



RECENT SIGNIFICANT OFCCP DEVELOPMENTS

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John C. Fox, Esq. is the President of Fox, Wang & Morgan P.C. He represents companies and tries cases in state and federal courts throughout the United States. His advice counseling and litigation work involve primarily wage-hour and employment discrimination class actions, properly structuring compensation analyses, properly structuring AAPs and statistical Disparity Analyses and Adverse Impact Analyses, defending and prosecuting trade secret claims, employment contract disputes, wrongful termination, corporate investigations, the use of statistics in employment matters and defending OFCCP audits/lawsuits. Mr. Fox also provides strategic advice to companies nationwide regarding their employment practices and helps build HR recruitment, selection and promotion systems to minimize legal risk. Mr. Fox was also previously Executive Assistant to the Director of OFCCP, where he was responsible for all enforcement and policy matters and OFCCP's contacts with the Congress, other federal agencies and The White House.

GANDHI

WHAT HE REALLY SAID:

“We but mirror the world. All the tendencies present in the outer world are to be found in the world of our body. If we could change ourselves, the tendencies in the world would also change. As a man changes his own nature, so does the attitude of the world change towards him. This is the divine mystery supreme. A wonderful thing it is and the source of our happiness. We need not wait to see what others do.”

-Mahatma Gandhi

AS SUMMARIZED FOR POWERPOINTS, E-MAIL SIGNATURE BLOCKS AND T-SHIRTS:

“Be the change you want to see in the world”

AGENDA

INTRODUCTION: Gandhi: Making Change

- I. The Pandemic Is A Blessing In Disguise For D&I
- II. The Incredible Shrinking, Adaptable **AND** Evolving OFCCP
- III. Let's Straighten Out The Confusion Over Who Is "Similarly Situated"
- IV. Why Kors Are Still At Odds With OFCCP Over Discrimination Claims
- V. Lessons To Be Learned From OFCCP's Enforcement Statistics
- VI. The Happy Ending
 - (A) How To Undertake Employment Preferences The Right Way (i.e., lawfully)
 - (B) How To Convert Your AAP Into An Intelligent D&I Generator
 - (C) Call To Action

KEY TO ABBREVIATIONS

AAP=Affirmative Action Plan

CO=Compliance Officer

D&I= Diversity & Inclusion

EE= Employee

Kor=Contractor

Prima Facie case=OFCCP (or Plaintiff) evidence sufficient to compel a Kor/employer to thereafter go forward with evidence to respond to the claim during an audit, investigation or lawsuit

I. The Pandemic Is A Blessing In Disguise For D&I

DON'T BLOW IT THIS TIME!

This is the best opportunity to effect D&I **IN YOUR LIFETIME!!!**

There are now millions of jobs available and waiting to be filled!

- more than became available during the DEEP recession of 2008-2011

More jobs will become available as the economy comes back

- July 2020: 1.8 million jobs were filled LAST MONTH alone (third largest hiring month in U.S. history!)

The 7-Eleven Story

PUNCHLINE: Unless your are 7-Eleven, EACH and EVERY job you fill is precious

I. The Pandemic is a Blessing in Disguise for D&I (Con't)

ALL VETERANS (not just Protected Veterans)

Labor Force Participation Rate	49.2% (2019)	48% (July 2020)
Unemployment Rate	3.1% (2019)	8% (July 2020)

I. The Pandemic is a Blessing in Disguise for D&I (Con't)

INDIVIDUALS WITH A DISABILITY

16-24

Labor Force Participation Rate	33.6% (2019)	33% (July 2020)
Unemployment Rate	8% (2019)	14.8% (July 2020)

COMPARE

PERSONS WITHOUT A DISABILITY

16-24

Labor Force Participation Rate	77.3% (2019)	76.4% (July 2020)
Unemployment Rate	3.6% (2019)	10.4% (July 2020)

I. The Pandemic is a Blessing in Disguise for D&I (Con't)

<u>Employment Status</u>	<u>Feb. 2020</u>	<u>April 2020</u>	<u>May 2020</u>	<u>June 2020</u>	<u>July 2020</u>
WHITE					
Participation Rate	63.3	60.3	61.0	61.6	61.4
Unemployment Rate	3.1	14.2	12.4	10.1	9.2
MEN - 20 years and over					
Participation Rate	71.8	69.1	69.5	70.1	69.8
Unemployment Rate	2.9	12.4	10.7	9.0	8.3
WOMEN – 20 years and over					
Participation Rate	58.2	55.4	56.1	56.9	56.9
Unemployment Rate	2.8	15.0	13.1	10.3	9.6
BLACK or AFRICAN AMERICAN					
Participation Rate	63.1	58.6	59.6	60.0	60.2
Unemployment Rate	5.8	16.7	16.8	15.4	14.6
ASIAN					
Participation Rate	64.4	60.7	60.8	61.4	63.4
Unemployment Rate	2.5	14.5	15.0	13.8	12.0
HISPANIC or LATINO					
Participation Rate	68.1	63.3	64.1	65.5	64.6
Unemployment Rate	4.4	18.9	17.6	14.5	12.9

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP

OFCCP currently employs approximately 425 EEs (authorized to 500) spread across 55 offices:

- 1 National Office (HQ)

- 6 Regional Offices

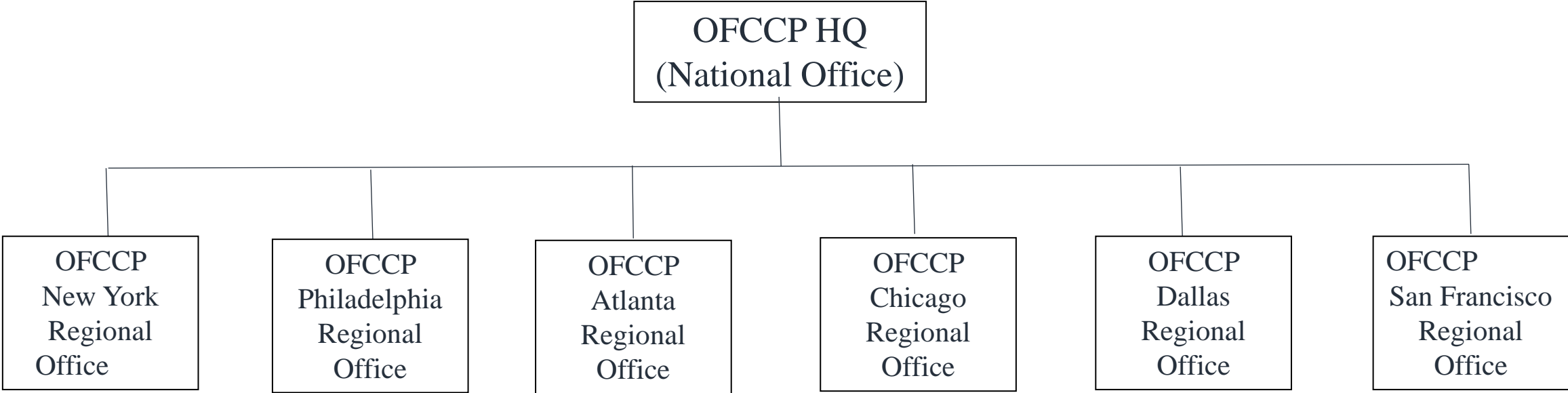
- 31 District Offices

- 14 Area Offices

- 3 Field Stations

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

OFCCP Regional, District & Area Offices and Field Stations (Con't)



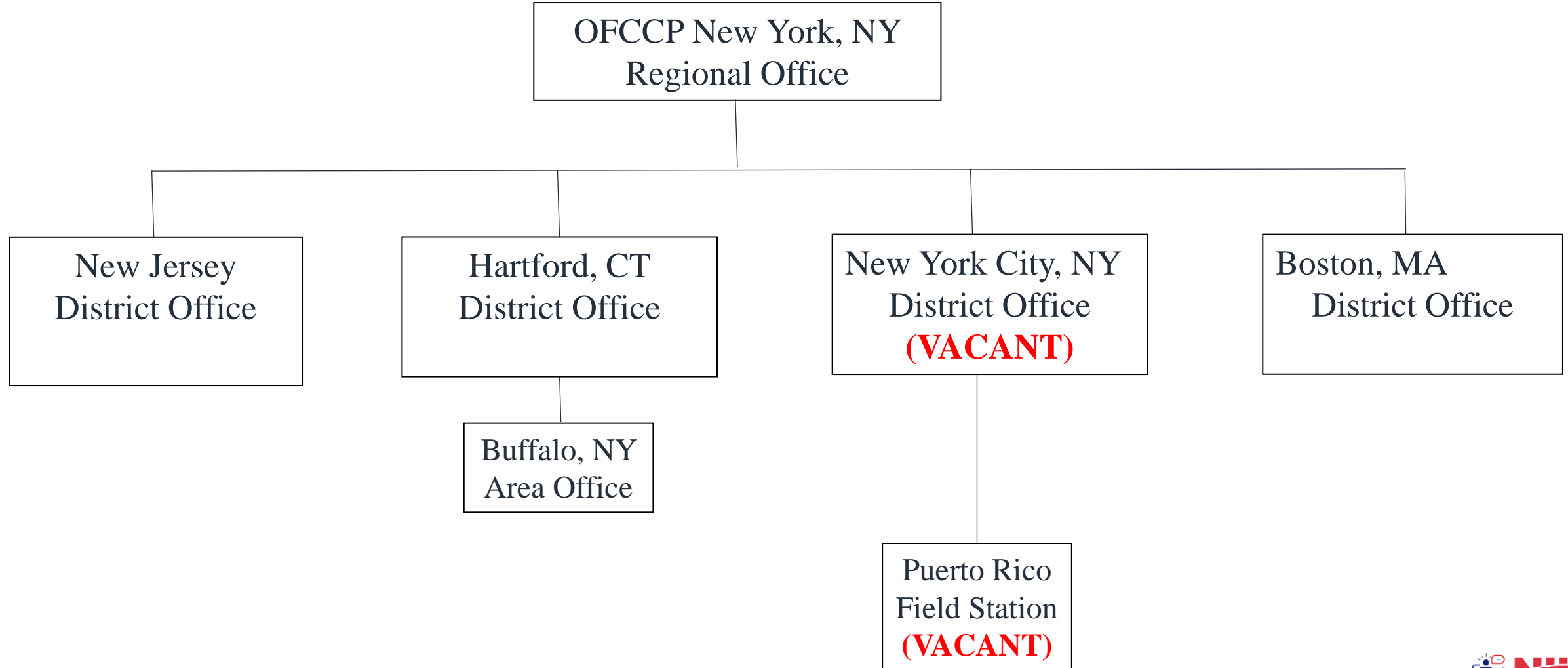
Note 1: Information provided is as of August 21, 2020

