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Failure to Develop Alternate Theory of Discrimination Precludes Appeal of Denial of Class Certification

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By Susan M. Schaecher

A disparate impact claim alleged in a complaint but not meaningfully developed in connection with efforts to obtain class certification was waived and could not be considered on appeal of the denial of class certification, according to the 7th U.S. Circuit Court of Appeals.

Disparate impact claims require a plaintiff to establish that a specific employment practice, though neutral on its face, caused a disparate impact on a member of a protected group. They do not require evidence the employer intended to discriminate. Causation can be established with statistical evidence that the practice had the effect of excluding the plaintiff and other members of the protected group. Conversely, disparate treatment claims require evidence the employer intended to discriminate.

Katherine Puffer sued Allstate Insurance Co. alleging Allstate had discriminated against a class of women because its salary, promotion and training policies led to a nationwide pattern or practice of sex discrimination in violation of Title VII. Her complaint based this pattern-or-practice claim on both disparate impact and disparate treatment theories of discrimination.

The lower court held that the case failed to meet the commonality and typicality requirements for class certification under Federal Rule of Civil Procedure 23. The named plaintiff then settled her individual claims, and the court dismissed the case with prejudice. Other members of the putative class were allowed to intervene in the action, and they appealed the denial of class certification, but only for the disparate impact claim.

On appeal, the 7th Circuit noted first that a pattern-or-practice claim represents a theory of intentional discrimination. A pattern-or-practice claim requires a showing that an employer regularly and purposefully discriminates against a protected group—that there is a pattern of discriminatory decision-making.

The circuit court found that Puffer had argued almost exclusively that she was seeking class certification based on a pattern-or-practice of discrimination and had presented facts and arguments only in support of a pattern-or-practice claim. Although her motions and memoranda seeking class certification described her claims using the terms "disparate impact" as well as "pattern or practice," she did not argue that Allstate had a facially neutral policy that resulted in a disparate impact. Rather, she argued that the alleged disparities resulted from a paternalistic culture, an organizational structure that vested authority in male-dominated senior manager ranks and policies that allowed the managers to apply their own subjective views. The lower court's opinion gave minimal attention to her disparate impact claim, which the circuit court attributed to the scant support she provided for the claim.

Accordingly, the circuit court held that she had waived the disparate impact claim, citing the rule that arguments not made in the lower court are waived on appeal.

Puffer v. Allstate Ins. Co., 7th Cir., No. 11-1273 (Mar. 27, 2012).

Professional Pointer: When an employer evaluates how the law may apply in a given situation pre-litigation, the employer should be mindful that the same facts may support different theories of discrimination and consider all of the risks.

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