

**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. 13 FOR AN ORDER
BIFURCATING THE HEARING
AND EXCLUDING ANY
EVIDENCE OR ARGUMENT OF
DAMAGES FROM THE FIRST
PHASE REGARDING LIABILITY**

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San Francisco, Ca

ORACLE'S MOTION IN LIMINE NO. 13 FOR ORDER BIFURCATING THE HEARING

CASE NO. 2017-OFC-00006

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT.....	1
A. Pattern or Practice Cases Are Routinely Bifurcated Under <i>Teamsters</i>	1
B. Bifurcation Is Necessary Because a Formulaic Approach to Any Backpay Deprives Oracle of Its Right to Individualized Determinations and Risks Unfairly Compensating Any Recovering Employees.....	2
III. CONCLUSION.....	4

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Brown v. Nucor Corp.</i> , 576 F.3d 149 (4th Cir. 2009)	2
<i>OFCCP v. Bank of Am.</i> , 2016 WL 2892921 (DOL ARB Apr. 21, 2016)	3
<i>E.E.O.C. v. Kettler Bros.</i> , No. 87-3069, 1988 WL 41053 (4th Cir. Apr. 27 1988)	1
<i>E.E.O.C. v. Mavis Discount Tire, Inc.</i> , 129 F. Supp. 3d 90 (S.D.N.Y. 2015)	2
<i>E.E.O.C. v. Monarch Mach. Tool Co.</i> , 737 F.2d 1444 (6th Cir. 1980)	2
<i>E.E.O.C. v. Sterling Jewelers Inc.</i> , 788 F. Supp. 2d 83 (W.D.N.Y. 2011)	2
<i>Hilao v. Estate of Marcos</i> , 103 F.3d 767 (9th Cir. 1996)	3
<i>Hill v. W. Elec. Co.</i> , 672 F.2d 381 (4th Cir. 1982)	2
<i>Int'l Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977)	1, 2, 3
<i>Pettway v. American Cast Iron Pipe Co.</i> , 494 F.2d 211 (5th Cir. 1974)	3
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011)	2, 3, 4
<i>Washington Cty. v. Gunther</i> , 452 U.S. 161 (1981)	1

I. INTRODUCTION

OFCCP has made clear that it intends to try this case under the standards approved by the Supreme Court in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). OFCCP's Aug. 22, 2019 Position Statement, p. 2. Accordingly, any determination of damages must be bifurcated from a determination of liability, as *Teamsters* requires.

Defendant Oracle America, Inc. ("Oracle") therefore moves for an order *in limine* bifurcating the hearing of this matter into two phases. In the first phase, the Court must determine whether OFCCP can satisfy its high burden of proving Oracle engaged in a pattern or practice of disparate treatment compensation discrimination.¹ During this phase, any evidence or argument regarding damages should be excluded. Only if OFCCP satisfies its burden in Stage I would the proceedings continue to the second stage (to be scheduled at a later point in time), during which the Court must determine what damages, if any, should be awarded. Not only does *Teamsters* require this framework, it is necessary to prevent windfall recoveries by individual employees and to protect Oracle's due process right to individualized determinations of any backpay it might owe.

II. ARGUMENT

A. Pattern or Practice Cases Are Routinely Bifurcated Under *Teamsters*

The requirement for bifurcation in pattern or practice cases derives directly from *Teamsters*. There, the Court described an "initial, 'liability' stage," in which the government has the significant burden "to establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336, 360. The Court went on to state that "[w]hen the Government seeks individual relief for the victims of the [alleged] discriminatory practice, a district court must

¹ As explained in detail in Oracle's pending Motion for Summary Judgment, any determination of whether OFCCP has met its burden of demonstrating liability during Phase 1 must also take into account Oracle's affirmative defenses pursuant to the Bennett Amendment to Title VII, as those defenses go to liability. *See, e.g., Teamsters*, 431 U.S. at 360-61, n.46 (employer may raise legitimate, nondiscriminatory explanation for pay disparities during Stage I); *Washington Cty. v. Gunther*, 452 U.S. 161, 167 (1981); *E.E.O.C. v. Kettler Bros.*, No. 87-3069, 1988 WL 41053, at *1 (4th Cir. Apr. 27, 1988) (employer may rebut *prima facie* case with EPA affirmative defenses).

usually conduct *additional proceedings after the liability phase* of the trial to determine the scope of individual relief.” *Id.* at 361 (emphasis added); accord *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366-67 (2011).

Based on *Teamsters*, “[b]ifurcation of Title VII class action proceedings for hearings on liability and damages is now commonplace.” *Brown v. Nucor Corp.*, 576 F.3d 149, 159 (4th Cir. 2009) (quoting *Hill v. W. Elec. Co.*, 672 F.2d 381, 387 (4th Cir. 1982)); see also *E.E.O.C. v. Monarch Mach. Tool Co.*, 737 F.2d 1444, 1449 (6th Cir. 1980); *E.E.O.C. v. Mavis Discount Tire, Inc.*, 129 F. Supp. 3d 90, 119 (S.D.N.Y. 2015); *E.E.O.C. v. Sterling Jewelers Inc.*, 788 F. Supp. 2d 83, 86 (W.D.N.Y. 2011).

