



Using Disparate Treatment and Disparate Impact to Challenge Discrimination Based on Immigration Status as a Proxy for Race and National Origin Discrimination

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Disparate Treatment and Disparate Impact in FHA Litigation

Disparate Treatment

- ▶ Proof of discriminatory intent or purpose
 - ▶ Any circumstantial or direct evidence showing that the discriminatory purpose was a motivating factor

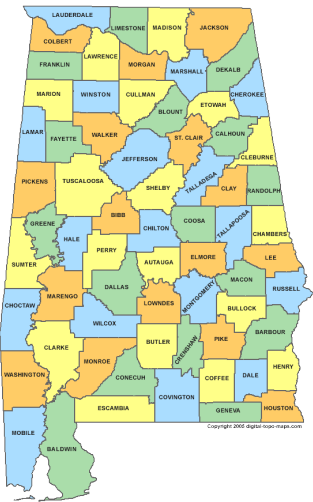
Disparate Impact

- ▶ 3-step burden-shifting framework set out in *Inclusive Communities*
- ▶ HUD regulation setting framework for disparate-impact liability, 24 CFR §100.500 (2014)

Case example 1:

Central Alabama Fair Housing Center v. Magee

- ▶ 3604(a) challenge to §30 of Alabama's HB 56, which criminalized transactions with the state by undocumented immigrants
 - ▶ Although §30 on its face did not condition housing on immigration status, as applied, HB 56 made it unlawful for mobile home owners who lacked lawful status to pay their annual mobile home registration fees
 - ▶ §30 made mobile home housing unavailable and changed the terms or restrictions of housing by conditioning housing on proof of lawful immigration status
 - ▶ Owners had to choose between facing civil and criminal liability if they did not pay their mobile home fee, while also facing liability if they attempted to remove their homes from the states
- ▶ HB 56 intended to encourage self-deportation



Disparate Impact Claim in *Magee*

The subset of individuals most directly impacted by HB 56 are non-citizens, who in AL were disproportionately Latinos

- ▶ Latinos made up 3.7 % of the state's population but were 64.8 % of the non-citizens living in AL
- ▶ Latinos made the largest racial group living in mobile homes (27.6% Latinos compared to 14.6% white, 10.2% black, and 3.2% Asians)
- ▶ So, while Latinos were only 3.7% of state population, they represented about 7% of those living in mobile homes
- ▶ HB 56 significantly affected 2 groups that were disproportionately Latino: non-citizens in AL, and mobile home owners
- ▶ There was also no direct evidence showing that *anyone* other than Latinos would be harmed by the policy

Disparate Treatment Claim in *Magee*

- ▶ Applying *Arlington Heights*, the court held that there was substantial evidence showing that race and national origin played a role in HB 56:
 - ▶ **Disproportionate impact:** HB 56 disproportionately affected Latinos, as Latinos made a disproportionate share of the state's immigrant population
 - ▶ Latinos represented 3.7% of the state population, while between 65-77% of the undocumented immigrants living in AL (2.5% of state population) were Latinos
 - ▶ **Substantive departures:** AL had substantively departed from the *values* it normally prioritized when passing legislation
 - ▶ The State abandoned its interest in protecting children
 - ▶ Change suggested that it was not targeting immigrants but Latinos



Arlington Heights Factors Continued...

- ▶ **Background:** Throughout history, influxes in immigration often led to discriminatory legislation towards that particular immigrant group
 - ▶ The number of immigrants living in Alabama had increased drastically
 - ▶ Legislation that comes on the heels of significant immigrant influx, and which has a disproportionate impact on that immigrant group, should be eyed carefully
- ▶ **Contemporaneous statements:** Statements made by AL legislators, incl. HB 56's drafter, showed that the term "illegal immigrant" was just a racially discriminatory code for Latinos
 - ▶ HB 56 debates were laced with derogatory comments about Latinos, and the legislators often conflated Latinos with immigration when describing the harms they wanted to fix through HB 56

Takeaways from *Magee*

- ▶ The Fair Housing Act protects any person regardless of immigration status
- ▶ It is no defense to an FHA claim to assert that those harmed by the State's actions are undocumented
- ▶ *Magee* remains the only FHA case where a disparate treatment claim successfully challenged an anti-immigrant policy



“The entire purpose of the FHA is to root out discriminatory-housing practices, whether implemented with the intent to deprive certain groups of equal access to housing or not.”

Case example 2:

Georgia State Conference of the NAACP v. LaGrange

- ▶ 3604(b) challenge to the City of LaGrange's court-debt and immigrant-utility policies, each of which disproportionately impacts African Americans and Latinos residing in LaGrange
- ▶ The Immigrant Utility Policy requires LaGrange's residents to provide both a SSN and an ID issued by the federal government or a U.S. State when registering for utilities. As a result:
 - ▶ Latino immigrants living in LaGrange are often unable to register for utilities themselves
 - ▶ They must either rely on their landlord or a friend (which subjects them to potential criminal prosecution)
 - ▶ They can leave LaGrange
 - ▶ Or they can live there without access to water, gas, and electricity
- ▶ Case was dismissed by the district court in December of 2017
- ▶ The Eleventh Circuit heard Oral Argument in December of 2018



Disparate Impact in *LaGrange*

- ▶ The Immigrant Utility Policy disproportionately affects Latino residents in LaGrange
 - ▶ The policy severely impacts undocumented residents in LaGrange, as this group is categorically ineligible for the forms of documentation LaGrange requires
 - ▶ Latinos represent about 68% of the immigrant population in LaGrange, and are thus disproportionately impacted by the policy
- ▶ LaGrange's interests in verifying identity and checking credit can be accomplished through less discriminatory means
- ▶ A decision from the Eleventh Circuit is expected soon, which may or may not reach disparate impact

Case example 3: *Reyes v. Waples Mobile Home Park, L.P.*

- ▶ 3604(a) challenge to a policy requiring all mobile home tenants to provide evidence of lawful status when renewing their lease
 - ▶ Tenants could either produce SSN or a foreign passport, original U.S. visa, and original arrival/departure form which combined could show proof of status
 - ▶ Failure to provide proof of status led to the lease being terminated and eviction
- ▶ District court dismissed the disparate impact claim
 - ▶ Plaintiffs failed to make a prima facie case of disparate impact
- ▶ The Fourth Circuit reversed



Disparate Impact in *Reyes*

Per the Fourth Circuit:

- ▶ Plaintiffs established a prima facie case of disparate impact by showing that the policy disproportionately affected Latino families, compared to non-Latinos
 - ▶ Latinos represent 64.6% of the undocumented population in VA
 - ▶ Latinos are 10x more likely to be adversely affected by the policy compared to non-Latinos
 - ▶ Undocumented immigrants represent 36.4% of the Latino population compared to 3.6% of non-Latinos
 - ▶ Latinos are nearly twice as likely to be undocumented compared to Asians, and twenty times more likely to be undocumented than other groups
 - ▶ 60% of the tenants at the Park are Latino
 - ▶ 91.7% of the tenants at the Park who were not in compliance with the policy were Latino

Key points from *Reyes*

- ▶ The crux of the analysis in deciding whether a prima facie showing of disparate impact has been made is whether a protected class was disproportionately *affected* by the challenged policy
- ▶ That a Plaintiff is affected because of their legal status does not prevent Plaintiffs from making a prima facie case of disparate impact
- ▶ A disparate impact claim that relies on a statistical disparity needs to show that the challenged policy causes the disparity

Thank you

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