



Proof : Evidence of Housing Discrimination

2018 Region V Fair Housing Law and Policy Conference

50 Years Further

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Two Theories of Proving Discrimination

Disparate Treatment

- Intentional treatment of one person differently than another similarly situated person based upon a protected classification.
- Is proven by direct or circumstantial evidence.

Disparate Impact

- Discriminatory effect resulting from the implementation of a policy that is facially neutral.
- Proven almost entirely by circumstantial evidence.



Disparate Treatment

Direct Evidence of Discriminatory Intent



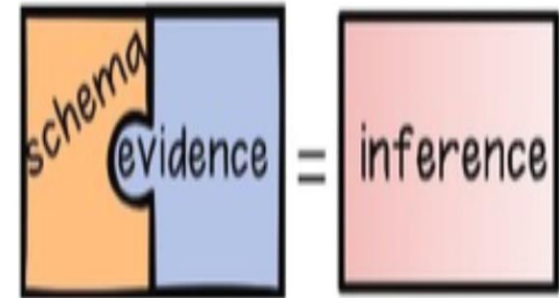
Direct Evidence:

Evidence that supports the truth of an assertion without the need for the trier of fact to draw inferences.

Circumstantial Evidence of Discriminatory Intent

Circumstantial Evidence:

Evidence of events, actions, or circumstances from which a trier of fact may reasonably infer discriminatory intent.



Schema + Evidence = Inference
To infer means to come to a conclusion about something.

Inferring Discriminatory Intent

- From evidence of “suspicious timing, ambiguous statements, [or] behavior toward or comments directed at others in the protected group...”
- Also “...evidence that others similarly situated to plaintiff, other than in the characteristic on which the defendant is forbidden to base a difference in treatment (e.g., race), received systematically better treatment.”
- From evidence that:
 - Plaintiff is a member of a protected class;
 - Defendant knew of the Plaintiff’s membership in the protected class;
 - Defendant denied a benefit for which Plaintiff was qualified; and
 - Defendant’s offered non-discriminatory explanations for the denial are pretextual.

H.O.P.E., Inc. v. Lake Greenfield Homeowners Association, 2018 WL 3630044, at *8 (N.D. Ill., 2018) citing *Robinson v. Parkshore Co-op*

H.O.P.E., Inc. v. Lake Greenfield Homeowners Association, 2018 WL 3630044, at *8 (N.D. Ill., 2018) citing *Hamilton v. Svatik*, 779 F.2d 383, 387 (7th Cir. 1985)



Disparate Impact



“

The Court holds that disparate-impact claims are cognizable under the Fair Housing Act...

”

Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.,
135 S.Ct. 2507, 2525 (2015)



Establishing the Method for Analyzing Disparate Impact Claims

In affirming the Fifth Circuit Court of Appeals, in *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, the United States Supreme Court also resolved the lack of consensus existing in the District Courts regarding the proper method of analyzing disparate impact cases.

747 F.3d 275 (5th Cir., 2014)



Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs, 747 F.3d 275 (5th Cir., 2014)

The Fifth Circuit Court of Appeals rejected application of the burden shifting approach set forth in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, that required the Texas Department of Housing and Community Affairs to establish both:

- (1) a legitimate non-discriminatory purpose for its action; and
- (2) that a no less discriminatory alternative exists.



Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs, 747 F.3d 275 (5th Cir., 2014)

Referencing, but not ruling on, HUD's recently established disparate impact regulation, 24 C.F.R. 100.500, the Fifth Circuit determined that if the Texas Department of Housing and Community Affairs provided proof of a legitimate, non-discriminatory purpose for its action, Inclusive Communities Project, Inc. would be required to establish evidence of a different, non-discriminatory means of achieving the identified legitimate purpose.

Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S.Ct. 2507 (2015)

By affirming the Fifth Circuit, the United States Supreme Court adopted the following burden shifting strategy for analyzing disparate impact claims under the Fair Housing Act.

- 1.** The Plaintiff must prove that the challenged practice caused or predictably will cause a discriminatory effect.
- 2.** After Plaintiff establishes a prima facie case, the Defendant has the burden of proving that the practice is necessary to achieve a legitimate, non-discriminatory interest.
- 3.** If the Defendant proves a legitimate non-discriminatory necessity for the practice, the Plaintiff may still prevail if it is able to prove that the legitimate purpose of the Defendant can be served by alternative, non-discriminatory means.

Focus on Balance After *Inclusive Communities*

- “Disparate-impact liability mandates the ‘removal of artificial, arbitrary and unnecessary barriers,’ not the displacement of valid governmental policies.” *Id.* at 2522, citing *Griggs*.
- “...a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity. A robust causality requirement ensures that ‘racial imbalance...does not, without more, establish a prima facie case of disparate-impact’ and thus protects defendants from being held liable for racial disparities they did not create.” *Id.* at 2523, citing *Wards Cove Packing*.

Plaintiff's *Prima Facie* Case

- “Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and ‘would almost inexorably lead’ government or private entities to use ‘numerical quotas,’ ...” *Id.* at 2523, citing *Wards Cove Packing*.
- “Courts must examine with care whether a plaintiff has made out a prima facie case of disparate impact.... A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.” *Id.* at 2523.



Defendant's Proof of a legitimate, non-discriminatory purpose

- “Just as an employer may maintain a workplace requirement that causes a disparate impact in that requirement is a ‘reasonable measure[ment] of job performance,’ so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.” *Id.* at 2523.