This framework applies here and makes clear that bifurcation is warranted.

B. Bifurcation Is Necessary Because a Formulaic Approach to Any Backpay Deprives Oracle of Its Right to Individualized Determinations and Risks Unfairly Compensating Any Recovering Employees

In the event OFCCP can satisfy its high burden of proving systemic, pattern or practice discrimination by Oracle, it seeks relief in the form of “lost compensation, interest and all other benefits of employment” for “the affected classes.” Second Amended Complaint (“SAC”), Prayer for Relief (d). Bifurcation is further warranted because a class-wide, formulaic approach to calculating any backpay that Oracle might owe—the only approach available if the hearing is *not* bifurcated—is wholly inappropriate given the law and the facts of this case.

First, in the event OFCCP prevails at Stage I, as a matter of law Oracle is entitled to individualized determinations of any employees’ entitlement to backpay. *Teamsters* itself is clear that the Stage II inquiry is individualized. 431 U.S. at 361. More recently, the Supreme Court rejected a “Trial by Formula” approach for determining individual employees’ eligibility to backpay under the *Teamsters* framework. *Wal-Mart*, 564 U.S. at 348, 367 (rejecting proposal to determine damages in Stage II by allowing Wal-Mart to defend against randomly selected “sample cases” that would supposedly “reveal[] the approximate percentage of class members whose unequal pay or nonpromotion was due to something other than gender discrimination”).

The Court left no doubt that the employer has a due process right “to *individualized determinations of each employee’s* eligibility for backpay.”² *Id.* at 366 (emphasis added).

The facts of this case further dictate that an individualized approach is appropriate. Specifically, OFCCP’s statistical models reflect mere average differences across groups of employees in the aggregate. *See* Omnibus Declaration of Warrington Parker in Support of Oracle’s Motions in Limine, Ex. I (Madden Dep.) 246:2-7 (“Q: Do your analyses furnish evidence that every woman in the population you studied was paid less than some men performing substantially similar work? A. No.”) (objection omitted); Madden Rpt. at 3-4 (reporting findings for women, Asians, and African-Americans “on average”), 10 (describing statistical analysis as “comparing the average difference in compensation by race (or gender)”). Thus, if applied formulaically to the actual population, some employees in the impacted classes—women, Asians, and African-Americans—will receive back pay simply by virtue of being class members, even though their actual compensation is well above where it is expected to be (and above what OFCCP’s own statistical models indicate they “should be” paid, based on the factors included in those models). These class members will receive a windfall. And, in the event other class members are underpaid (according to OFCCP’s models), they might *still* not be “made whole” under a formulaic approach, as the models do not account for these employees’ particular circumstances. In short, because the models provide averages, they do nothing to ensure that employees whose experiences are outside of that average will be correctly compensated.

Oracle anticipates that OFCCP will argue that a damages phase is unnecessary, and such windfalls are avoidable, because the Court can calculate any damages that Oracle owes by

² The Court explicitly rejected the Ninth Circuit’s reliance on *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), and in doing so implicitly rejected the line of cases descended from *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), which allowed in some instances for formulaic proof at Stage II of the *Teamsters* framework. 564 U.S. at 348, 367. To the extent it is *ever* appropriate to use a formulaic approach to calculate backpay post-*Wal-Mart*, this approach is nonetheless unwarranted here. *Contrast OFCCP v. Bank of Am.*, 2016 WL 2892921, at *13 (DOL ARB Apr. 21, 2016) (permitting formulaic calculation of damages in hiring case where “[t]here was no way to determine which 50 individuals of the 1,147 applicants would have been hired [by the defendant] in the absence of discrimination” due to “missing records, ambiguous and highly subjective use of disqualifying codes,” and the fact that “the liability hearing occurred more than a decade after the violations”).

formula, require Oracle to pay that amount to OFCCP, and then rely on OFCCP to distribute monies from that amount in a way that ensures each employee is fairly compensated. That is no answer. Such an approach would usurp the Court's role as factfinder and eliminate Oracle's due process right to an individualized determination of each employee's eligibility for backpay. 564 U.S. at 366.

These untenable consequences underscore that bifurcation is necessary to ensure that this proceeding is fair to all involved.

III. CONCLUSION

For the foregoing reasons, the Court should issue an order bifurcating the hearing of this case into (1) a pattern-or-practice liability phase, from which any evidence of damages is excluded, and (2) a second phase to determine individual monetary relief.

Respectfully submitted,

November 15, 2019

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