



USE OF STATISTICS IN SINGLE PLAINTIFF DISPARATE TREATMENT DISCRIMINATION CASES

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August 24, 2018



Who
What
When
Where
How
Why

Who can use statistics to their advantage?

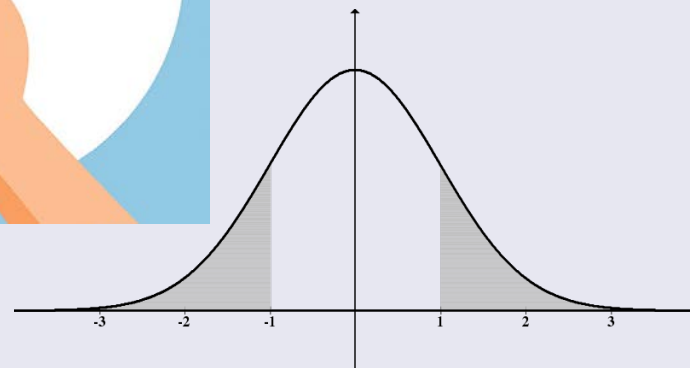
- Plaintiffs

AND

- Defendants

What are we talking about?

- Key terms
 - Statistically significant
 - Standard deviation
 - Sample size
- Other jargon
 - Variables
 - EEOC's 4/5ths or 80% Rule
- Keep in mind: correlation is not causation



When are statistical analyses most useful?

- Prima facie case
 - Create an inference of discrimination when no replacement
 - Bolster with other evidence



“Under the disparate treatment analysis, a Title VII plaintiff may establish a prima facie case of disparate treatment using statistics alone if the statistics show a “gross disparity” in the treatment of workers based on discriminatory factors such as race.... However, if the statistical disparity shown by the plaintiffs' evidence is insufficient alone to establish a prima facie case of disparate treatment, we have held that a Title VII plaintiff “may get over his or her hurdle by combining statistics with historical, individual, or circumstantial evidence.””

Page v. U.S. Indus., Inc., 726 F.2d 1038, 1046 (5th Cir. 1984) (internal citations omitted)

When are statistical analyses least useful?

- Pretext
 - Rarely successful at this stage
 - Historical acts not indicative of present discriminatory intent
 - Bolster with other evidence
- “While relevant, statistics do not ordinarily suffice to prove the requisite discriminatory intent in individual disparate treatment cases. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); *Walther v. Lone Star Gas Co.*, 977 F.2d 161, 162 (5th Cir.1992) (“[P]roof of pretext, hence of discriminatory *intent*, by statistics *alone* would be a challenging endeavor.”).” *Conlay v. Baylor Coll. of Med.*, 688 F. Supp. 2d 586, 595 (S.D. Tex. 2010)
- “The fact that a similarly situated individual outside a Plaintiff's protected class was treated more favorably than that Plaintiff may constitute probative evidence of disparate treatment. However, the more favored treatment must have occurred under “nearly identical” circumstances. Where the comparator and the Plaintiff have different supervisors, their situations are not “nearly identical.”” *Coleman v. Exxon Chem. Corp.*, 162 F. Supp. 2d 593, 613 (S.D. Tex. 2001)



Where do we get the data?



