

**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. 3 TO EXCLUDE  
EVIDENCE RELATED TO  
ALLEGED POST-AUDIT  
VIOLATIONS**

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San Francisco, Ca**

**ORACLE'S MOTION IN LIMINE NO. 3 TO EXCLUDE EVIDENCE RELATED TO ALLEGED POST-  
AUDIT VIOLATIONS**

CASE NO. 2017-OFC-00006

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## **I. INTRODUCTION**

Defendant Oracle America, Inc. (“Oracle”) hereby moves for an order *in limine* to preclude OFCCP from introducing any evidence or argument relating to alleged discrimination occurring after the 2013-2014 audit period, *unless* OFCCP *first* is able to prove a violation during the audit period. Such post-audit evidence is not relevant to OFCCP’s claims unless and until OFCCP proves a violation within the audit period that properly serves as a basis for its so-called continuing violation claim. Unless OFCCP makes a preliminary showing of relevance by establishing a violation within the audit period, such post-audit evidence would also waste time, confuse the issues, and mislead the Court.

## **II. STATEMENT OF FACTS**

OFCCP’s compliance audit covered only January 1, 2013 through June 30, 2014. *See* Notice of Violation (“NOV”) at 1 (“the review period [was] from January 1, 2013 through June 30, 2014”).

Following the compliance review, OFCCP issued its NOV alleging that Oracle engaged in compensation discrimination violations from January 1, 2013 “and continuing thereafter[.]” NOV at 5. But OFCCP gave no indication as to what time period “thereafter” referred to. *Id.* Indeed, OFCCP only alleged that a violation was found during the 2013-2014 audit period. NOV, Attachment A, nn.1-4 (OFCCP’s compensation analysis was based on “one year of compensation data that included Oracle employees . . . [as of] January 1, 2014.”).

Although OFCCP’s initial Complaint alleged compensation discrimination violations from January 1, 2013 to the present, Compl. ¶ 10, that allegation lacked any factual support. OFCCP’s compensation violation charge was based solely on 2014 data, and it admitted that it had not analyzed compensation information for any other years. *See* Compl. ¶¶ 7-9.

After OFCCP obtained post-audit compensation and employment data through discovery in this litigation, OFCCP amended its Complaint to include that data. *See* Second Am. Compl.

(“SAC”) ¶ 11. The SAC alleges a continuing violation, contending that the challenged conduct began in 2013. *See id.* ¶¶ 12, 17.

The Court permitted OFCCP to allege a continuing violation in the SAC based on OFCCP’s representations that the “continuing violation” was connected to an initial violation found during the audit period. *See Order Granting Conditional Leave to File Second Amended Complaint*, at 10, Mar. 6, 2019 (“This is not a case where OFCCP is attempting to assert a violation premised entirely outside of the relevant review period”).

Since that time, OFCCP has made clear that it will seek to prove its case based primarily on statistical analyses by Dr. Janice Madden. *See OFCCP’s Opp. to Oracle America Inc.’s Motion to Compel OFCCP to Designate and Produce 30(b)(6) Witness*, at 4, June 12, 2019 (“OFCCP will not rely on the econometric model in the SAC to prove liability or damages at trial. Rather, OFCCP will rely on an entirely separate analysis, produced by an outside testifying expert or experts, which will be based on the information Oracle produced in discovery.”); *Position Statement in Response to Order Directing OFCCP to State Position with Respect to Oracle Managers*, at 3, Aug. 22, 2019 (identifying expert as Dr. Madden). OFCCP reaffirmed this position as recently as its *Motion for Summary Judgment* filed last month. *See Mem. of Points and Authorities in Support of OFCCP’s Mot. for S.J.*, at 15-21, Oct. 21, 2019 (arguing that statistical evidence alone is sufficient to establish liability). OFCCP has admitted that the managers for the job functions at issue did not engage in any wrongdoing, *see Position Statement in Response to Order Directing OFCCP to State Position with Respect to Oracle Managers*, at 8-9, Aug. 22, 2019, and has proffered no anecdotal evidence of systemic compensation discrimination.

### III. ARGUMENT

#### A. Evidence Relating to Alleged Violations After the Audit Period Is Irrelevant Unless and Until OFCCP Proves a Violation in the Audit Period That Is Shown To Be Continuing

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 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.

Here, any evidence regarding alleged discrimination occurring after June 30, 2014 is irrelevant to the claims at issue in this case and should be excluded unless and until OFCCP proves that a violation occurred—at least in part—during the audit period. OFCCP only has authority to prosecute alleged discrimination that occurred (at least in part) during the audit period. 41 C.F.R. § 60-1.26(a)(1) (OFCCP authorized to pursue violations based on “the results of a compliance evaluation.”).

Moreover, OFCCP may only seek relief for employees “identified during a complaint investigation or compliance evaluation.” *Id.* § 60-1.26(a)(2). Nowhere do the regulations allow OFCCP to pursue other claims. *See, e.g., OFCCP v. Analogic Corp.*, ALJ No. 2017-OFC-00001, at 6 n.6 (Mar. 22, 2019); *see also 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 investigation); *E.E.O.C. v. Dillard’s Inc.*, 2011 WL 2784516, at \*6 (S.D. Cal. July 14, 2011) (agency may seek relief only for unlawful conduct discovered in its investigation). Indeed, this Court recently noted that OFCCP may not initiate enforcement proceedings based on anything *except* the compliance review. Order Granting in Part and Denying in Part Def. Oracle America Inc.’s Second Mot. to Compel Pl. OFCCP to Produce Documents and Further Respond to Interrogs., at 6 n.6 (June 10, 2019).

