IFSEA Conference 2023: Risk, Reward, Regulatory and Reputation Management Issues for Senior Executives & Founders
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Saddlers' Hall 40 Gutter Lane
London, EC2V 6BR United Kingdom

Afternoon Plenary Session, 14:15-15:15

Women, Age and the C Suite

A discussion on the sex/age discrimination intersection, and the use of individual and class actions, pay transparency and pay audits, and regulatory intervention to address widespread bias against women executives in pay and promotions. To what extent does the menopause impact women executives' careers too? And what positive action and initiatives are available to support career progression and re-entry after periods of absence?

Intersectionality Claims Under U.S. Federal Law

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"A plaintiff states an intersectional discrimination claim when he or she alleges discrimination on the basis of two protected characteristics (such as sex and race) and shows that the discrimination he or she experienced is attributable, at least in part, to the combination of those protected characteristics." *Anderson v. New York City Health & Hosps. Corp.*, No, 2020 WL 2866960 (S.D.N.Y. Mar. 2, 2020).

Origins of Intersectionality Theory

In 1989, Professor Kimberlé Crenshaw coined the term "intersectionality" in her essay "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine Feminist Theory and Antiracist Politics" as a way to help explain the oppression of African-American women. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139 (1989).

The idea of intersectionality existed long before Professor Crenshaw coined the term but was not widely recognized until her work. Black feminist trailblazers like Sojourner Truth in her 1851 speech "Ain't I a Woman?" and Anna Julia Cooper in her 1892 essay "The Colored Woman's Office" exemplified the ideas of intersectionality before intersectionality came to be.

Professor Crenshaw often refers to *DeGraffenreid v. General Motors* as an example of early U.S. courts not recognizing an intersectional claim. *See DeGraffenreid v. Gen. Motors Assembly Div.*, 413 F. Supp. 142, 144–45 (E.D. Miss. 1976) (finding that in a claim brought by African American women, the employment of African American male factory workers disproved racial discrimination, and the employment of white female office workers disproved gender discrimination).

Intersectional Claims Under Title VII

Now, multiple U.S. federal statutes protect the right of employees to be free from discrimination in the workplace, including Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), the Americans with Disabilities Act of 1990 (ADA), and the Equal Pay Act (EPA) of 1963, among others.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin. Title VII prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex). *See* EEOC COMPLIANCE MANUAL, Title VII, 29 CFR Parts 1600, 1607, 1608, Section 15 Race and Color Discrimination, https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination.

Sex-plus discrimination is when an employer discriminates against an employee because of a combination of sex and another factor. The Supreme Court of the United States first recognized the viability of a sex-plus discrimination claim under Title VII in the 1971 case, *Phillips v. Martin Marietta Corp.*, where it concluded that discriminating against women with pre-school age children violated Title VII even though the employer did not discriminate against women in general. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

Since then, lower courts have further developed sex-plus jurisprudence to permit other sex-plus claims, including sex-plus-marital status, sex-plus-race, and sex-plus-age claims. Notably, in sex-plus claims, the "plus" factor does not need to be another protected class. Rather, it need only relate to either an immutable characteristic or to the exercise of a fundamental right. *See* Kayla King, Comment, *Tenth Circuit Ruled in Favor of Sex-Plus-Age Claims of Discrimination Under Title VII in the Wake of* Bostock v. Clayton County, 62 B.C. L. Rev. E-Supp. II-185, II-202–03 (2021).

Examples include: Title VII prohibits discrimination against African American women even if the employer does not discriminate against White women or African American men. *See Jeffries v. Harris County Comty. Action Comm'n*, 615 F.2d 1025, 1032-34 (5th Cir. 1980) ("we hold that when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant"); *see also She Said Equinox Fired Her for Being a Black Woman. A Jury Agreed.* https://www.nytimes.com/2023/05/26/nyregion/equinox-settlement-discrimination.html; *'A Success of Listening': Plaintiff's Lawyer Explains How She Won $11.25 Million Verdict Against Equinox* https://www.law.com/newyorklawjournal/2023/05/18/a-success-of-listening-plaintiffs-lawyer-explains-how-she-won-11-25-million-verdict-against-equinox/.