Note 2: Information taken from OFCCP public information and is subject to daily change

Note 3: Office location descriptions are abbreviated to fit page and describe physical location of the referenced OFCCP office

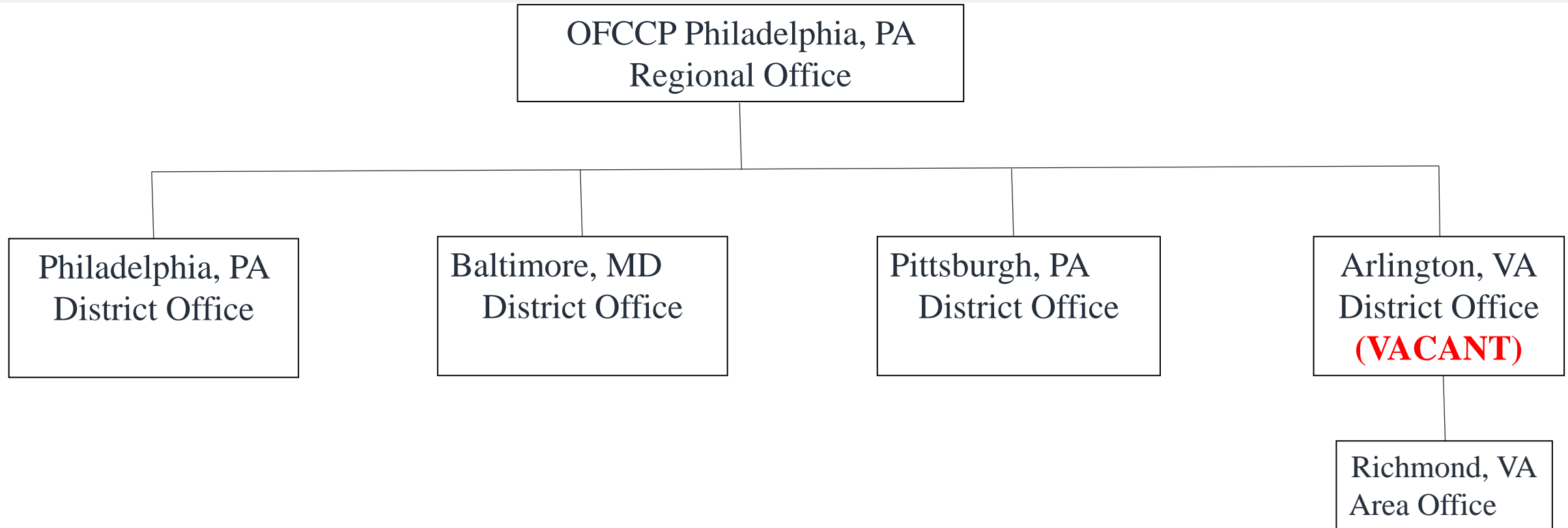
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OFCCP Regional, District & Area Offices and Field Stations (Con't)



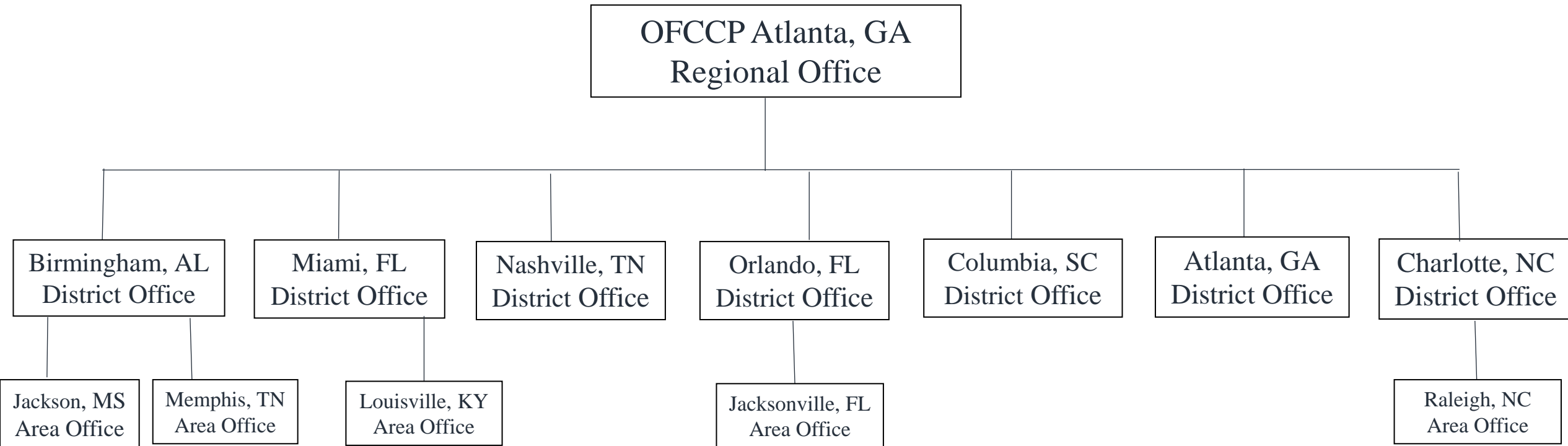
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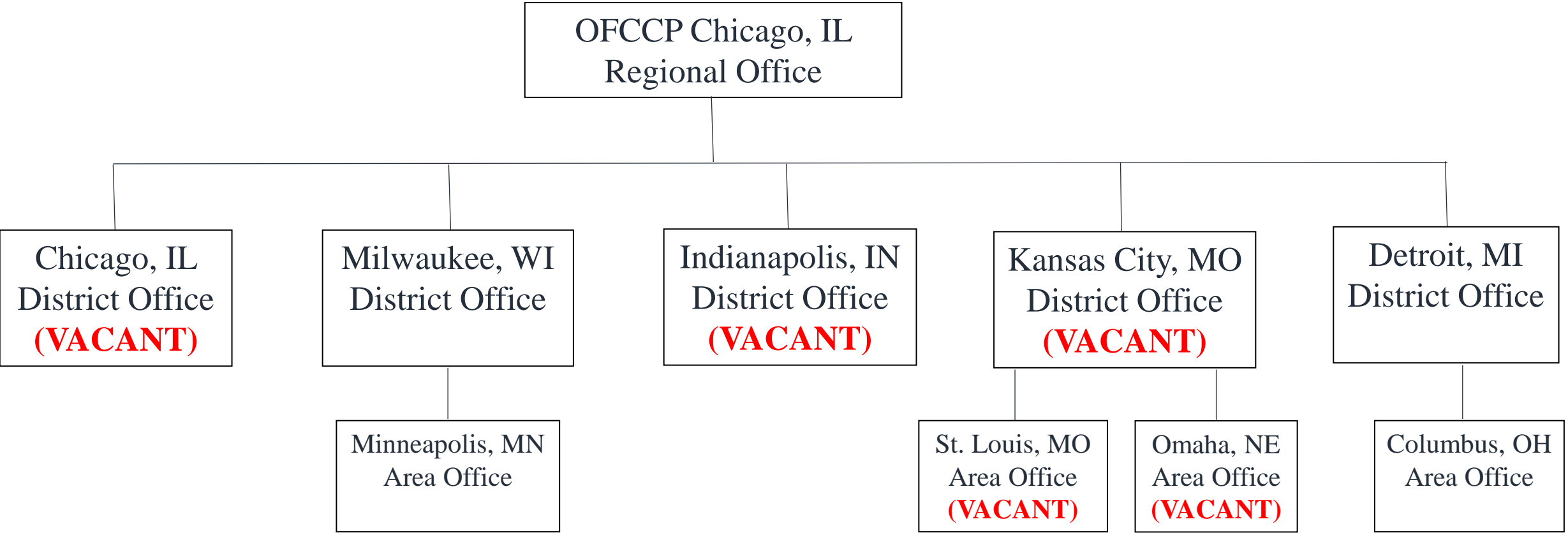
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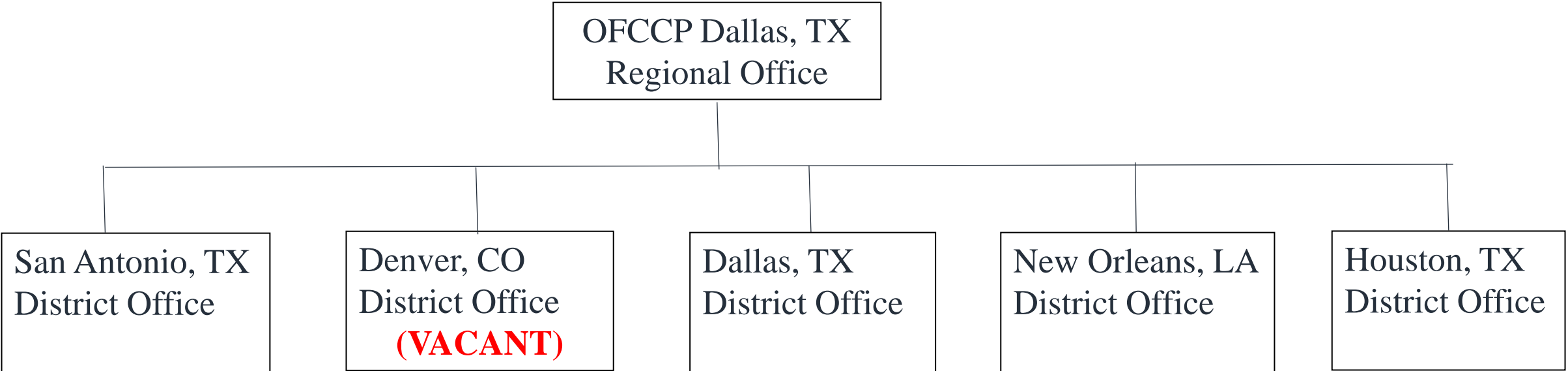
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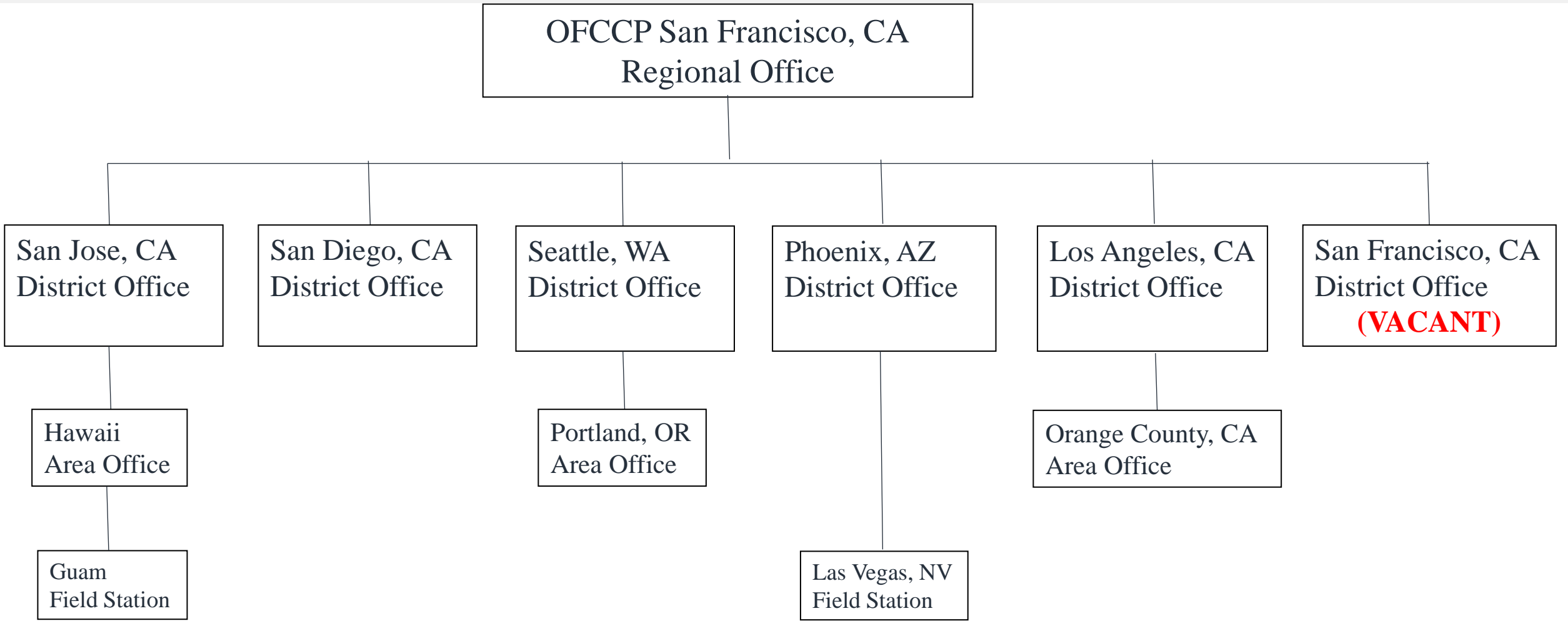
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OFCCP Regional, District & Area Offices and Field Stations (Con't)



