

Supreme court rules to remove housing discrimination: Landlords and developers beware

The U.S. supreme court ruled that victims of discrimination under the Fair Housing Act can sue based upon a legal theory called disparate impact discrimination, which addresses conduct that appears neutral on its face, but which nonetheless has a discriminatory effect. According to the supreme court, disparate impact claims "counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." In other words, landlords and developers can be held liable for "covert and illicit stereotyping," which creates "artificial barriers to housing." Now, landlords and developers are on the hook for the unintended consequences of their actions.

To illustrate, while it's commonly understood that a landlord could not prohibit a person from renting an apartment merely because she was a woman, what if the landlord prohibited her from renting because she had long hair (don't women disproportionately have long hair as compared to men)? The supreme court's ruling protects such a woman from this covert discrimination and many other similarly situated vulnerable protected classes, including race, color, national origin, religion, sex, disability and familial status.

Race refers to an individual's ancestry. Color refers to an individual's skin pigmentation. National origin deals with what country or part of the world an individual comes from or appears to come from. Religion addresses one holding religious, ethical or moral belief, not just being a member of a formal or traditional religious organization. Sex has been shown to not only address anatomical structure, but also gender roles. Disability refers to an individual's physical or mental impairments and can be addressed in housing through either an accommodation to the rules or structures of housing. Lastly, familial status does not address marriage as many mistakenly believe, but instead the status of having children under the age of 18, being pregnant or being charged with the care of such a child.

The case before the supreme court, Texas department of housing and community affairs v. Inclusive Communities Project, Inc., addressed the state of Texas' distribution of real estate development tax credits where it was alleged that Texas assigned low-income housing tax credits statistically disproportionately to areas that were comprised of less than 50% of caucasian residents and thereby caused low-income housing units to be concentrated in non-white areas. Before the court was the issue of whether "practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale" can form the basis for a lawsuit regardless if they were unintended to be discriminatory. The court ruled in the affirmative and explained that in order to bring a disparate impact claim a victim must allege "a statistical disparity" impacting a protected class and "point to a defendant's policy or policies causing that disparity," called a "causal connection."

In rendering its decision, the supreme court went through great pains to express its view that "[e]ntrepreneurs must be given latitude to consider market factors" regardless of its endorsement of disparate impact claims against such businesspeople. The court explained that in order to avoid losing such a lawsuit, landlords and developers must be able to "state and explain the valid interest served by their policies" (i.e., a significant business objective), but that these interests must not be "artificial, arbitrary, and unnecessary." To be sure, landlords and developers will be best served by immediately ending any practices where they attempted to walk the tightrope of legality as those practices create the greatest exposure to suit (i.e., many clients want legal advice on how to comply with just the letter of the law, not the spirit). Still further, best practice is to document evidence of the non-discriminatory justification for a policy when the policy is first created rather than waiting to think-up a justification when you are eventually sued.

While this case is groundbreaking on a national stage, disparate impact claims have already been available under the NYC Human Rights Law, which has had an express section codifying disparate impact claims since 1991. In housing discrimination, the Federal Fair Housing Act is just the floor under which more localized governments cannot fall below, but states, cities, towns and villages are each encouraged to adopt local laws to expand upon



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the protections afforded to citizens.

In NYS there are 11 protected classes (race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, and familial status) and in NYC there are 14 protected classes (race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, alienage status, citizenship status, lawful source of income, and children are, may be, or would be residing with such person).

New Yorkers should not underestimate the importance of this decision even though we have lived with its effects since 1991. A victim of housing discrimination can sue for actual and punitive damages as well as attorneys' fees when they pursue a claim. With the supreme court's decision, the public is on notice that landlords and developers cannot hide behind the excuse of claiming that they did not mean to discriminate. Now, landlords and developers need to carefully consider the discriminatory impact of their actions, and not just their apparent intentions, while doing business in New York.

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