Avoiding A Collision When Code Enforcement and Fair Housing Intersect, Part 2

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INTRODUCTION

Welcome back to the intersection of code enforcement and the Fair Housing Act. Part 1 of this article addressed the Act and two types of discrimination: failure to grant a reasonable accommodation and different treatment. This part will address two additional types of discrimination and strategies to reduce the likelihood that a collision will result in liability.

Types Of Discrimination (Continued)

3. Disparate Impact.

A facially neutral policy or practice[1] may violate the Act if it causes an adverse impact on a group of individuals in a protected class. Disparate impact claims "challenge[] practices that have a disproportionately adverse effect on" members of a protected class and "are otherwise unjustified by a legitimate rationale."[2] It is intended to remove artificial, arbitrary, and unnecessary policies that are barriers to fair housing choice.[3] In *Texas Dept. Housing & Community Affairs v. Inclusive Communities Project, Inc*, ("*ICP*"), the Supreme Court first recognized disparate impact claims as actionable under the Act.[4,5] In the code enforcement context, this means the Act prohibits enforcement policies or practices that create an adverse impact on a group of individuals in a protected class, are barriers to fair housing choice and are artificial, arbitrary, and unnecessary.

Disparate impact claims are decided using a three-step burden-shifting framework.[6] The initial burden is on the plaintiff. To establish a *prima facie* case, a plaintiff needs to "allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection" between the policy and the disparity.[7] In *ICP*, the Supreme Court required that the casual connection be "robust" so that defendants are not "held liable for racial disparities they did not create."[8]

Unfortunately, the Court's opinion in *ICP* did not define "robust casual connection" and, as a result, the courts are split as to whether the Court adopted HUD's disparate impact rule or a stricter test.[9] For example, the Fifth Circuit found that the Supreme Court adopted a test that is stricter than HUD's rule.[10] In contrast, the Second Circuit determined that *ICP* implicitly adopted HUD's approach.[11] The Fourth, Eighth, and Eleventh Circuits have also considered how to apply *ICP*'s robust causality requirement.[12]

If a plaintiff establishes the causal connection, the burden shifts to the local government to demonstrate that the policy is necessary to achieve one or more of its substantial, legitimate, non-discriminatory interests. If the local government meets its burden, the burden shifts back to the plaintiff to prove that there are less discriminatory alternatives to achieve the government's legitimate objective. This means that the challenged enforcement policy will be compared to one or more policies that achieve the same objective. If the plaintiff puts forward a policy that is feasible and has less of a disparate impact, the challenged policy constitutes discrimination based on disparate impact.[15]

Over the years, landlords have tried to use the disparate impact cause of action to resist enforcement of minimum property standards and rental registration requirements. In *Gallagher v. Magner*, a pre-*ICP* decision, landlords sued the City of St. Paul and claimed that the city's code enforcement practices had a disparate impact on their tenants who were members of a protected class.[16] Specifically, the landlords alleged that the city "issued false Housing Code violations and punished property owners without prior notification…or adequate time to remedy Housing Code violations."[17]

Additionally, the landlords alleged that the City had a viable alternative to its then-current practices.[18] In its decision, the Eighth Circuit ruled that the landlords offered sufficient evidence to show a *prima facie* case and that the City had a legitimate non-discriminatory objective, but that a genuine issue of material fact existed as to whether the landlord's proposed policy was a viable alternative to the City's current policy.[19]

Post-*ICP*, landlords continue to raise similar claims. In *Ellis v. City of Minneapolis*, low-income rental housing landlords challenged how the City enforced its Housing Code.[20] Specifically, plaintiffs alleged that the City wanted to discourage for-profit rental housing because the City required for-profit rental property landlords to make repairs "without delay" and to maintain their properties while not requiring government-owned housing to meet the same minimum standards.[21] The Court read the landlords' complaint to allege that the "policy" at issue was the City's "deliberate or negligent" misapplication of the Housing Code.[22] Additionally, the Eighth Circuit determined that the landlords' allegations were an "attempt to bootstrap" single decisions into a policy.[23] Lastly, the court concluded that the plaintiffs failed: (1) to plead sufficient facts to show that the alleged policy existed and (2) to show that the Housing Code provisions were arbitrary or unnecessary to protect health and safety.[24]

Two years later, the Eighth Circuit again considered a disparate impact claim involving Minneapolis' code enforcement practices. In *Kahn v. City of Minneapolis*, the landlord alleged that the City's "heightened enforcement of housing and rental standards" had a disparate impact on the availability of low-income rental housing for individuals protected under the Act.[25] In many ways, Khan's allegations mirrored those in *Ellis*. Consistent with its decision in *Ellis*, the Court ruled that Khan's allegations and arguments failed to identify a policy that caused a disparate impact.[26]

As the discussion in *ICP* and the decisions in *Ellis* and *Khan* cases show, enforcement of municipal housing / minimum property standard codes can withstand disparate impact claims. Even though the courts have recognized enforcement of minimum property/housing standards as a legitimate objective, the possibility of a successful disparate impact claim remains real. Not all enforcement policies will qualify as an enforcement policy with the least discriminatory impact. For example, a local government may adopt an enforcement policy that equates to zero-tolerance for non-compliance with minimum property standards. If that policy causes a disparate impact on members of a protected class and the plaintiff can identify a feasible policy with less a of disparate impact, then the policy is discriminatory.

