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Increasing Representation: 
Expanding Intersectional Claims in 
Employment Discrimination 

Anna Maria Sicenica* 

“The way we imagine discrimination or disempowerment often is more complicated for people who are subjected to multiple forms of exclusion. The good news is that intersectionality provides us a way to see it.” 

– Kimberlé Williams Crenshaw1 

ABSTRACT 

The trend of globalization has only continued to bring workers from different races, religions, and countries to the United States. Moreover, in a country where women continue to become a larger part of the workforce every year, and as the age of retirement continues to grow, there will inevitably be more women who will face discrimination on multiple grounds: specifically, for their age and sex. Thus, it is no wonder that “intersectional claimants,” or claimants that belong to least two or more protected classes under the law, now make up the majority of the workforce. 

However, despite the fact that intersectional claimants represent the majority of the population, many courts do not recognize an employment discrimination claim based on multiple protected characteristics. Circuit courts are split on whether a claimant can bring a claim based on sex (under Title VII) plus another protected Title VII characteristic. Further, even fewer circuits recognize claims based on sex (under Title VII) plus age under the Age Discrimination in Employment Act of 1967. Consequently, these types of “intersectional” claimants face varying burdens of proof based on the jurisdiction they reside in and the claim they decide to bring forward. This type of division is exactly what a leading scholar of critical race theory, Kimberlé W. Crenshaw, warns can lead to identity erasure. Identity erasure occurs when the law does not recognize individuals who belong to multiple protected classes wholistically. 

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Indeed, different legal causation standards exist based on the type of claim workers bringing forward: the “motivating factor” standard for ADEA discrimination claims, and the “but-for” standard for age discrimination claims. Because this “but-for” standard has a higher burden of proof for plaintiffs, this causes individuals who belong to multiple protected classes to bisect their identity and often choose sex before their other traits within a sex-plus jurisdiction.

This Article discusses these circuit splits in detail as well as the different legal causation standards. In addition, it discusses recent case law such as the United States Supreme Court’s Bostock v. Clayton County ruling, which has opened the door for future intersectional claims. This Article argues for statutory changes and highlights the need for courts to embrace a new understanding of intersectionality.

I. INTRODUCTION

In 1954, a decade after the United States Supreme Court’s landmark decision in Brown v. Board of Education, President Lyndon B. Johnson signed the first significant civil rights law since Reconstruction: the Civil Rights Act of 1964 (“Civil Rights Act”). Yet, this ten-year path to the Civil Rights Act’s inception was fraught

with hardship. In the wake of the Court’s momentous Brown decision and series of southern state laws disenfranchising Black voters, the Civil Rights Movement was reinvigorated and continued to grow throughout the late 1950s and 1960s. Then, in the early 1960s, after “a number of catalytic events that marked the early history of the modern civil rights movement,” Congress passed the Civil Rights Act.

Some of these catalytic events include the brutal murder of a Black 14-year-old, Emmett Till, in 1955 by white supremacists and the photo of Till’s mutilated corpse shared with media across the country; Black students staging a sit-in at a Woolworth’s in Greensboro, North Carolina in February 1960; Black veteran, James Meredith’s, fight to attend the University of Mississippi in 1962; the civil rights protests in Birmingham, Alabama (including the 1963 Children’s Crusade where police used batons, dogs, and firehoses against demonstrators); the murders of three young civil rights workers—James Chaney, Andrew Goodman, and Michael Schwerner—in Mississippi in June 1964; and the monumental March on Washington, D.C., showing support of President John F. Kennedy’s Civil Rights Bill. At the end of the March on Washington, more than 200,000 demonstrators gathered in front of the Lincoln Memorial where Dr. Martin Luther King, Jr. delivered his iconic “I Have a Dream” speech. Immediately following the March, Dr. King and other civil rights leaders met with President Kennedy and Vice President Lyndon B. Johnson at the White House to discuss civil rights legislation and the bipartisan support that would be needed to pass it.

During this time, civil rights groups argued that the problem of discrimination in employment was not simply a problem of business practices that reinforced “blatant exclusion,” but instead, a far-reaching “complicated, deeply rooted, and structural” issue.

