

Litigators of the Week: The Orrick Team Who Beat Back the Government's Pay Discrimination Case Against Oracle

After eight days of trial last December and extensive post-trial briefing, Administrative Law Judge Richard M. Clark in San Francisco on Tuesday issued a 200-plus page decision dismissing the case brought by the U.S. Department of Labor's Office of Federal Contract Compliance Programs. That result has landed Litigator of the Week honors for Oracle's defense team at Orrick, Herrington & Sutcliffe.

By Ross Todd
September 25, 2020

The risks Oracle Corp. faced at trial late last year were huge—both in terms of reputational risk and dollar figures.

Lawyers at the U.S. Department of Labor's Office of Federal Contract Compliance Programs alleged that the enterprise software giant had policies and practices that led to "widespread" compensation and assignment discrimination against female, Asian and black employees spread accross product development, information technology and support roles. The OFCCP lawyers were seeking nine-figures in potential damages from Oracle.

But after eight days of trial last December and extensive post-trial briefing, Administrative Law Judge Richard M. Clark in San Francisco on Tuesday issued a 200-plus page decision dismissing the OFCCP's case in-full. That result has landed Litigator of the Week honors for Oracle's defense team at **Orrick, Herrington & Sutcliffe**: lead trial counsel **Erin Connell**, her partner **Warrington Parker** and senior counsel **Gary Siniscalco**. The Lit Daily recently asked the trio about their approach to litigating such a high stakes matter in an unfamiliar venue.

Litigation Daily: Who was your client and what was at stake?

Erin Connell: Our client is Oracle, and there was a tremendous amount at stake. OFCCP made salacious—



L-R: Erin M. Connell, Warrington Parker, Gary Siniscalco and Kathryn Mantoan of Orrick Herrington & Sutcliffe.

Courtesy Photos

yet baseless—allegations of widespread systemic compensation and job assignment discrimination by Oracle against thousands of current and former employees at Oracle's headquarters in Redwood Shores. At trial, OFCCP estimated damages totaling more than \$800 million dollars. But perhaps more important than the dollars, also at stake was the reputation and integrity of Oracle's senior leaders, combined with Oracle's relationship with its employees and ability to compete for talent in the highly competitive high tech industry in which Oracle operates.

What unique challenges are there to defending against allegations of systemic discrimination based on race and gender in this particular venue?

Warrington Parker: There were several unique challenges to defending against allegations of systemic discrimination in this particular venue. First, it was unfamiliar. None of us previously had litigated in this forum, which uses a unique set of procedural rules.

By contrast, OFCCP litigates only in this forum and has offices in the same building. So, we had concerns about a home court advantage for OFCCP. We also had concerns that because we were litigating within a Department of Labor forum, we might face a disadvantage because OFCCP is an agency within the Department of Labor. Additionally, OFCCP kept changing its legal theories and the statistical analyses on which their claims purported to be based, so we continually faced a moving target. Notwithstanding these challenges, over the course of nearly three years of litigation, we learned the ins and outs of litigating in this venue. Judge Clark also permitted extensive pre- and post-trial briefing, which allowed us to keep the issues focused on Title VII legal standards and the actual claims OFCCP brought.

Who all was on the Orrick trial team and how did you divide the work?

Connell: We had an incredibly talented and diverse trial team, and everyone played a critical role in reaching this fantastic outcome. Our team included not only Warrington, Gary and me, but also our Orrick colleagues **Katie Mantoan, Kayla Grundy, Hannah Ghaffari, and Lara Graham**, as well as our in-house legal partners at **Oracle, Juana Schurman and Emily Sullivan**. I was lead counsel, and led all aspects of both the litigation and trial. Warrington was second in command, and played a particularly important role in overseeing evidentiary issues and examining and cross-examining fact witnesses. Gary played a critical role in driving legal strategy. Katie ran point with the experts, Kayla was our indispensable case manager, Hannah prepared fact witnesses to testify and assisted with motion practice, and Lara was responsible for overseeing the extensive confidentiality issues that were at play. Juana and Emily were with us every step of the way, partnering with us on legal strategy from the start of the litigation through trial and post-trial briefing.

What was your approach to handling current and former Oracle employees who came to court to testify about individual allegations of discrimination?

Gary Siniscalco: OFCCP presented a combination of both current and former employees who came to

testify about their experiences at Oracle. Our approach to these witnesses was largely the same, although for current employees, we were acutely sensitive to ensuring that even on cross examination, they did not feel attacked or disrespected for testifying about their experiences. Notably, however, and as ALJ Clark noted in his decision, these witnesses really did not testify about individual experiences of discrimination. Instead, their testimony consisted largely of sharing experiences they perceived as unfair. We emphasized that these witnesses' subjective views that they were treated unfairly does not amount to evidence of discrimination by Oracle.