II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

OFCCP Regional, District & Area Offices and Field Stations (Con't)



II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

OFCCP District & Area Offices and Field Stations (Con't)

Alabama

1. Birmingham District Office
District Director: Alvin Q. Mitchell

Arizona

2. Phoenix District Office
District Director: Marvin Jordan

California

3. Los Angeles District Office
District Director: Agnes Huang
4. Greater San Francisco Bay Area District Office
District Director: **Vacant**
5. San Diego District Office
District Director: Sean Ratliff
6. San Jose District Office
District Director: Lynda Sakseangvirat
7. Orange Area Office
District Director: Agnes Huang

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

OFCCP District & Area Offices and Field Stations (Con't)

Colorado

8. Denver District Office
District Director: **Vacant**

Connecticut

9. Harford District Office
District Director: Mary Ellen Bentivogli

Florida

10. Jacksonville Area Office
District Director: Miguel A. Rivera, Jr.
11. Miami District Office
District Director: Michelle Hernandez
12. Orlando Area Office
District Director: Miguel A. Rivera, Jr.

Georgia

13. Atlanta District Office
District Director: Sybil Shy-Demmons

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

OFCCP District & Area Offices and Field Stations (Con't)

Guam

14. Guam Field Office
District Director: Lynda Sakseangvirat

Hawaii

15. Hawaii Area Office
District Director: Lynda Sakseangvirat

Illinois

16. Chicago District Office
District Director: **Vacant**

Indiana

17. Indianapolis District Office
District Director: **Vacant**

Kentucky

18. Louisville Area Office
District Director: Michelle Hernandez

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

OFCCP District & Area Offices and Field Stations (Con't)

Louisiana

19. New Orleans District Office
District Director: Rachel Woods

Maryland

20. Baltimore District Office
District Director: Tom Wells

Massachusetts

21. Boston District Office
District Director: Rhonda Aubin-Smith

Michigan

22. Detroit District Office
District Director: Laila Turner

Minnesota

23. Minneapolis Area Office
District Director: Timothy Roark

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

OFCCP District & Area Offices and Field Stations (Con't)

Mississippi

24. Jackson Area Office
District Director: Alvin Q. Mitchell

Missouri

25. Kansas City District Office
District Director: **Vacant**
26. St. Louis Area Office
District Director: **Vacant**

Nebraska

27. Omaha Area Office
District Director: **Vacant**

Nevada

28. Las Vegas Field Office
District Director: Marvin Jordan

New Jersey

29. New Jersey District Office
District Director: Joanne Karayiannidis

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

OFCCP District & Area Offices and Field Stations (Con't)

New York

- 30. Buffalo Area Office
District Director: Mary Ellen Bentivogli
- 31. New York District Office
District Director: **Vacant**

North Carolina

- 32. Charlotte District Office
District Director: Pamela Quinn
- 33. Raleigh Area Office
District Director: Pamela Quinn

Ohio

- 34. Columbus Area Office
District Director: Phyllis Lipkin

Oregon

- 35. Portland Area Office
District Director: Leigh Jones

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

OFCCP District & Area Offices and Field Stations (Con't)

Pennsylvania

- 36. Philadelphia District Office
District Director: Edward J. Rogers
- 37. Pittsburgh District Office
District Director: Tracie C. Brown

Puerto Rico

- 38. Caribbean Field Office
District Director: **Vacant**

South Carolina

- 39. Columbia District Office
District Director: Pamela Quinn

Tennessee

- 40. Nashville District Office
District Director: Michelle Hernandez
- 41. Memphis Area Office
District Director: Alvin Q. Mitchell

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

OFCCP District & Area Offices and Field Stations (Con't)

Texas

- 42. Dallas District Office
District Director: LaQuandra Adebajo
- 43. Houston District Office
District Director: Karen Hyman
- 44. San Antonio District Office
District Director: Dinorah Boykin

Virginia

- 45. Arlington District Office
District Director: **Vacant**
- 46. Richmond Area Office
District Director: Dianna Adams

Washington

- 47. Seattle District Office
District Director: Leigh Jones

Wisconsin

- 48. Milwaukee District Office
District Director: Timothy Roark

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

OFCCP District & Area Offices and Field Stations (Con't)

SHRINKING: SOME CONTEXT

- ~2,000 OFCC EEs in the K compliance function across 17 federal compliance agencies = (Nixon Admin)
- ~1200 at “Consolidation” of the compliance agencies into OFCCP on October 1, 1978 = (Carter Admin)
- ~785=end of Clinton Administration
- ~585=end of Bush (the son #43) Administration
- ~785=after first year of Obama Administration
- ~550 OFCCP EEs=start of Trump Administration
- ~425 OFCCP EEs=active today (budget to 500)

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

SHRINKING (Con't):

I recite this history for two reasons:

- 1) OFCCP needs more budget to survive. This is just too small to make for a credible, professionalized federal agency. Talk to your CEOs to support OFCCP budget increases
 - Number of audits at all time low
 - Audit quality at all time low, you say
- 2) Not all of this shrinkage is bad
 - Computerization brings efficiencies
 - OFCCP was always manager-heavy relative to the work (Sandra Ziegler proved that in Chicago)

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

ADAPTABLE:

- The only thing constant at OFCCP is change
- 1996 was turning point: No more automatic On-site audits (100 times out of 100) (Shirley Wilcher/Clinton Admin)
 - **So, audits could NOW be completed remote for the first time, OFCCP concluded**
 - BTW: OFCCP Rules have not kept pace
 - No authority for employee/manager interviews, let alone remote interviews
 - See 41 CFR Section 60-1.42 written in the 1970s
 - Until 2000, OFCCP's Rules required all OFCCP investigations to conclude within 60 calendar days (no thought of interviews: was a paper review world)
 - 20-30% On-site audits in 1997 & 1998
 - 10% On-Sites/yr by end of Clinton Administration
 - 5% On-Sites/yr by end of Bush (the son) Administration
 - <100 -On-Sites/yr in Trump Administration?

