

**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

**POST-HEARING REPLY BRIEF BY
DEFENDANT ORACLE AMERICA,
INC.**

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I. INTRODUCTION

In its opening statement at trial, OFCCP told this Court it would prove that Oracle's senior executives and Human Resources managers engaged in a pattern or practice of intentional compensation discrimination, discriminatory job steering, and that Oracle had a discriminatory practice of basing starting pay on prior pay. OFCCP proved *none* of these things. Indeed, despite accusing Oracle of intentional discrimination against thousands of employees, OFCCP has no evidence of intent or discrimination. It argues that as a federal government agency responsible for enforcing anti-discrimination laws, it does not need such evidence. Instead, it twists itself in knots with tortured legal theories, misplaced reliance on compliance regulations, and disregard of well-settled Title VII case law. It relies on statistical models that produce "statistically significant" yet meaningless results, and argues alleged compliance violations suffice to prove intentional discrimination. Neither comes remotely close. Simply stated, OFCCP failed to prove *any aspect* of its legal claims, and Oracle is entitled to judgment in its favor.

OFCCP's post-trial brief in no way resembles the actual trial. It confirms the evidence does not prove a pattern or practice of discrimination because OFCCP does not even attempt to apply Title VII standards to the evidentiary record. Instead, OFCCP presents facts it wishes it had, not those developed at trial. OFCCP has no choice but to contort both the law and the facts because the linchpin of its entire case – Dr. Janice Madden's statistics – are wholly inconsistent with Title VII's governing legal standards and are based on her own dogmatic assumptions rather than reality. They do not consider employees' actual duties, skills, or experience. They do not compare similarly situated employees. They fail to account for important factors that impact pay at Oracle, including performance and product. They do not account for Oracle's affirmative defenses. In short, they do not prove discrimination by Oracle.

OFCCP also fails to prove bias by senior executives or Human Resources managers. Not only does the evidence confirm that compensation decision-making at Oracle is made by individual managers, but OFCCP's theory that senior executives intentionally discriminated

because they allegedly oversee Oracle's compensation system makes no sense given OFCCP's concession that pay decisions made within that system are bias-free.

OFCCP's attempt to overcome these fatal flaws by asserting an alternative claim of discriminatory job steering also fails. The evidence confirms that employees choose the jobs to which they apply and generally are hired into those jobs. In the minority of cases where they were up-leveled or down-leveled one level at hire, there is no pattern of disparate treatment based on race or gender. Moreover, job "assignments," even if they occurred, are made by individual managers, who OFCCP unequivocally cleared of blame. Faced with this self-made paradox, OFCCP's brief barely addresses its steering claim, let alone proves it has merit.

OFCCP's disparate impact claim based on prior pay fares no better. OFCCP has not established Oracle had a policy or practice of basing starting pay on prior pay. And it certainly did not prove that any such policy or practice resulted in unlawful pay discrimination.

Over one year ago, this Court explicitly recognized that if OFCCP's "allegations cannot be substantiated, Oracle deserves to be able to clear its name and move on." That time is now. For all the reasons set forth below and in Oracle's brief, the Court should dismiss this action.

II. OFCCP MISSTATES THE GOVERNING LEGAL STANDARDS

A. Regulations Do Not Replace Title VII

In its Notice of Violation, Show Cause Notice, original complaint, and two amended complaints, OFCCP claimed that Oracle engaged in intentional compensation discrimination. This means OFCCP must prove a pattern or practice, as defined by Title VII law. Oracle Brief at 3-6. The majority of OFCCP's brief, however, focuses on allegations of compliance violations, which do not suffice to prove a pattern or practice of discrimination. Brief at 3-5. Indeed, as this Court has acknowledged on several occasions, most recently a week before trial, "affirmative action regulations are separate and apart from the employment discrimination issues and involve a different set of requirements, considerations, and inquiries." Nov. 29, 2019 Order Denying OFCCP Leave to Amend Complaint, at 8.

