

**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

**REPLY IN SUPPORT OF
DEFENDANT ORACLE AMERICA,
INC.'S MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, FOR PARTIAL
SUMMARY JUDGMENT**

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San Francisco, Ca**

ORACLE'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

CASE NO. 2017-OFC-00006

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I. INTRODUCTION

OFCCP's opposition asks the Court to believe the following:

1. There is a different, lower standard for "similarly situated" in a statistics-based "class" case than in an "individual" case;
2. Madden's statistical models are only a few variables away from rendering the thousands of employees they study similarly situated and accounting for legitimate factors explaining pay differences among those employees;
3. Madden and OFCCP have proven that Oracle assigns women and minorities into lower-paying career levels at hire; and
4. Oracle has centralized compensation "policies" that dictate pay and are enforced by senior management.

None of this is true. OFCCP misstates the law and misconstrues the facts because the correct law applied to the true facts compels summary judgment for Oracle.

OFCCP's first argument can be dispensed with quickly: "similarly situated" is well-defined by Title VII case law. OFCCP cites no authority for its theory that when statistics are involved, a pattern or practice case has a less-exacting comparator standard than any other case.

Similarly, OFCCP's second contention that Oracle cannot rebut its statistical analyses "by merely calling into question whether the analyses perfectly capture all variables that are used to set pay" fails. Opp. at 10. In what will become a motif in this brief: That is not Oracle's argument. This is not a "missing variable" case. Instead, Oracle's argument is that the statistics on which OFCCP relies here will never be "close enough" no matter how many inapposite hiring cases it cites, because by dumping the thousands of employees at issue into one set of models and using only rudimentary "controls" as proxies for similarity, Madden's analyses are foundationally infirm and cannot be fixed by plugging in a missing variable or two. One sign that OFCCP has not responded to Oracle's real arguments is this: OFCCP does not even attempt to explain how the measures Madden uses are valid. Madden is missing over half the data for "education" and relies solely on employees' age and tenure at Oracle for "experience." No case

cited justifies OFCCP's approach, which stands in contrast to Oracle's argument.

If that were not enough, OFCCP's bogus claim of assignment discrimination proves the magnitude of OFCCP's failures. OFCCP asserts assignment discrimination to excuse its failure to acknowledge differences in work at Oracle (for example, career level, differentiating whether an employee is an entry-level programmer or a vice president). But that is required by Title VII. *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (employees in supervisory positions not similarly situated to lower level employees). Contrary to Title VII law, OFCCP claims it can ignore career level entirely because Oracle "discriminates in setting an employee's global career level within a job title." Opp. at 14. OFCCP is still relying on this specious assigning theory despite the fact it was thoroughly debunked by Oracle's expert Dr. Ali Saad. Madden did not even analyze Oracle's applicant data before coming up with her initial assignment discrimination opinion. Saad did, however, and found no support for her theory in the data. By wide margins and with no statistically significant differences between race or gender, Oracle's employees are hired into the jobs to which they apply. OFCCP cannot create a material dispute of fact with unsupported assumptions.

The final argument central to OFCCP's opposition is that Oracle supposedly has a centralized set of compensation policies that dictate pay at Oracle. OFCCP contends that managers "are specifically directed, and enforced through the approval process required from top executives, to set compensation within the dictated salary ranges based on employees' skills, experience and education." Opp. at 5. There is no evidentiary support for this. In fact, the evidence OFCCP cites demonstrates managers have wide discretion to set compensation, and that compensation practices vary across groups and organizations.

From there, OFCCP's opposition devolves into a confusing mixture of (a) causes of action that are not at issue (Oracle supposedly "admits that it is in significant violation of its affirmative action obligations," Opp. at 6); (b) wishful burden-shifting (Oracle should purportedly "search for prohibited discrimination," instead of OFCCP proving discrimination, Opp. at 6); (c) rebuttals to arguments Oracle did not raise ("Oracle's attempt to blame front-line

managers for disparities provides no defense,” Opp. at 6); and (d) speculative assertions of sources of bias (“budget approvals cancelled recommended pay raises, which might have muted pay inequities,” Opp. at 6). All of these are wrong and together they sound the chorus of OFCCP’s arguments—that OFCCP will say virtually any unsupportable thing to win.

