May Legal Masterclass: Disposition Codes

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WHY DO YOU HAVE DISPOSITION CODES?

QUESTION: Why do you create and document your use of Disposition Codes?

ANSWER: To gather and preserve evidence of the “legitimate non-nondiscriminatory explanation(s)” for the adverse action in question.

Yellow-Highlighting on the following pages is designed to bring your eyes to the key legal requirements

WHY HAVE DISPOSITION CODES? (con't)

- **WHY?** FRANKS ET AL. v. BOWMAN TRANSPORTATION CO., INC., ET AL.] ; **424 U.S. 747 (1976)**
  - [***Franks*** was a race discrimination case alleging that the Bowman trucking company refused to hire a class ("class 3") of African American applicants who applied for lucrative Over-The-Road" ("OTR") truck driver jobs.] Here is famous footnote 32 which started the tradition of "Disposition Codes":
    - "Thus Bowman may attempt to prove that a given individual member of class 3 was not in fact discriminatorily refused employment as an OTR driver in order to defeat the individual's claim to seniority relief as well as any other remedy ordered for the class generally. Evidence of a lack of vacancies in OTR positions at the time the individual application was filed, or evidence indicating the individual's lack of qualification for the OTR positions—under non-discriminatory standards *actually applied* by Bowman to individuals who were in fact hired—would of course be relevant. It is true, of course, that obtaining the third category of evidence with which the District Court was concerned—what the individual discriminatee's job performance would have been but for the discrimination—presents great difficulty. No reason appears, however, why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue." *(emphasis added)*

WHY HAVE DISPOSITION CODES? (con't)

- In 1977, the SCOTUS reiterated this need for employers (not OFCCP/EEOC/ plaintiffs' lawyers) to collect and introduce into evidence (it is the employer's burden) the "legitimate nondiscriminatory explnation(s)" for adverse action (failure to hire, failure to promote, pay, etc.) in what are called:

  1) "pattern and practice," or
  2) more formally: "class-type disparate treatment intentional discrimination law cases," or
  3) what OFCCP often calls "systemic discrimination" (which is what OFCCP analyzes in audits/lawsuits 99.99% of the time), or
  4) what OFCCP also (erroneously) calls them: "IRAs" ("Impact Ratio Analyses"…which are NOT "adverse impact" analyses), or
  5) what OFCCP's self-evaluation requirement in AAPs for Minorities and Women calls "Disparity Analyses"…. see 41 CFR Section 60-2.17(b)(2)&(4)

- So yes: there are five different names for the same kind of discrimination claim.

WHY HAVE DISPOSITION CODES? (con't)

- See: **Teamsters v. United States,** 431 U.S. 324, 359 (1977)
  - Page 431 U. S. 329: "The central claim *** was that the company had engaged in a pattern or practice of discriminating against minorities in hiring so-called line drivers. Those Negroes and Spanish-surnamed persons who had been hired, the Government alleged, were given lower paying, less desirable jobs as servicemen or local city drivers, and were thereafter discriminated against with respect to promotions and transfers."
  - Page 431 U. S. 336: "As the plaintiff, the Government bore the initial burden of making out a *prima facie* case of discrimination. And, because it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure -- the regular, rather than the unusual, practice. [Footnote 16]"

WHY HAVE DISPOSITION CODES? (con't)

- Page 431 U. S. 339: "In any event, our cases make it unmistakably clear that "[s]tatistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue. *(citations omitted)* We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a *prima facie* case of racial discrimination in jury selection cases *(citation omitted)*. Statistics are equally competent in proving employment discrimination. [Footnote 20]"
  - [Footnote 20]: "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will, in time, result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a workforce and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a workforce mirror the general population. *(citation omitted)* Considerations such as small sample size may, of course, detract from the value of such evidence, *(citation omitted)* and evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant." (emphases added)

WHY HAVE DISPOSITION CODES? (con't)