Despite this admonition, OFCCP attempts to prove its case by contending that because Oracle did not perform certain internal compensation analyses, this necessarily demonstrates Oracle “concealed” the unlawful racial and gender pay disparities OFCCP alleges. Brief at 36. Not only is there no evidence to support this baseless allegation, but OFCCP concedes Oracle *did* comply with its regulatory requirement. Brief at 34-35 (acknowledging managers performed periodic reviews of compensation). Indeed, OFCCP’s assertion of non-compliance rests solely on the distorted notion that Oracle was required to perform a centralized statistical analysis based on race and gender, which both this Court and OFCCP itself have acknowledged is not the case.¹

More fundamentally, none of this replaces Title VII standards for proving discrimination. Oracle’s regulatory compliance is not at issue in this case. OFCCP’s inflammatory arguments that Oracle’s senior executives “concealed” compensation discrimination are based solely on unfounded speculation, not evidence. For example, OFCCP accuses Oracle CEO Safra Catz of failing to “perform her oversight functions,” solely because her name appears in Oracle’s 2014 Affirmative Action Plan (“AAP”). But Shauna Holman-Harries confirmed at trial that she, not Ms. Catz, is responsible for implementing Oracle’s AAP. Tr. at 368:19-369:7 (Holman-Harries). And in any event, oversight of Oracle AAP’s does not demonstrate an intent to discriminate.

B. Statistics Must Be Properly Constructed To Infer Discrimination

OFCCP is also wrong when it argues it does not need to prove “animus” or intent. It does. While case law recognizes that in some cases, intent can be inferred through statistics (particularly when coupled with other relevant anecdotal evidence), the cases on which OFCCP

¹ See, e.g., 71 Fed. Reg. at 35,119 (“OFCCP agrees that the contractor need not have relied on quantitative or statistical techniques to comply with 41 CFR 60–2.17(b)(3), as OFCCP has repeatedly noted that the contractor has the discretion to comply by using any self-evaluation technique it deems appropriate.”); 78 Fed. Reg. at 13,517 (“[C]ontractors may continue to choose a self-evaluation method appropriate to assess potential pay disparities among their workforce. OFCCP will not be mandating any specific methodology.”); 81 Fed. Reg. at 39,125 (“Because the regulation does not specify any particular analysis method that contractors must follow to comply with this regulation, contractors have substantial discretion to decide how to evaluate their compensation systems.”); see also September 19, 2019 Order Granting in Part and Denying in Part Plaintiff’s Motion to Compel Oracle’s Compensation Analyses at 13 (acknowledging that 41 C.F.R. section 60-2.17(b)(3) is “not precise as to what form the evaluation of compensation must take”).

relies make clear that statistics must be complete and meaningful before any such inference can possibly arise. Brief at 5; *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1413 (D.C. Cir. 1988) (noting that “statistics are not irrefutable” and that employer’s rebuttal case often focuses on “inadequacies in the plaintiffs’ statistical case”); *Palmer v. Shultz*, 815 F.2d 84, 91 n.6 (D.C. Cir. 1987) (underscoring that statistics “must focus on the appropriate []pool in order to properly establish a prima facie case of discrimination”).

OFCCP also muddles and contorts the similarly situated standard. Brief at 6-9. For example, OFCCP contends pay factors must be “actually used by the contractor in setting compensation” or “consistently used for setting pay in a non-discriminatory manner.” Brief at 7-8. But the regulations cited have nothing to do with a “similarly situated” analysis under Title VII. Instead, they address *pay* factors – not similarity of jobs, which is a separate analysis.

OFCCP invents from whole cloth requirements that the pay factors Oracle uses be “documented and maintained” and that Oracle “supply the data necessary for analysis.” Brief at 7. The regulations OFCCP cites say nothing of the sort, and the case cited, *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1189 (9th Cir. 2002), merely confirms that where employers argue missing factors explain pay disparities, they should introduce evidence supporting that assertion. Here, Oracle has provided *enormous* amounts of data to OFCCP and *repeatedly* has explained how OFCCP’s statistics omit or mis-measure important pay factors. Oracle further demonstrated, through Dr. Saad’s analyses, that by accounting for just some of those factors, OFCCP’s pattern of statistical disparities vanish. Oracle Brief at 17; *see also* Section IV.C. All of this data was available to both OFCCP and Dr. Madden. They simply chose to ignore it.

