

# CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Winter 2018

## From the Desk of the Chairperson

In April 2017, the FBA Civil Rights Law Section joined with the Southern Poverty Law Center, the South Eastern Louisiana Legal Services, the Louisiana Bar Association and the FBA New Orleans Chapter to present the Civil Rights Etouffee, a full day Civil Rights CLE. We had ten incredible panels connecting civil rights with Immigration issues, impact litigation, educational rights, housing, the First Amendment and much more. This event quickly sold out and became in its first year a not to be missed legal Civil Rights program.

We are already underway planning year 2 of the Civil Rights Etouffee in New Orleans, Louisiana for the Fall of 2018. In the interim, between now and the next Etouffee, the FBA Civil Rights Law section is proud to announce the Etouffee on the Road Civil Rights CLE Series.

With stops in New York City (Foil CLE presented by Barea Fett of Harvis & Fett); in Boston

(Qualified Immunity presentation presented by Rob Sinsheimer of Sinsheimer & Associates with the Qualified Immunity recognized expert, Professor Karen Blum); Detroit, Michigan (Special "Fed Talk" on Post Iqbal pleading practice featuring Hon. Judith E. Levy, E.D. Mich. and Iqbal Counsel and FBA Civil Rights friend Professor Alex Reinert of Cardozo School of Law, organized by Robin Wagner of Pitt McGehee Palmer & Rivers) to Chicago (Presented by Jared Kosoglad of Kosoglad Law with Judge M. David Weissman of the N.D. Illinois), and to Salt Lake City.

Salt Lake City, Utah will host an incredible Etouffee on the Road program in March 2018. Two panels featuring the First Amendment and the expansion of what is speech, and a Qualified Immunity updated. I will be on the panels joined by members of the Utah Attorney General's Office,

*Chair continued on page 8*

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## “Nice to meet you, Hon.”

*by Robin B. Wagner, Pitt McGehee Palmer & Rivers, PC, Royal Oak, MI  
Secretary, Civil Rights Law Section, FBA*

I grew up in Baltimore, so it always touches my silly side just a bit when I am at an FBA event and meet someone with “Hon.” on her nametag.

The first time I got to enjoy this little pun was during the fall of my second year of law school (DePaul in Chicago), when the local FBA chapter sponsored what sounded like an interesting event. The courtroom illustrator Carol Renaud would be sharing tales of her life drawing the famous and infamous characters to have appeared in the Northern District of Illinois over the decades. Two other classmates also were interested, so we nervously walked over to the event and shyly stood by ourselves at a cocktail table waiting for the event to start. Then a kind-looking woman walked over to us, and after a couple beats we realized that the “Hon.” on her nametag meant she was a judge! Wow! Coming over to talk to the three awkward-looking law students, no less.

This warm and welcoming woman turned out to be Magistrate Judge Mary M. Rowland, N.D. Ill.. She had just been appointed to the bench and very patiently explained to us what a magistrate judge was and that she had worked as a civil rights and criminal defense attorney prior to her appointment. The presentation on courtroom illustration was very interesting, but meeting Judge Rowland was the highlight of the event. So much so, that I wrote an email right afterward asking that if she didn’t already have an extern lined up for the spring semester, maybe she would consider me. I got the gig—learning that brazenness can be a good thing in this profession!—and during that spring term of my 2L year, I learned a ton about how the federal courts work, how to write for a judge, and the dedicated hard work that judges put into resolving cases through mediation. It contributed greatly to

my legal education and stood out on my resume as I applied for judicial clerkships.

That first FBA event taught me that this is a friendly, engaged group of professionals who work extensively in the courts and genuinely care about the federal courts and the professionalism of all of us who practice in them. Since then, I have always made sure to attend FBA events whenever possible, since it’s a great way to meet and get to know the judges and attorneys I’ll be working with throughout my career.

The connections I have made and continue to make through the Civil Rights Law Section have been particularly meaningful to me as relatively new attorney practicing plaintiff-side civil rights and employment law. I met our Section Chair Wylie Stecklow when I was clerking for Magistrate Judge Michael H. Dolinger, S.D.N.Y. ret., and he welcomed me warmly to our section, first as the liaison to the Young Lawyer’s Division and now as Secretary. I really appreciate our section’s strong commitment to continuing legal education, and to that end I am working with the FBA chapter for the Eastern District of Michigan to organize a panel this spring on the impact of Iqbal and Twombly on civil rights and employment litigation. It’s similar to a panel hosted in New York last year, and I’m hoping it will resonate and bring together FBA members here in the Detroit area who share our interests in civil rights law.

There you have it, hon. Now pass down some of those steamed crabs. ■

## In Memoriam

### *Marilyn Tobocman*



The Civil Rights Section of the Federal Bar Association lost a leader and dominant civil rights advocate with the passing on January 3, 2018, of Marilyn Tobocman. Marilyn served as a Co-Chair of the Committee on Discrimination in Employment, Housing and/or Public Accommodations, and also as co-editor of the Civil Rights Insider Newsletter. Marilyn was a Principal Assistant Attorney

General in the Civil Rights Section of the Ohio Attorney General for over 20 years, and handled a number of significant

cases, including breaking down gender barriers at private country clubs, stopping racial discrimination by homeowners insurers, and increasing the availability of accessible housing units. She was a regular speaker on civil rights issues and had served as an adjunct professor at Cleveland-Marshall College of Law, where she also worked in the Fair Housing Law Clinic.

