

**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANT
ORACLE AMERICA, INC.'S
MOTION TO CORRECT
OFCCP'S MISLEADING
COMMUNICATIONS TO
ORACLE'S EMPLOYEES**

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Office of Administrative Law Judges
San Francisco, Ca.

**MEMO OF P&AS ISO ORACLE'S MOTION TO CORRECT
OFCCP'S MISLEADING COMMUNICATIONS TO EMPLOYEES**

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I. INTRODUCTION

OFCCP recently sent a letter to current and former Oracle employees – potential witnesses in this action – announcing that Oracle discriminated against them and that they may be entitled to a portion of over \$600,000,000 in purportedly lost wages. The letter encourages employees to contact the Department of Labor to learn whether their wages have been affected. Specifically, OFCCP’s letter states the following:

Based on our analysis of Oracle’s pay data, we have determined that [female, Black, and Asian] employees have been underpaid as much as 20% relative to their peers. We estimate that this discrimination cost these employees at least \$600,000,000 in lost wages from 2013 to the present. The Department of Labor is bringing this lawsuit to end this discrimination, and require Oracle to pay its injured employees for their lost wages.

We are looking to talk to employees who were employed by Oracle any time between 2013 and 2019, who were affected by this discrimination. We want to hear what happened to you. . .

As explained below, this letter is misleading, false, and coercive. It is a facially partisan document sent on U.S. Department of Labor letterhead. It implies the Department of Labor already has ruled on OFCCP’s claims, and that employees should contact the Department of Labor in order to reap the benefit of this purported determination. It fails to clearly explain that no court has decided OFCCP’s allegations or that Oracle denies them. As a result, this letter has unfairly prejudiced Oracle and tainted these witnesses’ testimony by presenting as a foregone conclusion the very claims OFCCP is attempting to prove. The letter also reassures employees (including managers) that “you have not been accused of any wrongdoing.” OFCCP insists this particular statement is not false because even though it was sent to Oracle managers, OFCCP accuses *Oracle* – not any individual manager – of discrimination. Accordingly, Oracle has served Requests for Admission to confirm the accuracy of OFCCP’s statements (the responses to which are not yet due, but if not admitted, will obviously further underscore the false and misleading nature of OFCCP’s communication).

When Oracle asked OFCCP to send a corrective notice, OFCCP responded that its letter was accurate and refused to make any corrections. Oracle therefore asks the Court to order OFCCP to issue a corrective notice, or prohibit OFCCP from introducing into evidence any information obtained through the misleading correspondence.

As this Court told OFCCP only two months ago in its order granting leave to file the Second Amended Complaint, “I remind the government particularly that, ‘Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation.’” (citing *Reid v. U.S. INS*, 949 F.2d 287, 288 (9th Cir. 1991)). OFCCP’s letter is contrary to both the Court’s admonition and the rule governing attorney conduct in this forum.

II. ORACLE’S EFFORTS TO MEET AND CONFER WITH OFCCP

On or around April 4, 2019, OFCCP sent the letter that is the subject of this motion to Oracle’s employees. *See* Declaration of Erin M. Connell in support of Oracle’s Motion (“Connell Decl.”), Ex. A. Shortly after it learned of the letter, Oracle wrote to OFCCP on April 29, expressing concerns about the letter’s content, identifying the specific portions that were improper, and requesting a telephone call on May 1. *Id.*, Ex. B.¹ Oracle proposed that an appropriate, mutually-agreed upon corrective notice be issued. OFCCP responded the next day, April 30, in a lengthy letter that made several separate, unfounded allegations against Oracle and its counsel. *Id.*, Ex. C. That same day, Oracle corrected some of OFCCP’s misstatements and (again) requested a telephone call. *Id.*, Ex. D. OFCCP claimed it was not available for over a week. *Id.*, Ex. D. Accordingly, counsel for Oracle and OFCCP finally met and conferred telephonically on May 9, 2019, and Oracle sent a letter confirming that discussion. *Id.*, Ex. E.