OFCCP further states that “[j]ob titles and an employer’s own compensation system are highly relevant to the similarly-situated analysis.” Brief at 8-9 (citing *Coward v. ADT Sec. Sys., Inc.*, 140 F.3d 271, 275 (D.C. Cir. 1998)). But *Coward* makes the opposite point. There, a party admitted she “knew nothing about the duties of Project Managers” and therefore the district court properly granted summary judgment because she failed to establish “a critical element of her prima facie case – that she is similarly situated to Project Managers.” *Id.* At trial, Dr. Madden

made an identical admission: she did not evaluate what work Oracle employees within a job title actually perform. Tr. at 863:10-864:4 (Madden) (“I didn’t independently evaluate what people were doing. There’s no way I could do that and I don’t think I would if I had access to do that.”). At a company as diverse and complex as Oracle, with thousands of specialized technical roles, one cannot rely on a job title like “Software Developer 4” to declare employees similarly situated. Instead, OFCCP must prove the employees it is comparing are similarly situated based on *actual job content*, not titles or labels, which it plainly did not do. *See, e.g.*, EEOC COMPLIANCE MANUAL CH. 10, at § III.A.2 (“The actual content of the jobs must be similar[.] Job titles ... are helpful [but] not controlling.”) (citing *Coward*, 140 F.3d at 275).²

With respect to OFCCP’s argument that Title VII governs and not the EPA – while that obviously is true, the relevant point is that under *both* Acts, courts look at job **content** and not simply job **titles**. *Boumehti v. Plastag Holdings, LLC*, 489 F.3d 781, 791 (7th Cir. 2007) (“[J]ob title alone is not dispositive ...”); *Rabe v. United Air Lines, Inc.*, 971 F. Supp. 2d 807, 824 (N.D. Ill. 2013) (“[J]ob titles and rank alone are not dispositive of the ‘similarly situated’ issue.”).³

III. OFCCP MISCONSTRUES THE FACTS

In an effort to assemble a post-trial case contrary to the trial record, OFCCP not only contorts the law, it also distorts the facts. The actual evidence confirms the following:

Oracle’s Compensation System Is Decentralized. OFCCP contends that Oracle’s compensation system is centralized and “not discretionary.” Brief at 11-12. In fact, it is undisputed that managers make their own compensation decisions and salary ranges are intentionally broad to allow managers discretion. Tr. at 1084:5-13 (Miranda) (hiring managers

² The second case OFCCP cites, *Connecticut State Employees Ass’n v. State of Conn.*, 1983 WL 491, at *1 (D. Conn. Feb. 25, 1983), simply states that the employer’s own compensation system matters, which is the exact point for which Oracle repeatedly cites *Analogic*: OFCCP must consider the factors Oracle actually uses to set compensation. *OFCCP v. Analogic Corp.*, ALJ No. 2017-OFC-00001 at *37.

³ Despite arguing this case is a Title VII case and not an EPA case, OFCCP nevertheless repeatedly refers to an order granting class certification in the *Jewett* case, which is a California EPA case, not a Title VII pattern or practice case. As explained in Oracle’s brief, this is a procedural order only, written nearly verbatim by plaintiffs’ counsel, and yesterday, the California Supreme Court ordered further briefing (and stayed class notice) in response to Oracle’s petition for review. By contrast here, the hearing is over and the record is closed. On this record, there is no question OFCCP failed to prove the claims at issue here.

write job requisitions, make hiring decisions, and set compensation); Tr. at 1293:13-16 (Balkenhol) (hiring manager is primary decision maker on offers); Tr. at 1187:9-1188:1 (Waggoner) (salary ranges are broad to account for differences in knowledge, skills, and abilities). The evidence further confirmed these lower-level compensation decisions are rarely, if ever, overturned. Tr. at 1444:6-8 (Balaji Bashyam has never rejected a line manager's recommendation); Tr. at 1292:23-1293:5, 1296:10-14, 1299:9-22 (Carolyn Balkenhol rarely questions pay decisions and cannot recall ever rejecting one); Tr. at 1893:5-7, 21-23 (Nachiketa Yakkundi never had a compensation decision overturned); Tr. at 1412:21-23 (Campbell Webb never rejected a dive and save); Tr. at 1549:24-1550:1 (Janet Chan does not recall her manager ever overturning her focal decisions).

Contrary to OFCCP's assertions, there is also no evidence that "high-level managers, HR, LOB heads, [or] the CEO's office" hold their compensation budgets from lower-level managers. Brief at 12. To the contrary, managers testified to just the opposite. *See, e.g.*, Tr. at 1407:7-16 (Campbell Webb distributes his budget to his direct employees, who push it down to the line manager to make decisions); Tr. at 1475:14-1476:16 (Juan Loaiza distributes his budget to his managers, who further distribute it down depending on the size of the team).⁴

Oracle Does Not "Assign" Employees A System Job Title. OFCCP is also incorrect that Oracle assigns system job titles to employees. Brief at 11. Instead, applicants apply to posted requisitions that already contain a job title, which cannot be changed except to adjust up or down one level based on an applicant's skills and experience. Tr. at 1197:5-13 (Waggoner) (managers can go up or down one career level, but cannot otherwise change the job after candidates apply).