Those of us who knew and worked with her will miss her, and extend our sympathy to her family and friends.

You can read the obituary here: <http://obits.cleveland.com/obituaries/cleveland/obituary.aspx?n=marilyn-tobocman&pid=187734556&fhid=2098>.

# Algorithms and Civil Rights: Understanding the Issues

by Rachel Goodman, Racial Justice Program, American Civil Liberties Union, New York, NY

It's safe to say that when Congress passed the Civil Rights Acts in the 1960s, legislators weren't focused on the problem of algorithmic discrimination. Nearly fifty years later, though, predictive algorithms play a major role in driving housing decisions, as well as credit and employment decisions, and the evidence that the use of such algorithms often perpetuates discrimination is piling up.

Thankfully, our existing civil rights laws apply no less forcefully when software, rather than a human decision maker, engages in discrimination. In fact, equipped as they are with the disparate impact framework, the Fair Housing Act (FHA), Title VII of the Civil Rights Act of 1964 (Title VII), and the later-enacted Equal Credit Opportunity Act (ECOA), these laws can make clear that twenty-first century discrimination is no less illegal than its analogue predecessors.

## Because Data Reflects Disparities, Disparate Impacts are Likely

There isn't one simple explanation for how discrimination creeps into algorithmic decisions. There are many.<sup>1</sup> Most simply, for purposes of this article, an algorithm is a model that makes predictions about the future by relying on historical data.<sup>2</sup> Sometimes, the impact of biased data is quite straightforward. For example, in the early 1980s, a British medical school trained an algorithm on historical admissions decisions to make the same decisions that its panel of human reviewers would have made. From that perspective, it was a success—but the algorithm systematically discriminated against women and people with names that appeared to be non-European, just as the human reviewers had in past years.<sup>3</sup>

Given the history of discrimination, however, combined with persistent racial wealth disparities and residential segregation, nearly all available data—from zip code to credit score to education history—will reflect and encode racial disparities. When algorithms are trained to understand the world through such “biased” data, they incorporate that bias. As a result, instead of freeing us from the legacy of discrimination, automatic reliance on predictive tools can solidify and perpetuate the status quo. That's why one analytics firm excludes data about the commute times of applicants for employment from its tools—the racialized nature of American geography means that such data could easily result in Title VII violations.<sup>4</sup>

Moreover, existing disparities mean that many generalizations will create inaccurate results for people of color; because affluent Black Americans tend to live in much poorer neighborhoods than similarly affluent white Americans,<sup>5</sup> when zip codes or other geographic data play a role in credit decisions, affluent and creditworthy Black Americans may be systematically disadvantaged. And even if an algorithm is free of bias in its original form, many predictive tools are built to evolve as they receive feedback from users' responses, which may themselves reflect intentional or unconscious discrimination. That may be why Google search began to link advertisements for arrest

records vendors to prototypically Black names—users may have been more likely to click on those ads when they appeared alongside Black names, and the algorithm evolved to incorporate that preference.<sup>6</sup>

## Implications for Civil Rights Law

The FHA, Title VII, and the ECOA all prohibit practices that discriminate on the basis of protected class status, whether that discrimination is intentional or results from a neutral practice that has a disparate impact.<sup>7</sup> That means that when a housing provider, an employer, or a creditor uses a predictive algorithm to make a decision affecting access to opportunity, it must ensure that the software does not create an unjustified discriminatory effect or risk liability for the resulting discrimination.

These concerns are no longer in the realm of the hypothetical. Today, many and perhaps most large employers use algorithmic tools during the application and interview process. These tools analyze application information and compare it to the employer's historical data to predict which potential employees are likely to succeed and which are likely to quit after a short time. They also make predictions based on analysis of video interviews, including vocal quality, word choice, and facial expressions. Employers have also become more likely to use these kinds of tools to make promotion decisions. And the EEOC has recently taken an interest in these practices.<sup>8</sup>

Screening software utilized by public and private landlords and property managers can present similar concerns. These tools ingest data about potential tenants' criminal records, eviction records, and credit history, among other things, and assign a score or risk level to each potential tenant. Depending upon the data on which it is trained and the particulars of these algorithms, their use may also risk disparate impact liability.

Assessing liability for these kinds of algorithms is, in some ways, not a novel problem—the civil rights laws can deal with disparate impacts in a manner that is fundamentally similar to how they have dealt with previous forms of employment tests or exclusionary housing or credit policies. But there is one area where algorithms really do make things different: targeted digital marketing.

## Digital Marketing: A Special Case

Algorithms predict who is likely to react positively to an online ad and seek to display that ad to those people, which can lead to discriminatory exclusion. Platforms also allow advertisers to intentionally show ads to, e.g. male users and not female users.<sup>9</sup> Through one of these mechanisms, researchers at Carnegie Mellon recently found that high-paying executive jobs were disproportionately shown to male users. This kind of personalization means that advertising can discriminate while remaining facially neutral—an ad need not say “No Asians need apply” if targeting means that no Asians ever see the ad. In fact, such exclusion may be even more pernicious than that historical

practice because today, people are unlikely to know which opportunities they were excluded from.<sup>10</sup>

Each of the major civil rights laws applies to marketing. The FHA prohibits “mak[ing], print[ing], or publish[ing], or caus[ing] to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on” membership in a protected class.<sup>11</sup> Regulations make explicit that “[s]electing media or locations for advertising . . . which deny particular segments of the housing market information about housing opportunities because of” protected class status is prohibited.<sup>12</sup> Title VII similarly prohibits discriminatory advertising,<sup>13</sup> and EEOC’s Compliance Manual makes clear that Title VII prohibits an employer from “refus[ing] to advertise its jobs in newspapers that circulate in” an overwhelmingly Black nearby city.<sup>14</sup> Finally, the ECOA’s prohibition against discriminatory credit transactions extends beyond the approval or denial of credit applications, to include “every aspect” of a credit transaction,<sup>15</sup> and its Regulation B makes clear that creditors may not use advertising or marketing to “discourage on a prohibited basis a reasonable person from making or pursuing an application.”<sup>16</sup>

It seems, then, that discriminatory ad targeting is and should be governed by existing civil rights laws. What that means remains to be seen.