The handful of employee declarations OFCCP submits change nothing. There is certainly no evidence of a systemic pattern of Oracle senior management conspiring to manipulate lower-level managers’ salary decisions to the detriment of women, Asians, and African-Americans. What is apparent is that **OFCCP’s opposition and its summary judgment motion represent the entirety of its case.** OFCCP will not have anything more or better at hearing. The statistics depend on flawed assumptions and methodology. The “anecdotal” evidence reflects idiosyncratic experiences without any hint of systemic discrimination. And overlaying it all is OFCCP’s twisted version of Title VII law that is not supported by any of the cases it cites.

As to the remaining claims, OFCCP dismisses Oracle’s arguments regarding its mandatory pre-suit obligations and failure to produce claim as mere “procedural challenges.” Opp. at 20. But the evidence is undisputed. The Court can determine for itself whether OFCCP’s conduct was reasonable. With respect to the failure to produce claim, OFCCP never addresses what legal remedy this claim entitles it to, nor why it should be tried at a hearing on the merits.

Lastly, assuming OFCCP ever alleged it in the first place, any disparate impact claim must be dismissed. OFCCP still fails even to articulate it, let alone meaningfully defend it.

In short, Oracle is entitled to summary judgment on all of OFCCP’s claims.

II. OFCCP FAILS TO PROVE A *PRIMA FACIE* CASE, LET ALONE SHOW IT HAS EVIDENCE TO SUSTAIN ITS CLAIMS AT TRIAL

OFCCP contends its analyses are subject to a lower comparator standard than “similarly situated” because this is a “statistical case,” and thus OFCCP need not respond to Oracle’s critiques that Madden’s analyses do not compare similarly situated employees. That is wrong.

A. OFCCP Misrepresents the Law When It Argues “Oracle’s Narrow Similarly-Situated Test” Doesn’t Apply to a “Statistical Case”

OFCCP acknowledges it has the “heightened” burden of proving a pattern or practice of intentional discrimination, Opp. at 1, but then baldly asserts that “OFCCP has easily met its burden” (while also describing it as “minimal”). Opp. at 9. Setting aside how OFCCP’s burden can be both “heightened” and “minimal,” OFCCP misstates the standard for “similarly situated,” contending that the cases Oracle cites do not “consider statistical evidence of discrimination and thus provide no support for Oracle’s contention that Dr. Madden’s analyses do not compare similarly-situated employees[.]” Opp. at 12. But no case says the comparator standard in statistical cases is broader than the standard in individual cases. This is because it is not the law.

Also, such a distinction makes no sense. “Making a comparison to similarly situated employees is essential to proving a discrimination case because it is only illegal to treat employees of a protected class differently from similarly situated employees.” *E.E.O.C. v. Bloomberg, L.P.*, 778 F. Supp. 2d 458, 483 (S.D.N.Y. 2011); *see also Lacey v. Robertson*, 221 F.3d 1334 (6th Cir. 2000) (“An employer’s decision to pay more educated employees more money is not discrimination under Title VII.”). Indeed, under OFCCP’s version, it would never lose a “statistical case.” It could simply assert pay disparities based on a simplistic comparison of employees without regard to job content or qualifications; make next to no attempt to consider legitimate, non-discriminatory factors explaining pay differences; provide no accompanying anecdotal evidence of systemic bias; and still claim pay discrimination. In other words, this case.

OFCCP relies on *Honeywell*, *Bazemore*, *Segar* and *General Telephone* to “validate the type of regression analyses Dr. Madden performed[.]” Opp. at 12. Not only are these cases inapplicable, but their holdings demonstrate OFCCP has failed to meet its burden.