⁴ OFCCP's reliance on testimony by Nicole Alexander merely reconfirms the decentralized nature of compensation at Oracle. OFCCP recounts Dr. Alexander's belief that she was underpaid and received a negative performance review in retaliation for requesting a promotion. Brief at 39. But that testimony does not show a "pattern or practice" of discrimination by senior executives and HR. According to Dr. Alexander herself, the sole person responsible for underpaying her, impeding her promotion, and retaliating against her was her supervisor, whose conduct OFCCP does not question. Position Statement at 1-2, 9. Moreover, any subjective belief by Dr. Alexander that she was underpaid due to her race or gender does not establish discriminatory intent, and her assertion of retaliation is not relevant to OFCCP's claims. *See, e.g., Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir. 1992) (subjective beliefs "wholly insufficient evidence to establish a claim of discrimination as a matter of law").

Top Executives Do Not Approve All Compensation Decisions. OFCCP contends, citing nothing, that “all compensation decisions must be approved by Oracle’s top executives.” Brief at 11 & FN15. That is not true. As Carolyn Balkenhol explained, transactions requiring approval by Safra Catz or Larry Ellison are sent to a queue that Ms. Balkenhol and her team of administrative employees review “as the highest level approver,” and the review is merely a “sanity check.” Tr. at 1289:7-1290:20 (Balkenhol). None of the testimony supports OFCCP’s assertion that Oracle’s CEOs personally approve the thousands of pay decisions at issue.

OFCCP Has No Evidence Of Discriminatory Intent. OFCCP accuses Oracle’s chief executives of deliberately paying less to women, Asians, and African-Americans for budgetary purposes. Brief at 28. Again, no evidence is cited. Even without evidence, OFCCP’s jumbled allegations fail to demonstrate intent to discriminate: according to OFCCP, Oracle executives set “lean budgets” so only “top performers” get raises (which, of course, is not discrimination, and contradicts OFCCP’s assertion that Oracle does not consider performance when it comes to pay); Oracle paid some employees below-market rates due to wage compression (again, not discrimination, as not tied to race or gender); and Oracle did not issue a handful of recommended pay raises (also not discrimination, as there was no evidence that race or gender played any role). “Dive and saves,” a nickname describing individualized attempts to retain employees at risk of leaving Oracle, also do not demonstrate Oracle executives had knowledge of widespread, unlawful pay disparities. Brief at 31. Dive and saves are not limited to women, Asians, or African Americans, and do not support a pattern or practice claim.⁵

Joyce Westerdahl Did Not Set Up Oracle’s Compensation System. Ms. Westerdahl was not involved in a single compensation decision at issue in this case. Tr. at 1240:12-1241:3

⁵ OFCCP contends that off-cycle pay adjustments such as dive and saves are approved only when an employee has a higher offer from a competitor. Brief at 32. In fact, the evidence shows that off-cycle pay increases also are used to reward performance or to address dissatisfaction with pay. *See* Exs. D-128; D-133; D-136; D-139; D-140; D-142 (off-cycle pay increase justifications without competitive offer); J-134 (demonstrating approval of foregoing off-cycle pay increases without a competing offer); Tr. at 1235:15-1236:2 (Waggoner) (managers propose off-cycle increases for many reasons, including internal equity). In any event, OFCCP’s attempt to contort individualized instances of dive-and-saves into a pattern or practice of intentional discrimination merely demonstrates how specious OFCCP’s claims really are.

(Waggoner). Nevertheless, OFCCP makes a transparent effort to inflate her role to impart greater significance to a fifteen-year-old comment attributed to her, which OFCCP claims evidences bias. Not only does Ms. Westerdahl deny making the comment, but the deposition testimony on which OFCCP relies confirms only that she assisted putting in place Oracle's computerized HR system in 2000, prior to which "you had clerks processing paperwork." PX-26A at 17:5-18:11; 338:19-25. She did not "design[] Oracle's compensation system." Brief at FN50.⁶

IV. OFCCP'S STATISTICS DO NOT DEMONSTRATE DISCRIMINATION

Rather than address Oracle's arguments that the statistical models on which OFCCP relies are meaningless, OFCCP instead fixates on the fact that they produce statistically significant results, which OFCCP claims necessarily prove discrimination by Oracle. Once again, OFCCP is wrong. As a matter of law, statistics must be properly structured to raise any inference of discrimination. *See, e.g., Penk v. Oregon State Bd. of Higher Educ.*, 1985 WL 25631, at *34 (D. Or. Feb. 13, 1985) (a "high degree of statistical significance says nothing about the validity of the assumptions behind the regression analysis model that produced the figures"); Oracle Brief at 6. Indeed, Dr. Madden agreed that statistical significance alone tells one nothing about whether the model is correct. Tr. at 946:1-19 (Madden); Tr. at 1606:19-1607:14 (Saad) (agreeing "if the model is wrong, the results are wrong"). Here, both the models and results are wrong.