Likewise, Title VII protects Asian American women from discrimination based on stereotypes and assumptions about them "even in the absence of discrimination against Asian American men or White women." *See Lam v. University of Hawaii*, 40 F.3d 1551, 1561-62 (9th Cir. 1994) (holding lower court erred when it treated the claim of an Asian woman in terms of race or sex separately; lower court should have considered whether discrimination occurred because of the plaintiff's combined race and sex); *see also* Caitlin Ramiro, *After Atlanta: Revisiting the Legal System's Deadly Stereotypes of Asian American Women*, 29 Asian American Law Journal 90 (2022).

Intersectional Claims under ADEA

Under The Age Discrimination in Employment Act of 1967 (ADEA), employers may not discriminate against employees older than forty because of their age. The Supreme Court in

Gross v. FBL Fin. Servs. Inc., 557 U.S. 167 (2009) held that a plaintiff must prove that age was the "but for" cause of employer's discriminatory behavior under the ADEA, rendering the intersection of motives under the ADEA prohibited. *See* Joanne Song McLaughlin, *Limited Legal Recourse for Older Women's Intersectional Discrimination under the Age Discrimination in Employment Act*, 26 Elder L.J. 287 (2019).

Sex-Plus-Age Claims Under Title VII vs Age-Plus-Sex Claims under ADEA

As discussed above, the sex-plus doctrine for Title VII claims is well established, but courts have been hesitant to recognized age-plus discrimination under the ADEA, due to differing standards of causation. Specifically regarding sex and age, the age-plus-sex cause of action has not been considered viable under the ADEA, but courts have mixed views on viability of sex-plus-age claims under Title VII.

Some district courts have found that plaintiffs may bring a sex-plus-age discrimination claim under Title VII. The main distinction between sex-plus-age claims and other sex-plus claims is that Congress has separately addressed age discrimination in the ADEA. For this reason, some courts hesitate to expand Title VII to include age as a "plus" factor, despite an established sex-plus doctrine.

District courts recognizing Title VII sex-plus-age claims:

- *Arnett v. Aspin*, 846 F. Supp. 1234, 1240 (E.D. Pa. 1994) (finding the distinction between sex-plus-age cases and other sex-plus cases in which the other factor is not separately protected irrelevant).
- *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 109–10 (2d Cir. 2010) (acknowledging that age discrimination is distinct from sex discrimination and that when both are present courts cannot neatly separate the two components).

District courts NOT recognizing Title VII sex-plus-age claims:

- *Kelly v. Drexel Univ.*, 907 F. Supp. 864, 875 n.8 (E.D. Pa. 1995) (rejecting the argument that the ADEA protects the subclass of older workers with disabilities).
- *Bauers-Toy v. Clarence Cent. Sch. Dist.*, No. 10-CV-845, 2015 U.S. Dist. LEXIS 193758, at *19 (W.D.N.Y. Sept. 30, 2015) (rejecting the possibility of age-plus-sex claims by reasoning that the ADEA and Title VII cover age discrimination and sex discrimination separately, with two separate standards and remedies).

In 2020, the U.S. Court of Appeals for the Tenth Circuit, in *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1055 (10th Cir. 2020), was the first circuit court to directly address and choose a side of the district court split regarding the viability of sex-plus-age claims under Title VII.

- The court held that permitting a sex-plus-age claim would not allow plaintiffs to circumvent the requirements of the ADEA because Title VII and the ADEA exist to address two distinct harms.
- The court recognized "intersectional" discrimination and noted that some people experience a form of discrimination based on multiple factors that is distinct from discrimination based on those factors individually.