## Conclusion

Algorithms hold the potential to make decisions with far less bias than humans do, but they must be carefully designed and tested to achieve results free from discrimination. Compliance lawyers have begun to engage seriously with these issues; civil rights litigators should be thinking about them, too. Although the often-hidden nature of algorithmic discrimination makes it difficult to identify the individuals who are harmed, litigation on these issues is inevitable in coming years. ■

## Endnotes

<sup>1</sup>See Solon Barocas & Andrew Selbst, *Big Data’s Disparate Impacts*, 104 Cal. L. Rev. 671, 677-694 (2016).

<sup>2</sup>Thanks for this definition to Cathy O’Neil, author of *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (2016).

<sup>3</sup>A blot on the profession, 296 Brit. Med. J. 657, 657-58 (Stella

Lowry & Gordon MacPherson eds., 1988).

<sup>4</sup>Don Peck, *They’re Watching You at Work*, *The Atlantic* (Dec. 2013), <https://www.theatlantic.com/magazine/archive/2013/12/theyre-watching-you-at-work/354681/>.

<sup>5</sup>Sean F. Reardon et al., *Neighborhood Income Composition by Household Race and Income: 1990-2009*, 660 *Annals Am. Acad. Pol. & Soc. Sci.* 78, 78; David Leonhardt, *Middle-Class Black Families*, in *Low-Income Neighborhoods*, N.Y. Times (June 24, 2015), <https://www.nytimes.com/2015/06/25/upshot/middle-class-black-families-in-low-income-neighborhoods.html>.

<sup>6</sup>Racism is Poisoning Online Ad Delivery, Says Harvard Professor, *MIT Tech. Rev.* (Feb. 4, 2013), <https://www.technologyreview.com/s/510646/racism-is-poisoning-online-ad-delivery-says-harvard-professor/>.

<sup>7</sup>42 U.S.C.A. §§ 3604–3605; *Texas Dept of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (FHA). 42 U.S.C. § 2000e-2(a)-(b); (k)(1) (Title VII). 15 U.S.C. § 1691; 12 C.F.R. § 202.1; 12 C.F.R. Pt. 1002, Supp. I § 1002.6(a)(2) (2016) (official staff interpretation) (ECOA).

<sup>8</sup>Kevin McGowan, *When Is Big Data Bad Data? When It Causes Bias*, *Bloomberg News* (July 29, 2013), <https://www.bna.com/big-data-bad-n73014445584>.

<sup>9</sup>Byron Spice, *Questioning the Fairness of Targeting Ads Online*, *Carnegie Mellon University News* (July 7, 2015), <http://www.cmu.edu/news/stories/archives/2015/july/online-ads-research.html>.

<sup>10</sup>Rachel Goodman, *Facebook’s ad-targeting problems prove how easy it is to discriminate online*, *NBC News*, (Nov. 30, 2017), <https://www.nbcnews.com/think/opinion/facebook-s-ad-targeting-problems-prove-how-easy-it-discriminate-ncna825196>

<sup>11</sup>42 U.S.C. § 3604(c).

<sup>12</sup>24 C.F.R. § 100.75(c)(3).

<sup>13</sup>42 U.S.C. § 2000e-3(b).

<sup>14</sup>E.E.O.C. Compliance Manual § 15-VI(A)(3) (2006) & n.86 (citing cases).

<sup>15</sup>12 C.F.R. § 202.2(m).

<sup>16</sup>12 C.F.R. § 202.4(b). See also CFPB, *Consumer Laws and Regulations: ECOA at 3* (June 2013), [http://files.consumerfinance.gov/f/201306\\_cfpb\\_laws-and-regulations\\_ecoa-combined-june-2013.pdf](http://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf) (“For example, a creditor may not advertise its credit services and practices in ways that would tend to encourage some types of borrowers and discourage others on a prohibited basis.”).

## Call for Articles for the Civil Rights Insider

The editors of *The Civil Rights Insider* invite submissions for publication. Publication allows you to announce your latest win (or loss,) publicize a successful appeal that offers a valuable precedent, share a local phenomenon in the law that may have national implications, invite others to a conference that will be addressing novel issues of civil rights law, provide your personal take on a recent Supreme Court decision and its implications for your practice, or highlight a member whose work you believe should be acknowledged. We welcome your contributions as well as suggestions of subjects that should be addressed so that the newsletter serves us all.

Articles need only be between 500 – 1000 words. If interested, contact Steve Dane of Relman, Dane & Colfax PLLC, at [sdane@relmanlaw.com](mailto:sdane@relmanlaw.com).