4. Retaliation.

The Act prohibits retaliation against a person who exercised or enjoyed their rights under the Act or aided or encouraged another to do so.. Retaliation includes coercion, intimidation, threats, or interference.[27] Activities covered by this provision include filing a complaint with HUD, requesting a reasonable accommodation, or assisting another individual with exercising their rights.[28]

A retaliation claim can survive even if the underlying discrimination claim lacks merit.[29] For example, a tenant files a complaint with HUD against their landlord and, subsequently, the landlord engages in intimidation tactics against the tenant. Because the intimidation is retaliation, the tenant will have a viable retaliation claim against the landlord even if HUD determines that the discrimination allegation in the initial complaint is not substantiated.

A retaliation claim under the Act is analyzed using the burden-shifting framework found in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[30] To establish a *prima facie* case, the plaintiff must show they were engaged in a protected activity, that subsequent action was causally linked with the plaintiff's exercise of protected activity, and that the plaintiff suffered some resulting damage. It is important to note that the causal connection can be "established indirectly by showing that the protected activity was closely followed in time by the adverse action."[31] If the plaintiff makes a prima facie case of retaliation, the burden shifts to the local government to "articulate a legitimate, nondiscriminatory reason for the challenged … action."[32] If the local government cannot articulate such a reason or the plaintiff can show that the reason was merely pretext, the local government will be held liable for violating the Act.[33]

The trial court's decision in *Oxford House, Inc. v. City of Baton Rouge* aptly demonstrates how easily code enforcement activities can be considered retaliation.[34] The controversy started with a notice of violation stating that the single-family home was over-occupied. The occupants, represented by an attorney, responded with a request for a reasonable accommodation. Shortly after plaintiffs filed their complaint with HUD, the City issued its first notice, identifying a certificate of occupancy violation and directing the plaintiffs to remedy the violation within a specific time frame.[35] The second notice, sent shortly after the plaintiffs filed their lawsuit, reiterated the notice of violation, provided ten days to remedy it, and advised plaintiffs that the City would take legal action if the violation was not resolved.[36]

The City argued that the plaintiffs failed to show retaliation because the notices were an attempt to get the site into compliance with applicable regulations.[37] However, the trial court disagreed and found that the plaintiffs made a *prima facie* case for retaliation, albeit indirectly, because the notices were sent within a few weeks after the plaintiffs engaged in protected activities – filing a complaint with HUD and filing a lawsuit.[38] The trial court ruled in the plaintiffs' favor

Continued on page 18

on the retaliation claim even though the plaintiffs simply established a *prima facie* case because the City did not argue that it had a legitimate and non-discriminatory reason for its actions. The trial court's decision noted that if the City had argued its legitimate and non-discriminatory reason for sending the letter was that all residential occupancies need a certificate of occupancy, the Court would have been skeptical of that reason. The Court's skepticism seems to be based on the City's knowledge that the certificate of occupancy violation existed a few months before the plaintiffs filed their complaint.[39]

Due to the formal nature of code enforcement activities, such as investigations, written notices of violations, penalties (civil, administrative, or criminal), and court proceedings, it is easy to see how enforcement activities can be easily considered retaliation. Additionally, the resources of local government, such as peace officers and building officials, make its activities particularly vulnerable to retaliation claims. Lastly, when code enforcement occurs at the behest of persons with ulterior motives including discrimination, the prospect increases that enforcement could be considered retaliation. To say it more bluntly, courts can find retaliation when the government acts "for the sole purpose of effectuating the desires of its private citizens, that racial or other improper considerations were a motivating factor behind those desires, and that [government] decision makers were aware of the motivations of the private citizens."[40]

Reduce the Likelihood of a Collision and Liability.

The most important way to reduce risk across all types of discrimination is education and awareness. However, there are some additional discrimination-specific strategies that should reduce risk.

1. Requests for Reasonable Accommodations.
Adopting a reasonable accommodations process is an important strategy to reduce risk. The process should identify decision-makers; grant the necessary authority to approve or deny the requests; provide timeframes for your client to follow; and establish how your client will document decisions, requests for additional information, and the interactive process. Second, it is important to cease enforcement efforts while the accommodation process is ongoing. Pausing enforcement efforts is crucial, even if your client does not adopt an accommodations process. This pause will help your client avoid liability for a failure to grant a reasonable accommodation or for a claim based on retaliation.

2. Disparate Treatment.
There are a few ways to reduce risk of liability for disparate treatment claims. First, encourage your client to identify and articulate a non-discriminatory reason(s) for treating a particular investigation (or type of investigation) differently from other investigations (or types of investigations) before the investigation begins. This also applies when your client deviates from existing department practices or policies.