In that May 9 call, the parties agreed that OFCCP was not representing or seeking to

¹ Oracle also renewed its request that OFCCP produce all communications between OFCCP and Oracle’s current and former employees in response to OFCCP’s letter, which Oracle already had requested in discovery, and which are among the documents at issue of Oracle’s currently pending motion to compel. *Id.*

represent any Oracle employee, and therefore OFCCP did not have an attorney-client privilege with any current or former Oracle employee. *Id.* The parties also agreed that OFCCP did not need Oracle's permission to speak with Oracle's managers in their personal capacity regarding potential claims they may have against Oracle, but that OFCCP could not contact Oracle's managers regarding their acts as a manager, or otherwise seek to bind Oracle by these managers' statements. *Id.* OFCCP also represented that it was not accusing any current or former Oracle employee (including managers) of wrongdoing. The parties disagreed regarding whether OFCCP's April 4 letter was misleading but OFCCP agreed to consider a corrective notice. Counsel for Oracle also informed counsel for OFCCP that Oracle intended to file this motion, to which counsel for OFCCP responded that if Oracle did so, OFCCP would likely file its own counter-motion (although counsel for OFCCP could not identify what that motion would be, nor the relief that would be sought). *Id.*

The next day, May 10, Oracle provided the text of its proposed corrective notice, set forth below. *Id.*, Ex. F. On May 13, OFCCP responded in a wide-ranging letter that, among other things, disparaged Oracle's proposed corrective notice. That letter was also freighted with invective and personal attacks against Oracle's counsel, mostly relating to Oracle's purported communications with its own employees. *Id.*, Ex. G. On May 16, Oracle sent a letter correcting some of OFCCP's various misrepresentations and confirming the parties were at an impasse with regard to OFCCP's letter to Oracle's employees. *Id.*, Ex. H. This motion followed.

III. OFCCP'S LETTER IS MISLEADING, FALSE, AND COERCIVE

OFCCP's letter to potential witnesses in this action is misleading and the Court should order OFCCP to send a corrective notice. As explained below, OFCCP's letter violates 29 C.F.R. § 18.22, which provides that attorneys practicing before the OALJ must not "[t]hreaten, coerce, intimidate, deceive or knowingly mislead a party, representative, witness, potential witness, judge, or anyone participating in the proceeding regarding any matter related to the proceeding",

or “[k]nowingly make or present false or misleading statements, assertions or representations about a material fact or law related to the proceeding[.]”

A. The Letter Misleadingly Presents OFCCP’s Allegations As Holdings of this Court

OFCCP’s letter fails to make clear that OFCCP’s claims against Oracle are mere unproven allegations, or that Oracle denies the claims. The letter also does not state that the Court has not yet ruled on these allegations. Instead, the letter unreservedly declares that discrimination has been established and wages lost:

Based on our analysis of Oracle’s pay data, we have determined that these employees have been underpaid as much as 20% relative to their peers. We estimate that this discrimination cost these employees at least \$600,000,000 in lost wages from 2013 to the present. The Department of Labor is bringing this lawsuit to end this discrimination, and require Oracle to pay its injured employees for their lost wages.

These statements are misleading because they do not adequately describe OFCCP’s allegations as just that: allegations that Oracle denies. Although the letter acknowledges this action is scheduled for trial on December 5, 2019, it does not explain that the purpose of the trial is to establish (a) whether in fact any discrimination occurred; (b) the amount, if any, of lost wages; and (c) who, if anyone, may have lost wages. These material omissions also unfairly prejudice Oracle because this letter was sent to potential witnesses, who have now been told that discrimination was already determined, and implies they merely need to come forward with stories of discrimination to potentially collect a payout.

Whether a communication is misleading is construed based on the communication as a whole. *See, e.g., O’Connor, et al. v. Uber Tech., Inc., et al.*, No. 13-CV-03826-EMC, 2017 WL 3782101, at *7 (N.D. Cal. Aug. 31, 2017) (“A reasonable lay person, reviewing the e-mail as a whole, could be misled into believing that ‘only drivers who sign up’ with Class Counsel would recover any money.”). When OFCCP’s letter is read in its entirety, including its official U.S. Department of Labor letterhead, the unmistakable impression one is left with is that OFCCP has

already proven its allegations and that the employee should contact OFCCP to take their portion of the \$600,000,000.

In other cases, courts have proposed that parties jointly notify employees about a pending action, or have suggested providing a specific statement that the case has not been resolved. *See, e.g., Hoffman v. United Telecomms., Inc.*, 111 F.R.D. 332, 337 (D. Kan. 1986) (recommending the EEOC and defendants jointly draft and send a letter to managers who may be potential claimants, notifying them of the action and stating that “the case has not been resolved and that there has been no determination of any claim asserted in it”); *see also* Christopher Lage, *Avoiding and Dealing with Unethical Communications with Putative Class Members in Systemic Cases*, 27 ABA J. Lab. & Emp. L. 43, 58 (2011) (noting that communications to potential class members should include “a statement that [the] defendant is denying liability (or other appropriate description of client’s interest)”).