Appear in the  
Civil Rights  
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# The Fair Housing Imperative to Address the Displacement Crisis

by Anne Bellows, Goldstein, Borgen, Dardarian & Ho and Michael Allen, Relman, Dane & Colfax PLLC

Fifty years ago this April, Congress passed the Fair Housing Act, 42 U.S.C. § 3601 et seq., to remedy segregation and racial inequality. The Act both prohibits discrimination and requires that state and local governments and public housing authorities (“PHAs”) receiving federal funding take additional steps to eradicate segregated housing patterns by “affirmatively further[ing]” fair housing (the “AFFH duty”).<sup>1</sup>

For the following four decades, the U.S. Department of Housing and Urban Development (“HUD”) — during Republican and Democratic administrations<sup>2</sup> — largely neglected its obligation to enforce the AFFH duty. Enforcement increased appreciably under the Obama administration, culminating in the promulgation of a detailed regulatory framework in July 2015 (the “2015 Rule”),<sup>3</sup> which requires state and local governments to undertake detailed planning and make firm commitments to eradicating barriers to fair housing choice.

The 2015 Rule provides a durable regulatory and enforcement structure that continues to have teeth under the Trump Administration.<sup>4</sup> Every five years, state and local governments and PHAs must complete an Assessment of Fair Housing (“AFH”) identifying critical fair housing issues and their “contributing factors.” Most importantly, these local governments and agencies are required to then take “meaningful action” to advance fair housing goals.<sup>6</sup>

## The current displacement crisis in American cities

Across the country, cities are grappling with housing cost pressures and the corresponding displacement of low-income residents of color. A 2017 study found that in the New York City metropolitan region, nearly one million residents, who are disproportionately people of color, are at risk of displacement from their current homes and neighborhoods.<sup>7</sup> In San Francisco’s vibrant Mission District, long a gateway of access and opportunity for Spanish-speaking immigrants, the Latino population has declined precipitously year-over-year as higher income, non-Latino households have flocked to the neighborhood.<sup>8</sup>

The displacement of low-income residents of color from their homes and neighborhoods in urban centers across the country is more than a demographic shift—it is an urgent fair housing problem similar in degree to “white flight” of the mid-twentieth century, and just as likely to result in harmful patterns of segregation and racial inequality.

## Analyzing and acting on displacement as a fair housing issue

The 2015 Rule identifies fair housing concepts that state and local governments and PHAs must use to guide the analysis in the AFH, including segregation, disparities in access to opportunity, disproportionate rates of housing problems, and fair housing choice.<sup>9</sup> Applied to displacement

pressures, these concepts bring into sharp focus the racial justice issues at stake:

*Segregation.* The displacement of communities of color from urban areas is best understood as a process of re-segregation. Any appearance of integration is belied by forces increasing the risk that residents of color will be expelled from their homes and neighborhoods—whether through increases in rent or property taxes, eviction or foreclosure—and barred from finding replacement housing nearby due to increasing prices and the absence of affordable housing. Moreover, the forced moves resulting from displacement pressures all too often push families of color to segregated communities in the suburbs or at the fringes of metropolitan regions—a leap-frog process of re-segregation shaped by exclusionary barriers in high-income suburbs.

*Disparities in Access to Opportunity.* Displacement experienced by residents of color is often connected with a loss of access to opportunity. Households displaced to poorly-served suburban and fringe communities may lose access to high quality public transportation and experience an increase in their commuting time and costs. Involuntary moves can disrupt children’s education and fracture supportive community networks. In the Mission District in San Francisco, community advocates have highlighted that displaced Spanish-speaking residents are losing access to a rich network of Latino cultural institutions and service organizations—and indeed that the neighborhood’s role as a social and political epicenter for a historically disadvantaged group is at risk.<sup>10</sup>

*Disproportionate Housing Needs.* “Disproportionate housing needs” is a concept set out in the 2015 Rule that examines whether members of protected classes experience hardships like overcrowding, housing cost burden, or substandard housing conditions at a disproportionately high rate. Where displacement is occurring, this inquiry can capture both some of the hardships that drive displacement—such as high cost burden—and some of its consequences—such as overcrowding resulting from families doubling up, pressure to accept substandard conditions, and homelessness.

*Fair Housing Choice.* Lastly, and perhaps most fundamentally, displacement reflects a loss of fair housing choice where residents of color are disproportionately deprived of the option of remaining in their homes and neighborhoods.

## Moving forward

The AFH represents an important opportunity to fully involve the community in a dialogue about fair housing barriers,<sup>11</sup> make robust official findings about the fair housing impacts of displacement, and lay the groundwork for policies preventing and mitigating displacement. However, the duty to affirmatively further fair housing is ongoing, and is not

limited to completing the AFH. Wherever they may be in the AFH cycle, local governments can and should take immediate steps to counter displacement by protecting tenants and addressing risks faced by low-income homeowners of color. In compliance with the duty to affirmatively further fair housing, local governments must squarely confront this crisis. ■

*Anne Bellows worked on fair housing and displacement as an Equal Justice Works Fellow at Public Advocates, Inc. Michael Allen is a leading expert on the duty to affirmatively further fair housing.*

#### Endnotes

<sup>1</sup>42 U.S.C. §§ 3608(d) & (e)(5); 5304(b)(2).

<sup>2</sup>The high point of HUD's enforcement came in 1968, but was quickly shot down by the Nixon Administration. See N. Hannah-Jones, "Living Apart: How the Government Betrayed a Landmark Civil Rights Law, PRO PUBLICA (June 25, 2015, available at <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> (last visited Dec. 11, 2017).