Second, identify ordinances and regulations that impose different treatment, facially and as applied; and determine whether the different treatment is because of an individual's status as a member of a protected class. If the ordinances or regulations discriminate in a manner that will violate the Act, your client may want to consider non-enforcement strategies or amendments to the regulations and ordinances to reduce its risk for liability.

A third way to reduce risk is to plan for and identify enforcement requests that are the product of community fears, prejudices, stereotypes, or assumptions about individuals. Planning prepares staff and elected officials to respond to these risk-laden requests in a manner that does not violate the Act. Identifying these enforcement requests requires learning about and listening for "code words." In some circumstances, it also includes understanding a regulation's or an ordinance's political, legislative, and operational background.

3. Disparate Impact.
One strategy to reduce legal risk with disparate impact claims is to assume that a new policy/practice will adversely impact members of a protected class. With that assumption in mind and before adopting the policy or practice, your client should identify its substantial, legitimate, non-discriminatory interests for adopting the new policy or practice; and explore whether there are other practices that serve its interests with a less discriminatory effect.

4. Retaliation.
Even with the best intentions, your client's actions may qualify as retaliation. Because the timing of your client's actions is critical, one strategy is to pause enforcement once your client learns that someone needs an accommodation or when a complaint is filed at HUD. However, if there is no pause, your client needs to have a legitimate, nondiscriminatory reason for enforcement that is identified before enforcement occurs. Additionally, in light of the Court's skepticism in the *City of Baton Rouge* case, the reason may also need to reflect a serious or urgent violation.

Conclusion

It is inevitable that the Act and code enforcement will intersect. Only in an ideal world will they not collide. However, the collision and resulting liability does not have to be inevitable. If your client recognizes the intersection and responds appropriately, the likelihood of a collision and liability can be reduced. ML

NOTES

1. In this part of the article, policies and practices are interchangeable.
2. Ellis v. City of Minneapolis, 860 F.3d 1106, 1110 (8th Cir. 2017). Alternatively, this claim may be used to challenge a policy that perpetuates segregation. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 619–20 (2d Cir. 2016).
3. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 540-41 (2015) ("*ICP*").
4. Prior to the *ICP* decision, nine courts of appeal agreed that disparate impact claims were cognizable under the Act. *Mhany Mgmt., Inc.*, 819 F.3d at 616-617.
5. *ICP*, 576 U.S. 519 (2015).
6. Reyes v. Waples Mobile Home Park Limited Partnership, 903 F.3d 415, 424 (4th Cir. 2018).
7. *ICP*, 576 U.S. at 542-543.
8. *ICP*, 576 U.S. at 542.
9. Inclusive Communities Project, Inc. v. Lincoln Property Company, 920 F.3d. 890, 902 (5th Cir. 2018); *Reyes*, 903 F.3d at footnote 4.
10. *Lincoln Property Company*, 920 F.3d. at 902.
11. *Mhany Mgmt., Inc.*, 819 F.3d at 618.
12. *Reyes*, 903 F.3d at 415; *Ellis*, 860 F.3d at 1106; Oviedo Town Center II, L.L.L.P. v. City of Oviedo, 759 Fed. Appx. 828 (11th Cir. 2018).
13. *Reyes*, 903 F.3d at 424.
14. *Lincoln Property Company*, 920 F.3d. at 906; *Reyes*, 903 F.3d at 424.
15. City of Ft. Lauderdale v. Scott, 551 Fed. Appx. 972, 976-977 (11th Cir. 2014).
16. Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010).
17. *Id*. at 834.
18. *Id.* at 838.
19. *Id.*
20. *Ellis*, 860 F.3d. at 1106.
21. *Id*. at 1109.
22. *Id*. at 1112.
23. *Id*. at 1113.
24. *Id.* at 1112-1113.
25. Khan v. City of Minneapolis, 922 F.3d 872 (8th Cir. 2019).
26. *Khan*, 922 F.3d at 875.
27. 42 USC § 3617; 24 CFR 100.400.
28. Oxford House, Inc. v. City of Baton Rouge, 932 F.Supp.2d 683, 700-702 (M.D. La., 2013); Walker v. City of Lakewood, 272 F.3d 1114, 1128 (9th Cir. 2001).
29. Harmony Haus Westlake, LLC v. Parkstone Property Owners Association, Inc., 468 F.Supp.3d 800, 815 (W.D. Tex. 2020).
30. *City of Lakewood*, 272 F.3d at 1128.
31. *City of Baton Rouge*, 932 F.Supp.2d at 701.
32. *Id*. at 700.
33. *City of Lakewood*, 272 F.3d at 1128.
34. *City of Baton Rouge,* 952 F. Supp.2d at 683.
35. *Id*. at 699-700.
36. *Id*. at 700.
37. *Id.* at 702.
38. *Id*.
39. *Id*.
40. Peoples Helpers, Inc. v. City of Richmond, 789 F.Supp. 725, 732 (E.D. Va. 1992).