3. Id.
7. Id.
8. Susan D. Carle, A Social Movement History of Title VII Disparate Impact Analysis, 63 FLA. L. REV. 251, 286 (2011) (citing PAUL D. MORENO, FROM DIRECT ACTION TO
Indeed, this novel understanding of discrimination in employment as a multi-faceted problem was not limited to civil rights groups. At both the federal and state administrative levels, "structural approaches to solving the problem of racial employment subordination were well entrenched in the relevant public actor's discourse."10

Thus, it was amid this societal push and with a new structural understanding of employment discrimination that the Senate and House of Representatives enacted the most comprehensive federal statute governing employment discrimination. Title VII of the Civil Rights Act of 1964 ("Title VII") not only made it unlawful for employers to discriminate based on race or color, but also made discrimination based on religion, sex, and national origin illegal.11 Moreover, the Civil Rights Act established the United States Equal Employment Opportunity Commission ("EEOC") to administer and enforce civil rights laws against workplace discrimination.12

Yet, despite creating and enforcing the most comprehensive employment discrimination statute, there were still gaps in coverage under Title VII. This led to a series of unpopular decisions by the Supreme Court in 1989 which fueled the creation of the Civil Rights Act of 1991.13 One of these decisions by the Court included Wards Cove Packing Co. v. Atonio, where the Court held that non-white cannery workers were unable to produce evidence of a legitimate business justification for the hiring practices that created the disparity.14 The Court’s decision in Wards Cove not only diminished the scope of the Civil Rights Act of 1964 but also severely weakened it and exacerbated the remaining gaps in Title VII.15 Indeed, in Section 2 of the Civil Rights Act of 1991, Congress acknowledged that the Wards Cove decision was a catalyst for the needed reform, stating that "the decision of the Supreme Court in Wards Cove..."
Packing Co. v. Atonio has weakened the scope and effectiveness of Federal civil rights protections.”¹⁶ Ultimately, the Court’s Wards Cove decision, along with “each of the other landmark cases[,] left its own footprint on the law of employment discrimination.”¹⁷

Thus, in 1991, Congress amended Title VII and the Civil Rights Act at large to create wider coverage with the support of civil rights groups.¹⁸ Congress found that additional legislation was necessary to prevent unlawful harassment and intentional discrimination in the workplace.¹⁹ However, it is important to note that when President George H. W. Bush signed this Act into law, he acknowledged that even this action was insufficient, stating that it “would not have done enough to advance the American dream of equal opportunity for all.”²⁰ Although the Act was insufficient, it was nonetheless a necessary step to start to address America’s deeply rooted history of inequality. The purpose of this Act is outlined in section 3, which states that the Act is necessary:

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
(2) to codify the concepts of “business necessity” and “job relatedness” enunciated by the Supreme Court in Griggs and in the other Supreme Court decisions prior to Wards Cove;
(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII . . . ; and
(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.²¹

To achieve these ambitious goals, Congress first amended the statutory language in Title VII § 703(m) to state that violations occur when “the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other [non-discriminatory] factors also motivated the practice.”²² Thus, proof of a motivating factor

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¹⁷. Wexler et al., supra note 4, at 352.
²⁰. Id.
became sufficient to establish a violation. Further, the amendments explained that employers could no longer avail themselves of an affirmative defense to be absolved of liability; but instead, this defense would only restrict the remedies available to plaintiff.\(^{23}\) And to have this defense, employers must “demonstrate that [it] would have taken the same action in the absence of the impermissible motivating factor.”\(^{24}\) Adding to this lower burden of proof, in Desert Palace v. Costa, the Supreme Court held that circumstantial evidence is sufficient in Title VII cases to obtain a mixed motive instruction and shift the burden to the defendant.\(^{25}\)

Today, while Title VII allows employees to assert disparate treatment claims for intentional discrimination and disparate impact claims for unintentional discrimination, there are different prima facie elements that must be met for each type of claim. The elements for disparate treatment were set forth in McDonnell Douglas Corp. v. Green: (i) belonging to a protected class; (ii) that they were qualified for a job for which the employer was seeking applicants; (iii) despite being qualified, plaintiff suffered an adverse employment action; and (iv) after the adverse employment action, the plaintiff was treated less favorably than a similarly-situated individual outside the protected class.\(^{26}\) After the plaintiff establishes a prima facie case, the burden then shifts to the employer, who must articulate some “legitimate, non-discriminatory” reason for the employee’s rejection.\(^{27}\) Then, if the employer articulates such a reason, the plaintiff has the opportunity to prove pretext.\(^{28}\)

In the alternative, “a plaintiff can allege disparate impact and argue that a facially neutral and objective employment practice . . . has a statistically significant adverse effect on members of a protected class, and as such is discriminatory absent a legitimate business justification.”\(^{29}\) However, as disparate impact cases have a higher evidentiary burden, plaintiffs more often bring forth disparate treatment claims.\(^{30}\) Yet, in contrast to both disparate treatment and impact claims brought under Title VII, claims brought under

\(^{23}\) Id.

\(^{24}\) Id.