According to OFCCP, *Honeywell* holds that Madden’s statistical analyses alone are enough to establish a *prima facie* case. Opp. at 12. *Honeywell*, however, was an assignments, hiring and promotions case, not a compensation case. As Oracle previously has explained, compensation cases are categorically different from other employment cases because they

require detailed examination of the skills, experience, education, job duties, and performance of existing employees. *See* Oracle’s Opp. to OFCCP’s MSJ at 21 n.10. A compensation analysis cannot be limited merely to “qualifications” as in a hiring case because this ignores the many other factors that go into pay decisions. In *Honeywell*, the plaintiff alleged a pattern or practice of intentional discrimination where the relevant comparator groups were unskilled, entry-level manufacturing jobs. *See OFCCP v. Honeywell*, 1994 WL 68485 at *5 (Mar. 2, 1994). There was no dispute that the employer assigned jobs, and whether employees were similarly situated was not at issue because the jobs required “no prior training or experience[.]” *Id.* Thus, the Secretary compared “equally *qualified* groups,” which did not involve an analysis of pay data or factors that may influence pay. *Id.* (emphasis added).

The only discussion in *Honeywell* of whether jobs were similarly situated favors Oracle, not OFCCP. The Secretary acknowledged that statistics which “group together many employees in highly skilled, high wage jobs who have worked for Defendant for long periods of time” would “not show injury to the affected class” because “[s]tatistical comparisons, if they are to have any value, must be between comparable groups and free from variables which could undermine the reasonableness of discrimination inferences to be drawn.” *Id.* at *7, n.13 (quoting *Mazus v. Dep’t of Transp.*, 629 F.2d 870, 875 (3d Cir. 1980)).

OFCCP also cites *Bazemore* and *General Telephone* to suggest that critical omissions in Madden’s models do not impact its *prima facie* case. Opp. at 11-12. *Bazemore* involved claims of race-based pay discrimination following the desegregation of a public entity in North Carolina. *Bazemore v. Friday*, 478 U.S. 385, 391 (1986). The plaintiffs submitted statistics showing that, on average, African-American salaries were lower than alleged white comparators. *Id.* at 398. The plaintiffs’ statistics analyzed race, education, tenure, and job title based on testimony those factors determined salary. *Id.* The trial court excluded the statistical evidence, a decision that was upheld on appeal in part because the regressions “did not include all measurable variables thought to have an effect on salary.” *Id.* at 399. The Supreme Court reversed, reasoning that “**absent some other infirmity**,” the “analysis [] accounts for the major

factors.” *Id.* at 400 (emphasis added). The Court explicitly noted, however, “[t]here may, of course, be some regressions so incomplete as to be inadmissible as irrelevant.” *Id.* at n.10.

This case is nothing like *Bazemore*. Oracle is not arguing that the only problem with Madden’s models is a missing variable. As the *Honeywell* court observed, an analysis like Madden’s here that groups together thousands of highly-educated, highly-differentiated, highly-skilled jobs does not compare similarly situated employees. *Honeywell*, 1994 WL 68485 at *7, n.13. This structural problem with Madden’s analyses is the “other infirmity” *Bazemore* cautioned would render statistical evidence unable to meet the plaintiff’s *prima facie* burden. *Bazemore*, 478 U.S. at 400 (“Whether, in fact, such a regression analysis does carry the plaintiffs’ ultimate burden will **depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant.**”) (emphasis added). Here, the evidence is undisputed that Oracle’s jobs each require significantly different skills. *See* Oracle’s SUF at UFs 14-19, 22-24, 27-28, 30. Even Madden admits this. *See* Oracle’s *Daubert* at 9-10.¹

Given this, failing to consider what employees actually do means that Madden is not comparing similarly situated employees. This is not some immaterial omission. It is necessary to a valid statistical analysis. *See* Oracle’s MSJ at 14-15.

