

**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. 10 TO EXCLUDE  
EVIDENCE OF DISPARATE  
IMPACT**

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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 argument or evidence in support of a disparate impact claim by OFCCP. OFCCP has not alleged a disparate impact claim. OFCCP’s Notice of Violation (“NOV”), Show Cause Notice (“SCN”), and its three Complaints do not allege a disparate impact claim, much less identify the specific policies or practices at issue.

In fact, OFCCP all but admits that it has not alleged a disparate impact claim. In Oracle’s Motion for Summary Judgment, Oracle argued that OFCCP had not alleged a disparate impact claim. Oracle argued that OFCCP had not alleged a policy or practice and established that that policy or practice gives rise to a statistically cognizable claim for disparate impact.

In response, OFCCP argued only that a disparate impact framework would be appropriate “*should* [Oracle] attempt to provide actual explanations for the disparities . . . .” OFCCP’s Opposition to Oracle’s Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment (“Opp. to MSJ”) at 15 (emphasis added). Based on this response, it is clear that Oracle is correct. The claim of disparate impact was not affirmatively raised by OFCCP.

But in addition, OFCCP does not get the chance to raise a disparate impact claim in this case. Oracle is entitled to challenge the statistics that underlie OFCCP’s claim of disparate treatment. If those statistics cannot pass muster in terms of establishing a valid disparity, then there is no opportunity for OFCCP to move to a disparate impact claim. In those cases suggesting that a rebuttal of a disparate treatment claim can give rise to a disparate impact claim, the statistical analysis has been considered sound. All that has been resolved is that the statistics—while sound—do not establish intentional discrimination.

## **II. ARGUMENT**

### **A. Disparate Impact Evidence Is Irrelevant Because It Was Not Pleaded**

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.

Any evidence of disparate impact should be excluded because OFCCP did not give sufficient notice of its disparate impact claim in the NOV, SCN, Complaint, First Amended Complaint or Second Amended Complaint. See 41 C.F.R. §§ 60-4.8, 60-2.2(c)(1). None of these documents allege a disparate impact claim. See, e.g., *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 641 (3d Cir. 1993) (finding that allegations of disparate impact, which were not plead in the complaint and which plaintiff raised after discovery, were prejudicial and noting that plaintiff should have moved to amend his pleadings during discovery to add a disparate impact claim); see also *Armbruster v. Unisys Corp.*, 1996 WL 55659, at \*3 (E.D. Pa. Feb. 7, 1996) (dismissing plaintiff’s disparate impact claim because it was not mentioned in the allegations stated in the complaint); *Verney v. Dodaro*, 872 F. Supp. 188, 193 (M.D. Pa. 1995) (holding that plaintiff’s failure to assert disparate impact claim in her complaint precluded later assertion of that claim).

As such it is entirely appropriate—and correct—to exclude any evidence of a disparate impact claim as irrelevant. See *Marines v. UPS Ground Freight, Inc.*, 2012 WL 12951433, at \*1-2 (W.D. Tex. July 13, 2012) (excluding evidence of a negligent maintenance claim that was not plead in the complaint).

**B. The Failure to Identify a Specific Practice Also Warrants Exclusion of Evidence**

Under a disparate impact theory, a plaintiff can establish discrimination by showing that a “facially neutral employment practice, not justified by business necessity, has a disproportionately adverse impact” on a protected class. See, e.g., *Am. Fed’n of State, Cty., & Mun. Emps., AFL-CIO (AFSCME) v. State of Wash.*, 770 F.2d 1401, 1405 (9th Cir. 1985). Unlike a disparate treatment theory, disparate impact does not require a showing of intentional discrimination on the part of the employer. Instead, a purported disparate impact is based on the

“rationale that where a practice is **specific and focused** we can address whether it is a pretext for discrimination in light of the employer’s explanation for the practice.” *Id.* (emphasis added).