A. OFCCP's Statistics Do Not Compare Similarly Situated Employees

Despite OFCCP's acknowledgement that it must compare employees who are similarly situated, OFCCP insists it can rely on Oracle job titles to meet this legal requirement.⁷ Brief at 18. Not so. First, case law makes clear courts must look **beyond** job titles. *See, e.g., Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1414 (9th Cir. 1988) ("a court should rely on actual job

⁶ OFCCP's new objection, that the court should not consider Ms. Westerdahl's denial of the statement attributed to her, is both meritless and waived. Brief at FN58. OFCCP cannot raise evidentiary objections post-trial. Moreover, OFCCP cross-examined Ms. Westerdahl at deposition about the statement at issue.

⁷ For purposes of proving its compensation discrimination claim, OFCCP appears to have abandoned its reliance on all of Dr. Madden's pay models except for "Column 8," notwithstanding Dr. Madden's opinion that Column 8's inclusion of job title, which she deems "endogenous," "cannot be used in any analysis of whether discrimination has occurred." Oracle Brief at 14. Indeed, even Dr. Madden does not use job title to similarly situate employees – only OFCCP makes that argument. *See id.*

performance and content rather than job descriptions, titles, or classifications”); *Kassman v. KPMG LLP*, 416 F. Supp. 3d 252, 283, 289 (S.D.N.Y. 2018); *Boumehdi*, 489 F.3d at 791. OFCCP’s assertion also contradicts the vast amount of evidence confirming employees who share job titles perform different work. *See, e.g.*, Tr. at 1166:10-1167:18 (Waggoner); 1435:13-1437:23 (Bashyam); Oracle Brief at 14-17.

OFCCP contends that Oracle’s 139 job titles at issue are “very granular” and the “large concentration” in the Software Developer 4 or Software Developer 5 job titles must mean “many employees doing similar work at a similar skill level for purposes of compensation.” Brief at 18. None of this speculation is supported by expert testimony or factual evidence. Oracle has hundreds of products. P-274 at ¶ 6. The relatively large number of employees who hold mid-level Software Developer job titles proves nothing more than they are the most common job titles in the data. It also demonstrates the opposite of OFCCP’s point: the more employees in a single job title at a large, complex, and diverse employer like Oracle, the more likely it is they are working on different products using different skills and duties. *See* Tr. at 1639:4-1640:15, 1658:3-1661:20 (Saad) (describing cluster analysis identifying differences in job requirements for different specific positions within SD4 job code), 1693:25-1695:1, 1811:3-20 (Saad) (different SD4 requisitions indicate “different types of work”); *accord* J-104 at ¶ 75 (“The requisitions make clear that even holding job title constant, different jobs draw on different sets of skills and experiences.”), n.89, Attachment D; J-103 at ¶¶ 47-61.

OFCCP even goes so far as to suggest the Court “not develop its own approach to determine which employees are similarly situated” because Oracle already has done so. Brief at 19. Yet Oracle has made clear since the compliance review that its job titles are *not* appropriate for similarly situating employees. Now, after years of litigation and a full trial on the merits, OFCCP attempts to abdicate entirely its *prima facie* burden and urges the Court to join it.

B. OFCCP’s Statistics Do Not Account for the Major Factors Impacting Pay

OFCCP’s statistical models also fail to account for all the major factors impacting pay, further rendering them unreliable and meaningless. Oracle Brief at 8. OFCCP declares that Dr.

Madden’s analysis “is on all fours with Oracle’s compensation system” because Dr. Madden’s education and experience controls “are the same factors” Oracle uses. Brief at 17. Nonsense. Oracle already has explained at length how these “education” and “experience” controls are manifestly deficient. Oracle Brief at 10-12. In OFCCP’s “on all fours” view, Oracle determines an employee’s pay based on her age, the highest level of education completed (which half the time the employee does not know), and the amount of time the employee has spent at Oracle. No evidence in the record supports such an assertion, which on its face is patently absurd.

