

BURDEN SHIFTING

National Low Income Housing Coalition

August 1, 2019

Current Rule §100.500

(Unlettered Preface)

Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by a discriminatory intent.

The practice may still be lawful if supported by a legally sufficient justification, as defined in paragraph (b) of this section.

The burdens of proof for establishing a violation under this subpart are set forth in paragraph (c) of this section.

(a) **Discriminatory effect.**

A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.

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(a) **General.** Liability may be established under the Fair Housing Act based on a specific policy or practice's discriminatory effect on members of a protected class under the Fair Housing Act even if the specific policy or practice was not motivated by a discriminatory intent.

(b) **Prima facie burden.**

To allege a prima facie case based on an allegation that a specific, identifiable policy or practice has a discriminatory effect, a **plaintiff** or the charging party (collectively, "plaintiff") must state facts plausibly alleging **each** of the following elements:

- (1) That the challenged policy or practice is **arbitrary, artificial, and unnecessary** to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law.
- (2) That there is a **robust causal link** between the challenged policy or practice and a disparate impact on members of a protected class which shows the specific practice is the direct cause of the discriminatory effect;
- (3) That the alleged disparity caused by the policy or practice has an adverse effect on **members of a protected class**;
- (4) That the alleged disparity caused by the policy or practice is **significant**; and,
- (5) That there is a **direct link** between the disparate impact and the complaining party's alleged injury.

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(b) Legally sufficient justification.

(1) A legally sufficient justification exists where the challenged practice:

- (i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and
- (ii) Those interests could not be served by another practice that has a less discriminatory effect.

(2) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in paragraphs (c)(2) and (c)(3) of this section.

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(c) Failure to allege a prima facie case.

A defendant, or responding party, may establish that a plaintiff's allegations do not support a prima facie case of discriminatory effect under paragraph (b) if:

- (1) The defendant shows that its discretion is materially limited by a third party such as through:
 - (i) A Federal, state, or local law; or
 - (ii) A binding or controlling court, arbitral, regulatory, administrative order, or administrative requirement;
- (2) Where the plaintiff alleges that the cause of a discriminatory effect is a model used by the defendant, such as a risk assessment algorithm, and the defendant:

(Three detailed paragraphs regarding the algorithm)
- (3) The defendant demonstrates that the plaintiff has failed to allege sufficient facts under paragraph (b).

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(c) Burdens of proof in discriminatory effects cases.

- (1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.
- (2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.
- (3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

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(d) Burdens of proof for discriminatory effect.

If a case is not resolved at the pleading stage, the burden of proof to establish that a specific, identifiable policy or practice has a discriminatory effect, are as follows:

(1) Plaintiff's burden

- (i) A plaintiff must prove by the preponderance of the evidence, through evidence that is not remote or speculative, each of the elements in paragraphs (b)(2) thru (5); and
- (ii) If the defendant rebuts a plaintiff's assertion that the policy or practice is arbitrary, artificial, and unnecessary under (b)(1) by producing evidence showing that the challenged policy or practice advances a valid interest (or interests), the **plaintiff must prove** by the preponderance of the evidence that a less discriminatory policy or practice exists which would serve the defendant's identified interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.

(2) Defendant's burden The defendant may, as a complete defense:

- (i) Prove any element identified under paragraph (c)(1) or (c)(2);
- (ii) Demonstrate that the plaintiff has not proven by the preponderance of the evidence an element identified under (d)(1)(i); or
- (iii) Demonstrate that the alternative policy or practice identified by the plaintiff under (d)(1)(ii) would not serve the valid interest identified by the defendant in an equally effective manner without imposing materially greater costs on, or creating other material burdens for the defendant.