

**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. 4 RE: OFCCP'S
POSITION STATEMENT ON
ORACLE MANAGERS**

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**Office of Administrative Law Judges
San Francisco, Ca**

**ORACLE'S MOTION IN LIMINE NO. 4 RE OFCCP'S POSITION STATEMENT ON ORACLE
MANAGERS**

CASE NO. 2017-OFC-00006

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I. INTRODUCTION

Defendant Oracle America, Inc. (“Oracle”) hereby moves for an order *in limine* excluding any evidence or arguments at hearing that Oracle managers, except “top leadership” and “Human Resources managers,” have engaged in any wrongdoing, including, but not limited to, any suggestion that a manager is biased against or has engaged in any discriminatory act against women, Asian-American or African-American individuals.

This evidence is inadmissible as it is inconsistent with OFCCP’s letter sent to Oracle managers stating that it was not accusing them of any wrongdoing, and OFCCP’s filed Position Statement with Respect to Oracle Managers. *See* OFCCP’s Response to Order Directing OFCCP to State Position with Respect to Oracle Managers (Aug. 22, 2019) (“Position Statement”). In this regard, because OFCCP’s stated position was ordered by the Court pursuant to 41 C.F.R. § 60-30.15(b), the ALJ may prohibit OFCCP from introducing evidence contradicting such a statement. 41 C.F.R. § 60-30.15(j). In addition, as a matter of case law, a party may not take one position and later contradict it.

Moreover, the evidence of wrongdoing is irrelevant. Any evidence at the hearing that Oracle’s managers—other than top management and HR managers—have engaged in any wrongdoing, including, but not limited to, any suggestion that a manager is biased against or has engaged in any discriminatory act against women, Asian-American or African-American individuals would not matter. In light of OFCCP’s Position Statement, such acts could only be relevant if somehow attributed to top management or HR managers. Yet neither top management nor HR managers can be held liable for acts that are not wrongful in the first instance. An act committed by a manager cannot become wrongful when relied on, approved or acquiesced in by another and such acts therefore lose any possible probative value.

II. BACKGROUND

As this Court knows, OFCCP sent a letter to Oracle managers soliciting witnesses assuring them that OFCCP was not accusing them of any wrongdoing. Oracle subsequently propounded Requests for Admission on OFCCP, leading the Court to request a position

statement from OFCCP pursuant to 41 C.F.R. § 60-30.15(b), requesting that OFCCP identify whether and which Oracle managers it was accusing of wrongdoing. *See* Order Denying Defendant Oracle’s Motion to Compel Plaintiff OFCCP’s Further Response to Requests for Admission and Order Directing OFCCP to State Position with Respect to Oracle Managers (Aug. 8, 2019) (“the Order”).

In its Position Statement, OFCCP stated that its allegations are based on conduct “at the highest levels” by “Oracle’s top management,” “Legal”¹ and “Human Resources Managers,” not other managers. Position Statement 2, nn. 1, 7, 9. OFCCP defined “top managers” to mean those managers in

- Oracle’s “Business Practice” job function such as high-level executives Larry Ellison, Safra Catz, Mark Hurd, and Thomas Kurian (*id.* at 2, n. 1); and
- “Human Resources Managers,” managers in Oracle’s “Human Resources” job function, that is, “its compliance group overseeing OFCCP compliance and Oracle’s Affirmative Action Program, Oracle’s Compensation Group, HR Business Partners who advised managers and worked with Oracle leadership regarding compensation issues, and handled discrimination complaints.” *Id.* at 2, n. 2.²

OFCCP explained its narrow allegations: “statistical evidence does not require identifying any specific act of wrongdoing by any specific managers,” and to the extent that

¹ OFCCP is unclear and inconsistent in its Position Statement as to whether it is accusing managers in “Legal” of any wrongdoing. In some places, OFCCP suggests that “Legal” provided advice to “top management” but appears otherwise excluded from that “top management” definition. *See* Position Statement 2, n. 1 (“Managers in Legal advise top leadership and Human Resources on issues related to discrimination and OFCCP compliance.”). However, in other places in the Position Statement, OFCCP names those in the “Legal” job function as “wrongdoers.” *Compare id.* at 9. Oracle reserves the right to object to the calling of any legal witnesses at the hearing on grounds that include, but are not limited to, attorney-client privilege, attorney work product, and relevance. *See* 29 C.F.R. §§ 18.402, 18.501.

² Despite the ALJ’s clear instruction that OFCCP must state “without equivocation, which categories of Oracle managers it is accusing of wrongdoing” (Order at 9), OFCCP obliquely references Oracle’s “Board of Directors” twice in its Position Statement hinting but refusing to state whether they are accused of wrongdoing. Position Statement at 2, n. 1 (“Some of the individuals in the Business Practice job function are also members of Oracle’s Board of Directors”); *id.* at 9 (“Oracle’s Board of Directors also bears responsibility.”).