\(^{27}\) Id.

\(^{28}\) Id. at 804.


\(^{30}\) Id.
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the Age Discrimination in Employment Act of 1967 ("ADEA") generally do not utilize a "mixed-motives" theory.\(^{31}\)

Concurrently with Title VII's inception, in 1967, President Lyndon B. Johnson signed the ADEA into law to forbid employment discrimination against anyone at least forty years of age in the United States.\(^{32}\) In the 2009 case of *Gross v. FBL Financial Services*, the Supreme Court held that a plaintiff asserting an ADEA claim must prove their protected characteristic was the determinative factor for the employer's adverse action instead of just a motivating factor under a "mixed-motives" theory.\(^{33}\) Thus, a plaintiff claiming discrimination under the ADEA could only succeed where the discriminatory reason was the "but-for" cause for their adverse employment action, while a Title VII plaintiff could succeed by merely showing the discriminatory motive was a motivating factor in the employer's decision. Due to these differing standards, plaintiffs now potentially face two different legal causation standards based on the type of claim they are bringing forward: the "motivating factor" standard for Title VII discrimination claims, and the "but-for" standard for age discrimination claims. By analyzing existing protections under Title VII and the ADEA as well as examining current circuit splits regarding the way claimants who belong to two or more protected groups should bring their employment discrimination claim forward, it is possible to see that certain groups such as older women are falling through the cracks by facing a higher burden of proof.

II. BACKGROUND

A. Existing Protections

As discussed, Title VII protects against race, color, religion, sex, and national origin while the ADEA protects against age.\(^{34}\) Other

\(^{31}\) Age Discrimination in Employment Act, 29 U.S.C. § 621 (1967); *Mixed Motive Case*, PRAC. LAW GLOSSARY, Item 5-521-1274, https://www.westlaw.com/5-521-1274?transition-Type=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (stating that in "[a]n employment discrimination case in which there is evidence that the defendant employer had both lawful and discriminatory reasons for taking a particular adverse employment action. In a mixed motive case, once a plaintiff establishes that discrimination was a motivating factor in the employment decision, the burden shifts to the employer to prove that it would have made the same decision even without the unlawful factor. Unlike the after-acquired evidence defense, the employer must prove that the lawful reason was a motivating factor in the employment decision").


\(^{34}\) *Civil Rights Act of 1964 § 7; Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (1967).*
federal statues which protect against discrimination in employment include physical or mental disability, veteran status, genetic information, and citizenship.\(^{35}\) Indeed, of these numerous protected classes, it is not difficult to imagine someone that falls into two, three, or even more of these characteristics. For example, a fifty-three-year-old Muslim woman could be discriminated against based on her national origin, sex, religion, or age. As she is protected under multiple statutes, she could be considered an intersectional claimant—or a claimant who suffers multiple forms of discrimination.

Although there are other federal statutes besides Title VII and the ADEA that protect against employment discrimination, for the purposes of this Article, the focus will be on how courts have addressed Title VII claims combined with age. If courts would allow intersectional claimants to base their claim in either the same statute or multiple statutes, this would not only remedy forms of intersectional discrimination that the courts are not aware of, but it would also provide a voice to those that have suffered from multiple and complex forms of discrimination.

B. History of Intersectionality

The idea of intersectional claims and the idea of intersectionality was first coined by a leading scholar of critical race theory, Kimberlé W. Crenshaw. In 1989, Crenshaw proposed that individuals may face discrimination on multiple levels, which ultimately leads to a very specific type of oppression.\(^{36}\) However, historically, the law only provides a “single-axis framework” for viewing discrimination claims, thus minimizing and “eras[ing] Black women in the conceptualization, identification and remediation of race and sex discrimination.”\(^{37}\) Later, African American feminist scholar Moya Bailey coined the specific term “misogynoir,” to help unravel one of the most pervasive forms of intersectional discrimination—the idea that Black women not only experience sexism and racism, but


\(^{37}\) *Id.* at 140.
indeed, racialized sexism or sexualized racism.\textsuperscript{38} It is important to note that while Crenshaw first put the term of “intersectionality” into the public vernacular, this idea “predates the Civil Rights Act itself,” and in fact, “what we now call intersectionality crucially shaped Title VII from its inception.”\textsuperscript{39}