<sup>3</sup>80 Fed. Reg. 42272 ff. (July 16, 2015).

<sup>4</sup>According to documents in the possession of the authors, HUD declined to accept nearly one-third (10 of 29) of the early Assessments of Fair Housing submitted pursuant to the 2015 Rule. Furthermore, HUD has negotiated the resolution of at least two administrative complaints alleging that local or state governments were out of compliance with their AFFH duties. See <http://www.fairhousingwisconsin.com/PDF/WaukCountyAgreement2.2017.pdf> (January 24, 2017 settlement of claims against Waukesha County,

Wisconsin) and [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/2017/HUDNo\\_17-088](https://www.hud.gov/press/press_releases_media_advisories/2017/HUDNo_17-088) (October 3, 2017 settlement of claims against the State of Maryland).

<sup>5</sup>24 C.F.R. § 5.154.

<sup>6</sup>24 C.F.R. § 5.152 (definition of "affirmatively furthering fair housing").

<sup>7</sup>Regional Plan Association, *Pushed Out: Housing Displacement in an Unaffordable Region*, at 7, 13-14 (March 2017), available at <http://library.rpa.org/pdf/RPA-Pushed-Out-Housing-Displacement-in-an-Unaffordable-Region.pdf> (last visited Dec. 11, 2017).

<sup>8</sup>National Association for Latino Community Asset Builders (NALCAB) & Marquez Community Strategy, *An Assessment of Housing and Housing Affordability in the Mission Promise Neighborhood*, (March 2015), available online at [http://medasf.org/redesign/wp-content/uploads/2015/08/1429-03252015\\_MPN-NALCAB-Mission-Housing-Assessment\\_v151.pdf](http://medasf.org/redesign/wp-content/uploads/2015/08/1429-03252015_MPN-NALCAB-Mission-Housing-Assessment_v151.pdf) (last visited Dec. 11, 2017).

<sup>9</sup>24 C.F.R. §§ 5.152 (definitions) & 5.154(d)(3) (analysis requirements).

<sup>10</sup>Relman, Dane & Colfax PLLC, Public Advocates, and the Mission Economic Development Agency, "Civil Rights Law & The Displacement Crisis in San Francisco's Mission District," [http://www.publicadvocates.org/wp-content/uploads/fair\\_housing\\_framework\\_for\\_san\\_franciscos\\_mission\\_district-1.pdf](http://www.publicadvocates.org/wp-content/uploads/fair_housing_framework_for_san_franciscos_mission_district-1.pdf) (last visited Dec. 11, 2017).

<sup>11</sup>M. Allen, "HUD's New AFFH Rule: The Importance of the Ground Game," THE DREAM REVISITED (Sept. 2015), available at <http://furmancenter.org/research/iri/essay/huds-new-affh-rule-the-importance-of-the-ground-game> (last visited Dec. 11, 2017).

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## Why I Joined the Civil Rights Section

*by Stephen Haedicke,*

It started with an email. A little over a year ago, sitting at my desk with a rare moment of free time, I opened the email announcing a conference call for the Federal Bar Association's Civil Rights Section. Although I had been a member of the FBA for some time, I hadn't heard of the Civil Rights Section before the email. Given my practice is about 50% civil rights (police misconduct) in federal court, it sounded like the perfect section for me, so I joined the call.

I was right to do so. Over the course of the last year, through involvement with the Section, I've connected with an impressive community of civil rights practitioners—both defense and plaintiff—across the country. We worked hard to put on the inaugural Civil Rights Etouffee CLE in my hometown, New Orleans, which was a sold-out success. And the quarterly newsletter, our Section conference calls, and the work by the various Committees have broadened and deepened my perspective on what it means to be a civil rights lawyer.

And this next year promises to be even better. The Etouffee CLE will return in the Fall of 2018, and we'll build on the success of our first attempt. We have new membership plan to grow the Section's ranks, and hope to take the Etouffee on the road with a series of mini-CLE events in various cities.

The Civil Rights section has helped me to become a better lawyer—more knowledgeable, better connected, and more in tune with what's going on in the federal bar. I look forward to getting even more involved during 2018. ■

# The Robust Causality Requirement In Disparate Impact Claims Under The Fair Housing Act

by Joseph D. Rich, Lawyers Committee for Civil Rights Under Law, Washington, D.C.

The Supreme Court's 2015 decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*<sup>1</sup> reaffirmed 40 years of lower court precedent which recognized disparate impact claims brought under the Fair Housing Act. The Court held that "recognition of disparate-impact claims is consistent with the FHA's central purpose" to "eradicate discriminatory [housing] practices." It specifically noted that "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification . . . reside at the heartland of disparate-impact liability."<sup>2</sup> At the same time, the *Inclusive Communities* decision explained that "disparate-impact liability has always been properly limited" and "mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."<sup>3</sup> In light of this limitation, the Court went on to set forth cautionary standards to guard against "abusive" impact claims.<sup>4</sup> Particular emphasis was placed on a "robust causality requirement" which requires plaintiffs who bring disparate impact claims based on statistical disparities to (1) identify the defendant's policy or policies causing that disparity, noting that "one-time decisions that may not be a policy at all;" and (2) produce statistical evidence at the pleading stage demonstrating that a defendant's policy or policies cause that disparity.<sup>5</sup>

