

Disparate treatment and disparate impact



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Title VII of the 1964 Civil Rights Act provides two primary theories of recovery for individuals—these are disparate treatment and disparate impact (sometimes labeled adverse impact). This section of the Civil Rights Code forbids job discrimination based on race, color, or national origin. Members of those “protected classes” cannot lawfully be denied employment opportunities merely because they are Native Americans, black, of Vietnamese ancestry, or white, for that matter (Paetzold, 2005, p. 330). Title VII made overt, blatant employment discrimination illegal. It enforced a legal theory of disparate treatment.

Disparate treatment exists if an employer gives less favorable treatment to employees because of their race, color, religion, sex, or national origin. For example, a retail store that refused to promote black warehouse workers to sales positions, preferring white salespeople to serve predominantly white customers, would be guilty of this kind of discrimination. Disparate treatment violates the plain meaning of Title VII. On the other hand, disparate impact is the discrimination caused by policies that apply to everyone and seem neutral but have the effect of disadvantaging a protected group.

Such policies are illegal unless strongly job-related and indispensable to conduct of the business. Basically, the intention of Title VII was to create a level playing field by prohibiting all discrimination, given the entrenched prejudices of employers. Early disparate treatment law cases sometimes included direct evidence of this conscious hostility or intent to discriminate. Because perceivers can never know what another person actually thinks, the determination of intent required inferences arising from the other person's behavior. For example, in the early case of *Slack v.*

Havens, (1975) four Black women claimed that they were illegally discharged because of their race when they refused to perform heavy cleaning duties that were not within their job description. Another coworker, a White woman, was excused from performing these duties. Their supervisor, Pohansky, who had ordered the women to do the heavy work, was known for making statements such as “ Colored people should stay in their places” and “ Colored folks are hired to clean because they clean better” (pp. 1092-1093). The court noted that these statements reflected ill motives for requiring the Black plaintiffs to perform the heavy cleaning.

The statements were taken as “ direct evidence” of racial animus, i. e. , conscious intent to discriminate on the basis of race. Under the law, “ direct evidence” suggests that the commentary from Pohansky was the equivalent of Pohansky telling the women that they were discharged as a result of their being Black. In other words, he was aware of his prejudicial attitudes toward Black persons and consciously treated them differently as a result. The bad intent caused the illegal discrimination to occur, supporting a district court decision (later affirmed) for the plaintiffs.

If Pohansky had not made the statements attributed to him, but had instead told the plaintiffs that they were selected because he truly believed they cleaned better than the White woman (based on his own observation), would the result have been the same? He might still have been acting out of prejudice or stereotypes, known or unknown to him, but he would not have exhibited a conscious intention to discriminate. The legal outcome would not be as straightforward. When the behaviors may reflect an unconscious or

ambiguous intent to discriminate, the legal system may not recognize them as constituting illegal discrimination (Krieger, 1995).

For disparate impact, *Fickling et al. v. New York State Department of Civil Service* (1995) provides a good example. Juliette Fickling and other plaintiffs were employed as temporary Social Welfare Eligibility Examiners by Westchester County. In 1989 and 1990, each plaintiff took and failed, more than once, the civil service examination for the position of Eligibility Examiner with Westchester County. On March 15, 1991, each plaintiff was terminated because her failing test score precluded her placement on the “eligible list” for the position of Eligibility Examiner.

Each plaintiff, except one, had received satisfactory to excellent performance evaluations from at least one of her supervisors prior to her termination. Initially, access to the position of Eligibility Examiner is controlled by competitive examination; the applicants must attain a score of 70 on the examination to be placed on an Eligibility Examiner “eligible list.” Plaintiffs had been employed as temporary Eligibility Examiners because Westchester County did not have an “eligible list” at the time.

Temporary Eligibility Examiners may become permanent, however, only by passing the examination. Plaintiffs sued, claiming their termination due to failing the competitive exam was unlawful because the exam had a racially disparate impact on minorities and failed to serve defendants' employment goal of fair competition. It turned out that the examinations had a disparate impact on African Americans and Hispanics in Westchester County and statewide.

In Westchester County, the impact ratios (% minority passing/%white passing) at the cutoff score on the 1989 examination ranged from 52.8% to 66.2% for African-Americans and between 43.1% and 56.6% for Hispanics. For the 1990 examination, the pass rate for African-Americans was between 40.4% and 50.8% of the white pass rate, while Hispanics passed at between 25.5% and 34.9% of the white rate. Because the examinations had a significant disparate impact and defendants have failed to offer credible evidence that the examinations served the legitimate business goal of fair competition in civil service employment, Fickling et al. won the court battle.

References

Fickling et al. v. New York State Department of Civil Service (1995). United States District Court, Southern District of New York, 909 F. Supp. 185.

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Slack v. Havens (1975). 522 F. 2d 1091 (9th Cir. 1975).