General Telephone likewise supports Oracle. Like *Bazemore*, OFCCP cites *General Telephone* for the proposition that Oracle must do more than “merely point[] to flaws” in OFCCP’s model. *Opp.* at 11. But *General Telephone* stands only for the unremarkable proposition that a defendant cannot rebut a statistical analysis by pointing out minor, insignificant flaws that do not undermine the overall integrity of the analysis. Indeed, *General Telephone* explicitly aligns itself with the Ninth Circuit’s decision in *Penk v. Oregon State Bd. of*

¹ OFCCP also cites *Bazemore* in response to Oracle’s argument that OFCCP lacks jurisdiction to pursue an assignment theory for pre-2013 hires, asserting that “discriminatory pay practices are driven by starting pay and OFCCP is simply trying to correct the present effects of past discrimination.” *Opp.* at 16. That is not Oracle’s argument. Oracle is not arguing, like the employer in *Bazemore*, that OFCCP cannot allege historic starting pay discrimination. Rather, as Oracle explained in its moving papers and consistent with case law, a job assignment (*i.e.*, the employee’s starting job and career level, not the employee’s starting salary) is a discrete employment decision that does not give rise to a continuing violation. *See* Oracle’s MSJ at 21-22.

Higher Educ., explaining “it is clear that the statistical omissions in *Penk* were so central to [the] employment decisions that the defendants, by merely pointing out such omissions, could defeat any inference of discrimination.” *E.E.O.C. v. Gen. Tel. Co., of Nw., Inc.*, 888 F.2d 575, 582 (9th Cir. 1989) ; *see also Penk*, 816 F.2d 458 (9th Cir. 1987) (rebuttal evidence can take several forms, including “a showing that the plaintiff’s statistics are flawed”). The alleged flaw in *General Telephone* was the plaintiffs’ failure to account for gender-based differences in career interests. In contrast to *Penk* and this case, there was no evidence the omission in *General Telephone* was significant.

Again, however: Oracle is not arguing that OFCCP’s analyses are just a few cards short of a full deck. Even if, for example, they considered career level (or even job titles, which OFCCP claims occurs in “column 8”), employees would *still* not be similarly situated because the analyses combine all employees into a single aggregated model and the “controls” used by Madden are insufficient to account for differences across the jobs at issue.² *See, e.g.*, Miranda Decl., ¶¶ 4-9; Waggoner Decl., ¶¶ 21-23; Saad Rpt. ¶¶ 46-61; Abushaban Decl., ¶¶ 10-13; Adjei Decl., ¶ 8; Budalakoti Decl. ¶ 8; Chechik Decl. I 6, 8; Eckard Decl. ¶ 9; Suri Decl., ¶¶ 10-13; Talluri Decl., ¶¶ 10-12.

OFCCP also cites *Segar*, which involved DEA agents claiming discrimination in almost all aspects of employment (including pay, promotions, and assignments). *Segar* supports Oracle, not OFCCP, however. It repeatedly emphasizes that a plaintiff, even in a statistics case, must show a disparity among appropriate comparators. *Segar v. Smith*, 738 F.2d 1249, 1266, 1267 & 1274 (D.C. Cir. 1984). In *Segar*, unlike here, the qualifications for the positions at issue had a “high degree of homogeneity.” Moreover, the D.C. Circuit recognized the DEA failed to show the “missing variables” about which it complained would meaningfully dilute the plaintiffs’ statistics, including because the arguments the DEA made were wrong as a factual matter, and

² OFCCP disputes Oracle’s UF 82 by averring that Madden “has neither in her reports [n]or her deposition given an opinion that the last columns of the tables in her initial report compare employees doing similar work.” So, to the extent OFCCP relies on those final columns of Madden’s analyses as comparing similarly situated employees, OFCCP contradicts its own expert, who confirms she herself would not do so. Madden Rep. at Table 1(a).

plaintiffs had direct evidence that race was a factor in determining job assignments. *Id.* at 1263, 1279 (“the trial court credited much of plaintiffs’ nonstatistical evidence”). In short, neither *Honeywell*, *Bazemore*, *Segar* nor *General Telephone* authorize Madden’s failure to compare employees who are not “similarly situated.”