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

ADAPTABLE (Con't):

- 2016: GAO Report suggested (in Recommendation #3) that OFCCP not allow OFCCP's chronic attrition of employees problem to leave imbalances in audits which audits OFCCP had always predicated on an office site located near the establishment to be audited. Rather, GAO suggested to OFCCP it assign audits within OFCCP irrespective of the auditor's proximity to contractor establishments under review:

“Make changes to the current scheduling list distribution process so that it addresses changes in human capital and does not rely exclusively on geographic location.”

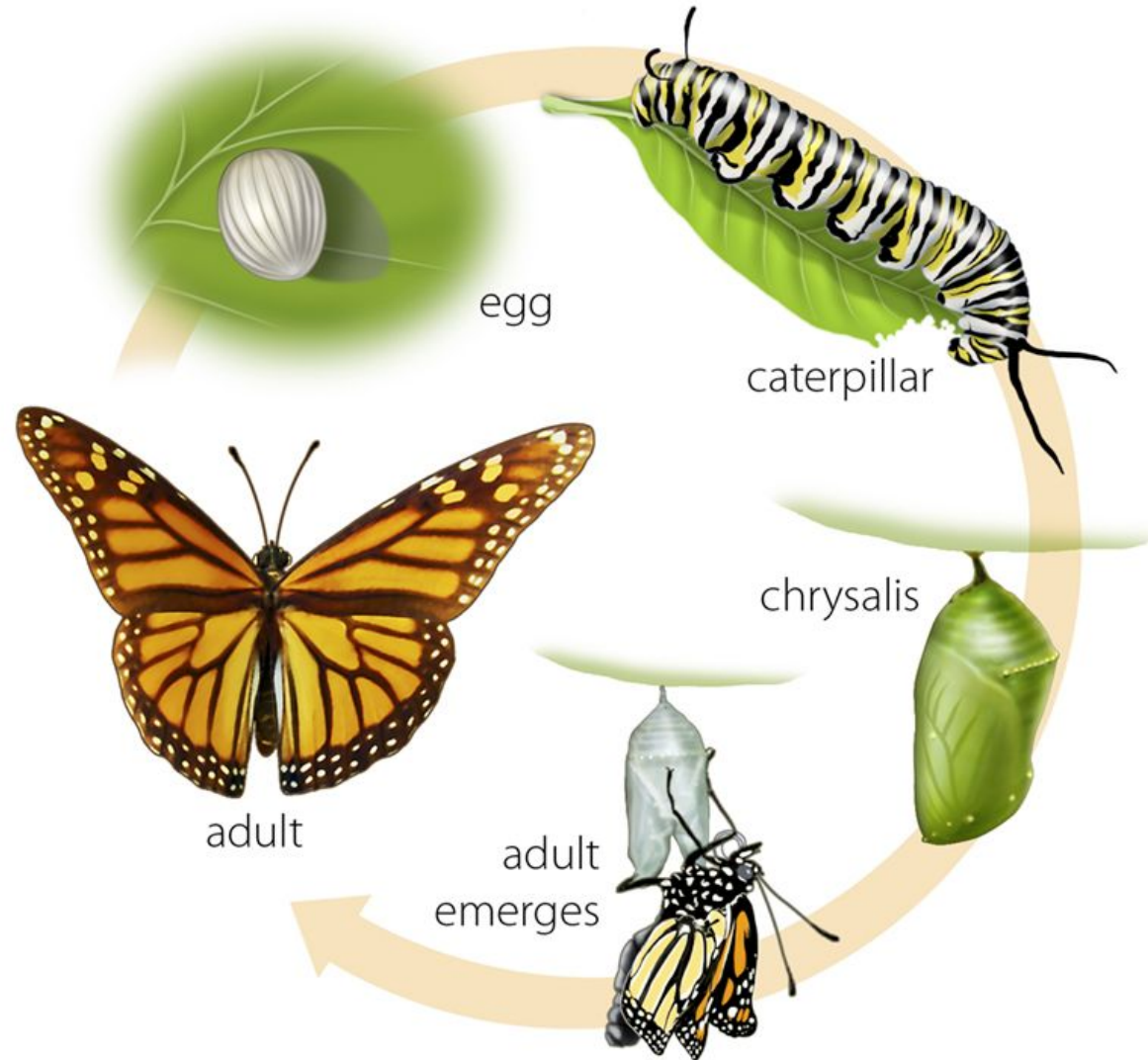
II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

EVOLVING:

- OFCCP Branch of Expert Services (formerly the Statistical Analysis Unit) has now centralized all discrimination analyses.
 - Gone are the days when the OFCCP District Office CO gathered, organized, analyzed and resolved ALL compliance matters locally
 - OFCCP DO COs these days are paralegals, in effect, which gather the data, organize it a bit, and send the data off electronically to BES (wherever located) to look at discrimination analyses
 - BTW: this is why COs (and DDs and RAs) rarely know what is going on with your hiring or compensation analyses, and when they do find out can only relay only perfunctory information and not much substantive about the analyses
- The advent of OFCCP Mediation Services is yet another step in the continuing evolution of OFCCP to more specialization and more centralization

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

LIFE CYCLE OF A BUTTERFLY



II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

EVOLVING:

PUNCHLINE 1: Specialization/consolidation will continue because the complexity of the work demands it and work remote allows facile work product relocations within OFCCP to “dedicated experts”

PUNCHLINE 2: Scope of Work shift is underway:

Prediction: OFCCP will soon start to shed fringe work as headcount further decreases

- Send entire Complaint docket to EEOC, OTHER THAN the VEVRAA docket (No EEOC jurisdiction) and any Complaints which fail EEOC jurisdiction but meet OFCCP jurisdictional requirements???
- 5 Complaint resolutions in FY2019; 10 in FY2018 [Why bother with a distraction?]

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

EVOLVING (Con't):

PUNCHLINE 2 (Con't):

- Stop Affirmative Action Plan enforcement and leave to a Technical Assistance Unit???
- Affirmative Action violations are now few and far between (2 technical violations out of the recent 500 Section 503 Focused Reviews)
- Data for FY2019 not sufficiently discreet, but AA violations were fewer than 180 (7%) for Supply & Service + Construction, together)
 - Compare 76% AAP violation rate in first term Reagan Administration
 - Compare 1982 survey of OFCCP personnel who reported spending 70% of their time on Affirmative Action issues, some of them to the exclusion of any discrimination work
 - Maybe the Affirmative Action Plan arena is a “problem solved”???
- OFCCP no longer (since Pat Shiu/Obama Admin) defines itself as an Affirmative Action Government Contracting agency, as it did for four decades
 - OFCCP’s new characterization, the Trump OFCCP echoes from Obama, is “Civil Rights Agency”

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

EVOLVING (Con't):

PUNCHLINE 3: Next Administration, Republican or Democrat, will need to determine OFCCP's CURRENT purpose/place/utility in the galaxy of federal "Civil Rights agencies"

PUNCHLINE 4: Just a matter of time, the pandemic work-remote experience has ACCELERATED, before OFCCP reduces its brick and mortar offices to a few and then in 10 years time decentralizes them to a remote inexpensive location or locations in second or third tier cities: National Office + an "efficiency pod" clustering all OFCCPers in Des Moines? Kansas City? Louisville?

- National Office plus 6 cities?
- Policy decision, haunted by politics (every Member of Congress who loses federal employees in his/her jurisdiction will scream, as will OFCCP's union...but they are battling gravity)
- Budget and OFCCP's chronic inability to hire and retain employees will drive a total reorganization and dictate how many offices, and where

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

EVOLVING (Con't):

PUNCHLINE 5:

Once you start specializing, and then consequently centralizing, and working remote untethered to local geography, THERE IS NO TURNING BACK from a dismantling of the more expensive and less flexible local brick and mortar office architecture

The Genie is out of the bottle!



