Disparate Impact in Fair Housing

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HOUSE
FOR SALE

Civil Rights Division

- The Civil Rights Division enforces the Arizona Fair Housing Act (AFHA).
  - Investigation
  - Conciliation
  - Litigation
- AFHA is substantially equivalent to the Federal Fair Housing Act (FFHA).
- Contracts with HUD to investigate dual complaints of housing discrimination.

Scope of fair housing act

- **People on the basis of:**
  - **race,**
  - **color,**
  - **religion,**
  - **national origin,**
  - **gender,**
  - **familial status, and**
  - **disability.**

Old News: Disparate Treatment

- Motivated by animus against the protected class, the housing provider assessed an adverse employment action.
- There may be disparate treatment where a city departs from its normal zoning practices to deny a building request from a company known for serving Hispanic families, where the evidence shows that constituents discussed that fact at the planning meetings.

New News? Disparate Impact

- Although it appears neutral, a housing policy or practice, in fact, has a disproportionately adverse effect on a protected class.
- A statistical review shows that a policy against five-or-more-person households resulted in nearly screening out an entire religious population.

Case In Chief

Disparate Treatment

- Member of protected class;
- Objectively qualified for housing;
- Faced an adverse housing action;
- Facts show animus more likely than not motivated the action.

Disparate Impact

- Member of a protected class;
- Policy or practice has or would have a disproportionately adverse effect on members of protected class or perpetuates segregation.

Defenses

Disparate Treatment

- If there is direct evidence of discrimination violates the Civil Rights Act;
- If there is circumstantial evidence of discrimination, Defendant may show a legitimate, non-discriminatory reason for the adverse action. That Defense wins unless it is pretext.

Disparate Impact

- A legal, non-discriminatory reason for the policy or a business necessity will defend the claim;
- Plaintiff may show an alternative means to reach those goals with decreased impact on protected class.

Disparate Treatment vs. Disparate Impact

- Knowledge
- Animus

- Statistics
- Justification – not an artificial, arbitrary or unnecessary barrier.

Disparate Impact:

How the Legal Theory Developed

- US Supreme Court Title VII employment cases first used disparate impact analysis.
  - *Griggs v. Duke Power* Co. , 401 U.S. 424 (1971)
  - *Wards Cove Packing* Co. *v. Atonio, 490 U.S. 642* (1989). No proof of intent. Defendant asserts business justification, Plaintiff proves alternative with less impact on protected class.

Disparate Impact:

Fair Housing Cases

- First disparate impact fair housing case before U.S. Supreme Court:
- *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P., 488 U.S. 15* (1989). Zoning ordinance restricted most private multifamily housing projects to minority urban renewal areas. *Court did not decide if disparate impact applied to fair housing cases.*

Disparate Impact

U.S. Courts of Appeal

- *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984) All-adult conversion policy for building had disparate impact on minority tenants. Defendant had *burden* to *prove* business necessity to justify its business practice.
- (Plaintiffs liked this, but the standard has changed.)

More Cases

- 1988 – FHAA adopted. 9 federal courts of appeal had upheld FHA disparate impact claims. A trend?

- 1993 - *Secretary v. Mountain Side Mobile Estates*. HUD Secretary required ALJ to use the simpler business necessity test from *Betsey v. Turtle Creek Associates*.

- *2009 – Greater New Orleans Fair Housing Action Center v. St. Bernard Parish.* Invalidated post-Hurricane Katrina ordinance that restricted housing rentals to "blood relatives" in city area that was 88.3% white and 7.6% black.

HUD Guidance

- 1993 - HUD Asst. Secy. FHEO Roberta Achtenberg Guidance on Applicability of Disparate Impact Analysis to Fair Housing Cases, particularly where:
- Local residency preference disproportionately excludes minorities
- Policies refusing to count alimony as income for housing eligibility
- Occupancy cases where facially neutral policy excludes or disadvantages families with children (but see Keating memo)
- 2013 - HUD Final Rule re: Implementation of the Fair Housing Act's Discriminatory Effects Standard, 24 C.F.R. § 100.500.