- Page 431 U. S. 359: "The *Franks* case thus illustrates another means by which a Title VII plaintiff's initial burden of proof can be met. The class there alleged a broad-based policy of employment discrimination; upon proof of that allegation, there were reasonable grounds to infer that individual hiring decisions were made in pursuit of the discriminatory policy, and to require the employer to come forth with evidence dispelling that inference. [Footnote 45]"
  - [Footnote 45] "The holding in *Franks* that proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief is consistent with the manner in which presumptions are created generally. Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof. *(citations omitted)* These factors were present in *Franks.* Although the *prima facie* case did not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it did create a greater likelihood that any single decision was a component of the overall pattern. Moreover, the finding of a pattern or practice changed the position of the employer to that of a proved wrongdoer. Finally, the employer was in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records were the most relevant items of proof. If the refusal to hire was based on other factors, the employer and its agents knew best what those factors were and the extent to which they influenced the decision-making process." ***(emphases added)***

WHY HAVE DISPOSITION CODES? (con't)

- Page 431 U. S. 360: "Although not all class actions will necessarily follow the *Franks* model, the nature of a "pattern or practice" suit brings it squarely within our holding in *Franks.* The plaintiff in a "pattern or practice" action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers. *(citations omitted)* At the initial, "liability" stage of a "pattern or practice" suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a *prima facie* case that such a policy existed. The burden then shifts to the employer to defeat the *prima facie* showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant. An employer might show, for example, that the claimed discriminatory pattern is a product of pre-Act hiring rather, than unlawful post-Act discrimination, or that, during the period, it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination. [Footnote 46]"

  - [Footnote 46]: "The employer's defense must, of course, be designed to meet the *prima facie* case of the Government. We do not mean to suggest that there are any particular limits on the type of evidence an employer may use. The point is that, at the liability stage of a "pattern or practice" trial, the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decision making. While a pattern might be demonstrated by examining the discrete decisions of which it is composed, the Government's suits have more commonly involved proof of the expected result of a regularly followed discriminatory policy. In such cases, the employer's burden is to provide a nondiscriminatory explanation for the apparently discriminatory result. *See* n 20, *supra*, and cases cited therein." *(emphases added)*

WHY HAVE DISPOSITION CODES? (con't)

- Page 431 U. S. 36: "If an employer fails to rebut the inference that arises from the Government's *prima facie* case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy."

- So, if there is a statistically meaningful disparity in selections (for hire/promotion, etc.), your selection managers/TA had better have their documentation as to the "legitimate non-discriminatory explanation(s)" as to why they rejected protected group members disproportionally.

WHY HAVE DISPOSITION CODES? (con't)

SO, THAT'S WHY YOU DO DISPOSITION CODES!!!!!

TO DOCUMENT THE LEGITIMATE NON-DISCRIMINATORY EXPLANATION(S) FOR REJECTION.

WHAT DISPOSITION CODES TO HAVE?

- In the “failure-to-hire” context, analytically, you are documenting four general kinds of specific evidentiary “explanations”:

1. The “jobseeker” was not an “Applicant”
    a. Interested?
    b. Sustained interest?
    c. Minimally qualified?
    d. Available job?
    e. You “considered” the jobseeker for the open position?

- Each of these “elements” of proof could have many different Disposition Codes
- (For example, there are many ways Jobseekers lose interest: do not return phone calls; no-show the interview; take a competing job, etc.)

WHAT DISPOSITION CODES TO HAVE? (con't)

2. The "Applicant" was not the better/best qualified (need detail though: cannot just say NBQ: that is a conclusion, not an "explanation" of the facts supporting your conclusion)

    - ❑ Interview your selection personnel and find out the explanations they tell you they need to record/document their explanations to describe their rejections

3. Declined job (REMEMBER: Declined Offers = "Hired": *OFCCP v. Jacksonville Shipyards)*

4. Hired? (Should you have a "Hired" Disposition Code? Why? They are NEVER accurate. Just use payroll records to determine which Applicants actually hit payroll?? Your choice.)

WHAT DISPOSITION CODES TO HAVE? (con't)

Miscellaneous observations:

- ❑ Beware of recycling the Disposition Codes of other companies to your use. You must customize Disposition Codes to YOUR company's selection process/processes and explanations for NOT advancing a candidate for further consideration.
- ❑ Document the several explanations, where they exist, the candidate failed to advance (OFCCP/the Court may not feel persuaded by one Code, but may accept the second or third explanation as valid).
- ❑ Too many Disposition Codes are too many. How many are "enough"? You want as few as you may, as many as you need to explain the "legitimate non-discriminatory explanation(s) for rejection."
- ❑ If TA is now pre-screening or selecting candidates, they are now compliance staff. Train them as such.

Thank You

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