II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

EVOLVING (Con't):

PUNCHLINE 6: If the decision in coming Administrations is to continue the refocusing of OFCCP to attack unlawful employment discrimination, OFCCP will likely devolve to a Plaintiff's law firm model: 6 Regional offices staffed primarily by lawyers with OFCCP Compliance Officers (located anywhere) doing the paralegal work to organize the file and ship it to the lawyers to frame the analyses before sending the file off to the statisticians (located anywhere) who will analyze the data provided to them

II. The Incredible Shrinking, Adaptable AND Evolving OFCCP (Con't)

EVOLVING (Con't):

PUNCHLINE 7: Implications of the continuing centralization of OFCCP and increasing pressure to reorganize OFCCP's decentralized office model

- Learn to present persuasively via remote
- Your data will have to improve as local relationships you have built with OFCCP District Office personnel over the years shrink and disappear
- Local ILGs will eventually disappear entirely, or will all but disappear depending on decisions about office locations OFCCP makes in coming Administrations

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III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” UNDER TITLE VII AND EO 11246?

St. Mary’s Honor Ctr. V. Hicks, 509 U.S. 502, 506 (1993) [Whether a comparator is “similarly situated” is an analysis that must be conducted at the *prima facie* stage of the *McDonnell Douglas* framework].

See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

- So, first, OFCCP must set its legal framework for analysis before the Kor has to respond to OFCCP

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

OFCCP’s Belief As To Which Employees Are “Similarly Situated”

41 C.F.R. 60-20.4(a): “...For purposes of evaluating compensation differences, the determination of similarly situated employees is case-specific. Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.

- So, it is a FACTUAL question shaped by Title VII’s definition: not a puzzle for Labor Economists (they have no role in this). Lawyers frame the questions; HR employees (**ESPECIALLY recruiters**) find the facts in Job Descriptions and by understanding the job (interview employees/managers)

FOX: UH OH! “Common supervisor” is left out of OFCCP’s factors which make EEs “similarly situated.” Often **WRONG!**

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

OFCCP’s Belief As To Which Employees Are “Similarly Situated”

FOX: What’s up with that last sentence of the OFCCP Rule? Is that an exception which swallows the Rule?

- Answer: No. OFCCP properly mirrored Title VII law in its Rule and which thinking the ADA brought into sharper and more crisp focus:
 - Some job functions are “Essential” (which an employer need never dilute if a reasonable accommodation cannot be found to render the EE minimally qualified to perform)...Compare “Non-essential job functions”
 - Title VII law often uses the term “relevant” job functions which the ADA converted to “essential.” They are interchangeable terms
- **BOTTOM LINE:** To be similarly situated, the two EEs of concern have to be able to perform all the essential, or relevant, or “material” functions of the two jobs. SPOLIER ALERT: Some judges have migrated “relevant” to “material” which is the same as “essential”

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

OFCCP-Specific Sources re Compensation Analyses (Con’t)

OFCCP once believed individuals were “similarly situated” based upon similarity in work performed, skills and qualifications involved in the job, and responsibility levels. *Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination*, 71 Fed. Reg. 35137, 35124 (June 16, 2006) (**rescinded** at 78 Fed. Reg. 13308 (February 28, 2013)).

In *Oracle*, OFCCP’s expert witness Dr. Janice Madden testified that the employees she treated as “similarly situated” were those she grouped based on age, tenure, education, and job descriptor. *OFCCP v. Oracle America, Inc.*, 2017-OFC-00006 p. 14 (OALJ Order Denying Cross-Motions for Summary Judgment, November 25, 2019, and sending the “similarly situated” issue to trial.)

- Dr. Madden’s testimony provides insight as to what OFCCP’s position would be in audits
- With all due respect to Dr. Madden, she is not competent to testify about who are “similarly situated” EEs

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

OFCCP-Specific Sources re Compensation Analyses (Con’t)

- As to OFCCP’s “steering” claim (as to assignments) against Oracle
- HELD: “What it means to be ‘similarly situated’ for the basis of comparison depends on what is material to the employment actions being considered.” OFCCP v. Oracle America, Inc., 2017-OFC-00006 p. 43 (OALJ, November 25, 2019).
 - FOX: “Material” vs essential/relevant. Again, enter the lawyers to frame the question who is “similarly situated” and then enter HR to find those like creatures.
 - No role for labor economists to define who is “similarly situated.” Labor economists/statisticians take the lawyer/HR work product and then apply their statistical training/skills to that data set

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

The HR Rule of Similarly Situated

If Harry can parachute into Sally’s desk/job and perform at a minimum level of competence, and Sally can parachute into Harry’s desk/job and perform at a minimum level of competence, Harry’s and Sally’s jobs are typically “similar”

A more sophisticated HR analysis will first catalogue and then compare all “essential functions”/“relevant functions”/“material functions” of the jobs and see if they duplicate each other

- They are DIFFERENT jobs if one or more essential/relevant/material elements are different
- The Hit, Bunt and Pitch example

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

Title VII Employment Discrimination Similarly Situated Case Decisions: Generally

- Courts will look to whether the plaintiff and a comparator *have some or all* of the following characteristics:
 - Shares same supervisor;
 - Subject to the same employment policies or rules;
 - Performs very similar job tasks and responsibilities; Similar job performance evaluations and disciplinary history; and
 - Approximately same experience levels

<https://www.forbes.com/sites/ericbachman/2019/04/01/who-is-a-similarly-situated-employee-in-an-employment-discrimination-case/#3caf93113d6e>

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

Title VII Employment Discrimination Similarly Situated Case Decisions: Generally (Con’t)

Individuals are “similarly situated” in a Title VII claim if an individual plaintiff or class show at the least that they are similarly situated to employees outside the protected group “in all material aspects”

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

TITLE VII Employment Discrimination Similarly Situated Compensation-Specific Cases

- *Simpson v. Metro-North Commuter R.R.*, 2006 U.S. Dist. LEXIS 50331, at p. 24 (S.D.N.Y. July 20, 2006) (“[T]o be ‘similarly situated,’ employees must be substantially similar as to specific work duties, education, seniority, and performance history, all of which affect an employee’s rate of pay”)
- *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1529 (11th Cir. 1992) (the “substantial similarity” element for purposes of a compensation claim under Title VII is limited to a comparison of job similarity)
- *Cooper v. Southern Co.*, 390 F.3d 695, 735 (11th Cir. 2004) (not similarly situated because jobs being performed are notably different; differences in professional experience or formal education constitute legitimate, non-discriminatory reasons for a pay disparity, and thus are not part of the *prima facie* case as to similarly situated)
- *Conti v. Universal Enterprises, Inc.*, 50 Fed. Appx. 690 (6th Cir. 2002) (whether a plaintiff and a male employee performed “equal work” is based on the skill, effort, and responsibilities of each job and the working conditions under which each job is performed)

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

TITLE VII Employment Discrimination Similarly Situated Compensation-Specific Cases (Con’t)

- *Randall v. Rolls-Royce Corp.*, 742 F. Supp.2d 974 (S.D. Ind. 2010) (there is no hard and fast formula to determine whether employees are similarly situated; instead, court must examine all relevant factors, including whether the employees: (i) held the same job description; (ii) were subject to the same standards; (iii) were subordinate to the same supervisors; and (iv) had comparable experience, education, and other qualifications, which attributes were also taken into account by the employer in making its compensation decision)
- *Franklin v. City of Evanston*, 384 F.3d 838, 847 (7th Cir. 2004) (an employee must be substantially similar with respect to performance, qualifications, and conduct for Title VII compensation claims)

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

TITLE VII Employment Discrimination Similarly Situated Cases re: Hiring

- *Anderson v. Zubieta*, 180 F.3d 329, 342 (D.C. Cir. 1999) (“...to eliminate the most common nondiscriminatory explanation for a disparity – lack of qualifications – a plaintiff’s *prima facie* case must take into account the ‘minimum objective qualifications’ for the position at issue . . . ‘Minimum objective qualifications’ are those ‘objective qualifications that can be shown to be truly required to do the job at issue’”)
- *Everroad v. Scott Truck Sys.*, 2008 U.S. Dist. LEXIS 60114 (S.D. Ind. August 7, 2008) (“...to be similarly situated, employees must be directly comparable in all material aspects, including their performance, qualifications, and conduct”)
- *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994) (holding that to be similarly situated, employees must be “nearly identical” in the relevant aspects)

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

TITLE VII Employment Discrimination Similarly Situated Cases Re: Disciplinary Action

- *Cardona Jimenez v. Bancomercio de Puerto Rico*, 174 F.3d 36, 42 (1st Cir. 1999) (to be similarly situated for the purpose of our discrimination jurisprudence, the two individuals or situations must be similar in all relevant aspects)
- *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53-54 (2d Cir. 2001) (rejected magistrate judge’s interpretation that other employees cannot be similarly situated to a plaintiff unless they have the same supervisor, worked under the same standards, and engaged in the same conduct; rather, must be similarly situated in all material respects, not in all respects. Plaintiff not obligated to show comparator is identically situated to her; need only show that the employees have a situation sufficiently similar to plaintiff to support at least a minimal inference that the difference of treatment may be attributable to discrimination). *See also Hogan v. Conn. Judicial Branch*, 64 Fed. Appx. 256, 258 (2d Cir. 2003) (plaintiff must establish a reasonably close resemblance of the facts and circumstances of plaintiff’s and comparator’s cases, rather than a showing that both cases are identical, and their acts must be of comparable seriousness; citation omitted)
- *Wilcher v. Postmaster Gen.*, 441 Fed. Appx. 879, 882 (3d Cir. 2011) (to be similarly situated for purposes of Title VII, comparator employees must be similarly situated in all relevant aspects of their employment)

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

TITLE VII Employment Discrimination Similarly Situated Cases Re: Disciplinary Action (Con’t)