Consistent with this rationale, a plaintiff alleging discrimination under a disparate impact theory must identify a “specific, clearly delineated employment practice” that it claims causes the disparate impact. *Id.*; *see also*, 42 U.S.C. § 2000e-2(k)(1)(A)(i). The plaintiff must demonstrate causation by producing evidence sufficient to show the identified practice caused a disparate impact on a protected group. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). A plaintiff may not rely on statistical disparities untethered to a specific policy to show disparate impact. *Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002) (plaintiffs must identify the “particular element or practice within the process that causes an adverse impact”). Nor can a plaintiff rely on bottom-line compensation and demographic data to prove a disparate impact theory. *OFCCP v. Analogic Corp.*, ALJ No.: 2017-OFC-00001 at 32-35 (Mar. 22, 2019); *Bennett v. Nucor Corp.*, 656 F.3d 802, 818 (8th Cir. 2011) (“a bare assertion of racial imbalances in the workforce is not enough to establish a Title VII disparate impact claim.”). Similarly, a plaintiff cannot mix together policies and practices and claim that the combined effect was a disparate impact. *See Watson*, 487 U.S. at 994 (where employer evaluates employees using subjective and objective criteria, plaintiff must isolate and identify the specific practice(s) allegedly responsible for statistical disparities); *Nucor*, 656 F.3d at 815.

OFCCP has not identified a specific policy or practice. It is therefore correct to exclude any evidence or argument of disparate impact. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000) (denying plaintiffs’ request for leave to amend because “[a]t no time prior to summary judgment, did [plaintiffs] identify *which facially neutral Quaker employment practice they challenged as having a discriminatory impact. . .*”); *see also Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1284 (5th Cir. 1994) (affirming district court’s rejection of disparate impact claim where plaintiffs failed to identify a specific policy that caused the alleged

racial disparity).<sup>1</sup>

To compound the issue, during deposition, OFCCP identified consideration of prior pay and assigning as two policies or practices that it claimed may have resulted in a disparate impact—all while keeping its 75-plus page interrogatory response. *See* Parker Decl., Ex. E (Sean Ratliff 30b6 Depo Excerpt) at 12:9-16:15. However, OFCCP cannot even prove the existence of these policies, let alone that they caused a disparate impact. Oracle never had a practice of relying on prior pay. *See* Declaration of Connell in Supp. of Oracle’s MSJ, Ex. C (Waggoner PMK 7/19 Dep. 203:20-204:7); Ousterhout Decl. in Supp. of Oracle’s MSJ, ¶ 16; Yakkundi Decl. in Supp. of Oracle’s MSJ, ¶ 17; Shah Decl. in Supp. of Oracle’s MSJ, ¶ 13; Talluri Decl. in Supp. of Oracle’s MSJ, ¶ 14. Nor has OFCCP offered any evidence that consideration of prior pay caused the statistical results it contends show discrimination. Similarly, OFCCP has not presented sufficient evidence to establish that Oracle had a practice of discriminatory assignments, let alone that it was a consistent practice for purposes of sustaining a disparate impact claim. *See, e.g., Prince*, 435 F. Supp. 2d at 27 (challenged practice must be “generally applicable.”). In fact, the data demonstrates the opposite of OFCCP’s contention: the majority of applicants were hired into the jobs to which they applied. *See* Declaration of Connell in Supp. of Oracle’s MSJ, Ex. M (Saad Report, ¶¶ 150-156), Ex. O (Saad Rebuttal, ¶¶ 57, 65-

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<sup>1</sup> In discovery, Oracle propounded an interrogatory asking OFCCP to identify the policies or practices that OFCCP contends had a disparate impact. *See* Omnibus Declaration of Warrington Parker in Support of Oracle’s Motions in Limine (“Parker Decl.”), Ex. H (4/9/19 Response to ROGS Set 2) at Interrogatory No. 50 (“If YOU contend that ANY of the discrimination alleged in the Second Amended Complaint is based upon a theory of disparate impact identify the policies, practices, procedures, and tests that YOU contend operate to have a disparate impact.”). OFCCP responded to this interrogatory with a vague and incomplete list of non-specific categories of practices and policies. *Id.* at 58-62. Oracle moved to compel more specific responses, and the Court granted Oracle’s motion. June 10 Order at 39-41. OFCCP’s supplemental response to Interrogatory No. 50 was over 75 pages. Parker Decl., Ex. C (7/5/19 Rog 50 Excerpt). It includes five and a half pages of single-spaced “policies” and “practices,” hundreds of documents identified only by Bates number, links to articles that are of no relevance to this case, and pages of text reciting categories of alleged facts that were copied from other interrogatory responses. Nowhere in this rambling information did OFCCP identify the “specific, clearly delineated employment practice” or policy that it alleges caused a disparate impact. *AFSCME*, 770 F.2d at 1405. OFCCP has also suggested it may attempt to rely on a purported practice of basing starting pay on prior pay. This fails because Oracle has never had any such practice, nor has OFCCP proffered evidence that consideration of prior pay caused the statistical results it claims show discrimination. Likewise, OFCCP has suggested it may attempt to rely on a purported practice of discriminatory job assignments. This claim also fails. OFCCP has not presented evidence of such a practice. It also has no evidence that such a practice was “generally applicable,” as required to succeed on a disparate impact claim. *Prince v. Rice*, 453 F. Supp. 2d 14, 27 (D.D.C. 2006).

