

# First Circuit Withdraws Earlier Opinion in Location-Based Discrimination Case; Issues Less Expansive Amended Opinion

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In August, [we wrote about](#) the First Circuit Court of Appeals' decision in *Abril-Rivera v. Johnson*, which affirmed a lower court ruling dismissing location-based discrimination and retaliation claims against FEMA. Last week, however, the First Circuit withdrew that decision and issued an amended opinion in the case. It is still a victory for employers, but one with slightly less import.

### Background

In *Abril-Rivera*, the plaintiffs worked at a FEMA call center in Puerto Rico, which was initially established as a temporary facility to help Spanish-speaking victims of Hurricane Marilyn. The call center eventually became a full-fledged claims processing center for FEMA, but was still housed in the temporary facility. A safety inspection later revealed that significant repairs were needed to fix fire safety issues at the facility, and FEMA decided to suspend operations at the call center while repairs were being made (though it placed its employees on administrative leave and continued to pay them). Afterwards, the facility resumed operations under a modified staffing plan, under which only 15-20 employees worked at the same time (out of approximately 300), on a rotational basis. Subsequently, a FEMA administrator decided to close the center permanently.

The plaintiffs filed a discrimination claim under Title VII, alleging that FEMA discriminated against them based on their national origin. Importantly, the plaintiffs did not bring a disparate treatment claim and their discrimination claim relied solely on a disparate *impact* theory. The claim, in essence, alleged that FEMA's rotating staffing plan and facility closure disparately impacted them because, as employees in the Puerto Rico center, they were treated differently than employees in FEMA call centers in the continental United States. Similarly, the plaintiffs' retaliation claim was also based on the rotating staffing plan and facility closure.

### The First Circuit's Initial Decision

The Puerto Rico District Court granted FEMA summary judgment finding that FEMA's decisions to implement the rotational staffing plan and close the plant were based on non-discriminatory, valid business reasons. On appeal, the First Circuit noted that Title VII prohibits both intentional discrimination (known as "disparate treatment") and practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as "disparate impact"). An employer can defend against the latter theory by showing that the practice is job-related and consistent with business necessity. The plaintiff may then rebut that showing by demonstrating that the employer refused to adopt an alternative practice that has less disparate impact and that services the employer's legitimate needs. The First Circuit said the plaintiffs' disparate impact claim failed for two reasons.

First, disparate impact claims are simply unavailable where the plaintiff alleges a violation under 42 U.S.C. § 2000e-2(h) – as the plaintiffs did here. That "safe harbor" provision permits employers to treat employees working in different locations differently as long as the treatment is not based on an *intention* to discriminate based on race, color, religion, sex or national origin. The plaintiffs expressly disavowed that FEMA intended to discriminate against them here and thus could not pursue a location-based discrimination claim premised under a disparate impact theory.

Second, even if Title VII's safe harbor provision did not bar a disparate impact claim, the claim still failed because FEMA provided legitimate, non-discriminatory business justifications for its actions. Namely, the rotational staffing plan served FEMA's need to maintain as many employees as possible to assist in the

event of a disaster, while still maintaining a safe working environment. Additionally, the decision to close the location was a legitimate business decision because it would have been very expensive to repair all of the deficiencies at the facility and would be even more expensive to establish a new facility. The call center also had experienced a decrease in call volume and the remaining calls could be picked up by other FEMA call centers.

In reaching this conclusion, the First Circuit relied heavily on the rationale recently set forth by the Supreme Court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* The First Circuit echoed the Supreme Court in stating that “disparate impact liability must be limited so employers . . . are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system” and that “private policies are not contrary to the disparate-impact requirement unless they are artificial, arbitrary, and unnecessary barriers.” Furthermore, to succeed on a disparate impact claim, the plaintiffs would have to show that there is “an available alternative . . . that has less disparate impact and serves the [entity’s] legitimate needs.” Because the plaintiffs could not do so here, their disparate impact claim failed.

### **The First Circuit’s Amended Decision**

In its **amended opinion**, the First Circuit eliminated its discussion of the safe harbor provision, a defense which the First Circuit had raised on its own initiative in the withdrawn opinion. While the amended decision ultimately affirmed the District Court’s finding that the former employees could not proceed in their disparate impact discrimination claim, it did so only on the basis that the employer provided a legitimate, non-discriminatory business justification for its actions.

### **Takeaways**

Though this case still presents a victory for employers, the First Circuit’s amended opinion restricts the breadth of the withdrawn opinion. The withdrawn opinion – through its discussion of the safe harbor provision – had essentially prevented employees from bringing Title VII discrimination claims based solely on a disparate impact theory that employees in other locations were treated differently than them. Because the First Circuit eliminated its discussion of the safe harbor provision, however, this rationale is no longer applicable. The amended opinion is still helpful for employers, however, because it still uses expansive language to describe an employee’s burden of overcoming an employer’s legitimate business justification in the disparate impact context – an employee must prove the employer had an available alternative with less of a disparate impact and that alternative serves the employer’s legitimate needs.

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