

**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. 14 TO EXCLUDE
EVIDENCE OF "SALARY
DISCRIMINATION" AND ANY
DAMAGES RELATED THERETO**

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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 salary discrimination claim and any damages related thereto by OFCCP. OFCCP did not allege a salary discrimination claim in its Notice of Violation (“NOV”), its Show Cause Notice (“SCN”), or any of its three Complaints. Rather, in each of these documents, OFCCP asserts discrimination claims based only on total compensation. Indeed, OFCCP raised the issue of salary discrimination for the first time in OFCCP’s Motion for Summary Judgment.

Not surprisingly then, OFCCP has no evidence of damages relating to a claim of salary discrimination. Dr. Madden—the only witness to opine on damages for OFCCP as an expert—offered an opinion on damages based on discrimination relating to total compensation, not “salary discrimination”.

II. ARGUMENT

A. OFCCP Did Not Plead a Salary Discrimination Claim and Is Not Entitled to Do So Now

Any evidence of salary discrimination should be excluded because OFCCP did not plead a salary discrimination claim in the NOV, SCN, Complaint, First Amended Complaint or Second Amended Complaint (“SAC”). *See* 41 C.F.R. §§ 60-4.8, 60-2.2(c)(1). In fact, with one exception, the SAC makes clear OFCCP’s compensation discrimination claims are based on disparities in *total* compensation. SAC, ¶¶ 14 (noting disparities between females and males in “total compensation”), 15 (noting disparities between Asians and Whites in “total compensation”), 17 (estimating damages in “lost total compensation”); *see also id.* ¶ 11 (alleging “Oracle discriminated against women, Asians, and African Americans or Blacks in compensation”).¹

¹ The SAC makes only a single allegation regarding salary discrimination: that Oracle allegedly discriminated against African-Americans in *only* 2015 and 2016 (*i.e.*, not during the 2013-2014 audit window), resulting in \$1.3 million in lost wages out of \$401 million claimed total lost compensation. SAC, ¶ 16.

That OFCCP's claims are about total compensation is proved by its expert's damages opinion. The damages figures Madden offers in her report are damages based on total compensation. . Madden offers no damages opinion based on claimed "salary discrimination." See Madden Rep. at 52-57.

As such OFCCP should not be allowed to pursue a "salary discrimination" claim only raised at the summary judgment stage of litigation. *See, e.g., Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292-93 (9th Cir. 2000) ("After having focused on intentional discrimination in their complaint and during discovery, the employees cannot turn around and surprise the company at the summary judgment stage on the theory that an allegation of disparate treatment in the complaint is sufficient to encompass a disparate impact theory of liability."); *Ward v. Clark Cty.*, 285 F. App'x 412, 412-13 (9th Cir. 2008) (affirming grant of summary judgment against plaintiff on unpleaded retaliatory transfer claim raised in opposition to summary judgment); *Jackson v. Geithner*, 2011 WL 2181394, at *7 (E.D. Cal. June 3, 2011) (plaintiff could not raise Title VII discrimination claim at summary judgment stage when complaint alleged retaliation, not discrimination); *Benson v. Cal. Corr. Peace Officers Ass'n*, 2010 WL 682285, at *1, *6 n. 3 (E.D. Cal. Feb. 24, 2010) (plaintiff whose complaint alleged failure to accommodate in violation of the Americans with Disabilities Act and violation of the Equal Pay Act could not present new retaliation claim in opposition to defendant's motion for summary judgment); *see also Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995) ("Though we fully appreciate that a complaint may be constructively amended as a case proceeds . . . this principle cannot mean that plaintiffs may leave defendants to forage in forests of facts, searching at their peril for every legal theory that a court may some day find lurking in the penumbra of the record. Under the Civil Rules, notice of a claim is a defendant's entitlement, not a defendant's burden. The truth-seeking function of our adversarial system of justice is disserved when the boundaries of a suit remain ill-defined and litigants are exposed to the vicissitudes of trial by ambush.").