OFCCP offers evidence of policies, practices or anecdotal evidence, its case would be “about the centralized decision-making by Oracle’s top leadership and Human Resources managers” not low-level managers. *Id.* at 3, 7. As OFCCP has asserted in its Position Statement that it is not accusing any lower level managers of any wrongdoing, it follows that OFCCP should not be permitted to introduce any evidence that those managers were allegedly biased or discriminated against an Oracle employee.

III. ARGUMENT

A. OFCCP Should Be Precluded From Offering Any Evidence at the Hearing That Oracle’s Managers—Other Than Top Management and HR Managers—Have Engaged In Any Wrongdoing

OFCCP should be precluded from offering any evidence at the hearing that Oracle’s managers—other than top management—have engaged in any wrongdoing or are biased with respect to claims asserted in Second Amended Complaint. This includes evidence that any manager is biased against or has discriminated against women, Asian-American or African-American individuals. Such evidence would be contrary to OFCCP’s prior Position Statement and its representations in discovery. It should be excluded. 41 C.F.R. § 60-30.15(j) (ALJ may “[i]mpose appropriate sanctions against any party or person failing to obey an order under these rules” which may include “[r]efusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence”); *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (parties may not “gain[] an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.”); *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001) (party was estopped from taking a position contrary to a previous one); *Republic Tobacco, L.P. v. N. Atl. Trading Co.*, 254 F. Supp. 2d 985, 993 (N.D. Ill. 2002) (party was precluded from taking a position in litigation that it had “express[ly] renunciat[ed]” in discovery); *see also* Fed. R. Civ. P. 37(b)(2)(B) (authorizing the court to prohibit a party who fails to obey a discovery order from introducing designated matters in evidence); *United States v. Sumitomo Marine &*

Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980) (“Preclusionary orders ensure that a party will not be able to profit from its own failure to comply.”).

Additionally, the Position Statement served the purposes of discovery. And to allow evidence that contradicts the statement would thwart the very reason parties are allowed discovery. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (holding the principal purpose of the federal discovery rules is to remove surprise at trial by allowing the parties to obtain the fullest possible knowledge of the issues and facts before trial); *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998) (“Generally, the purpose of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute.”); *Clark v. California*, 2010 WL 11636686, at *1 (N.D. Cal. Mar. 10, 2010) (adherence to pretrial discovery procedures is vital in order to “make litigation less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent possible”) (internal quotation marks omitted).

B. “Wrongdoing” By Anyone Other Than Top Leadership and Human Resource Managers Is Irrelevant

Given the Position Statement, such evidence 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 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.

While OFCCP may attempt to introduce evidence that managers made biased or discriminatory decisions that were later approved by more senior management, such evidence could not be used to prove discrimination. OFCCP conducted an audit of Oracle. It has made the determination that no manager engaged in wrongdoing, discrimination, or bias other than top leadership and human resource managers. Thus, the acts of these managers even if ratified by top leadership and human resource managers cannot be wrongful. For top leadership and human

resource managers to be liable for the acts of others, the acts must have been wrongful in the first instance. *See Cejas v. Paramo*, 2017 WL 1166288, at *10 (S.D. Cal. Mar. 28), *report and recommendation adopted*, 2017 WL 3822013 (S.D. Cal. Sept. 1, 2017) (plaintiff could not state a claim against a warden as there was no underlying violation committed by warden’s subordinate supervisors); *see also McCormack v. City & Cty. of Honolulu*, 2014 WL 692867, at *3 (D. Haw. Feb. 20, 2014), *aff’d*, 683 F. App’x 649 (9th Cir. 2017) (holding that if there is no underlying wrong, then the claim that a manager is responsible must be dismissed as well); *see also Carillo v. Nationwide Mut. Fire Ins. Co.*, 2007 WL 1831072, at *2 (N.D. Cal. June 25, 2007) (“[F]or liability to attach to [a corporate defendant] under a respondeat superior or vicarious liability theory, an underlying tort must exist.”). Therefore, because OFCCP has clearly stated that Oracle managers have committed no wrongdoing, OFCCP should not be permitted to introduce any evidence of those managers’ alleged bias or discrimination to hold Oracle or its top management liable for discrimination.

C. **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**

This evidence is also inadmissible because any minor probative value it might have is substantially outweighed by the fact that it will waste a significant amount of time. 29 C.F.R. § 18.403. Allowing OFCCP to introduce evidence of managerial misconduct—after OFCCP had asserted it would not do so—would require the Court to take unnecessary and time-consuming detours to delve into the specifics of that evidence. The minimal probative value of that 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.

IV. **CONCLUSION**

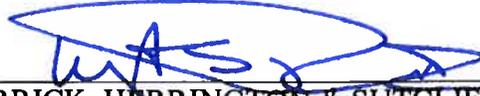
For the foregoing reasons, Oracle respectfully requests that the Court exclude any evidence or arguments at hearing that Oracle managers have engaged in any wrongdoing,

including, but not limited to, any suggestion that a manager is biased against or has engaged in any discriminatory act against women, Asian-American or African-American individuals.

Respectfully submitted,

November 15, 2019

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