OFCCP’s argument that Oracle either has decided that women, Asians and African-Americans have “inferior” work abilities, or it intentionally discriminates against these groups, is a forced and false dichotomy. It ignores the obvious third explanation that men and women of different races and genders come to Oracle with *different* skills, duties and responsibilities that command different pay, which is not discrimination by Oracle. Tr. at 1715:6-1717:1, 1743:10-1745:22 (Saad); *see also Am. AFSCME v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985); MSJ Order at 30 (Oracle “can only [be] held liable for *its* discrimination”) (emphasis in original).

Product Matters. Multiple witnesses confirmed that work on different products requires different skills, which in turn command different compensation. Tr. at 1188:2-16, 1197:14-25 (Waggoner); 1089:1-11 (Miranda); 1403:23-1404:19 (Webb); 1438:18-1439:12 (Bashyam); 1472:3-14 (Loaiza). OFCCP seeks to excuse Dr. Madden’s failure to account for product by asserting Oracle does not keep records of product assignments and product is not expressly listed as a factor for compensation.⁸ Brief at 20. In fact, several witnesses confirmed that Oracle cost centers, which Dr. Saad uses to proxy product, are organized around product groupings. Tr. at 1068:21-1069:9, 1076:4-1080:20, 1157:12-14 (Miranda); Tr. at 1466:5-1467:24, 1491:16-20

⁸ These are specious arguments. For one, OFCCP’s various quotes from Oracle’s compensation documents make clear that Oracle considers, among many other factors, “technical abilities” and “hot skill[s]” when setting compensation. Brief at 11. The evidence confirms these technical abilities and hot skills matter because they enable employees to work on certain products that are more valuable to Oracle than others. Tr. at 1188:2-16 (Waggoner) (hot skills, such as Cloud-related skills, command more in the market than other skills, such as PeopleSoft-related skills), 1197:14-25 (explaining relationship between product, skills, and pay for new hires), 1206:25-1207:13 (“[T]he product piece comes with the experience and the knowledge and the skill of what somebody brings.”).

(Loaiza); Tr. at 1016:9-15 (Shah). Thus, Dr. Saad appropriately uses organization (*i.e.*, cost center) to proxy differences in employee skills, as indicated by the products in which they specialize. Brief at FN37; Tr. at 1623:5-1624:23, 1695:2-22, 1697:12-1703:22 (Saad) (addressing Dr. Madden’s critiques). Dr. Madden, however, ignored this variable. Tr. at 749:9-750:14 (Madden). OFCCP and Dr. Madden propose no alternative way of proxying different employees’ skills, instead falling back on a model that does not even try. Put simply, Oracle pays employees according to their skills, duties, and experience, and those skills, duties, and experience are reflected in the product or product group on which they work.⁹

Performance Matters. Dr. Madden’s statistics ignore performance entirely. OFCCP attempts to excuse this fatal flaw by arguing Oracle does not apply performance systematically or objectively to compensation and its performance data is incomplete. Brief at 22. These arguments are unavailing. Indeed, there are numerous examples in the record of an employee’s performance greatly impacting pay. Tr. at 1206:2-10 (Waggoner); Tr. at 1515:6-20 (Adjei); D-128 (dive and save justification based on employee’s performance); J-134 (demonstrating proposed increase took effect). In fact, OFCCP’s own witnesses testified they received guidance that focal allocations should be distributed to the best performers. Tr. at 131:5-20 (Klagenberg) (guidance “strongly focused on merit” and “rising stars in the organization”).¹⁰ The fact that promotions are not automatically accompanied by a raise is irrelevant, and certainly does not demonstrate that performance doesn’t matter when it comes to pay. Brief at 22-23.

⁹ OFCCP’s attempt to demonstrate product does not impact pay because changing products generally does not result in an immediate pay change fails for several reasons. Brief at 20. First, a compensation change is not always warranted. Software developers may work within the same general type of product (*e.g.*, Cloud), but less commonly move between product lines. Tr. at 204:6-214:23 (Shah describing her various roles at Oracle, which all involved Cloud products). Second, Oracle has a separate business reason for not allowing pay changes for lateral transfers: it seeks to avoid managers poaching each other’s top talent. Tr. at 1089:20-1090:12 (Miranda). Moreover, if an employee’s lateral move to a new product warrants a pay increase, they eventually are addressed through the normal focal review process. *Id.*; *see also* Tr. 1212:4-9 (Waggoner) (lateral transfers may receive a pay increase after the transfer, as appropriate).

