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What Is Disparate-Impact Discrimination?

Many federal antidiscrimination laws encompass two theories of discrimination: *disparate treatment* and *disparate impact*. Disparate-treatment discrimination involves intentional harm based on race, sex, disability, or some other proscribed motive. Disparate-impact discrimination occurs when a seemingly neutral policy or action causes a disproportionate and unjustified negative harm to a group, regardless of intent.

Statutes That Allow Disparate-Impact Liability

Constitutional discrimination claims, grounded in the Fifth and Fourteenth Amendments, must assert intentional discrimination, not just disparate impact. Disparate-impact claims are permitted, however, under some antidiscrimination statutes.

The disparate-impact theory of liability was first applied in the Supreme Court's 1971 interpretation of Title VII, which bars employment discrimination. In *Griggs v. Duke Power Co.*, the Court concluded that a power company used job criteria that disproportionately eliminated Black applicants but were not "significantly related to successful job performance" and did not advance the company's asserted goal of facilitating promotions within the company. The Court held that the policy violated the statute, saying that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." In 1991, Congress amended Title VII, codifying the theory and laying out the burden-shifting framework described above.

In addition to Title VII, court opinions and agency regulations have applied the disparate-impact theory to discrimination under other statutes, including age discrimination under the Age Discrimination in Employment Act, lending discrimination under the Equal Credit Opportunity Act, and housing discrimination under the Fair Housing Act (FHA). In the FHA context, the Supreme Court stated that "zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification" are at the heart of disparate-impact liability. The Americans with Disabilities Act (ADA) also bars disparate-impact discrimination in public accommodations, disallowing criteria "that have the effect of discrimination on the basis of disability."

Depending on the underlying statute, there may be procedural differences between disparate-impact and disparate-treatment claims. Under Title VII of the Civil Rights Act of 1964, for example, a disparate-impact finding does not allow for damages as a disparate-treatment claim does.

The availability of disparate-impact liability under certain other antidiscrimination laws is unclear. For example, whether disparate-impact liability exists under the Rehabilitation Act has yet to be conclusively decided.

Finally, some antidiscrimination statutes clearly do not include disparate-impact liability. At times, as with the Genetic Information Nondiscrimination Act, Congress has expressly barred disparate-impact claims. The Supreme Court has also concluded that one wide-ranging statute, Title VI of the Civil Rights Act of 1964, does not support disparate-impact claims. This statute reaches public programs that accept federal funding (e.g., in education, transportation, and health care) and bars discrimination based on race or national origin. After initially appearing to allow disparate-impact claims under Title VI, the Supreme Court later concluded that statute's central provision does not support disparate-impact claims; thus, private plaintiffs may not bring disparate-impact suits under Title VI.

Disparate-Impact Regulations

Even though it disallowed private disparate-impact suits under Title VI, the Supreme Court has left open the question of whether federal agencies may issue and enforce Title VI *regulations* requiring grantees to avoid disparate impacts.

In the absence of a definitive ruling on the question, grant-administering agencies have promulgated such Title VI disparate-impact regulations and developed internal guidance for enforcing these regulations. The Department of Education, for example, issued guidance in 2014 urging schools to avoid disparate impacts in school discipline. In 2023, in response to a complaint, the department began to investigate the potential disparate impact of universities' legacy admissions. Many agencies also have enforced Title VI to support language-access requirements, as offering services only in English may exclude people based on national origin.

Proving a Disparate-Impact Claim

Courts decide disparate-impact claims using a burden-shifting framework, sometimes called an "effects test." To start, plaintiffs must identify the specific practice or policy (such as a loan approval or leasing rule) that is responsible for a discriminatory, or adverse, effect. Then they must meet a "robust causality requirement," meaning that they must show more than a mere imbalance by sex or race, for example; they must show that the policy or practice identified *causes* that difference. There is no liability "based solely on a showing of a statistical disparity."

The discriminatory effect must also be substantial. In the employment discrimination context, for instance, Equal Employment Opportunity Commission regulations generally require disparate-impact claims to show that employees of a certain group are selected at a rate that is less than 80% of the selection rate for the most selected group.

