

**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

**DEFENDANT ORACLE
AMERICA, INC.'S MOTION IN
LIMINE NO. 2 TO EXCLUDE
EVIDENCE OF PRE-2013 JOB
ASSIGNMENTS**

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*Office of Administrative Law Judges
San Francisco, CA*

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I. INTRODUCTION

Defendant Oracle America, Inc. (“Oracle”) hereby moves for an order *in limine* excluding evidence of job assignments prior to January 1, 2013. OFCCP contends that at least some of the compensation discrimination it alleges in this case is the result of discriminatory job assignments at hire, which purportedly lowered the salaries of certain Oracle employees. This evidence is inadmissible.

OFCCP can only proceed to litigation based on compensation discrimination that occurred at least in part during the 2013-2014 audit period because it does not have authority to seek remedy for job assignments that occurred before the audit period.

Nor can OFCCP claim that a job assignment is a continuing violation such that pre-audit assignments are cognizable. A discriminatory job assignment is considered a discriminatory act at the time the assignment is made. Courts have concluded that such an assignment *cannot* form the basis for a continuing violation claim.¹

Accordingly, pre-2013 job assignments are not relevant to any claim or defense and should be excluded from the hearing in this matter entirely. Allowing OFCCP to introduce evidence of pre-2013 assignments would waste time at the hearing on a series of mini-trials about what jobs employees applied to, what jobs they were hired into, and what jobs they were qualified for. Moreover, it would confuse the issues and distract from OFCCP’s principal allegations of compensation discrimination occurring from 2013 and forward.

OFCCP therefore requests that the Court exclude all evidence of pre-2013 job assignments.

II. ARGUMENT

A. Evidence of Pre-2013 Job Assignments Is Irrelevant

Evidence is inadmissible unless relevant to a disputed issue. 29 C.F.R. § 18.402. Relevant evidence is that “having any tendency to make the existence of any fact that is of

¹ Separately, the claim of discriminatory job assignments has no factual basis. Those arguments appear in Oracle’s *Daubert* Motion and Motion for Summary Judgment.

consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Powers v. Union Pac. RR. Co.*, 2015 WL 1959425, at *16 (ARB Mar. 20, 2015) (quoting 29 C.F.R. § 18.401). This Court is empowered to exclude irrelevant evidence pursuant to 41 C.F.R. § 60-30.15. For the following reasons, evidence of pre-2013 job assignments is irrelevant.

OFCCP is limited to the allegations of its Notice of Violation (“NOV”). In its NOV, OFCCP alleged that Oracle engaged in discrimination *after January 1, 2013*. See Declaration of Holman-Harries in Supp. of Oracle’s MSJ, Ex. B (NOV) at 3-6; *see also* Complaint (January 17, 2017), ¶¶ 7-10, 12; Amended Complaint (January 25, 2017), ¶¶ 7-10, 12; Second Amended Complaint (“SAC”), ¶ 12. As a result, OFCCP is limited by law to allegedly discriminatory acts committed by Oracle after January 1, 2013. See *E.E.O.C. v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012) (agency’s complaint must be limited to unlawful conduct uncovered during the investigation); *see also E.E.O.C. v. Dillard’s Inc.*, 2011 WL 2784516, at *6 (S.D. Cal. July 14, 2011) (agency may not seek relief beyond what is identified during the investigation).²

OFCCP’s allegations in this litigation may therefore only relate to alleged compensation discrimination that occurred on or after January 1, 2013. *OFCCP v. Analogic Corp.*, ALJ NO.: 2017-OFC-00001 at 6 n. 6 (Mar. 22, 2019). As a result, any job assignment that occurred prior to January 1, 2013, would not fall within the ambit of this litigation.

This is so because a job assignment is a single act. It is not an act that is “continuous.” As a matter of law, a job assignment is a one-time, discrete decision that the employee is aware of at the time of the decision. It *cannot* form the basis for a continuing violation. *Holloway v. Best Buy Co., Inc.*, 2009 WL 1533668, at *5 (N.D. Cal. May 28, 2009) (“[T]he act of assigning a newly-hired individual a particular job is a discrete act” and, under the Fair Pay Act, is not actionable under a “continuing violations” theory); *see also Johnson v. Austal, U.S.A., L.L.C.*, 805 F. Supp. 2d 1299, 1308 (S.D. Ala. 2011) (under Title VII the denial of a promotion is one-time violation, the consequences of which are felt at the time of the denial); *Schuler v.*

² It is important to note that OFCCP’s claim of “assignment” is assignment at time of hire. SAC ¶¶ 18, 22.

PricewaterhouseCoopers, LLP, 595 F.3d 370, 375 (D.C. Cir. 2010) (an alleged failure to promote is a discrete act and does not permit a derivative continuing compensation discrimination claim); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002) (refusal to hire is a discrete act).

B. Even If the Court Finds Minimal Probative Value in Such Evidence, the Court Should Nonetheless Exclude It Because It Will Waste Time, Confuse the Issues, and Mislead the Court

Given the above, allowing OFCCP to introduce evidence of pre-2013 job assignments would require the Court to take unnecessary and time-consuming detours to delve into the specifics of that evidence. Hiring at Oracle is case-by-case and involves weighing multiple factors specific to both the individual and the position for which the manager is hiring. Analyzing the reasons a manager chose to hire someone at a specific level would require an individualized inquiry for each employee. Accordingly, allowing OFCCP to introduce evidence of pre-2013 job assignments and to contend they are discriminatory would require the Court to examine what the qualifications and skills of each applicant were at the time they applied, as well as Oracle's need for that particular employee at the time. It would be an unnecessary and time-wasting detour to delve into the specifics of all those assignments. The minimal probative value of this evidence does not justify the Court and the parties spending part of the limited time set for the hearing on these detours. *See, e.g., Duran v. City of Maywood*, 221 F.3d 1127, 1133 (9th Cir. 2000) (affirming exclusion of evidence that would have required "full-blown trial within this trial"); Reporter's Note to 29 C.F.R. § 18.403. Moreover, this evidence poses a substantial threat of confusing the complex issues before this Court and that might come before any reviewing court. *Diederich v. Providence Health & Servs.*, 742 F. App'x 177, 179-80 (9th Cir. 2018) (evidence excluded where it would result in "mini-trials" and confusion about what legal theories are at issue); Reporter's Note to 29 C.F.R. § 18.403.

III. CONCLUSION

For the foregoing reasons, Oracle respectfully requests that the Court exclude evidence of pre-2013 job assignments because this evidence is irrelevant or, alternatively, because its

negligible probative value is substantially outweighed by the risk of wasting time, confusing the issues, and misleading the Court.

November 15, 2019

Respectfully submitted,

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