The problems with Madden’s analyses are not new or limited to this case. The Eleventh Circuit has affirmed summary judgment in favor of an employer where Madden’s analyses, just like here, made it “impossible to determine how wide a real gap, if any, existed in salaries and promotion rates among white and black employees, or whether any such gap was attributable to factors other than race.” *Cooper v. Southern Co.*, 390 F.3d 695, 719 (11th Cir. 2004). The criticism of Madden’s analyses in *Cooper* closely match Oracle’s here, including that:

- “Madden’s reports did not take into account the type or level of acquired skills of job applicants”;
- “Madden’s ‘education’ component failed to take into account the field of study, the relevance of that field to any position in question, or the quality of the educational institutions involved”;
- “Madden calculated ‘experience’ only by tabulating the amount of time that had passed since an individual finished his or her formal education and the amount of time that individual had spent on the defendants’ payroll ... While Madden’s “experience” variable may have measured the passage of time, it did not in any way factor in the quality, type, or relevance of an employee’s experience”; and
- “[T]he reports did not factor in any employee’s actual job performance, a consideration that is undeniably important in decisions relating to compensation[.]”

Id. at 717 (“[T]he wide-ranging and highly diversified nature of the defendants’ operations requires that employee comparisons take these distinctions into account[.]”). As explained in Oracle’s opposition to OFCCP’s cross-motion, Madden’s “job descriptor” variable does nothing to similarly situate employees because it combines numerous jobs and eliminates career levels. *See* Oracle’s Opp. to OFCCP’s MSJ at 10-12; *see also Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 261-62 (4th Cir. 2005) (excluding expert’s testimony where “a single job group could contain 147 separate individual job titles and up to seven separate pay grades”).

B. Case Law Requires Cohesive Evidence of Systemic Discrimination

While claiming Oracle has centralized policies and decision making, OFCCP simultaneously rails against the notion that pattern or practice claims require commonality. Opp. at 18-19. Again, OFCCP says anything, even contradictory things.

What this means is that OFCCP does not respond to Oracle's point that *Dukes* holds "proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 & n.7 (2011). The closest OFCCP comes to identifying the "glue" constituting the alleged "pattern or practice" of discrimination is a hodgepodge of claimed deviations from Oracle's "policies" (and thus no centralized policy). Opp. at n.21. These vague and unsupported "deviations" include "budget-driven exceptions"; "no mechanism to ensure or correct disparities" (whatever it means to "ensure" a pay disparity); "reli[ance] on prior pay to set pay"; and "discriminat[ion] in initial job level assignment."). *Id.* OFCCP does not establish the existence of these practices, let alone demonstrate they constitute a "pattern or practice." *Bloomberg L.P.*, 778 F. Supp. 2d at 461 ("'J'accuse!' is not enough in court. Evidence is required."). After dismissing *Dukes* as an inapplicable class case, OFCCP proceeds to cite *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110 (S.D.N.Y. 2015) approvingly. *Chen-Oster* is a pay and promotions class case involving only two positions (Associate and Vice President), not hundreds like this case. *Id.* at 117-21. OFCCP cannot argue class certification decisions are irrelevant when Oracle cites them but then claim this action is like *Chen-Oster*.

OFCCP's patchy statistics and weak anecdotal evidence doom its case, as in *OFCCP v. Bank of America*, where OFCCP alleged a pattern or practice of intentional discrimination against African-American applicants and presented statistical evidence of 4.0 standard deviations for African-American hiring from 2002-2005. The ALJ found for OFCCP, but the Review Board reversed, holding that OFCCP's expert only relied on "two or three bottom line conclusions" and that for two of the four years, there were only minor shortfalls in expected hiring rates. There was also no supporting anecdotal evidence. As a result, there was no basis to find intentional

discrimination. 2016 WL 2892921 (DOL Admin. Rev. Bd. Apr. 21, 2016).³

C. OFCCP Attacks Arguments That Oracle Did Not Make

Seeking to avoid the case law above, OFCCP responds to a variety of arguments that Oracle does not make. For example, OFCCP asserts that Oracle blames front-line managers for disparities. Opp. at 6. That is not Oracle's argument. As OFCCP itself has confirmed, Oracle's front-line managers have not engaged in any wrongdoing, so there is no one to blame. And in any event, Oracle does not contest that it would be responsible for its managers' decisions.