Crenshaw and other legal scholars have also emphasized that intersectionality is nuanced and individualized and, as such, intersectional claims are not additive.\textsuperscript{40} Instead of various classifications compounding on individuals equally, the true nature of intersectionality is “reconstitutive” as it has the “potential to constantly complicate known narratives and expose completely new ways of being.”\textsuperscript{41} Moreover, “intersectionality embraces the importance of Black women as a cohesive marginalized group, but it also intentionally rejects prescribing the reality of a few Black women as applicable to all Black women.”\textsuperscript{42} Thus, it has not been easy for courts to recognize the existence of intersectional experience when identities are so nuanced, and when it is much easier to classify people solely based on one trait—namely, the single-axis perspective.\textsuperscript{43}

C. Circuit Splits

1. Sex-plus Claims

The federal courts of appeals are split as to whether a plaintiff can succeed with their intersectional claim. Some circuit courts require a plaintiff to pursue only one claim, while others allow the merger of their claims into one, such as a sex-plus-race claim.\textsuperscript{44} In fact, the Second, Third, and Tenth Circuits have recognized sex-plus-race and/or race-plus sex claims; the Fifth and Eleventh Circuits recognize that intersectional claims involving Black women fall into a protected category; the Sixth and Ninth Circuits recognize intersectional claims in an “aggregate” or “totality” framework; the First and D.C. Circuits are inconsistent and undecided; and

\textsuperscript{38} Moya Bailey, Race, Region, and Gender in Early Emory School of Medicine Yearbooks (2013) (Ph.D. dissertation, Emory University) (on file with Emory Theses and Dissertations).


\textsuperscript{40} Trust Kupupika, Shaping Our Freedom Dreams: Reclaiming Intersectionality Through Black Feminist Legal Theory, 107 VA. L. REV. ONLINE 27, 38 (2021).

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Id. at 34.

\textsuperscript{44} Id.
finally, the Fourth and Eighth Circuits analyze protected traits separately.\textsuperscript{45}

2. Age-plus Claims

This clear lack of uniformity among the circuit courts to recognize sex-plus-race claims is similarly reflected in age-plus discrimination claims. Notably, even fewer courts recognize these types of intersectional claims. The majority view is that age-plus discrimination claims are invalid, since at least eight federal district courts have rejected attempts to claim age-plus discrimination under the ADEA.\textsuperscript{46} The primary reason that courts are reluctant to acknowledge age-plus discrimination claims is that the ADEA uses a separate statutory scheme than Title VII to analyze claims, and thus, the ADEA’s general prohibition of mixed-motive claims cannot be reconciled.\textsuperscript{47} Moreover, courts fear that authorizing these types of claims would amount to “judicial legislation” as Congress deliberately chose to pass entirely separate legislation and provide an entirely different basis for relief to persons.\textsuperscript{48}

The Supreme Court first established the mixed-motive framework in the 1989 case \textit{Price Waterhouse v. Hopkins}.\textsuperscript{49} In a plurality decision, the Court held that a plaintiff could succeed on a Title VII claim by showing that an impermissible reason was a motivating

\begin{itemize}
  \item \textsuperscript{45} Jamillah B. Williams, \textit{Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy}, \textit{2407 Geo. Emp. RTS. & Emp. POL’Y J.} 1, 16–22 (2021) (noting that: “[t]he Second, Third, and Tenth Circuits all recognize some variant of the sex-plus framework, but have not adopted a race-plus framework, though some district courts within this circuits have evaluated or discussed it,” in Jefferies v. Harris Cnty. Cnty. Action Ass’n, 615 F.2d 1025, 1034 (5th Cir. 1980), Williams v. City of Tupelo, 414 F. App’x 689, 694 (5th Cir. 2011), and Mosley v. Ala. Unified Judicial Sys., 562 F. App’x 862, 867 (11th Cir. 2014), the Fifth and Eleventh Circuits recognize that intersectional claims involving Black women fall into a protected category; in the Sixth Circuit case of Shazor v. Pro. Transit Mgmt., 744 F.3d 948, 958 (6th Cir. 2014) and the Ninth Circuit case of Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994) have applied a “aggregate” framework).
  \item \textsuperscript{47} \textit{Id.} at 495.
  \item \textsuperscript{48} \textit{Id.}
  \item \textsuperscript{49} \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228, 252 (1989).
\end{itemize}
factor in the employment decision. Ultimately, this decision lowered the burden of proof and made it easier for plaintiffs to bring a mixed-motive claim; it meant that even if the defendant had a legitimate reason for the employment action, the plaintiff could still succeed in their claim by proving that the defendant also considered an impermissible factor at the time the employment decision.

Justice Sandra Day O'Connor's opinion from Price Waterhouse, she stated that a plaintiff must present direct evidence that an illegitimate factor was a substantial factor in the decision, after which the burden shifts to the defendant. Accordingly, the defendant must “prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the impermissible factor into account. If the defendant succeeds, this showing acts as an affirmative defense and relieves the defendant of liability.”