¹⁰ Relatedly, not all managers use performance ratings the same way when deciding compensation. Tr. at 1103:3-11 (Miranda) (performance appraisals may be conducted but are not mandatory); Tr. at 1549:2-20 (Chan) (considers performance ratings in making focal decisions). Managers who use performance appraisals would be expected to use them consistently, but other managers may not use the formal system.

Relevant Prior Experience Matters. As explained in Oracle’s brief, *multiple* witnesses and Oracle’s compensation documentation undisputedly confirm that relevant prior experience plainly matters when it comes to pay at Oracle. Oracle Brief at 12, 19. “Age” does not matter. In fact, it is an *unlawful* basis for distinguishing pay among employees. Because Dr. Madden’s models do not account for relevant prior experience, they do not prove Oracle discriminates.

C. OFCCP’s Statistics Do Not Account for Oracle’s Affirmative Defenses

In order to prove discrimination by Oracle, OFCCP also must account for Oracle’s affirmative defenses. Oracle Brief at 7-8. OFCCP plainly did not do so here. As explained above, Dr. Madden’s models do not account for performance, prior experience, sought-after skills, educational background, or any of the host of bona fide factors that witnesses confirmed legitimately explain pay differences among the employees at issue. Oracle Brief at 18-21. Additionally, the aggregated nature of her models, which lump together thousands of employees across hundreds of job titles and multiple career levels and consider only averages among them, “seriously compromise[s] the ability to draw inferences regarding relationships between gender and pay and race and pay.” Tr. at 1596:9-1598:15 (Saad); Oracle Brief at 21.

OFCCP claims Oracle failed to rebut Dr. Madden’s statistical models because Oracle did not provide its own model showing no disparities. Brief at 19. But case law confirms Oracle did not need to provide its own analysis. *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 464 (9th Cir. 1987) (rebuttal evidence can be limited to showing the plaintiffs’ statistics are flawed); *OFCCP v. Bank of Am.*, 2016 WL 2892921, at *8 (Apr. 21, 2016) (same). Moreover, Oracle *did* provide an alternative model showing no pattern of statistically significant disparities. As explained in Oracle’s brief, when Dr. Saad included additional variables (such as organization and patent awards) to proxy employees’ skills, duties, and experience, the disparities on which OFCCP relies disappear. Oracle Brief at 17.

V. OFCCP'S ASSIGNMENTS/STEERING CLAIM FAILS

OFCCP's fallback claim of job steering also is meritless. Spanning a scant two pages, OFCCP contends that because so-called similarly qualified employees are found in different career levels, Oracle must have deliberately steered women, Asians, or African Americans into the lower levels. As Oracle explained in its brief, this assertion is based wholly on unfounded assumptions and not evidence. Dr. Madden did not conduct an assignments analysis, *i.e.*, an analysis of where employees wanted to be and where they found themselves. Dr. Madden simply took her poor measures of "experience" and "education" to identify purportedly "similarly qualified" employees, and then assumed that any career differences were the result of discrimination. OFCCP's brief does not even attempt to address any of Dr. Saad's critiques, or any of Oracle's arguments, regarding the baseless nature of Dr. Madden's steering conclusions.

With respect to anecdotal evidence, OFCCP contends that Oracle's HR recruiters steer applicants to apply to specific positions, but the cited documents show the opposite – **managers** post the position and select the candidate. Brief at FN45. Further, the single example offered (Ms. Klagenberg) related to an internal transfer. It did not involve initial job placement or advancement. It also does not override the *overwhelming* evidence, including from OFCCP's *own witnesses*, confirming that employees choose the jobs to which they apply, and are hired into those jobs. Tr. at 167:19-24 (Ng); 212:19-213:15 (Shah); 1919:14-1920:8 (Chechik); Tr. at 1500:15-1501:21 (Adjei); Tr. at 1698:7-24 (Saad) ("[T]here's basically no difference here between the organization people applied to go to and the organization that they ended up in.").

Simply stated, OFCCP's steering claim fails statistically because OFCCP has not demonstrated a pattern or practice of discriminatory steering, fails mechanically because applicants (not Oracle) choose the jobs to which they apply, and fails factually because there was no supporting anecdotal evidence of discriminatory job steering. This claim must be dismissed.

