DirectEmployers Association

# Employment Law Roundtable Masterclass

January 19, 2023

## Compliance Best Practices

# Today's Presenters

**Chris Liakos**

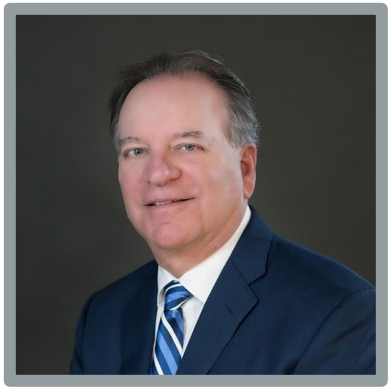
Associate Director | Fair Employment Practices Compliance

Ernst & Young LLP

**Dana Deason, PHR, SHRM-CP**

Manager, People

J. B. Hunt

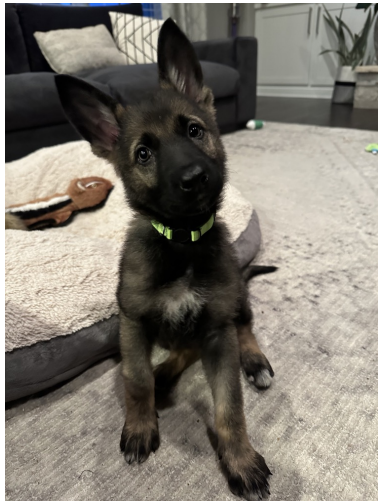


**John C. Fox, Esq.**

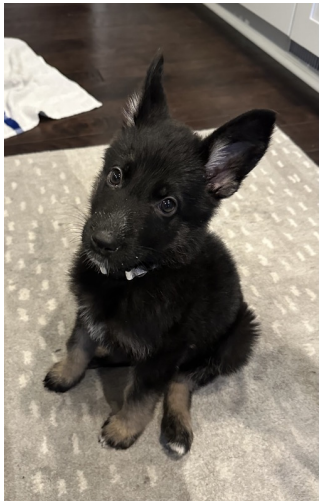
President & Partner

Fox, Wang & Morgan P.C.

# Jaime's German Shepherd puppies – Stars of the Show



Remy



Rowan

# Q 1: 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

# Q 1: Why do you 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)***

# Q 1: Why do you have Disposition Codes? (con't)

- **Teamsters v. United States,** 431 U.S. 324, 360 (1977)

- "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."
- PRACTICE TIP: So, if there is a statistically meaningful disparity in selections as to one or more Protected Groups (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.

# Q 1: Why do you have Disposition Codes? (con't)

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

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

# Q 1A: What Disposition Codes do you want?

There are three types (with many subsets of #1& #2):

1) Interested?
2) Minimally qualified? (aka "Basic" qualifications)

    - **NEVER USE THIS ONE:** "Not Best Qualified"

        - Not sufficiently detailed to carry your burden of proof

3) Offer made? (Declined Offer = a "Hire": ***Jacksonville Shipyards***)

Many companies use a "Hired" Disposition, but why? (almost never accurate: use payroll records to confirm Offered EE hit payroll)

# Q 2: What form of Compensation Evaluation do you want?

- **41 CFR § 60-2.17 Additional required elements of affirmative action programs.**

"In addition to the elements required by § 60-2.10 through § 60-2.16, an acceptable affirmative action program must include the following:

**(b)** ***Identification of problem areas.*** The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate:

**(3)** Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities;… ."

OFCCP has historically interpreted this to mean anything a contractor does, so long as it does something (i.e., investigate employee complaints re compensation)

The Administrative Procedure Act also requires formal Rulemaking to change any "longstanding" prior practice or interpretation of a federal agency Rule

# Q 3: It is a Best Practice to track "Offers" of Employment

A DECLINED OFFER = A "Hire" (within the meaning of Title VII/Executive Order 11246 law)

OFCCP v. Jacksonville Shipyards, 89-OFC-1 (ALJ Jeffrey Tureck July 7, 1992 Recommend Decision and Order at p. 12)

"Statistics reflecting that a job offer had been made, or definitely would have been made -- e.g., that the applicant had been sent for a physical, and all applicants who pass their physicals are offered jobs -- would be probative in determining whether JSI discriminated against women in hiring helpers 2/c. In fact, evidence that an applicant had been offered a job or would have been offered a job subject to passing a physical examination probably would be better evidence of "hiring" than the appearance of the applicant on the payrolls for the purpose of determining whether JSI discriminated against women." *(Recommended Decision and Order at p. 12; remanded on other grounds (see fn.10 of Sec'y of Labor Decision & Remand Order, May 9, 1995))*

# Q 4: Best Practice is to identify Job Groups composed of "Similarly Situated" employees

OFCCP is currently attempting to finish a 360-degree turn from being an agency almost exclusively dedicated to "Affirmative Action" to one almost exclusively dedicated to Non-Discrimination

AAPs AS SWORDS AGAINST YOU: One of the many changes that rotation brings is the need to understand that OFCCP mines contractor AAPs for evidence of unlawful discrimination, SPECIFICALLY to fuel "Failure-to-Hire" and "Compensation" discrimination investigations/claims

WHY? Executive Order 11246 commands it:

- "During the performance of this contract, the contractor agrees as follows:

  1. The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ***ensure*** that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin." ***(emphases added)***

# Q 4: Best Practice is to identify Job Groups of "Similarly Situated" employees (con't)

Where does OFCCP currently find "swords" in your AAP data to use against you in discrimination analyses?

**-Failure-to-Hire:** OFCCP currently measures your Hires against not just Applicant Flow, but now follows more traditional Title VII standards to compare against "demographic data" (i.e., calculations of available applicants). (Oh my! Where in your AAPs do you report "demographic data"?)