Thus, evidence regarding alleged post-audit violations could only become relevant if OFCCP first demonstrates that Oracle discriminated during the audit period. *See* Omnibus Declaration of Warrington Parker in Support of Oracle’s Motions in Limine (“Parker Decl.”),

Ex. A (OFCCP Federal Contract Compliance Manual), at 293 (continuing violation exists only where “at least one of the actions occurred within the liability period” or “the contractor maintains a discriminatory policy or practice into the liability period”); *Analogic*, ALJ No. 2017-0FC-00001, at 6 n.6 (“[F]or OFCCP to establish a continuing violation, it must demonstrate a violation during the audit period”); *W. Ctr. For Journalism v. Cederquist*, 235 F.3d 1153, 1157 (9th Cir. 2000) (requiring “series of related acts, one or more of which falls within the limitations period”). Even OFCCP agrees that a continuing violation cannot exist without an initial violation during the audit period. Parker Decl., Ex. B (Tr. of June 27, 2017 *Analogic* H’rg) 65:7-20 (“[If] there was no violation during that [audit] period . . . there is no continuing violation.”).

Indeed, courts have frequently declined to consider evidence of a claimed continuing violation unless and until the plaintiff establishes a *prima facie* case of an initial violation during the requisite time period. *See, e.g., Foster v. State*, 23 F. App’x 731, 733 (9th Cir. 2001) (In order “to establish a continuing violation, one must [first] demonstrate an overt or discrete anchoring event of discrimination occurring within the limitations period.”); *Lockridge v. The Univ. Of Maine Sys.*, 597 F.3d 464, 474 (1st Cir. 2010) (plaintiff “c[ould] []not avail herself of the continuing violation doctrine” where she failed to “establish that a discriminatory ‘anchoring act’ occurred within the limitations period”); *Woodard v. Lehman*, 717 F.2d 909, 915 (4th Cir. 1983) (“It is *only* where an actual violation has occurred within that requisite time period that under any possible circumstances the theory of continuing violation is sustainable.” (emphasis in original)); *Levine-Diaz v. Humana Health Care*, 990 F. Supp. 2d 133, 151 (D.P.R. 2014) (where plaintiff failed to establish a violation during the applicable time period, she could not show a continuing violation or otherwise rely on “untimely events” to resuscitate her claim); *Duckwall-Galvan v. Indiana Dep’t of Env’tl. Mgmt.*, 1999 WL 166191, at \*14 (S.D. Ind. Mar. 26, 1999) (declining to consider plaintiff’s continuing violation theory or allegations that fell outside the applicable time period where she had shown “no evidence of [an] anchor [violation] within the limitations period”); *Statzer v. Town of Lebanon, Virginia*, 2001 WL 710103, at \*4 (W.D. Va.

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June 4, 2001) (“[T]he continuing violation doctrine does not apply because . . . the plaintiff has not established that there was a violation within the statutory time period to ‘anchor’ the continuing violation pattern.”); *Recometa v. Glaxo, Inc.*, 1996 WL 296644, at \*9 n.5 (N.D. Ill. May 31, 1996) (“To meet the requirements of the continuing violation theory, there must be at least one illegal ‘anchor’ act that took place within the relevant time periods before acts outside of that period can be the basis for a claim.”).

Here, OFCCP has not yet established any violation during the audit period, much less a violation consisting of a continuing course of conduct. Because OFCCP has not yet proven that an initial violation occurred *during* the audit period, the question of a continuing violation is not yet relevant. Thus, the court should delay consideration of evidence about what occurred *outside* the audit period until, if ever, it becomes relevant—that is until, if ever, an initial violation is proven to have occurred during the audit period.<sup>1</sup>

**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**

Even assuming evidence relating to alleged violations after June 30, 2014 is relevant, it is still inadmissible because whatever minor probative value it might have is substantially outweighed by the danger that it will confuse the issues, waste a significant amount of time, and mislead the Court. 29 C.F.R. § 18.403. Allowing OFCCP to introduce evidence of alleged violations outside the audit period would require the Court to take unnecessary and time-consuming detours into the specifics of that evidence. *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

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<sup>1</sup> This includes Dr. Madden’s aggregated data analyses from 2013-2018. Such data analyses do not demonstrate and may not be relied upon to demonstrate a violation within the audit period. Indeed, when data has been aggregated as such, outliers might skew the data (making it impossible to ascertain when a violation actually occurred), or statistically insignificant findings might become so inflated as to become statistically significant upon aggregation (despite a lack of statistical significance during the audit period).

poses a substantial threat of confusing the issues before this Court because it would expand the evidence significantly beyond simply the audit window. *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. Finally, the time involved in addressing these issues at the hearing may mislead the Court “into believing the issue to be of major importance and accordingly into attaching too much significance to it in its determination of the factual issues involved.” Reporter’s Note to 29 C.F.R. § 18.403.

**IV. CONCLUSION**

For the foregoing reasons, Oracle respectfully requests that the Court preclude OFCCP from offering any evidence of alleged discrimination occurring after June 30, 2014 unless and until OFCCP proves a violation during the audit period that may properly serve as the basis for a continuing violation.

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Respectfully submitted,

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