 (D.Del. 1977). There is nothing to indicate that the Sodini study had any relationship to the self-analysis portion of the AAP Harris Bank submitted to Treasury as part of the compliance review in late 1974. Here too, the Bank believed at the time that it had already prepared an acceptable self-analysis for its AAP. Why would it have had Ms. Sodini duplicate that work? Language quoted by OFCCP from letters to EEOC,i from the Bank are just as, if not more, consistent with an interpretation that the Bank was preparing for EEOC investigations and Title VII lawsuits. "Patterns and practices" is a term of art in Title VII law; when the Bank said it was engaging EEOC,i to conduct a "patterns and practices analysis", and to make "recommendations for correcting and alleviating vulnerabilities and liabilities", that is certainly consistent with preparation for Title VII litigation. OFCCP regulations, on the other hand, speak in terms of identifying "problem areas (deficiencies)" (41 CFR 60-2.13(b)) of "underutilization" (41 CFR 602.11(b)) directed toward establishment of "goals and timetables" (41 CFR 60-2.12) to correct those deficiences. Failure to state in the letter to EEOC,i that the work was for litigation preparation proves no more about its actual purpose than failure to refer to the AAP and required self-analysis.

OFCCP also cites portions of Senior Vice President Stephens, testimony in which he said he had not looked at the Sodini report since 1975. That is just as inconclusive as the portion of the deposition discussed above. Mr. Stephens also said, at the same point in his testimony, "we said (to Ms. Sodini) make a worst case analysis of the bank because there was the ***8** threat of litigation at that point." (Tr. 1773.)

Thus, applying the factors discussed above to the facts and circumstances of this case, I think the Spangler and Sodini studies were prepared in anticipation of litigation. With respect to the Spangler study, there is a division of authority whether an in-house expert's work can ever be covered by Rule 26 (b) (4) (B). Compare: *Vepco v. Sun Shipbuilding and Dry Dock Co.*, 68 F.R.D. 397 (E.D.VA. 1975), with *Marine Petroleum Co. v. Champlin Petroleum Co.*, 671 F. 2d 984 (D.C. Cir. 1979), and *Seiffer v. Topsy's International, Inc.*, 69 F.R.D. 69 (D. Kan. 1975). I think an in-house expert who is specifically assigned to do trial preparation work as Mr. Spangler was, is covered.

OFCCP argues that, even if these reports were prepared in anticipation of litigation, nevertheless the reports should have been produced and their authors made available for deposition on several grounds. Having asserted as a defense in its answer to the original complaint that Harris had done studies which showed there was no affected class, OFCCP says the Bank has put the studies in issue and they are subject to discovery. But OFCCP filed an amended complaint and in its answer to that pleading Harris Bank simply denied the existence of an affected class and omitted any reference to the studies. It is one of the basic rules of modern pleading that "A pleading that has been amended (under the FRCP) supersedes the pleading it modifies..... once an amended pleading is interposed, the original pleading no longer performs any function in the case. . . Similarly, when the complaint is amended defendant should be entitled to amend his answer to meet the contents of the new complaint and, if this is done, any admissions in the initial responsive pleading will be superseded by the amended answer." 6 Wright and Miller, Federal Practice and Procedure §1476. It follows that defenses omitted from the answer to the amended complaint have been dropped.

Harris Bank pleaded estoppel as a defense in this case, arguing that it relied to its detriment on prior findings of compliance by Treasury, and that it had no knowledge of Executive order affected class violations. In order to respond to this defense, OFCCP says it must have access to the Spangler and Sodini reports. However, OFCCP can demonstrate the state of the Bank's knowledge of possible violations by other means. Facts known to a party through its expert are fully dicoverable, just not from the expert himself. Moore's Federal Practice and Procedure, 126.66 (2) at 26-481(1976). In Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984 (D.C. Cir. 1979), plaintiff's claim of "exceptional circumstances" that it needed the testimony regulations was rejected. Marine Petroleum could get at this information by discovery from the defendant itself or others. "There is no rule or principle," the court said, "restricting access to facts possessed by (an expert) alone. (Under) 26(b)(4)(B), factual information,, even when acquired in anticipation of litigation, is shielded only if discovery is attempted from the expert, and not at all if the effort is to obtain it from a party or another sharing it". 641 F.2d at 994.