- *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511 (4th Cir. 1993) (while employee situations do not have to be exactly the same, the similarity between comparators must be clearly established to be meaningful). See also *Ellington v. Metropolitan Sec. Servs., Inc.*, 2017 U.S. Dist. LEXIS 19121 at p. (D. S.C. January 12, 2017) (to be similarly situated and thus permit a valid comparison, employees outside the protected class must have dealt with the same decision maker, been subject to the same standards, and engaged in the same conduct without mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it); *Haywood v. Locke*, 387 Fed. Appx. 355, 359 (4th Cir. 2010) (plaintiffs are required to show that they are similar in all relevant respects to their comparator)
- *Lee v. Kansas City Southern Railway Co.*, 574 F.3d 253, 259-260 (5th Cir. 2009) (conduct must be nearly identical to that of the proffered comparator who allegedly drew dissimilar employment decisions. This requires taking into account factors such as the employees’ job responsibilities, the supervisors and decision-makers, and the nature of the misconduct engaged in; if the difference between the plaintiff’s conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer, the employees are not similarly situated)

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

TITLE VII Employment Discrimination Similarly Situated Cases Re: Disciplinary Action (Con’t)

- *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (to be similarly situated in the disciplinary context, individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards, and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it. In other words, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in “all of the relevant aspects” only)
- *Lynn v. Deaconess Med. Center-West Campus*, 160 F.3d 484, 487 (8th Cir. 1998) (to show employees are similarly situated, plaintiff need only establish that he or she was treated differently than other employees whose violations were of “comparable seriousness,” and thus district court applied “similarly situated” concept too narrowly as no requirement that employees engaged in exact same offense; employees need only be “similarly situated in all relevant respects”)

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

TITLE VII Employment Discrimination Similarly Situated Cases Re: Disciplinary Action (Con’t)

Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) (similarly situated employees must be “directly comparable” to the plaintiff in all material respects, but they need not be identical in every conceivable way. So long as the distinctions between the plaintiff and the proposed comparators are not so significant that they render the comparison effectively useless, the similarly-situated requirement is satisfied)

- Whether a comparator is similarly situated is usually a question for the fact-finder. *Id.* at p. 847. Must have enough common factors to allow for a meaningful comparison in order to divine whether intentional discrimination was at play. *Id.* The number of relevant factors depends on the context of the case, but usually a plaintiff must at least show that the comparators: (1) dealt with the same supervisor; (2) were subject to the same standards; and (3) engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer’s treatment of them. *Id.*
- See also *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 979 (to be similarly situated to another employee, plaintiff must show that the employee is directly comparable in all material respects)

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

TITLE VII Employment Discrimination Similarly Situated Cases Re: Disciplinary Action (Con’t)

- *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006) (to show that employees allegedly receiving more favorable treatment are similarly situated, the individuals seeking relief must demonstrate, at the least, that they are similarly situated to those employees in all material aspects)
- *Herrera v. United Airlines, Inc.*, 754 Fed. Appx. 684, 692 (10th Cir. 2018) (to be similarly situated, a plaintiff and comparator must have dealt with the same supervisor and been subject to the same standards governing performance evaluation and discipline). *See also Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997) (a court should also compare the relevant employment circumstances, such as work history and company policies, applicable to the plaintiff and the intended comparable employees in determining whether they are similarly situated)
- *Lewis v. City of Union City, Georgia, et al.*, 918 F.3d 1213, 128 (11th Cir. 2019) (similarly situated employees need not be “nearly identical,” but rather need only be “similarly situated in all material respects”). Plaintiff’s comparators not similarly situated because:
 - Plaintiff and comparators were placed on leave years apart and under different personnel policies;
 - Plaintiff placed on leave because she had been on unapproved leave while her comparators were placed on leave because they failed a physical fitness test; and
 - Plaintiff not cleared to return to duty, whereas comparators could have returned to duty

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

Here is the appropriate division of labor which companies sophisticated in proper compensation analyses undertake:

- 1) **LAWYER** (defines who are “similarly situated” employees, trains HR to find and isolate them, and then confirms the groups of similarly situated employees HR has bagged and tagged)
- 2) **FACT FINDER** (HR representatives, ESPECIALLY recruiters, ideally, preliminarily sort all “similarly situated” employees into groups, following legal training)
- 3) **LAWYER** then designs the appropriate legal analyses:
 - a) Are the analyses going to be a “cohort analysis (or analyses)”?
 - b) Are the analyses susceptible to class analyses? **(If not: STOP statistical analyses and either stop altogether or use your other compensation discrimination analysis tool: cohort analyses)**
 - pool of employees to be analyzed numerically large enough to make for meaningful statistical analyses? **(If not: STOP statistical analyses)**
 - 30-5-5 rule of thumb test
 - are all the data for the major factors which affect pay digitized? **(If not: STOP statistical analyses)**
 - are all the pay decisions known and digitized for the Executive Order’s statute of limitations period? **(If not: STOP statistical analyses)**
 - Complaints and/or Compliance Evaluations?
 - are there any “neutral”, “specific” and “particular” “policies” or “practices” which might lend themselves to an “Adverse Impact Analysis”? If so, run proper regression analyses on that policy or practice **(If not: STOP the “Adverse Impact Analysis”)**
- 4) **LABOR ECONOMIST** (CONDUCTS THE APPROPRIATE STATISTICAL ANALYSES WHICH FIT WITHIN THE ABOVE TITLE VII CONSTRAINTS)

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

SOME DON'TS (Part I)

- **DON'T** pay law firms, labor economists, or AAP vendors several hundred dollars an hour to do \$25-\$30/hour Recruiter/HR Generalist work to identify the “similarly situated” employees who perform the same essential/relevant/material job duties
 - You can hire expensive talent not well-suited to determine who is “similarly situated,” but why do that? If short staffed, hire short term experienced recruiters from an HR staffing firm: recruiters know how to read job descriptions and tell the difference between different job requirements. That’s what they do for a living
- **DON'T** expect a big bill from a law firm experienced in compensation or ADA work (also helpful experience to parse “fish from fowl”) to undertake the occasional difficult “line drawing problems” which present themselves, or to confirm the preliminarily parsed groupings of “similarly situated” employees. The big money work is to identify and sort your employees into “similarly situated” groups...but that is \$25-30/hr work....law firms/vendors/labor economists are not the best suited for that work: not trained in staffing and not priced right for that work

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

SOME DON'TS (Part II)

- **DON'T** default the decision who is “similarly situated” to statisticians/labor economists. That is work for HR/recruiters (fact finding/preliminary parsing) and lawyer (provides the legal definition of “similarly situated” *AT THE OUTSET*; “draws lines” on the occasional difficult employee pairings (they are the ones who are going to have to prove the employees were or were not “similarly situated”) and confirms HR’s parsings)
- **DON'T** misuse your resources: Statisticians/labor economists analyze and interpret statistical data to identify significant differences in relationships among different sources of information. Statisticians are not trained to create the information. Statisticians asked to parse “similarly situated” employees are going to throw the “similarly situated” work to \$300-\$400/hr graduate students who have no training or experience in what essential/relevant/material means and what are essential/non-essential job functions, or staffing experience parsing who has the KSAs for the jobs at hand

III. WHEN ARE EMPLOYEES “SIMILARLY SITUATED” (Con’t)

SOME DON'TS (Part III)

- **DON'T** make the classic mistake of asking lawyers, AAP vendors or statisticians to clean and complete your wage data for analyses (at usually 10-15 times the otherwise needed cost to properly clean and update your pay data). If you deliver clean and complete wage data already grouped into similarly situated employees, the statistical analyses are quick and relatively inexpensive. You pay the big bucks to clean data (names not spelled properly; missing cells of information; job title not updated; name after marriage/divorce not properly updated; wrong sex, or national origin or race; pay erroneously reported; bonuses not reported, or only some reported; compensation payments beyond base pay not sufficiently identified and parsed (discretionary one-time bonus?; mandatory annual bonus?, what kind of bonuses?; etc; conversion of data from an older or second payroll system did not transfer properly, etc)
- **DON'T** have statisticians try to statistically analyze groupings of similarly situated employee groups too small for meaningful analysis. Most of your discrimination analyses will be cohort analyses: statistical analyses are statistically rare...or should be if properly done
- The Silicon Valley Story

IV. Why Kors Are Still At Odds With OFCCP Over Discrimination Claims

Many, many speakers in this year's NILG series have reported and decried repeated lack of transparency issues with OFCCP over failure to hire and compensation discrimination analyses, ***despite Director Leen's continued assurance and insistence that OFCCP must and is and will be transparent*** and will allow Kors to replicate OFCCP's statistical analyses

Many speakers, too numerous to name, have commented upon and decried OFCCP's lack of adherence to Title VII standards, ***despite Director Leen's continued assurance and insistence that OFCCP must and is and will follow Title VII standards***

WHAT EXPLAINS THIS CHRONIC AND REPEATED DYSFUNCTION NATIONWIDE?

IV. Why Kors Are Still At Odds With OFCCP (Con't)

It gets down to two simple but IMPORTANT management issues within OFCCP:

- 1) The Branch of Expert Services (BES) is an island unto itself
 - Has no peer review within OFCCP
 - Previous due process safeguards are now gone.
 - The old days of an OFCCP District Director reviewing an ADD's proposed findings, and a Regional OFCCP Director reviewing a DD's proposed findings and the National Office then serving as a (rare) last resort for any disputes which survived these two reviews are now LONG GONE
 - Who reviews BES calculations and decisions?...the same statistician who heads BES is the manager who heads OFCCP's Enforcement Division.) Very poor architecture.