Rather than neutrally seeking facts regarding its case, OFCCP is tainting these potential witnesses’ testimony by presuming the Court’s finding and omitting Oracle’s position. Both Oracle and OFCCP need to understand how compensation decisions at Oracle are made, the nature of Oracle’s employees’ work and their specific tasks, and how employees are evaluated, promoted, or recruited. By declaring a foregone “determination” of discrimination to potential witnesses and dangling a cash reward, OFCCP’s letter manipulates the evidence that will be presented at trial by broadcasting to these witnesses what their testimony should be.

B. The Letter Falsely Implies A Fund Has Been Established And Coerces Oracle Employees To Contact the DOL To Recover

In addition to misleadingly assuming the outcome OFCCP seeks in this action, the letter implies that recipients may be entitled to a portion of this purported \$600,000,000 in lost wages and they should contact to the Department of Labor to learn their share or to help extract these funds from Oracle. Thus, rather than a neutral document produced by a U.S. Government agency charged with identifying and enforcing violations of the law, the letter is styled as a Court-approved notice to potential class members, or even a sweepstakes advertisement.

The letter also wrongly suggests this action has an opt-in structure, such that employees must contact the DOL in order to recover. It is apparent OFCCP only wants employees who may provide favorable testimony to contact it, but it should not be permitted to coerce them under the guise of calculating their purportedly lost wages. An accurate notice would make clear that employees do not need to take any action in order to recover (if OFCCP was to prevail). The letter also implies there is a fund already set aside from which aggrieved employees can recover, which is not true.

C. The Letter Is Contrary to Judge Clark’s Order and OFCCP’s Mandate

As noted above, this Court has already reminded OFCCP that its role is to enforce the law, not to blindly pursue liability for federal contractors. *See* Order Granting Conditional Leave to File Second Am. Compl. (Mar. 6, 2019) at 14 (citing *Reid.*, 949 F.2d at 288); *see also id.* at 13 (describing other “troubling” and “disingenuous” litigation conduct by OFCCP).

Yet OFCCP’s letter makes clear it has no interest in an evenhanded understanding of Oracle’s pay practices or soliciting a broad range of employees to respond to its allegations. Rather, OFCCP is expressly “looking to talk to employees who were employed by Oracle any time between 2013 and 2019, **who were affected by this discrimination.**” (emphasis added). Connell Decl., Ex. A. Far from a neutral request for information to determine if, indeed, the law has been broken, OFCCP’s tactics are solely aimed at victory in this litigation. While OFCCP is certainly entitled to seek information to support its case, this letter crosses the line into improper advocacy and partisanship under the imprimatur of the U.S. Government.

D. OFCCP May Contact Oracle’s Managers Under Certain Circumstances

To be clear, Oracle is not attempting to impede OFCCP’s ability to obtain evidence or testimony to support its case. Oracle has never instructed its employees or managers not to speak with OFCCP representatives. Oracle is objecting here solely to the substance of OFCCP’s misleading and false communication.

Under both the California and Washington Rules of Professional Conduct, contact with

Oracle's current managers is permitted only with Oracle's consent "if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization ... [or] may constitute an admission on the part of the organization." *See* Cal. R. Prof. Conduct 2-100(B)(2); *see also* Wash. R. Prof. Conduct 4.2.²

Accordingly, those rules do not prohibit OFCCP from contacting Oracle's managers to the extent that communications are limited only to the managers' individual experiences (and not their role as managers). Oracle and OFCCP are in agreement on this issue (although the distinction also underscores why discovery of the communications is appropriate and warranted, as referenced in footnote 1, *supra*).

E. The Court Should Order OFCCP To Issue A Corrective Notice

While 29 C.F.R. § 18.23 provides for disqualification of an attorney among its remedies for a violation of its regulations, Oracle simply asks that the Court order OFCCP to issue a corrective notice to Oracle's current and former employees. In analogous circumstances, Judge Chen in the Northern District of California ordered that a corrective notice to be issued on behalf of Uber after plaintiff's counsel sent a misleading notice to class members suggesting they were required to retain the plaintiffs' counsel. *See O'Connor*, 2017 WL 3782101, at *7 ("[T]he Court cannot allow the violation to go uncorrected. The sanction most appropriate to these circumstances is that which most directly addresses the harm the violation caused ... the Court directs Class Counsel to issue corrective notice to the Class approved by the Court.").