Further, OFCCP attempts to characterize Oracle's arguments as absolutes, implying Oracle's position is that statistics can never establish a *prima facie* case. Opp. at 6 ("Oracle's litigation story is that OFCCP cannot prove pattern and practice because it maintains no centralized compensation system"); 15 ("Oracle thus far has simply denied that its workforce is capable of objective study[.]"). That is not Oracle's argument. Oracle is saying that in *this case*, with *its workforce*, the *particular statistical analyses* used by Madden cannot establish discrimination for all the reasons set forth above and in Oracle's moving papers.

Further, OFCCP incorrectly claims that Oracle cites Equal Pay Act cases "to support its restrictive position that jobs need to be nearly identical before they can be compared." Opp. at 12. That is not Oracle's argument. The two EPA cases cited (*Forsberg* and *Port Authority*) stand for the proposition that courts should examine actual job duties and content, and not rely simply on job titles, which is true under both the EPA and Title VII. *See, e.g., Montgomery v. Clayton Homes Inc.*, 65 F. App'x 508, at *2 (5th Cir. 2003) (rejecting claims under Title VII and EPA because "the job content and actual job requirements, not the job title, classification or description, are determinative"); *Hooper v. Total Sys. Servs., Inc.*, 799 F. Supp. 2d 1350, 1364 (M.D. Ga. 2011). Indeed, other than arguing for a lower or nonexistent similarly situated

³ OFCCP suggests that a "pattern and [*sic*] practice may be found against a portion of a contractor's workforce." Opp. at 15 n. 20. But in the case OFCCP cites, the ALJ erroneously "masked the statistical disparity in the [] job group at issue by combining [it with] job groups" where no disparity was alleged. *See OFCCP v. Greenwood Mills, Inc.*, 89-OFC-39, ARB Decision and Remand Order *5 (Nov. 20, 1995). Here, Oracle is not seeking to draw employees from other job functions in to muddy the waters. Rather, OFCCP's assertion of *widespread* discrimination is undermined by its own conclusion of no violations in the 13 other job functions it investigated.

standard in statistical cases, OFCCP does not dispute Oracle's authority regarding what Title VII requires with respect to similarly situating employees.

III. OFCCP FAILS TO PROVE ORACLE ENGAGED IN DISCRIMINATORY JOB ASSIGNMENTS

To justify its failure to consider the actual work employees perform, OFCCP contends that Oracle discriminates in setting employees' career levels at hire and thus that factor is "tainted." Opp. at 14. As Oracle has explained, OFCCP's failure to consider career levels means, by definition, it is not comparing similarly situated employees. *Mansfield v. Billington*, 574 F. Supp. 2d 69, 82 (D.D.C. 2008) (where alleged comparator was the plaintiff's supervisor, plaintiff "cannot argue that the relevant aspects of her and [comparator's] employment at the time of the disputed events were nearly identical in material respects"). Because Madden's analyses *cannot* demonstrate *pay* discrimination, the only question remaining is whether Oracle engaged in *assignments* discrimination. This question has existential importance to OFCCP's case and yet OFCCP barely addresses it. Opp. at 8. That is because Madden has not shown discriminatory assigning, as detailed more fully in Oracle's *Daubert* motion and reply. She throws up a patchwork of analyses and discloses the results of three cherry-picked IC levels (Madden Rpt. at 51, App'x B; Madden Rebuttal at Charts R1-R2), but even her own flawed analyses do not show anything like a pattern of systemic "assignments" discrimination if one looks at her full results, as Saad and Oracle did. Madden's own results favor women and minorities in levels she ignored, and she finds no statistically significant differences even in levels she included. *See* Mot. to Exclude at 19; Saad Rebuttal ¶¶ 68-72. Nothing in Madden's analyses or OFCCP's obfuscation disputes that women, Asians, and African-Americans in fact applied to jobs at different levels at different rates. Saad Rpt. ¶¶ 27, 147-56. Further, applicants do not show up to Oracle like newly-hatched worker bees waiting to be assigned a role and career level at random, and this fact is essential to understanding why employees hold the jobs they do. Accordingly, OFCCP's only reason for ignoring career levels fails, and both its pay discrimination *and* assignments