VI. OFCCP FAILED TO PROVE A DISPARATE IMPACT BASED ON PRIOR PAY

OFCCP's final claim of disparate impact discrimination also fails both legally and factually. At most, the evidence shows that in *some* instances prior to October 2017, individual managers may have considered prior pay *among other factors* when setting starting pay. There was no evidence of any policy or widespread practice by Oracle mandating that its managers base starting pay on prior pay, let alone evidence that such a policy or practice caused unlawful pay disparities between similarly situated employees. Indeed, witnesses consistently testified to the contrary. *See, e.g.*, Tr. at 376:21-24 (Holman-Harries) (no knowledge of any policy that managers should request prior pay); Tr. at 1089:12-19, 1116:16-19 (Miranda) (no policy to request prior pay or to link a starting salary offer to prior pay); Tr. at 1198:8-19 (Waggoner) (Oracle has never had a policy of basing starting pay on prior pay); Tr. at 1412:6-11 (Webb) (never relied on prior pay and is not aware of that being done); *see also* Exs. D-143, D-148, D-149, D-150, D-152 (hiring justifications showing higher starting pay than prior pay); J-134 (demonstrating employees hired at the proposed salaries).

Ignoring the testimony and exhibits used at trial, OFCCP again relies on out-of-context quotes from documents that were not referenced, discussed or explained by anyone. *See, e.g.*, Brief at 13 and FN17-18 (citing P-71, P-72, P-74, P-176, P-188). Even where OFCCP cites actual testimony, its characterizations are not supported by the testimony cited. *See, e.g.*, PX24A at 55:15-25 (Waggoner depo) (prior salary "absolutely was not mandatory" and Ms. Waggoner has seen numerous forms without that value entered); *see also* P-20A at 60:4-10, 60:21-22, 61:1-8 (Kidder depo) (many candidates refused to disclose current compensation, and many managers proceeded with the offer without that information).¹¹

¹¹ OFCCP's cases also do not support this claim. OFCCP cites *Butler v. Home Depot, Inc.*, 1997 WL 605754, at *11 (N.D. Cal. Aug. 29, 1997), Brief at FN46, as an example of a court finding a *prima facie* case of adverse impact, but there the court merely passed the question to the jury and specifically declined finding for or against the parties' competing expert reports. Further, the defendant employer in *Butler* did not dispute that prior wages were a factor. And *McReynolds v. Sodexo Marriott Servs., Inc.*, 349 F. Supp. 2d 1, 27 (D.D.C. 2004) has nothing to do with prior pay. Neither of these cases is applicable.

With respect to the correlation between prior and starting pay, OFCCP asserts that “Oracle’s only response is that prior pay is a proxy for job-related skill.” Brief at 27. This is wrong. Oracle is not attempting to justify pay disparities by saying they were caused by prior pay. Rather, the evidence demonstrates there **was no practice** of basing starting pay on prior pay that would support a disparate impact claim.¹² Moreover, OFCCP’s brief ignores that both experts agree correlation does not prove causation, and the correlation identified by Dr. Madden would have been expected even if Oracle had no knowledge whatsoever of employees’ prior pay. Tr. at 912:3-913:17 (Madden); 1740:6-1741:9 (Saad).

VII. CONCLUSION

For each of the reasons described above, and as described more fully in Oracle’s post-trial brief, OFCCP failed to prove its claims. Accordingly, Oracle is entitled to a final administrative order in its favor, dismissal of the SAC with prejudice, and an award of costs.

June 12, 2020

Respectfully submitted,

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¹² For the same reason, OFCCP’s reliance on *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020), for the proposition that reliance on prior pay is not “job related” is misplaced. *Rizo* did not involve a disparate impact claim, and Oracle is not arguing that prior pay is bona fide factor other than sex explaining any pay differentials at issue. Further, there was no dispute in *Rizo* that the employer based starting pay on prior pay, and in fact it was the employer’s only justification for the pay disparity at issue. By contrast, here Oracle had no such policy, and has made no such argument.

PROOF OF SERVICE BY ELECTRONIC MAIL

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. My electronic service address is jkaddah@orrick.com.

On June 12, 2020, I served the interested parties in this action with the following document(s):
POST-HEARING REPLY BRIEF BY DEFENDANT ORACLE AMERICA, INC.

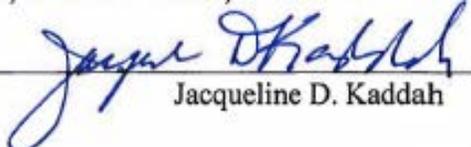
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 12, 2020, at San Francisco, California.



Jacqueline D. Kaddah