

DISPARATE IMPACT LIABILITY UNDER FAIR HOUSING

The Supreme Court upheld a Texas case brought under the Fair Housing Act. The results of the case are that liability can be found where even neutrally applied practices that create a disproportionate impact on a minority group, EVEN WITHOUT INTENT TO DO SO, are PROHIBITED.

Seven national housing associations files a joint Amicus Brief with the Court arguing that the liability could trigger discrimination claims for simple acts such as credit checks and criminal background reports – despite no intention of singling out any particular protected group. In response to this, the Court said that there were limitations for “practical business choices and profit related decisions that sustain free enterprise”.

So this gives leeway for properties to explain their policies but it’s not a guarantee that liability won’t be found.

A claim must show that a challenged practice actually caused a disparate impact on a protected class and that there is availability of an alternative practice that has a less damaging effect and still serves a legitimate business need.

The overall question was: Does the Fair Housing Act support the concept of disparate impact in housing discrimination cases (in other words, can you be liable without intent)? The Supreme Court’s answer is YES.

HOWEVER, the Court states that there are safeguards imposed that have raised the threshold of what it takes to have a successful claim. The Petitioner must show that the policy is artificial, arbitrary, and unnecessary.

How should a property protect itself? Properties need to consider “rules” when evaluating their own policies. Properties will need to document that they have investigated the possible ramifications of impact when creating policy and determine that the policy is still necessary to achieve a valid interest.

Properties need to prepare a Disparate Impact Analysis policy. This policy would explain the legitimate purpose for adopting the policy, identify policy alternatives and options available, and evaluate other less discriminatory alternatives.

In conclusion, the Court does support the idea that Fair Housing Act CAN create disparate impact liability but it imposes restrictions on its application that will prevent it from becoming an obstacle to REASONABLE policy decisions.

DISPARATE IMPACT LIABILITY

SAFEGUARD POLICY FOR FAIR HOUSING COMPLIANCE

Does the policy serve “practical business choices and profit related decisions that sustain free enterprise”.

An applicant making a claim against your policy must show that a challenged practice actually caused a disparate impact on a protected class and that there IS availability of an alternative practice that has a less damaging effect and still serves a legitimate business need.

1. The Petitioner must show that the policy is artificial, arbitrary, and unnecessary.
2. All policy implementation and evaluation should satisfy the following “rules”:
 - Investigation revealing possible ramifications of impact for each policy,
 - Determination that the policy is still necessary to achieve a valid business interest,
 - Explanation of the legitimate business purpose, and
 - Documentation evidencing consideration of alternative policy with evaluation to determine if there is a less discriminatory alternative.