Disparate Impact Challenged

- 2014 – *American Ins. Assn. v. Department of Housing and Urban Development* . Federal court in D.C. invalidated HUD's Final Rule on Discriminatory Effects as unconstitutional on theory that FHA applied only to intentional discrimination. - (Stage set for U.S. Supreme Court to weigh in.)

Disparate Impact

U.S. Supreme Court Decision

- *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, __U.S.__, 135 S.Ct. 2507 (2015).
- ICP: Too many LIHTCs in black inner-city areas and not enough in white suburbs caused continued racially segregated housing. Disparate impact.
- Court upheld use of disparate impact for FHA

Disparate Impact

Supreme Court decision

- Title VII, ADEA, Congressional Intent re FHAA.
- FHA purpose to provide fair housing across the nation.
- Disparate impact applies to consequences: “otherwise make housing unavailable” and “making a real estate related transaction available.”

Disparate Impact

Supreme Court Guidance

- No need to prove intent.
- Facially neutral policies and practices with disproportionate adverse effect.
- Limited to: removal of artificial, arbitrary and unnecessary barriers; *not valid gov't or business priorities.*

Disparate Impact

Proof Requirements

- Causation: Statistical disparity (e.g., racial imbalance) insufficient without showing a policy or policies caused it.
- Plaintiff: must allege facts at pleading stage or produce statistical evidence demonstrating the causal connection between the policy and the adverse effect.

Disparate Impact

Justification

- Defendants (govt. entities, housing authorities, private developers, etc.) must have opportunity to explain the valid interest served by their policies.
- Policies don't violate disparate impact unless artificial, arbitrary and unnecessary barriers.

Disparate Impact

Plaintiff's Burden of Proof

- Plaintiff: must prove that there is an available alternative practice that has less disparate impact and serve's the defendant entity's legitimate needs.
- Courts should avoid interpreting disparate-impact liability under the FHA so expansively as to inject race in every housing decision.

Disparate Impact

Remedies

- Remedial orders must be consistent with the Constitution.
- Concentrate on eliminating the offending practice that discriminates against protected class.
- Use race-neutral means to eliminate disparities.
- Race can be considered in certain circumstances.

Disparate Impact

After Supreme Court ruling

- HUD Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions.
- Ninth Circuit decision -*Avenue 6E Investments, LLC v. City of Yuma, Arizona (Disparate impact applies to refusal to rezone)*

Disparate Impact:

Anticipated Cases

Criminal Records:

1. Is there, statistically, an impact on a protected class caused by a policy?

2. If so, Is the policy necessary to achieve a substantial, legitimate, nondiscriminatory purpose?

3. If yes, is there another way to meet that purpose without causing the discriminatory impact? [See new HUD Guidance]

Disparate Impact:

Anticipated Cases

Credit Checks:

1. Is there, statistically, an impact on a protected class caused by a policy?

2. If so, is the policy necessary to achieve a substantial, legitimate, nondiscriminatory purpose?

3. If yes, is there another way to meet that purpose without causing the discriminatory impact?

Disparate Impact:

Anticipated Cases

Financial Obligations/Medical Bills:

1. Is there, statistically, an impact on a protected class caused by a policy?

2. If so, Is the policy necessary to achieve a substantial, legitimate, nondiscriminatory purpose?

3. If yes, is there another way to meet that purpose without causing the discriminatory impact?

Disparate Impact:

Anticipated Cases

Zoning :

1. Is there, statistically, an impact on a protected class caused by a policy?

2. If so, Is the policy necessary to achieve a substantial, legitimate, nondiscriminatory purpose?

3. If yes, is there another way to meet that purpose without causing the discriminatory impact?

Disparate Impact

Resources

- Supreme Court *ICP* Decision
- HUD OGC Guidance re Criminal Records
- Ninth Circuit's *City of Yuma* decision
- Statistics used to comply with AFFH requirements
- HUD

- Questions??

Disparate Impact

Questions??