These cautionary standards do not appear to diverge from how causality has generally been treated in past disparate impact claims.<sup>6</sup> However, since the *Inclusive Communities* decision, lower courts are examining causation issues much more closely.<sup>7</sup> A review of fair housing cases alleging disparate impact claims since the decision indicates that in cases that the Supreme Court defined as the "heartland" cases, lower courts have consistently found that plaintiffs have met the robust causality requirement. The Court explicitly cited several exclusionary zoning cases as examples of a "heartland" case and in two recent lower court exclusionary zoning cases attacking zoning decisions that disproportionately bar minorities from certain neighborhoods, courts have held that the causality requirement was met.<sup>8</sup>

Other cases in which courts have found that plaintiffs met the causality requirement also can be classified as "heartland" cases because the challenged housing restrictions, like exclusionary zoning decisions, exclude groups protected by the Fair Housing Act. One district court set forth in some detail how the plaintiff met the causality requirement in a challenge to an insurance company's refusal to insure landlords who rent to tenants with Housing Choice Vouchers.<sup>9</sup> Two other courts rendered similar holdings.<sup>10</sup>

The cautionary language in *Inclusive Communities* "does not require courts to abandon common sense or necessary logical inferences that follow from the facts alleged."<sup>11</sup>

Causation in "heartland" cases is straightforward – the policies being challenged are easily identified,<sup>12</sup> and are the direct reason that plaintiffs are excluded from housing or high opportunity neighborhoods. Statistical evidence in these cases should compare those affected by the policy with those unaffected by the policy to demonstrate the disparate impact of the policy,<sup>13</sup> or demonstrate that those injured by the policy are more likely to be members of a protected class than is true for the population as a whole.<sup>14</sup>

By comparison, plaintiffs have not fared as well in cases that do not fall into the "heartland" category. In *Inclusive Communities* the Supreme Court noted that the limitations of disparate impact liability are necessary to protect defendants against "abusive disparate impact claims," explicitly stating that "governmental entities . . . must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes." 135 S. Ct. at 2524. Thus, it is not surprising that several courts have dismissed disparate impact cases attacking such codes, primarily on the basis that plaintiffs had not identified the offensive policy.<sup>15</sup>

Similarly, in cases in which cities sued banks for injury to the City allegedly caused by discriminatory predatory lending practices, courts have found that plaintiffs failed to meet the causality requirements. In two cases decided by the Ninth Circuit Court of Appeals, the Court found (or assumed) that statistical disparities were shown, but the actions that plaintiffs alleged were neutral policies were either not a policy (the bank's failure to monitor loans), or plaintiffs did not demonstrate a robust causality between the alleged policies (the compensation "scheme" for loan officers and a targeted marketing policy) and the disparity.<sup>16</sup>

While the *Inclusive Communities* decision reaffirmed forty years of disparate impact claims under the Fair Housing Act, the cautionary language in the decision has resulted in increased scrutiny of the cause of the underlying disparate impact necessary for such claims. Attorneys contemplating pleading a disparate impact claim will need to carefully review these cautionary standards to determine how they affect such a claim.

Joseph D. Rich is Co-Director of the Fair Housing and Community Development Project at the Lawyers' Committee for Civil Rights Under Law in Washington D.C. ■

## Endnotes

<sup>1</sup>135 S. Ct. 2507 (2015)

<sup>2</sup>*Id.* at 2521-22

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* at 2524

<sup>5</sup>*Id.* at 2523-24

<sup>6</sup>In 2013, the Department of Housing and Urban Development (HUD) finalized its disparate impact regulation

– Implementation of the Fair Housing Act’s Discriminatory Effects Standard. 78 Fed. Reg. 11460 (Feb. 15, 2013). The definition of discriminatory impact is consistent with the Court’s causality requirements. See 24 C.F.R. 100.500(a) (“A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons protected by the Act. . . . Any facially neutral action, e.g., laws, rules, decisions, standards, policies, practices, or procedures. . . may result in a discriminatory effect”)(emphasis added). The Second Circuit Court of Appeals has noted that the “Supreme Court implicitly adopted HUD’s approach.” *Mhany Management Co .v. County of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016).

<sup>7</sup>More recently, the Supreme Court in *Bank of America and Wells Fargo v. City of Miami*, 137 S. Ct. 1296 (2017) remanded a case in which a municipality had brought a fair housing case against banks alleging discriminatory lending practices to define the “contours of proximate cause” under the Fair Housing Act. While this issue is somewhat different than the robust causality requirement in ICP, it has further heightened the examination of causation issues in fair housing cases.

<sup>8</sup>*Mhany Management Co .v. County of Nassau*, supra; *Avenue 6E Investments, LLC v. City of Yuma*, 217 F.Supp.3d 1040 (D. Ariz. 2017).

<sup>9</sup>*National Fair Housing Alliance v. Travelers Indemnity Co.*, 2017 WL 3608232 (D.D.C., August 17, 2017).

<sup>10</sup>*Rhode Island Commission for Human Rights v. Graul*, 120 E. Supp. 3d 110 (D.R.I. 2015) (challenge to a landlord’s occupancy standards that denied an apartment to a family with children); *Crossroads Residents v. MSP Crossroads Apartments LLC*, 2016 WL 3661146 (D. Mn. July 5, 2016) (challenge to change of policy by raising rents and not accepting Section 8 vouchers and in occupancy standard policy). But see, *Inclusive Communities Project v. Lincoln Properties*, 2017 WL 3498335 (N.D. Tx, Aug. 18, 2017) (on appeal to Fifth Circuit Court of Appeals, No. 17-10943); (holding that plaintiff had not established the requisite causal connection between the defendant landlords’ policy of not renting to Section 8 voucher holders and the statistical disparity).