There is now effectively no dispassionate review of statistical calculations and conclusions within OFCCP. Once BES decides, OFCCP is off and running. (Sure, some lawyers may poke their head in from time to time, but to what effect?)

IV. Why Kors Are Still At Odds With OFCCP (Con't)

It gets down to two simple but IMPORTANT management issues within OFCCP (Con't):

2) While the BES statisticians are competent statisticians, the BES does not follow all Title VII standards

Rather, what BES does over and over again is apply perfectly valid statistical concepts to Kor data, but they have not realized, yet, that they must confine and apply their statistical analyses the way Title VII prescribes...not the way statistical analyses COULD be applied the way they learned in grad school to analyze any data set

IV. Why Kors Are Still At Odds With OFCCP (Con't)

It gets down to two simple but IMPORTANT management issues within OFCCP (Con't):

This is where the Solicitor's Office could be of assistance since one cannot expect statisticians to know the law: the lawyers have to frame EACH and EVERY statistical analysis: it is NOT one-size fits all and it is NOT do what I learned in grad school

IV. Why Kors Are Still At Odds With OFCCP (Con't)

It gets down to two simple but IMPORTANT management issues within OFCCP (Con't):

Here is a list of the routine BES departures from Title VII law you have heard speakers in this 2-month Webinar series decry:

- 1) Compensation: All “major” factors which affect pay must be known and digitized for statistical analysis. I hit this hard at last year’s NILG and I have not seen in my own OFCCP docket BES straying from this Title VII statistical model limitation any longer (but several vendors and law firms tell me their experience continues to be different)

IV. Why Kors Are Still At Odds With OFCCP (Con't)

Here is a list of the routine BES departures from Title VII law (Con't):

- 2) Compensation: OFCCP analyses “current pay.” Wrong. No case law to support this model. All of Title VII is built around examining an employer’s decision(s). And, even if the Lilly Ledbetter Act amended the Executive Order (which it did not), LLA did NOT address this decisions issue (just the timing of the employers’ decisions). This is because ALL of Title VII law, in every context, is built around examination of an employer’s decision(s)

BES must confine itself to analyzing the pay decisions made within OFCCP’s two-year statute of limitations period in audits and its 180 day timely filing period as to Complaints

IV. Why Kors Are Still At Odds With OFCCP (Con't)

Here is a list of the routine BES departures from Title VII law (Con't):

- 3) Hiring and Compensation: There is no concept in Title VII of “aggregating” different jobs to get to some pre-ordained artificially constructed size threshold needed for meaningful statistical analyses...70% or 80% of the contractor’s workforce as BES advocated in this series for compensation analyses

If the dataset is too small for meaningful statistical analyses, so be it: you go back to the investigator tool box and pull out a different tool...a cohort analysis—as OFCCP has done for decades...not a shoe stretcher to try to force the data into a bigger statistical data base

Which employees are “similarly situated” is not a statistician’s job anyway: that task belongs to those trained to know that answer set: lawyers reading Title VII case decisions and applying them to the jobs in question and to the facts of each at-issue employee pairing (after HR reads any job descriptions, knowing the job duties, interviewing employees and managers as necessary to understand what the essential/relevant/material job duties are for the job in question AT THAT TIME

IV. Why Kors Are Still At Odds With OFCCP (Con't)

Here is a list of the routine BES departures from Title VII law (Con't):

- 4) BES cannot statistically analyze data sets too small to make for meaningful analyses
 - While they have more precise statistical tools to tell them when a data set is too small for statistical analyses, a good “Rule of Thumb” many different statisticians and labor economists have endorsed to me as highly reliable is the 30:5:5 test:
 - at least 30 in the pool (30 Applicants for hire, for promotion; for pay, etc.); **AND**
 - at least 5 of the at-issue employment transactions (5 hires; 5 promotions; 5 pay decisions; etc.); **AND**
 - at least 5 of the at-issue Protected Group (5 Blacks/African Americans; 5 Hispanics; 5 women; 5 men, etc.)

You need all three metrics: at least 30, at least 5 and at least 5 (two out of three does not count)

IV. Why Kors Are Still At Odds With OFCCP (Con't)

Here is a list of the routine BES departures from Title VII law (Con't):

- 5) Hiring and Compensation: BES must follow and analyze the Kor's hiring/pay system...NOT project what an ideal hiring system or ideal pay system might look like...not build a Best Practices model and tell the contractor it is in trouble because the Kor's system of hiring or pay does not mimic BES' idealized model
 - The Analogic compensation case decision criticized OFCCP for this error, and Title VII case decisions strictly require Plaintiff's statistics to analyze the employer's hiring/pay practices as ACTUALLY APPLIED

While this is not the place for an R-squared discussion, BES periodically produces low R-squared results (R-squared is a statistical measure of how well the statistical regression model fits the employer's data...i.e., how fully the statistical model does or does not explain the variability of the response data around the mean of the fitted regression line)

IV. Why Kors Are Still At Odds With OFCCP (Con't)

How will this drama end? There are only five possible ways:

- 1) BES will continue what it is doing (undaunted); or
- 2) Contractors will get fed up and bring gentle, but repeated steady pressure to bear—as OFCCP has observed during this seminar series--hoping BES will intellectualize its way through the stand-off with Kors, and if that fails, then go to the Hill
- 3) A new OFCCP Director will take the bull by the horns to save OFCCP's budget
- 4) The Solicitor's Office will step forward to start shaping BES statistical analyses
- 5) OFCCP-related lawsuits will eventually (over 10 years) decide these issues and reign-in BES—although the Title VII case decisions are already out there

IV. Why Kors Are Still At Odds With OFCCP (Con't)



V. Lessons To Be Learned From OFCCP's Enforcement Statistics

- 1) The Kor community has to face a harsh truth: Pat Shiu *may* have been right!

“Deep-Dredge” leave-no-stone unturned audits may produce more back pay (by a long shot) than Shirley Wilcher’s “SWAT Team” high volume, kick-the-front door down, look around and if you do not immediately see bad guys, leave, since OFCCP finds unlawful discrimination 2% of the time regardless whether it does 100 audits, 1,000 audits or 10,000 audits

And, of course, OFCCP is now harvesting 3x to 6x its normal annual backpay collection (from ~\$10M/yr to \$30M to \$60M/yr depending on year and how you count)

V. Lessons To Be Learned From Enforcement Statistics (Con't)

1) A harsh truth! (Con't)

I thought, and still think, Shirley's audit design had it right...but I now do not know... . Pat's audit selection techniques were likely unconstitutional and her inability to manage audits closed in the same decade they were started does not speak well for OFCCP

- Of course, my client Baker DC caught OFCCP secretly violating its and the construction industry's constitutional rights against unlawful search and seizure
- Of course, Pat separately denied in 2012 that OFCCP was auditing "by company," but she admitted that in 2014 (company targeting is most likely also unconstitutional in the OFCCP context)
- Of course, Pat separately denied in 2014 that OFCCP was auditing by industry, but she admitted that in 2016 (very low chance that it's constitutional for OFCCP, even though that works for OSHA)

V. Lessons To Be Learned From Enforcement Statistics (Con't)

1) A harsh truth! (Con't)

But, you have to pause and wonder and tip your hat to Pat for making a difference...whether we in the Kor community liked it or not...I just wish I could be more sure it was the style of audit (“Deep Dredge” vs. “SWAT”) which made the critical difference in backpay results and not the unconstitutional selections...I am NOT sure

Kors need to keep an eye on this as OFCCP continues to struggle with and migrate its audit selection system

V. Lessons To Be Learned From Enforcement Statistics (Con't)

- 2) OFCCP's big back-pay collections will fall off sharply in 2022 after the 8 year backlog of Obama-Bubble OFCCP audits is exhausted

There is always a two-three year lag time in harvesting audit results now that OFCCP has adopted the unfortunate habit of too often allowing audits to linger for multiple years

But the big harvest during the Trump OFCCP dates back to the audit work accomplished in the Obama OFCCP...and when that pipeline goes dry, OFCCP's backpay collections will likely return again to less than \$10M/year

V. Lessons To Be Learned From Enforcement Statistics (Con't)

2) OFCCP's big back-pay collections will fall off sharply in 2022 (Con't)

In 2019, ~\$30M of the ~\$40M OFCCP collected in backpay was from audits started before 2017 for alleged discrimination in 2011 through 2016

In 2019, about \$10M of the \$40M in OFCCP backpay collections was for alleged discrimination during 2017, 2018 and 2019

In 2020, OFCCP has collected a little over \$2M for discrimination alleged to have occurred in 2017, 2018, 2019 and 2020

- However, there are 4 more weeks left in FY2020

V. Lessons To Be Learned From Enforcement Statistics (Con't)

2) OFCCP's big back-pay collections will fall off sharply in 2022 (Con't)

Why is this important to understand? The big scary numbers were a short-lived phenomenon and will not repeat

- The big Obama collection Bubble may be legit collections, or it may be that they are unjust collections (duress on Kor held hostage to 6 year old audits), but whatever they are, they will not repeat
- OFCCP's current pipeline is tapped out. OFCCP is in this Administration responsibly keeping up with its docket and capturing back pay in real time
- Absent the “Bubble” audits still hanging around from 2008 to 2016, OFCCP's 2019 and 2020 back pay collections are within historical yield expectations (~\$10M), although OFCCP is going to have to hurry in the last month of FY2020 to get to \$10M from alleged discrimination during 2017, 2018, 2019 and 2020

VI. (A) How to Undertake Employment Preferences The Right Way (i.e. lawfully)

**THE THREE THEORIES: SUPREME COURT DECISIONS FINDING A
“COMPELLING STATE INTEREST” PREDICATE TO UPHOLD THE USE OF
RACIAL CLASSIFICATIONS BY **STATE ACTORS** (IN ANY LEGAL CONTEXT)**

**For Reasons of
National Security**

Korematsu v. United States

323 U.S. 214 (1944)

**To Remedy Past
Discrimination for
Which the State
was Responsible**

Richmond v. J.A. Croson Co.