Given this, no evidence regarding salary discrimination should be allowed because such evidence is not relevant to any claim in this case. 41 C.F.R. § 60-30.15. 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). Because salary discrimination was never pled in any of OFCCP’s prior pleadings, this Court is empowered to exclude it as irrelevant pursuant to 41 C.F.R. § 60-30.15.

B. In Addition, There Is No Evidence of Damages Relating to a Salary Discrimination Claim

Because there is no opinion regarding “salary discrimination” damages, OFCCP is now barred from offering an opinion. See Motion in Limine No. 1 (noting that the law limits an expert to the opinions given in a timely disclosed report).

A party is precluded from using “*any witness or evidence*” at trial that was not disclosed as required by Rule 26(a) or 26(e)(1), unless such failure is substantially justified or harmless. *Cooper v. Southern Co.*, 390 F.3d 695, 728 (11th Cir. 2004), *overruled in part on other grounds*, 126 S. Ct. 1195 (2006) (emphasis added). The disclosure requirements of Rule 26 are enforced by Rule 37, which bars introduction of non-disclosed expert opinions. Fed. R. Civ. P. 37(c)(1) (“[A] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, [be] permitted to use as evidence at a trial . . . any witness or information not so disclosed.”). Rule 37(c)(1) is an “automatic sanction [that] provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence . . .” Fed. R. Civ. P. 37 advisory committee notes (1993). “In their normal operation, Rules 26(a)(2)(B) and 37(c)(1) allow an expert to rely on no more than the expert disclosed in his Rule 26(a)(2)(B) report.” *Atmel Corp. v. Info. Storage Devices, Inc.*, 189 F.R.D. 410, 416 (N.D. Cal. 1999) (limiting expert to rely on no more than what he disclosed in his Rule 26(a)(2)(B) report). These rules were designed to avoid allowing one party to engage in

“trial by ambush.” *Sud-Chemie Inc. v. CSP Techs., Inc.*, 2006 WL 2246404, at *34 (S.D. Ind. 2006); *Point Prods. A.G. v. Sony Music Entm’t, Inc.*, 2002 WL 31856951, *5 (S.D.N.Y. Dec. 19, 2002); *Ginns v. Towle*, 361 F.2d 798, 801 (2d Cir. 1966) (“The basic purpose of the federal rules... is to eliminate trial by ambush....”).

C. **Even If the Court Finds Minimal Probative Value in Such Evidence, the Court Should Nonetheless Exclude It Because It Will Waste Time**

Finally, without a damages calculation, it is an utter of waste of time to have evidence of “salary discrimination.” Without damages, the claim fails. *Metro. St. Louis Equal Hous. & Opportunity Council v. Jezewak*, 2016 WL 2594064, at *6 (E.D. Mo. May 5, 2016) (holding that Plaintiff’s discrimination fails because he failed to offer any proof of damages); *Milam v. Dominick’s Finer Foods, Inc.*, 588 F.3d 955, 957-58 (7th Cir. 2009) (same). A claim must be supported by evidence of damages, *i.e.*, there must a proven harm. *Akouri v. State of Florida Dep’t of Transp.*, 408 F.3d 1338, 1345 (11th Cir. 2003) (finding no error in the district court’s reversal of a compensatory damages award where the plaintiff presented no evidence of any kind of harm, “mental, emotional, or otherwise, arising from the discrimination.”). *See also Thomas v. Alabama Home Constr., Inc.*, 2004 WL 7338567, at *11, *21 (N.D. Ala. Oct. 28, 2004) (plaintiff’s harassment claim failed because, in large part, no evidence of damages were presented); *Jackson & Coker, Inc. v. Lynam*, 840 F. Supp. 1040, 1052–53 (E.D. Pa. 1993) (employee’s claim failed because there was no evidence on the record that plaintiff suffered damages even though the jury found that employee was retaliated against in violation of Title VII). With no damages, there is no reason to hear a claim of salary discrimination.

III. **CONCLUSION**

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

November 15, 2019

Respectfully submitted,

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