How did you undercut the credibility of the statistical evidence presented?

Connell: At trial, OFCCP relied entirely on statistical analyses presented by its expert, Dr. Janice Madden. We undercut the credibility of this statistical evidence through substantive legal critiques and a strategic cross-examination of Dr. Madden, combined with the criticisms, opinions, and analyses presented by Oracle's expert, Dr. Ali Saad.

In legal briefing and at trial, we emphasized that Dr. Madden applied in this case her own version of "human capital approach," which is inconsistent with the legal principles and standards governing Title VII law. We further demonstrated that the overly aggregated statistical models Dr. Madden presented did not compare similarly situated employees, did not account for the major factors influencing pay at Oracle, and did not account for Oracle's affirmative defenses (all of which Title VII requires). We also argued that Dr. Madden's opinions, based on her statistical models, assume the conclusions they purport to prove, and ignore the complex, technical, and highly varied Oracle jobs they purport to analyze.

In addition to our substantive critiques of Dr. Madden, her cross-examination also played a key role. As Judge Clark noted in his decision, her demeanor changed markedly on cross, and she became defensive, evasive, and even argumentative, which further undercut her credibility.

With respect to job assignments, we demonstrated that Dr. Madden did not even analyze them,

statistically or otherwise. She instead analyzed pay data, and assumed the statistical disparities she purported to find must be the result of job assignment discrimination. We undercut the credibility of those assumptions through alternative analyses by Dr. Saad, combined with consistent witness testimony confirming job applicants at Oracle choose the specific jobs to which they apply, and in most cases are hired into those same jobs.

And finally, the credible and consistent testimony of Oracle's witnesses further undermined the credibility of OFCCP's overly simplified statistical models, as their testimony confirmed the complexity of Oracle's jobs and business framework.

How did you rebut the OFCCP's claim that Oracle had "a policy or practice" of determining starting salary on the basis of an employee's prior salary elsewhere?

Connell: We rebutted OFCCP's claim that Oracle had a "policy or practice" of determining starting pay based on prior pay by emphasizing that, in fact, Oracle never had such a policy or practice. Not a single witness testified that such a policy or practice existed, and several testified it did not. OFCCP's allegation of such a policy or practice was based on Dr. Madden's testimony that she observed a correlation between prior pay and starting pay at Oracle, combined with evidence suggesting that prior to October 2017, individual Oracle managers sometimes recorded information about prior pay for applicants in their new hire documentation. We emphasized that even if some managers recorded prior pay information for candidates, there was no evidence they based starting pay upon it. We also emphasized—as both experts testified—correlation does not prove causation, particularly here, where there is a reasonable alternative explanation for the correlation: namely, that both employers are similarly valuing the same skill set in a competitive market for talent.

What's important in this decision to federal contractors and employers more broadly?

Siniscalco: There are many important aspects of this decision. First, it demonstrates that OFCCP's

approach to analyzing compensation, using overly-aggregated and mis-specified statistical models that assume the conclusions they purport to prove, ignore the work employees actually perform, and fail to account for the job-related factors that impact the pay of those employees, is simply wrong. It is inconsistent with Title VII law, and does not demonstrate systemic compensation discrimination. Second, it demonstrates the importance of perseverance and consistency on the part of a contractor (Oracle), who stood its ground and did not cave under the pressure of OFCCP's unflattering yet unfounded allegations of discrimination and aggressive litigation tactics, dating all the way back to the underlying compliance audit. And third, it demonstrates the importance of thoughtful legal analysis combined with strategic trial preparation, as the extensive legal briefing in this case played as big of a role as the evidence presented at trial.

What will you remember most about this matter?

Parker: The amount of perseverance it takes to see a case like this through. In the face of government overreach and overblown allegations of wrongdoing, it takes a client, like Oracle, that places trust in you, a client that works hand in hand with you, and a client that will weather the good days and the bad days that occur in any litigation and in any trial. It takes the same from the team of lawyers, paralegals, and staff who are willing to work weekends and long hours to see that the right thing is done for your client no matter the obstacles.

Ross Todd is the Editor/columnist for the Am Law Litigation Daily. He writes about litigation of all sorts. Previously, Ross was the Bureau Chief of The Recorder, ALM's California affiliate. Contact Ross at rtodd@alm.com. On Twitter: @Ross_Todd