<sup>11</sup>*Travelers Indemnity*, 2017 WL at \*7

<sup>12</sup>In its analysis in this case, the Second Circuit also held that a single zoning decision met the Supreme Court’s definition of a policy, rejecting defendant’s argument that the zoning

decision was the type of “one-time decision” that the Supreme Court noted may not be a policy subject to disparate impact claims. In rejecting this argument, the Court found that because the extended process required by the defendant in reaching its zoning decision that “required passage of a local law. . . , the challenged zoning decision falls well within a classification of a “general policy.” 819 F.3d at 619.

<sup>13</sup>*Graul*, 120 F.Supp.3d at 124.

<sup>14</sup>*Travelers Indemnity*, 2017 WL at \*9. In this case, the court contrasted this kind of statistical evidence – presented in *Mhany Management*, 843 F. Supp.287, 329 (E,D,N,Y, 2012) and *Avenue 6E Investments, LLC*, 217 F.Supp.3d 1048-50 -- with that presented in two decisions that found plaintiffs had not demonstrated the requisite causality because the statistical evidence presented did not demonstrate the necessary connection between the policy and the disparity. 2017 WL at \*8 (citing *Burbank Apartments Tenant Ass’n v. Kargman*, 474 Mass. 107, 48 N.E.3d 394, 398 (2016)( distinguishing this case from the “heartland” cases of disparate impact liability) *Boykin v. Fenty*, 650 Fed.Appx. 42, 44 (D.C. Cir. 2016)( did not allege that disabled homeless individuals are more likely to rely on low-barrier shelters than non-disabled homeless individuals.); See also, *Oviedo Town Center II v. City of Oviedo, Florida*, 2017 WL 3621940 (M.D.Fl. Aug. 23, 2017) (statistical evidence did not demonstrate that the policy change at issue affected racial minorities differently than non-minorities.).

<sup>15</sup>In *Ellis v. City of Minneapolis*, 860 F3d 1106, 1114 (8th Cir. 2017), the Eighth Circuit Court of Appeals affirmed the lower court’s dismissal of the case, holding that plaintiffs did not plead sufficient facts to plausibly identify an “artificial, arbitrary, and unnecessary” policy causing the problematic disparity. See also, *Azam v. City of Columbia Heights*, 2016 WL 424966 (D. Mn. Feb. 3, 2016) (a series of decisions involving the same property owner does not constitute an identifiable policy).

<sup>16</sup>*City of Los Angeles v. Well Fargo & Co*, 691 Fed Appx 453 (9th Cir 2017); *City of Los Angeles v. Bank of America Corp.* 691 Fed Appx 464 (9th Cir. 2017). See also, *Cobb County v. Bank of America Corp.*, 183 F Supp 3d 1332 (N.D. Ga.) (the alleged policy -- steering minority borrowers into more costly loans – is an allegation of intentional discrimination. not a facially neutral policy); *Gomez v. Quicken Loans, Inc.*, 2016 WL 8229036 (C.D.Cal. April 20, 2016).

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### *CHAIRPERSON continued from page 1*

Rob Mejia of the UTAH ACLU, Chief Judge David Nuffer of the Utah District Court, as well as law professors from University of Utah and BYU. Most proudly, our keynote speaker will be Colorado Solicitor General Frederick R. Yarger, who recently appeared in the Supreme Court, arguing on behalf of the State of Colorado and in favor of the married couple in the Master Piece Cake litigation.

Organizing a 2-3 hour CLE is easier than one might realize, and it is an incredible way to connect with other practitioners and members of the judiciary, and connect together as a

community. The FBA Civil Rights Law section is here to help you organize an Etouffee on the Road CLE panel in your home district.

If you would like help organizing a local Etouffee on the Road, or if you want to help organize the next Civil Rights Etouffee in New Orleans in Fall 2018, or simply want to be kept up on information about these events, please email us at FBACIVILRIGHTSLAW@gmail.com and we will make sure you are in touch with the Etouffee and all its goings on.

# The Detroit Étouffée On The Road: The Art of Pleading

by Robin Wagner, Associate at Pitt McGehee Palmer & Rivers

This event is a joint program of the Civil Rights Law Section, the FBA Eastern District of Michigan Chapter, and the Michigan Bar Association's Labor and Employment Law Section. It will be held on March 23, 2018 at 3 pm in the Detroit Room of the Theodore Levin U.S. Courthouse, 231 W. Lafayette Blvd., Detroit, MI 48226.

## The Program

Professor Alexander A. Reinert of the Cardozo School of Law will address the difficult interpretive questions raised by the federal pleading standards ushered in by the Supreme Court decisions *Ashcroft v. Iqbal* (2009) and *Bell Atlantic Corp. v. Twombly* (2007), as well as the impact these rulings have had so far in the federal courts. Hon. Judith E. Levy, U.S.D.J. for the Eastern District of Michigan, will then provide commentary on how she has seen these interpretive issues play out in the courtroom. The program will also include an interactive session with the audience "voting" on the sufficiency of various examples in light of the pleading standards. Judge Levy and Professor Reinert will discuss the examples and the concerns they raise for practitioners. There will be time for questions and comments from the audience, as well as a reception following.