66). Finally, these very issues were raised in Oracles summary judgment motion. OFCCP made no attempt to respond to these specific issues regarding the claimed policies or practices relating to its disparate impact claim.

Allowing OFCCP to introduce argument and evidence of a purported disparate impact after failing to produce specific evidence supporting such theory during discovery would be highly prejudicial. For example, courts routinely reject as prejudicial plaintiffs' attempts to add disparate impact claims late in a case.

The same prejudice exists here.

**C. Evidence of Disparate Impact Is Not Relevant to OFCCP's Disparate Treatment Claim**

Nor is evidence of Oracle's practices relevant to OFCCP's claim based on a disparate treatment theory of discrimination. "Disparate treatment and disparate impact cases differ fundamentally." *Lumsden v. Campbell Taggart Baking Co.*, 1997 WL 610059, at \*3 (N.D. Ill. Sept. 26, 1997). Unlike a disparate impact theory, disparate treatment "hinges upon proof of discriminatory intent." *AFSCME*, 770 F.2d at 1406; *see also United States v. City of New York*, 717 F.3d 72, 87 (2d Cir. 2013) (disparate treatment requires evidence that the company "acted with the deliberate purpose and intent of discrimination against an entire class."); *OFCCP v. Honeywell*, No. 77-OFCCP-3, 1994 WL 68485 (Mar. 2, 1994). Evidence of neutral policies and practices, such as the ones that underlie disparate impact claims, cannot support a claim of intentional discrimination. *See Cardenas v. AT&T Corp.*, 245 F.3d 994, 1000 (8th Cir. 2001) ("[A]llegations that an employer's general practices and procedures have an adverse effect on minority promotions, though highly relevant to disparate impact claims, cannot support a claim of discrimination based on a disparate treatment theory."). Evidence of, or argument regarding, Oracle's neutral policies or practices in connection with any allegation of disparate impact should therefore be excluded as irrelevant.

**D. OFCCP Does Not Get to Convert Its Disparate Treatment Claim Into One of Disparate Impact at Trial**

OFCCP has cited to *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), and *Palmer v.*

*Schultz*, 815 F.2d 84, (D.C. Cir. 1987), for the proposition that a disparate treatment case can be converted to a disparate impact case *if* Oracle “attempt[s] to provide actual explanations for the disparities . . . .” OFCCP Opp. to MSJ at 15. Then, “OFCCP is entitled to test whether the ‘practices that have an adverse impact on the basis of sex’ and race are ‘job-related and consistent with business necessity.’” *Id.* However, Oracle is not rebutting “an allegation of discriminatory intent by claiming that a facially neutral selection criterion caused a disparity in selections.” *Palmer*, 815 F.2d at 114 n.21.<sup>2</sup>

Additionally, for this to happen, OFCCP must first have presented valid statistical analyses to establish a *prima facie* case. Both *Segar* and *Palmer* signal that this is so by noting that this issue arises when an employer seeks to rebut a pattern or practice claim by articulating a legitimate nondiscriminatory explanation for the disparity. 738 F.2d at 1270; 815 F.2d at 115 n. 21. And this would only happen if the statistical evidence is legally sound such that it can be relied on as establishing a disparity. *Segar*, 738 F.2d at 1271 (“An employer will face the justificatory burden only after a plaintiff class has shown a disparity in the positions of members of the class and the majority group who appear to be comparably qualified; if plaintiffs fail to make their *prima facie* case, the employer never faces this justificatory burden.”). OFCCP’s statistics are flawed. OFCCP does not make out a valid claim for pattern or practice discrimination. The predicates on which OFCCP relies, therefore, to state that there is some lurking claim of disparate impact discrimination do not exist.

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<sup>2</sup> *Segar* and *Palmer* are also distinguishable because both are hiring cases in which the plaintiffs actually alleged a disparate impact claim.

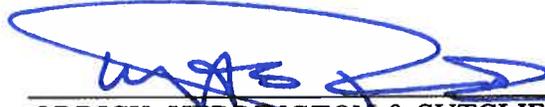
**III. CONCLUSION**

For the foregoing reasons, Oracle respectfully requests that the Court exclude argument and evidence related to any potential claim of disparate impact by OFCCP.

November 15, 2019

Respectfully submitted,

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