discrimination claims should be dismissed.⁴

IV. OFCCP FAILS TO DEMONSTRATE ANY MATERIAL DISPUTE OF FACT WARRANTING A TRIAL

OFCCP contends summary judgment is not warranted because of material factual disputes. It “strongly contests Oracle’s claims that its compensation policies are not centralized or that its compensation policies provide managers with discretion as to what factors to consider in setting compensation.” Opp. at 4. As evidence of these “policies,” OFCCP asserts that Oracle “admits” that employees have system job titles that reflect the employee’s career level. Opp. at 4. That Oracle, a company with over 130,000 employees around the world, provides job titles for employees and sorts them by career level, is not evidence of a “policy” with respect to how compensation is set. OFCCP conflates Oracle’s corporate structure with how it determines the compensation for those employees. OFCCP further contends that once an employee has a job title, managers are “specifically directed” to “set compensation within the dictated salary ranges based on employees’ skills, experience and education.” *Id.* at 5. OFCCP acknowledges that “front-line managers do have a role in *proposing* pay rates,” but that they require “approval from upper management[.]” *Id.*

First, there are no material fact disputes here. The Oracle compensation documents on which OFCCP relies confirm Oracle’s managers have great discretion to set salaries using ranges as guidelines to reflect generally the lower and upper bounds of the market value for the job. These ranges are intentionally broad to allow managers to differentiate compensation according to employees’ skills and experience. *See* Declaration of Norman E. Garcia in Supp. of OFCCP’s Mot. for Summ. J., Ex. 8 at 32, 69; Decl. of Erin M. Connell in Supp. of Oracle’s Opp. to OFCCP’s Mot. for Summ. J., Ex. E (7/19/2019 Waggoner PMK Dep.) at 178:3-18. And yes, managers’ decisions must be approved by senior management to ensure lower-level managers are not blowing through budgets or awarding arbitrary or absurd salaries. Oracle SUF at UFs 36-

⁴ OFCCP’s ineffective response to Saad’s assignments analysis is discussed in Oracle’s reply in support of its motion to exclude Madden. *See Daubert* Reply at 9-10.

38, 44. These compensation decisions, however, are rarely overturned. *Id.* But second, and more importantly, none of this proves there are highly-centralized “policies” for setting compensation. Instead, all of the evidence cited is consistent with a series of guidelines, practices, and factors that lower-level managers should take into account when *they* set the salaries.

OFCCP cites several declarations that supposedly demonstrate “how tightly circumscribed front-line managers are in making compensation decisions.” Opp. at n.6. These declarations do not support OFCCP’s position. Some are non-managers recounting conversations with managers about the lack of budget for raises, and are thus irrelevant.⁵ Others are consistent with the facts above, *i.e.*, managers receive compensation determination guidelines but there is no fixed policy, and Oracle expects managers will consider performance when distributing compensation increases.⁶ And two employees simply state they could not see overall budget or pay information for other employees.⁷

Oracle’s compensation documents speak for themselves, and OFCCP presents no evidence that senior management is routinely rejecting justified salaries or otherwise exerting close control over the thousands of compensation decisions at issue here. OFCCP is left arguing that Oracle’s business decisions and simple math – *i.e.*, whether Oracle’s business performance justifies a round of salary raises – are somehow inherently discriminatory. Opp. at 5-6. That is not a material factual dispute, and certainly not a defense to summary judgment.⁸

V. OFCCP DID NOT MEET ITS PRE-SUIT CONCILIATION OBLIGATIONS

OFCCP contends that its “efforts to conciliate were reasonable” because Oracle purportedly attempted to interfere with the audit or otherwise refused to provide information or have discussions. Opp. at 25. This of course assumes that Oracle did what OFCCP alleges, but

⁵ Sharma Decl., ¶ 10; Arehart Decl., ¶ 9; Boross Decl., ¶ 9.

⁶ Pandey Decl., ¶ 13; Snyder Decl., ¶¶ 13-15; Sharma Decl. ¶ 8; McGregor Decl., ¶¶ 9-13.

