Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., No. 13-1371

Claims of discrimination based on race, sex, or other protected characteristics may rest on a claim of disparate treatment, which requires proof that the defendant had a discriminatory purpose or motive; or of disparate impact, which requires proof that a facially neutral policy or practice has a "disproportionately adverse effect on minorities" and that even if it is justified by a legitimate rationale, the policy or practice serves an interest that could be achieved as effectively through another, less discriminatory means.

The Supreme Court ruled today that lawsuits under the antidiscrimination provisions of the Fair Housing Act may be premised on disparate impact as well as on disparate treatment. But the Court also explained that disparate impact will not automatically invalidate otherwise legitimate policies. In doing so, the Court appears to have raised the bar on the showing necessary to prove a disparate-impact claim, thus providing businesses and government agencies with tools needed to defeat unjustified claims. The decision will prove important to entities subject to the FHA, the Equal Credit Opportunity Act, and other statutes that have given rise to disparate-impact claims.

Under § 805(a) of the FHA, it is unlawful "to discriminate against any person in" making certain real-estate transactions "because of race" or other protected characteristics. This lawsuit challenged certain policies promulgated by the Texas Department of Housing and Community Affairs, alleging that those policies violated § 805(a) because they had a disproportionately negative effect on racial minorities.

The challenged policy involved the distribution by Texas of certain federal tax credits available to real-estate developers that are intended to facilitate the development of low-income housing. Under the challenged scheme, Texas distributed tax credits by using a point system that looked to various criteria, including the project's financial feasibility and the income level of the tenants. The plaintiff, a nonprofit group that assists low-income families seeking affordable housing, challenged Texas's distribution scheme, alleging that it allocated too many tax credits for housing in predominantly minority neighborhoods and not enough in predominantly white suburbs—thus leading to the development of a disproportionate amount of low-income housing in minority neighborhoods.

Texas argued that, to prove an FHA discrimination claim, it was not enough to show that the challenged policy had a disparate *impact* on members of a minority race. Instead, Texas maintained, the Act requires proof that the defendant acted with discriminatory *intent*. The district court sided with the plaintiff organization, holding that the FHA does permit disparate-impact claims. The district court further held that, once the plaintiff had made out a prima facie case of disparate impact, the burden shifted to Texas to prove that there were no less-discriminatory alternatives for accomplishing its housing-policy objectives. On appeal, the Fifth Circuit affirmed the district court's holding that the FHA permits disparate-impact claims. But it modified the burden-shifting, concluding that once a defendant demonstrates why a policy is necessary to achieve a nondiscriminatory interest, the plaintiff bears the burden of proving that the interest could be furthered by another practice with a less discriminatory effect. The Supreme Court granted certiorari to address the availability of disparate-impact claims under the FHA.

In today's 5-4 decision authored by Justice Kennedy, the Court held that the FHA does authorize disparate-impact claims. The Court relied on its previous decisions interpreting analogous provisions of Title VII and the Age Discrimination in Employment Act and on Congress's amendment of the FHA with knowledge that every court of appeals to address the issue had recognized the availability of disparate-impact claims. (We expect that defendants facing disparate-impact claims under other statutes, such as the Equal Credit Opportunity Act, will argue that the Court's analysis means that the different statutory language of those laws does not authorize disparate-impact claims.)

The Court in today's opinion went on to recognize that disparate-impact claims may be abused, and that "disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system." The Court therefore emphasized several limitations on the scope of this liability:

- Reliance on statistical disparities alone is insufficient: "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 '[r]acial 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." Therefore, "[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." This "robust causality requirement" may not be easily satisfied in cases in which the parties offer competing explanations for a challenged disparity. For example, it may "be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units."
- "Governmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'" The Court emphasized that "courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision." Thus, even if the plaintiff can establish a prima facie case showing an "artificial, arbitrary, and unnecessary barrier," "[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis . . . provides a defense against disparate-impact liability."
- Finally, "[r]emedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that 'arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of rac[e].'" If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means.

Justice Thomas filed a dissenting opinion, arguing that the majority's analysis relied on the Court's previous erroneous interpretation of Title VII. Justice Alito also dissented, arguing that the statutory prohibition against discrimination "because of" a prohibited characteristic could only plausibly be read to refer to intentional discrimination. Justice Alito's dissent was joined by the Chief Justice and Justices Scalia and Thomas.

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