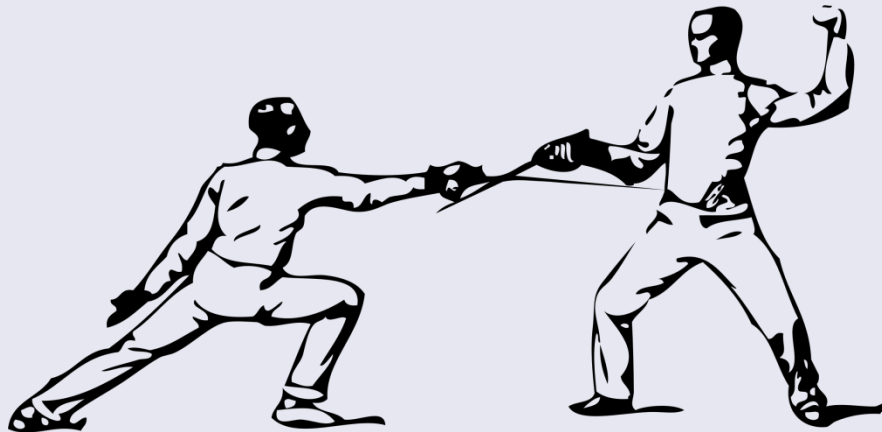
- Discovery
 - Most data will reside with the defendant
 - Hard files vs. electronic records
 - Understand the systems and their capabilities and limitations****
 - “[T]he court directs defendant to respond to Interrogatory No. 8 to the extent it seeks to obtain information regarding only those employees who have been terminated or disciplined in writing (including reprimands) for violating BCBSKS’ FMLA policy. As to Interrogatory No. 9, plaintiff proposes that defendant “could at least provide ... all employees terminated for attendance.” Thus, the court further directs defendant to respond to Interrogatory No. 9 to the extent it seeks information regarding *documented* instances of employee termination for attendance within the last five years.” *Moss v. Blue Cross & Blue Shield of Kansas, Inc.*, 241 F.R.D. 683, 691 (D. Kan. 2007)
 - Protective Order
 - “Courts have also specifically granted such orders to protect nonparties from the harm and embarrassment potentially caused by nonconfidential disclosure of their personnel files.” *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 365 (6th Cir. 1999)

Where do we get the data? Cont'd

- Discovery cont'd
 - Scope of requests
 - Time period
 - Details
 - Geography
 - Supervisor/Decision maker
 - *Huge v. Boeing Co.*, No. C14-857RSM, 2015 WL 6395645, at *4 (W.D. Wash. Oct. 21, 2015) (ordering production of information regarding referrals to defendant's physician with pseudonyms for relevant employees (e.g. Employee 1, Employee 2, etc.) and limiting the response to employees referred in a three-year period)

How are statistical analyses introduced?

- Experts
 - Raw statistics are rarely probative of anything. To be meaningful, further refinement (if not always expert analysis) is required.” *Conlay v. Baylor Coll. of Med.*, 688 F. Supp. 2d 586, 595 (S.D. Tex. 2010)
 - Battle of the Experts: *Page v. U.S. Indus., Inc.*, 726 F.2d 1038, 1051 (5th Cir. 1984)



Page v. U.S. Indus., Inc., 726 F.2d 1038, 1051 (5th Cir. 1984)

Plaintiffs' analysis reflected a statistically significant difference in length of time to progress between white and minority employees as of August 1974 in favor of white employees, but no such difference was shown as of December 1979

In sum, the evidence shows that while 51% of the employees hired by Wyatt during the years 1969 through 1978 were class members, over 54% had progressed to skilled A classifications by December 1979. It is obvious that no disparity exists between the number of minority employees expected to progress to upper level jobs and the number which actually progressed. Plaintiffs argue that even though these figures show that class members are not underrepresented in Wyatt's upper level jobs, minorities, nonetheless, took a disproportionately longer time to reach these upper level classifications than did white employees. However, plaintiffs offered no statistical evidence to support this contention or to show that the alleged longer progression rate for minorities was the result of race discrimination.

Why do we go to the trouble of statistical analyses?

- Summary Judgment and Trial success
 - “[T]he instruction in this case said only that statistics may be enough to establish that age was the reason for Lone Star Gas's decision to discharge Walther. We cannot say that this abstract proposition of law is incorrect on the facts of this case. We need not engage in a hypothetical debate as to whether and when statistics alone could suffice to carry an individual employee's burden of proof. The fact is that Walther did not rely on statistics alone to prove his case. He had other evidence, the sufficiency of which Lone Star has not challenged.” *Walther v. Lone Star Gas Co.*, 977 F.2d 161, 162 (5th Cir. 1992)
- BUT, proceed with caution...

Hill v. K-Mart Corp., 699 F.2d 776, 781 (5th Cir. 1983)

Guided by “a word of caution to those who would enter the courthouse armed with statistics that prove little more than a litigant's resourcefulness at manipulating numbers,” *Pouncy*, 668 F.2d at 804–05, we observe that the warning carries even more force where the numbers, after untethered handling, fail to prove discriminatory motive and practice. The record reveals no gross statistical disparities; indeed, it reveals no significant disparities at all.



Thank You

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