**-Compensation:** OFCCP now compares the compensation of all employees in a "Job Group" (from your AAP for Minorities & Women)

THE PROBLEM: Discrimination law assumes a comparison of "similarly situated" applicants and employees.

HOWEVER, most contractors have historically built "hybrid" (not homogenous) Job Groups in their AAPs for Minorities and Women composed of many kinds of employees. Why?:

# Q 4: Best Practice is to identify Job Groups of "Similarly Situated" employees (con't)

1) Cost/Sensibility (ever since Shirley Wilcher required (in the Clinton Administration) that all EEs be in a Job Group)

   a) Before 2000, Kors composed only "major" Job Groups composed of at least 50 EEs, KORs have been combining small clusters of different EEs into the same Job Group out of practical necessity to avoid large and costly AAPs

2) No Harm/No Foul: Formerly, it did not matter if Job Groups had apples and oranges in the same basket (Job Group)

3) Availability Data Shrinking (at OFCCP's suggestion): AAP developers feel constrained because the U.S. Census Bureau from 1970 to 2000 published an "EEO Special File" of availability data for minorities and women taken from the every 10-year "Decennial Census" compressing information for the 30,000+ types of jobs in the U.S. to only 512 categories of reported availability data

   Then, the USCB converted to the use of the American Community Survey and reported only 488 categories of availability data for Minorities and Women in its 2006-2010 EEO Tabulation,

   The USCB's 2014-2018 Tabulation (currently in use) dropped the availability data of minority and women by occupation to just over 50% to only 237 occupations

   All of these pressures on availability data have increasingly driven AAP developers to create more "hybrid" Job Groups consisting of an increasing number of employees with different KSAs (and fewer Job Groups with "similarly situated") EEs

# Q 4: Best Practice is to identify Job Groups of "Similarly Situated" employees (con't)

HOWEVER, all discrimination analyses, including compensation claims, require the comparison of *ONLY* "similarly situated" employees for both disparate treatment and disparate impact analyses

So, what do you think happens when OFCCP stumbles across a "hybrid Job Group" (let's imagine a "Professionals" Job Group) large enough to make for statistical analysis (30+ employees in the pool for analysis) and finds five Analysts (all women) earning $60,000/yr.; a female Librarian earning $90,000/yr.; two Maintenance Chiefs (all male) earning $100,000/yr.; three women Financial Analysts earning $130,000/yr.; two male Financial Analysts with two years each more experience earning $150,000/yr.; 14 male software engineers earning between $90,000 and $300,000; eight female lawyers earning $160,000 to $290,000; six male lawyers earning $160,000 to $500,000; 8 male chemists earning $230,000/yr. to $4590,000/yr.; and 12 male chemists earning $230,000 to $600,000/yr.).

You exclaim to OFCCP that: "Yes there is a disparity in pay men v. women (favoring men) in this Professionals Job Group, BUT the jobs are all different!!!

What is OFCCP's response?

# Q 4: Best Practice is to identify Job Groups of "Similarly Situated" employees (con't)

OFCCP to Contractor: "YOU, not OFCCP, said the Jobs in this Job Group were 'similar'":

Please see 41 CFR Section 60-2.12(b) ["Job group analysis"]:

"In the job group analysis, jobs at the establishment with similar **content, wage rates, and opportunities**, must be combined to form job groups. Similarity of content refers to the duties and responsibilities of the job titles which make up the job group. Similarity of opportunities refers to training, transfers, promotions, pay, mobility, and other career enhancement opportunities offered by the jobs within the job group." (color emphases added)

So, what is a responsible federal contractor to do given the numerous small job clusters in its workforce; the shrinking availability data causing AAP developers to mush more and more jobs together because they share the same USCB ACS Occupation Code (i.e., Flight Attendants and commercial Airline pilots: CANDEE's FAVORITE EXAMPLE) and it costs more to balkanize jobs into sometimes hundreds of Job Groups (Universities/Colleges: so sorry to hear about it)

# Q 4: Best practice is to identify Job Groups of "Similarly Situated" employees (con't)

1) You may use availability data *other than ACS Occupation Codes to develop your Availability Analyses for your AAPs for Minorities and Women and need not feel handcuffed to only 237 Occupation Codes. HUH?*

*See* **41 CFR § 60-2.14 Determining availability.**

"(a) Purpose: Availability is an estimate of the number of qualified minorities or women available for employment in a given job group, expressed as a percentage of all qualified persons available for employment in the job group. The purpose of the availability determination is to establish a benchmark against which the demographic composition of the contractor's incumbent workforce can be compared in order to determine whether barriers to equal employment opportunity may exist within particular job groups." * * * *

"(c) In determining availability, the contractor must consider at least the following factors:"

(1) [External availability]

(2) [Internal availability]

How about a "third-factor": **Applicant Flow** (where you can show it has good outreach: DE Members: use your PRM tool)

"(d) The contractor must use the most current and discrete statistical information *[does NOT say USCB or ACS data]* available to derive availability figures. Examples of such information include census data, data from local job service offices, and data from colleges or other training institutions." ***[yellow highlighting emphases added]***

# Q 4: Best Practice is to identify Job Groups of "Similarly Situated" employees (con't)

2) Develop Job Groups as big or as small as your collections of "similarly situated" employees exist in your establishment workforce
   - Size of the Job Group was never/is not now an OFCCP regulatory factor
   - "Super-sizing" Job Groups was a 90's thing KORs did out of their discretion trying to be practical
   - Those days are over now that OFCCP has weaponized KOR AAPs
3) Be prepared to argue these issues in OFCCP's coming regulatory overhaul of everything AAP. See the January 9, 2023, Direct Employers Week In Review