## Speakers



Alexander A. Reinert is Professor of Law and Director of the Center for Rights and Justice at the Benjamin N. Cardozo School of Law. He represented Javaid Iqbal in his lawsuit against John Ashcroft from the trial court through to the Supreme Court. His research since then has documented the significant impact that the *Iqbal* and *Twombly* decisions have had on civil rights and employment discrimination law. Through the Federal Judicial Center, he has trained federal judges on evaluating pleadings under these standards. He also continues to litigate civil rights cases, primarily representing people confined in jails and prisons



Judith E. Levy was appointed by President Obama to the United States District Court of the Eastern District of Michigan in 2013 and began serving in March of 2014. Before that she served as chief of the civil rights unit at the United States Attorney's Office for the Eastern District of Michigan. In addition to having significant experience dealing with pleadings both as a prosecutor of civil rights cases and as a judge, she also has taught topics in civil rights law at the University of Michigan for many years.

Robin Wagner, moderator and organizer of the panel, is an associate at Pitt McGehee Palmer & Rivers, a law firm specializing in employment discrimination and civil rights law.

This program is offered free of charge and is open to all attorneys, law clerks, and students.■

## Reception

*Date:*

Friday, March 23, 2018

*Time:*

3:00 pm – 5:00 pm

*Location:*

The Detroit Room  
Theodore Levin U.S. Courthouse  
231 W. Lafayette Blvd.  
Detroit, MI 48226

*RSVP:*

Please email [fbamich@fbamich.org](mailto:fbamich@fbamich.org) if you plan to attend so that we can anticipate seating and reception needs.

# MEMBER HIGHLIGHT

## Eileen Rosen, Rock, Fusco & Connelly, LLC, Chicago, IL



Consider this scenario: an agitated, disturbed man with a potential mental illness has chased a woman down the street, yelling her name as she tries to escape a threatening stranger. The woman darts into a crowded restaurant, but the man follows, yelling at her. A group of men stop the man and attempt to hold him as a police officer arrives on the scene. As the officer approaches, the man breaks

away from the group, punches the officer in the face, and runs up the street in escape. The officer draws his gun and starts shooting at the weaponless-man's back.

This is not a “ripped from the headlines” story, but if it sounds familiar, that’s because it’s from the movie “It’s a Wonderful Life.” If it was today’s headline, there would be public outcries and a civil rights lawsuit. In the 1946 movie, no one lifts an eyebrow.

Eileen Rosen uses this example to remind juries that historical context often matters, particularly when the police actions on trial took place decades earlier. Eileen, the immediate past Chair of the FBA’s Civil Rights Law Section, is a partner at the Chicago firm of Rock, Fusco & Connelly, LLC. She concentrates her practice on representing municipalities and their employees in the litigation and trial of civil rights cases, particularly those alleging various forms of police misconduct. Though some people assume “civil rights lawyers” represent plaintiffs only, Eileen works hard to increase the recognition that civil rights exist on both sides of the v.

Eileen grew up in Evanston, Illinois, the daughter of Greek immigrants. She went to college at Northwestern University and graduated with a B.S. and a major in Political Science. She then went to Loyola University Law School, where she graduated cum laude. Eileen began her legal career at the City of Chicago’s Law Department, where she specialized in defending Chicago Police Department officers in federal and state court cases. There, her large caseload ranged from simple false arrest or illegal search claims, to excessive force and battery claims with minor injuries (tight handcuffs) to shooting cases with death claims, to highly complex

reversed conviction cases. (Eileen doesn’t use the pejorative and often-inaccurate term “wrongful conviction.”) Eileen tried many cases at the City, and several cases she worked resulted in appellate opinions that have legal impact even today. See, e.g., *Wallace v. Kato*, 549 U.S. 384 (2007) (applicability of *Heck v. Humphrey*); *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001) (existence of a claim for federal malicious prosecution).

In 2006, Eileen left the City of Chicago and joined Rock Fusco, becoming a partner in 2008, and remained specialized in civil rights litigation. Her caseload became smaller, but the cases became bigger and more legally and factually sophisticated, high profile, and high exposure. In addition to representing individual defendants, Eileen also began representing municipalities against far-ranging Monell claims alleging unconstitutional policies and practices, usually in conjunction with complex reversed conviction claims. These cases are among the most challenging in the civil rights field: the stories are usually factually compelling and decades in the making; the law (involving the intersection of civil, criminal and constitutional) is complicated and nuanced; and the issues are subject to local, state and national politics, media coverage, and debates about policing and law enforcement generally.

In this highly-charged litigation environment, Eileen focuses on the specific facts of each case, which often get lost in the broader debates and which often contradict some of the current and common narratives. One of Eileen’s primary challenges is to have jurors put aside what they’ve seen on TV and the movies, where cases are solved with technology and forensics that don’t actually exist or which did not exist at the time the incident; where police officers are painted with unreasonably broad brushes; and where storylines do not have to follow the law or the rules of evidence. Her reference to “It’s a Wonderful Life” is not just entertaining, it’s meaningful.

When not working on her cases, Eileen enjoys time with her husband and daughter, particularly in rooting for the Cubs and Blackhawks. Even more, she looks forward to their annual fishing trip to Northern Canada, though the reach of the internet and cell phone reception is starting to invade that peaceful escape. While the challenges of her practice can be draining, Eileen appreciates the opportunity to defend law enforcement officials who work hard to lawfully defend not just the public’s civil rights, but also the rights to health, safety and welfare. “Constitutional policing” is the concern of all civil rights attorneys, plaintiff and defense alike. ■