

# Employment Discrimination Plaintiff Cannot Change Legal Theories at Trial

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In *Rosenfeld v. Abraham Joshua Heschel Day School, Inc.*, the [Second Appellate District](#) held that a plaintiff whose pleadings alleged intentional employment discrimination could not assert a disparate impact theory for the first time at trial.

The case highlights the distinction between “disparate treatment” and “disparate impact” theories under California’s Fair Employment and Housing Act (“FEHA”). Disparate treatment is intentional discrimination against an individual on prohibited grounds, such as race, sex or another protected category.

Under a disparate impact theory, a plaintiff is not required to prove intentional discrimination. A disparate impact exists where an employer’s facially neutral policy has a disproportionate adverse impact on a protected class.

Rosenfeld was a teacher at a private Jewish elementary school in Northridge, California. She resigned in August of 2007 at the age of 60 and later sued the school for age discrimination.

In her pleadings, Rosenfeld alleged that the school gradually reduced her hours to an intolerable level “in an effort to force her out because of her age.” The school countered that the reduction in Rosenfeld’s hours was due to a decline in enrollment.

Rosenfeld’s pleadings solely alleged age discrimination under a theory of *disparate treatment*. Shortly before trial, however, Rosenfeld filed a trial brief alleging *disparate impact* for the first time. The trial court precluded her from arguing disparate impact, stating that Rosenfeld couldn’t “raise a completely different theory on the eve of trial.”

The jury ultimately returned a defense verdict. Rosenfeld unsuccessfully moved for a new trial and then appealed, among other things, the trial court’s decision to disallow the disparate impact claim.

On appeal, Rosenfeld argued that she was not required to specifically plead disparate impact. The school was sufficiently on notice of the disparate impact theory, Rosenfeld argued, because she had retained a statistical

expert and proposed a disparate impact jury instruction.

The court rejected this argument. Affirming the trial court's ruling, the court noting that Rosenfeld's pleadings, discovery responses and case management conference statements never mentioned a disparate impact theory.

"Thus, Rosenfeld failed to give timely notice to [the school] that she intended to pursue a disparate impact theory at trial."

The *Rosenfeld* case makes clear that an employment discrimination plaintiff must explicitly allege a disparate impact if he or she wants to proceed under that theory. It is not enough to assert that the disparate impact theory is implicit in the intentional discrimination claims. This is a positive development for employers.

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