OFCCP argues that it has a need for the Spangler and Sodini studies because the authors had access to employees who may no longer be employees of the bank, and because the studies

may have revealed additional discriminatory employment practices and the identity of their victims. ***9** But simply because individuals are no longer bank employees does not mean they are not available to OFCCP. See *Hickman v. Taylor,* 329 U.S. 495 (1947). Harris Bank made all of its basic personnel data and information available from which OFCCP and its experts could discern discriminatory employment pratices and their victims. OFCCP's assertion that the studies likely contain information damaging to the Bank does not constitute "exceptional circumstances" under Rule 26(b)(4)(B). The same raw data, which is presumably the source of this damaging information, was available to OFCCP and its expert Dr. Michelson.

The ALJ emphasized that expert opinion is at the heart of this case and felt that, as a matter of fairness, Harris should divulge it experts' studies because OFCCP had been ordered to, and had, produced its own. (Dec. p. 58 and note 34.) But the Spangler and Sodini studies were not used or relied on (except perhaps in one way discussed below) at trial. To the extent that the Bank proposed to put on a defense based on statistical analysis, it was to be completely independent of these studies. No ambush or surprise of OFCCP could occur as long as it would have been permitted to depose any expert Harris Bank did intend to call as a witness and to discover his studies and analyses. It is not clear, because OFCCP chose not to litigate it, whether the Cabral and Shafie studies were covered by Rule 26(b)(4)(B). If the Spangler and Sodini studies are in fact protected by Rule 26(b)(4)(B), it is not unfair for the Bank to insist on its rights under the rule simply because OFCCP has not pressed its own.

OFCCP does raise one point which may entitle it to have access to the Spangler report and to take his deposition unhampered by the Bank's objections and directions not to answer. Harris Bank's expert witness, Dr. Roberts may have reviewed and utilized some of Mr. Spangler's work in making his own analysis. If so, Mr. Spangler's study, to some extent, formed the basis for Dr. Robert's testimony and OFCCP should have had access to it and should have been permitted to take discovery on it. In *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, supra, the defendant in an anti-trust case sought production of the background documentation on computer programs to be used by the plaintiff at trial to show economic harm and to take the depositions of two non-witness experts who had written the programs. Defendant also sought to discover "alternative models" of economic harm developed by plaintiff but rejected for use at trial. The court found that there were "exceptional circumstances" to permit the dicovery of the background information, shorthand codes and symbols used in the programs, and to permit deposing the two non-witness experts who had done the detail work on the programs. But the court refused production of the "alternate claims" programs because the trial expert was available to testify about these theories and defendant had not shown "excep- tional circumstances" to justify production of the programs themselves. Similarly here, if the Spangler study formed part of the background for Dr. Roberts' work, it should be subject to discovery.

Since the Sodini study apparently was rejected for use in any way by the Bank at the hearing, there are no exceptional circumstances justifying discovery of it.

CONCLUSION

In conclusion, I find that the ALJ mischaracterized the Spangler and Sodini studies as part of Harris Bank's affirmative action program, when the most reasonable inference from all the facts ***10** is that they were prepared in anticipation of litigation. As such, they should have been protected from discovery under FRCP Rule 26(b)(4)(B) (but not because they are "privileged", or because they come under the work product rule embodied in Rule 26(b)(3)). OFCCP has not shown exceptional circumstances to justify discovery of the Sodini report, but OFCCP should be allowed to depose Dr. Roberts again to clarify the extent to which he used the Spangler study in his own work. If he did use it, OFCCP should be allowed to fully depose Mr. Spangler and have access to his study. Finally, OFCCP should be allowed to depose any officer or employee of the Bank concerning facts learned or obtained from either Spangler or Sodini. Of course, if Harris intends to call any other expert witness as part of its case in chief, OFCCP should be allowed to depose him and to have access to his studies. If Harris Bank refuses to permit or comply with any of this discovery, it will be debarred for that reason. It does not make sense, it seems to me, to decide a complex case such as this without giving both sides a full opportunity to present statistical evidence and their analysis and interpretation of it. If it becomes necessary, debarment for refusal to comply with this Order will focus the issue on the discover questions discussed above and will avoid reaching a decision on the merits on an incomplete record.

Therefore, it is ORDERED that this case is remanded to the ALJ for further proceedings consistent with this Decision and Order.

RAYMOND J. DONOVAN
Secretary of Labor
Dated: May 17, 1983
Washington, D.C.