- Lastly, the court reasoned that sex-plus-age claims honored Congress's intent because it designed the ADEA to broaden protections against employer discrimination rather than to limit the application of Title VII.

In the Supreme Court's recent ruling in *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020), when describing the but-for test of causation that the "because of" language of Title VII incorporates, the Court concluded that something is a but-for cause if changing that factor would change the outcome. Even if there are multiple but-for causes for a particular event, liability attaches if at least one of those but-for causes is a protected class under Title VII. *Frappied* was a correct interpretation of *Bostock.*

Stronger State Laws

Some states still have two separate statutes for age discrimination and sex discrimination, but many states have a single statute to prohibit discrimination based on age, sex, and other groups:

- In California: Cal. Gov. Code § 12940
- In North Carolina: N.C. GEN. STAT. § 143-422.2

The court cannot expand the same rationale from *Gross* to state discrimination claims.
Some states explicitly allow for sex-plus-age causes of action:

- *Doucette v. Morrison Cty.*, 763 F.3d 978 (8th Cir. 2014) ("we agree with the district court that a claim of sex-plus-age discrimination is likely cognizable under the [Minnesota Human Rights Act] MHRA").

Some states explicitly allow mixed-motive theory under their individual state laws, including Alaska, California, Connecticut, and Missouri.

The ADEA allows only for liquidated damages, but some states allow for compensatory damages, punitive damages, or both.

Evidence of Older Women's Intersectional Discrimination

There is a large amount of anecdotal evidence of more discrimination against older women that is continuously reported in the media.

Further, a recent field experiment has found direct evidence of older women's intersectional discrimination in hiring to support these anecdotes. Neumark et al., *Is It Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment,* 127 J. Pol. Econ. 922, 966 (2019) found robust evidence that employers discriminate against older women in hiring but did not find strong evidence of age discrimination against older men. Other empirical findings analyzing older women's intersectional discrimination include a disproportionate increase in long-term unemployment for older women when compared to unemployment for older men after the Great Recession. These discriminatory behaviors can be explained by the sociological and psychological theory that older women may suffer more from a negative age stereotype than older men. For example, physical attractiveness matters much more for women in the workplace than for men. Moreover, since attractiveness oftentimes deteriorates with aging faster for women than for men, it is clear how age discrimination may disproportionally affect women.

Other Resources

- In Pursuit of Pay Equity: Examining Barriers to Equal Pay, Intersectional Discrimination Theory, and Recent Pay Equity Initiatives https://www.eeoc.gov/pursuit-pay-equity-examining-barriers-equal-pay-intersectional-discrimination-theory-and-recent-pay ("While some compensation disparities may be attributable to differences in occupations, skills, experience, and other legitimate factors, the Equal Employment Opportunity Commission (EEOC or Commission) acknowledges that not all disparities can be explained by such factors and that pay inequality may be the result of discrimination.")
- Jourdan Day, *Closing the Loophole-Why Intersectional Claims Are Needed to Address Discrimination Against Older Women*, 75 Ohio St. L.J. 447, 474 (2014) ("The intersectionality of two immutable characteristics is not the same as simply possessing two separate characteristics. While an individual can be both 'old' and be a 'woman,' being an 'older woman' is substantively different.") (cited in *Frappied*)
- Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 Denv.U.L. Rev. 79, 94-101 (2003) (cited in *Frappied*)
- Patti Buchman, Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 Colum. L. Rev. 190 (1985) (discussing sex-plus-age discrimination in local television broadcasting) (cited in *Frappied*)
- Twitter CEO Linda Yaccarino Is Teetering on the Glass Cliff / Elon Musk's appointment repeats a pattern in which companies led into crisis by men suddenly appoint women leaders. https://www.wired.com/story/twitter-linda-yaccarino-glass-cliff/
- Of course, they're probably going to put a woman in charge of CNN https://www.businessinsider.com/cnn-next-leader-probably-going-to-be-a-woman-2023-6