Once the plaintiff has shown that a policy causes a significant adverse effect, the burden shifts to the defendant to confirm that its challenged policy is justified. This confirmation may vary according to the context; in employment, for example, it should be job related and consistent with business necessity. If the defendant makes this showing, a plaintiff may still prevail if it proves that a less discriminatory policy would meet the business need. On the whole, observers have noted, disparate-impact cases are difficult to prove.

How might the effects test play out? Suppose a stockroom employer requires workers to be at least six feet tall. Applicants point out that the policy excludes far more women than men—that is, there is a discriminatory effect. The employer would then have to demonstrate that the height requirement is needed for a substantial, legitimate reason (so that workers can efficiently reach all the stockroom shelves, for example). Assuming such a showing were made, the applicants could still prevail by showing that there is a less discriminatory alternative (using step stools, possibly) that could meet the employer's needs.

Practical and Constitutional Issues

Many debate the value of disparate-impact laws and regulations. According to proponents, they help ferret out actions taken with hidden discriminatory motives and help eliminate vestiges of past discrimination. Critics claim that disparate-impact liability unduly burdens decisionmakers, who may not know in advance which policies will have a disparate impact and may have no role in creating societal conditions underlying the disparities. As Justice Scalia opined, decisionmakers trying to avoid disparate-impact liability might themselves make problematic, perhaps even unconstitutional, race-based decisions. Constitutional equal protection principles forbid government actors from making race-based decisions except in narrow circumstances. This restriction applies even if the government seeks to benefit a disadvantaged racial group.

The Supreme Court addressed this problem in a case where a police department threw out the results of a promotion examination because it had a racial disparate impact on Black and Hispanic officers—a disparity that the police department wanted to circumvent. White officers who had studied for the test, taken it, and passed it sued on the grounds that they were entitled to rely on the results. In their view, the department could not throw out test results for race-based reasons because this would be disparate treatment. The Court ruled in favor of the White officers and explained that an employer may only make a race-based decision, such as the one to discard test results because of a racially disparate impact, if "there is a strong basis in evidence" of an unjustified disparate impact. The department, in the Court's view, had not proven that the promotion exam was not job related or that it was inconsistent with business necessity.

Recent Changes in Enforcement

Recent executive action is changing how agencies address disparate impact. In an executive order entitled "Restoring Equality of Opportunity and Meritocracy," the Trump Administration stated its intent "to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible," calling on agencies to "deprioritize" disparate-impact enforcement and revoking presidential approval of certain disparate-impact regulations. This action may prompt agencies to change their disparate-impact guidance and regulations and dismiss or narrow pending cases.

Administrative changes could be particularly salient in regulating decisionmaking algorithms or artificial intelligence (AI). Agencies have previously noted that landlords, lenders, and employers could be liable for the technologies' disparate impacts. Guidance to this effect, however, has been removed from agency websites. Deprioritizing disparate-impact enforcement may also affect agencies' Title VI language-access efforts, which relied on a theory that limited language resources have a discriminatory effect based on national origin.

In all, because agencies' administrative enforcement is such a big part of disparate-impact law, especially under Title VI, the "Restoring Equality of Opportunity and Meritocracy" executive order may significantly curtail disparate-impact enforcement. Still, as some observers have pointed out, the executive order does not impact the ability of private litigants to pursue disparate-impact claims, particularly where disparate-impact theories are well established (such as under Title VII and the FHA).

Considerations for Congress

Given judicial treatment of Title VI—barring private disparate-impact suits and leaving in question disparate-impact regulations—Congress may consider amending the statute. It could, as has been previously proposed, codify a private right of action to sue federally funded entities for disparate impact, as already exists under Title VII for employers. For Title VI, and perhaps for other statutes, Congress could also specify available remedies for disparate-impact violations or separately address specific contexts, such as language access or AI.

Conversely, Congress could abolish or restrain certain disparate-impact theories, as by barring agencies from promulgating and enforcing Title VI disparate-impact regulations. In addition, Congress could consider amending other civil rights statutes to eliminate or limit disparate-impact causes of action. This would entail removing disparate-impact provisions where they exist and adding language to bar disparate-impact claims where they have been judicially recognized. Beyond legislation, Congress also exercises oversight of the agencies charged with enforcing Title VI and other civil rights laws.

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