The Court has the authority to make such an order based on its sanctioning authority and its inherent powers to supervise the professional conduct of attorneys practicing before it. *See, e.g.*, 29 C.F.R. § 18.12 ("the judge has all powers necessary to conduct fair and impartial proceedings"). Oracle has already prepared and proposed a neutral corrective notice, which OFCCP rejected:

On April 4 my office sent you a [letter/email] regarding the lawsuit Office of

² Some of the attorneys representing OFCCP in this matter practice in California, and some practice in Washington.

Federal Contract Compliance Programs, *United States Department of Labor v. Oracle America, Inc.*, OALJ Case No. 2017-OFC-00006. I am writing to clarify some of the statements in that letter to ensure they were not misleading. Our previous correspondence described the pending lawsuit that the Office of Federal Contract Compliant Programs (“OFCCP”) has brought against Oracle. I write to confirm that OFCCP’s claims, including the claims of discriminatory pay against Oracle, are accusations only. Oracle denies them. They have not been proven in court or in any judicial forum, meaning there has been no determination that any lost wages are due. In the event there is such a determination, you will be informed regardless of whether you previously have been in communication with my office.

Connell Decl., Ex. F.³ This notice accurately conveys that OFCCP’s claims are only accusations, that Oracle is contesting them, and that a court will eventually rule on OFCCP’s claims. *See also Hoffman*, 111 F.R.D. at 337.

F. OFCCP Manufactures Complaints About Oracle’s Communications With Its Employees

Although not relevant to this motion, which concerns OFCCP’s letter to Oracle’s employees, Oracle expects that OFCCP will contend in its response that Oracle’s communications with its own employees were improper. Here, in response to inquiries Oracle has received about OFCCP’s letter (for example, from employees wondering if it was a hoax or wondering how OFCCP got their personal contact information), Oracle provided the following form response:

The Office of Federal Contract Compliance Programs (OFCCP), an agency within the United States Department of Labor, has brought an enforcement action against Oracle that includes allegations of hiring and compensation discrimination in certain jobs at Oracle’s headquarters location in Redwood Shores, California. Oracle denies OFCCP’s allegations and believes they have no merit. As part of the litigation process, the Administrative Law Judge who was previously overseeing the case allowed OFCCP to obtain personal contact information from Oracle for some of Oracle’s employees, including yours. It is entirely up to you whether to speak to OFCCP, including by responding to the letter you received. You are not obligated to do so, although you are free to talk to them if you wish to do so. Oracle will not take any adverse action against you if you do choose to speak to OFCCP. If you have additional questions about the case, please feel free to respond to this email.

³ Of course, should OFCCP now attempt to back away from its statement to managers that “you have not been accused of any wrongdoing,” that statement, too, would need to be corrected.

Connell Decl., ¶ 10. Contradicting all of OFCCP's overheated rhetoric in its meet and confer correspondence about purported coercion by Oracle, Oracle's form response above is the opposite of coercion. It expressly informs employees they are free to speak to OFCCP if they choose to do so, and that Oracle will not take any retaliatory actions against them.

In an effort to confuse the issues, OFCCP may also contend that Oracle's communications to its employees in the separate *Jewett v. Oracle* state court class action were improper. Setting aside the impropriety of OFCCP coordinating its legal strategy with the *Jewett* counsel, OFCCP's unfounded aspersions regarding Oracle's communications in *Jewett* have nothing to do with this case and should be disregarded, as Oracle already has explained to OFCCP. Connell Decl., Ex. H.

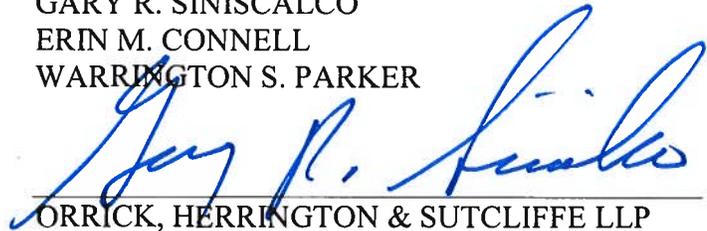
IV. CONCLUSION

For all the reasons set forth above, Oracle respectfully requests that the Court order OFCCP to issue a corrective notice, or prohibit OFCCP from introducing into evidence any information obtained through the misleading correspondence.

May 17, 2019

Respectfully submitted,

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