⁷ Kolotourous Decl., ¶ 8; Garcia Decl., ¶ 6.

⁸ OFCCP contends that Oracle’s motion should be denied because Oracle did not cite directly to its Statement of Uncontested Facts, and thus “depriv[ed] the Court of the purpose of the Statement of Disputed facts[.]” Opp. at 2-3. In fact, Oracle’s SUF closely tracked the facts recited in its brief, OFCCP cites no law or regulation requiring citation to the SUF, and Oracle doubts that OFCCP’s citation to dozens of SUFs (*e.g.*, Opp. at 5-6) are more helpful to the Court than Oracle’s pinpoint evidentiary citations.

more to the point OFCCP has not identified a material factual dispute. For example, OFCCP agrees that it did not provide the backup files for its statistical analyses, a detailed settlement demand, or a conciliation agreement. *Id.* at 26-27. OFCCP maintains that such efforts would have been “useless” because of the parties’ fundamental disagreements about the design of OFCCP’s analyses. *Id.* OFCCP’s subjective assessment that conciliation would have been futile does not excuse it from its regulatory obligations. As this Court held in denying OFCCP’s earlier motion for partial summary judgment on conciliation, OFCCP’s conduct viewed in the light most favorable to Oracle was “alarming” and “very troubling and calls OFCCP’s conciliation efforts into serious question.” May 23, 2019 Order Denying OFCCP’s Motion for Partial Summary Decision on Oracle’s Affirmative Defenses Re: Conciliation at 10-12.⁹ OFCCP’s approach during conciliation of treating discrimination as a foregone conclusion and demanding that Oracle prove it did not discriminate is equally present in this litigation. The Court should decide for itself whether OFCCP’s efforts were reasonable in light of the undisputed facts.

VI. OFCCP’S FAILURE TO PRODUCE CLAIM MUST BE DISMISSED

With respect to its failure to produce claim, OFCCP still does not explain the remedy for any purported failure to produce documents. In fact, the case OFCCP cites supporting its request for an injunction (which involved a debarment, not an injunction), held that once the documents at issue were produced, the employer must be “relieved from debarment.” *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 376 (D.D.C. 1979). Thus, OFCCP’s own authority provides it is not entitled to any remedy here. OFCCP did not bring this litigation, including the failure to produce claim, because it was missing documents and needed information. To the contrary, OFCCP insists it had reasonable cause to file this action alleging intentional discrimination based solely on its NOV statistical analyses. *Opp.* at 21-22.

⁹ OFCCP contends the Court cannot “evaluate the sufficiency of OFCCP’s investigation.” *Opp.* at 23. Incorrect. *See Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1653 (2015) (noting the “strong presumption favoring judicial review of administrative action.”) Indeed, its motion for partial summary judgment on conciliation demonstrates OFCCP knows the Court can review whether OFCCP met its presuit obligations.

VII. OFCCP STILL FAILS TO ARTICULATE, LET ALONE OFFER EVIDENCE TO SUSTAIN, ANY CLAIM FOR DISPARATE IMPACT

To the extent it was ever alleged, OFCCP's claim for disparate impact must now be dismissed. OFCCP does not (i) identify a specific facially-neutral practice; (ii) demonstrate how that practice resulted in a disparate impact; or (iii) identify another neutral practice that meets Oracle's business needs. *See* Oracle's MSJ at 22-25. OFCCP contends that a disparate treatment case can become a disparate impact case, citing *Palmer* and *Segar*. Opp. at 15. But those were hiring cases where the plaintiffs actually alleged a disparate impact claim. Further, Oracle is not rebutting "an allegation of discriminatory intent by claiming that a facially neutral selection criterion caused a disparity in selections." *Palmer v. Shultz*, 815 F.2d 114 n.21 (D.C. Cir. 1987). OFCCP has never established a disparity in the first place, because its analyses do not compare similarly situated employees.

VIII. CONCLUSION

For all the foregoing reasons, the Court should grant Oracle's motion for summary judgment.

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Respectfully submitted,

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