488 U.S. 469, 504 (1989)

**To Achieve
Educational Benefits
Flowing from a
Diverse Student
Body**

Grutter v. Bollinger

539 U.S. 306 (2003)

PLEASE VIEW THESE SLIDES IN CONJUNCTION WITH JOHN FOX' PAPER TITLED:
“Preferences in Employment” (61 pages)

VI. (A) How to Undertake Employment Preferences The Right Way (i.e. lawfully) (Con't)

The two ways to have “the predicate” necessary in the **private sector** for an employment preference is to show:

1) a “**MANIFEST IMBALANCE;**” OR

2) a “**STRONG BASIS IN EVIDENCE**”

THUS: A company may take “self-help” to remedy past unlawful discrimination: it need not wait for the class action to be filed

VI. (A) How to Undertake Employment Preferences The Right Way (i.e. lawfully) (Con't)

➤ Would the following Employment Preferences be Lawful?

Favoring Blacks	Favoring Whites	Favoring Hispanics	Favoring Asians	Favoring Native Americans	Favoring Women	Favoring Men	Favoring Veterans	Favoring the Disabled	Favoring Spouse of Active Duty Military	Favoring those over 40

VI. (A) How to Undertake Employment Preferences The Right Way (i.e. lawfully) (Con't)

➤ Would the following Employment Preferences be Lawful?

Favoring Blacks	Favoring Whites	Favoring Hispanics	Favoring Asians	Favoring Native Americans	Favoring Women	Favoring Men	Favoring Veterans	Favoring the Disabled	Favoring Spouse of Active Duty Military	Favoring those over 40
No*	No*	No*	No*	Could be**	No*	No*	Yes?***	Yes	Yes	Yes****

*This preference would be unlawful absent a successful affirmative legal defense.

** Title VII/EO11246 allows for an "Indian preference" if the at-issue Native American Applicant/employee lives on "or near" an Indian reservation. See 41 CFR Section 60-1.5(a)(7).

***Some pundits have theorized that Veterans Preferences may "adversely impact" women.

****But beware those states which have statutes protecting the young.

VI. (A) How to Undertake Employment Preferences The Right Way (i.e. lawfully) (Con't)

Employment Preferences in a Nutshell

U.S. Supreme Court	Issue	Claim	Description	Preference Upheld?
Case Name				
1) <u>United Steelworkers of America v. Weber</u>	Hiring	Title VII	Reverse discrimination challenge: selection to craft training program: 1-for-1 white/black quota The Imbalance: Available = 39% Blacks Incumbency = 1.8% Blacks (20xΔ)	Yes If: a) predicate (discrimination or persistent manifest imbalance) b) voluntary; c) temporary; and d) no trammeling (1-for-1 quota).
2) <u>Local 28 v. EEOC</u>	Hiring	Title VII	Overt, outrageous, contumacious discrimination in hiring (and transfer) into union The Imbalance: Available = 29.23% Minority Incumbency = 10.8% Minority (3xΔ)	Yes If: a) predicate (persistent or egregious discrimination); and b) relief carefully tailored to violation.
3) <u>Local 93 v. City of Cleveland</u>	Promotion	Title VII	Does § 706(g) of Title VII (remedies ¶) limit use of race conscious remedies embodied in Consent Decree to promote minority sergeants to lieutenants The Imbalance: Available = 46% (Local Labor Force) Incumbency = 4.3% (10xΔ)	Yes: Voluntary promotion preference in Consent Decree upheld, but whether Title VII permits promotion preferences left open.

VI. (A) How to Undertake Employment Preferences The Right Way (i.e. lawfully) (Con't)

Employment Preferences in a Nutshell (Con't)

U.S. Supreme Court Case Name	Issue	Claim	Description	Preference Upheld?
4) <u>Johnson v. Santa Clara County</u>	Promotion	Title VII	Reverse discrimination challenge: qualified, but slightly less qualified, woman promoted to road dispatcher position where no woman had ever been placed The Imbalance: Available = 36.4% Incumbency = 0% (inexorable "0")	Yes If: Weber test applied.
5) <u>U.S. v. Paradise</u>	Promotion	EPC 14th Amendment	1-for-1 promotion quota for black state troopers where history of "pervasive, systemic, egregious and obstinate" discrimination The Imbalance: Available = 25% Incumbency = 0% (inexorable "0")	Yes If: a) predicate of pervasive discrimination b) temporary; and c) flexible.
6) <u>Wygant v. Jackson School Board</u>	Layoff	14th Amendment/EPC	More senior white female school teacher laid off due to CBA preference to maintain racial percentage of teachers Incumbency = lay-off	No: a) predicate "compelling state purpose" not shown; and b) preference not "narrowly tailored" to predicate (layoff preference is not cure for hiring discrimination).
7) <u>Stotts v. City of Memphis</u>	Layoff	Title VII	More senior white police officers laid off due to court order in violation of CBA "last hired, first fired" layoff requirement Incumbency = lay-off	No: a) predicate discrimination not shown; and b) layoff of innocent white incumbents not appropriate.

VI. (A) How to Undertake Employment Preferences The Right Way (i.e. lawfully) (Con't)

Employment Preferences in a Nutshell (Con't)

U.S. Supreme Court Case Name	Issue	Claim	Description	Preference Upheld?
8) <u>Ricci v. DeStefano</u>	Promotion	Title VII Court did not reach 14 th Amendment Equal Protection Clause issue since the case resolved under Title VII	City failed to certify promotion test results (and thus denied test-taker promotions) because 19 White candidates and 1 Hispanic candidate passed the test, but no Black candidates scored sufficiently high to be promoted	No: a) before an employer may lawfully engage in intentional discrimination based on race, it must have a “strong basis in evidence” to believe it will be subject to liability before voluntarily enacting a remedial scheme (in this case by not promoting successful White and Hispanic test-takers) due to an unfounded fear of a lawsuit from the unsuccessful Black candidates. b) City not subject to disparate impact liability, in fact, because test in question was “job related and consistent with business necessity”.

VI. (A) How to Undertake Employment Preferences The Right Way (i.e. lawfully) (Con't)

Employment Preferences in a Nutshell (Con't)

U.S. Supreme Court Case Name	Issue	Claim	Description	Preference Upheld?
9) <u>Fisher v. University of Texas (Fisher II)</u>	College Admissions	EPC 14th Amendment	Challenge to university's use of an admission policy that considered race a part of a holistic-review process	<p>Yes: because:</p> <ul style="list-style-type: none"> a) PURPOSES: The university's rationale for diversity-associated action was "sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them," despite the lack of a numerical quota. The university's race-based purposes were "destruction of stereotypes," promotion of "cross-racial understanding," preparation of students for "an increasingly diverse workforce and society," and cultivation of "leaders with legitimacy in the eyes of the citizenry." b) OTHERWISE FAILURE OF PURPOSES: Race-neutral policies and enhanced outreach were not increasing minority enrollment. c) CONSIDERING RACE WAS ACHIEVING PURPOSES: Considering race (although the university did not describe how) was improving the percentage of minority enrollment to the Freshman class. d) HOW ELSE TO MEET LAUDABLE PURPOSES? The White challengers did not offer an alternative which would lessen the impact on Whites but allow for "multidimensional diversity" which the Court lauded as an admirable objective in the earlier <i>Bakke</i> case.

VI (B) How To Convert Your AAP Into An Intelligent D&I Generator

OFCCP's Rules to construct AAPs for Minorities and Women do not require a Kor to determine why it had to set a "Placement goal"

41 CFR Section 60-2.16, however, does require:

"(a) Purpose: Placement goals serve as objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work. Placement goals also are used to measure progress toward achieving equal employment opportunity." (emphasis added)

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I STRONGLY encourage you to determine why you had to set EACH Placement goal

This “*why*” knowledge will allow you to prescribe meaningful Good Faith Efforts (GFEs) which, over time, will make a big difference in the recruitment and eventually selection of minorities and women

There are five different major reasons a contractor sets a Placement goal

There is a different cure for each reason you identify to have operated to prevent the contractor from selecting minorities and women at or above calculated availability for each Job Group the contractor has identified

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Let's review each of the five drivers which cause a contractor to set a Placement goal:

- 1) Inadequate Applicant Flow
- 2) Good Applicant Flow, but not enough "Contender Candidates"
- 3) Good Applicant Flow, Enough Contender Candidates, But Still Setting A Goal
 - The "Historical Baggage" Problem
- 4) Good Applicant Flow, Enough Contender Candidates, Good Selection Rate, No "Historical Baggage," But You Are Still Setting A Goal: The "Backfill" Problem
- 5) None of the Above Problems, But You Are Still Setting Placement Goals
 - Whatever Could It Be?

VI. (C) Call To Action

GO OUT THERE AND BE AFFIRMATIVE!

FIND A WAY!

or

MAKE A WAY!

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