Moreover, while Title VII’s sex-plus doctrine allows for employees to claim discrimination “because of” a protected characteristic despite the potential for defendants to have multiple motives so long as the protected characteristic proved decisive to the employer’s decision, lower courts have tended to read this doctrine more narrowly.

Historically, lower courts have tended to limit mixed-motive cases to those concerning fundamental rights, “such as marriage or child-rearing [among] other immutable characteristics protected by Title VII.” As age is protected under the ADEA—and not under Title VII—courts have reasoned that “sex-plus-age” claims go beyond the contours of the “sex-plus” doctrine as both sex and age play into the employer’s decision. In Gross v. FBL Financial Services, Inc., Justice Clarence Thomas clarified that the Price Waterhouse “motivating factor” test was codified independently from the “but-for cause” standard, and as such, ADEA cases could not apply a mixed-motive analysis.

Historically, many lower courts have interpreted Justice Thomas’ language to require that without the

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51. Price Waterhouse, 490 U.S. at 228.
52. Id.
53. Id.
55. Id.
56. Id.
57. Id. (citing Gross v. FBL Fin. Serv., 557 U.S. 167 (2009)).
motivating factor test, age must be the “but-for cause” of an employment discrimination claim.\textsuperscript{58}

However, in the last decade, courts have started to be more permissive, and at least five federal courts have embraced the minority view which authorizes age-plus discrimination claims under the ADEA.\textsuperscript{59} Further, “other courts have recognized a combined sex and age discrimination claim without clearly specifying whether the claim is cognizable under Title VII or the ADEA, and still, other courts have refused to decide the issue where such a decision was unnecessary.”\textsuperscript{60} One justification for this validation of age-plus discrimination claims under the ADEA is a broader reading of the Gross “but-for causation” requirement by the Fourth, Fifth, and Tenth Circuits.\textsuperscript{61} These circuits have suggested that age does not need to be the only motivating factor.\textsuperscript{62} Moreover, other courts and legal scholars have underscored the idea that sex-plus-age claims have an “obvious analogy” to other forms of sex-plus discrimination.\textsuperscript{63} Like sex-plus claims, recognizing age-plus claims would have a greater impact on women, for studies show that there is a greater differential treatment against older women and the role of appearance than for men.\textsuperscript{64} Additionally, there is evidence to suggest that while the ADEA has improved the labor market outcomes for older men, it has had a far less favorable effect on older women.\textsuperscript{65} This indicates that the original goal of the ADEA to forbid employment discrimination against anyone at least forty years of age in the United States is not being met.\textsuperscript{66}

In the recent 2020 case of Frappied v. Affinity Gaming Black Hawk, LLC, terminated female employees, each over forty years old, brought “sex-plus-age” disparate impact and disparate treatment claims under Title VII, as well as separate age-based claims under the ADEA.\textsuperscript{67} Although the Tenth Circuit affirmed the dismissal of the Title VII disparate treatment claims, the court reversed and remanded the other claims.\textsuperscript{68} Most notably, the court

\textsuperscript{58} Id. (emphasis added).
\textsuperscript{59} McAllister, supra note 46, at 497.
\textsuperscript{60} Id. at 497–98.
\textsuperscript{61} Id. at 498–500 (citing Gross, 557 U.S. at 167).
\textsuperscript{62} Id.
\textsuperscript{63} McAllister, supra note 46, at 498.
\textsuperscript{64} Joanne S. McLaughlin, Falling Between the Cracks: Discrimination Laws and Older Women, 34 LABOUR 215, 217 (2020).
\textsuperscript{65} Id. at 228.
\textsuperscript{67} Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045 (10th Cir. 2020).
\textsuperscript{68} Id. at 1061.
held, as a matter of first impression, that a sex-plus-age claim “[is] cognizable under Title VII.”

Scholars have argued that, when the court in *Frappied* weighed in on the debate regarding sex-plus-age claims under Title VII, the decision was not only grounded in sound policy, but also logically followed the *Bostock v. Clayton County* ruling. In *Bostock*, the United States Supreme Court issued its opinion on a trio of consolidated cases, all of which were rooted in similar LGBTQ+ discrimination issues. In all three cases, the Court was presented with the same question: whether Title VII’s ban on discrimination “because of sex” covered sexual orientation and gender identity. In a historic 6–3 decision covering all three cases, the Court held that discrimination on the basis of sexual orientation or gender identity is necessarily also discrimination “because of sex,” which Title VII prohibits. Justice Neil Gorsuch’s majority opinion in *Bostock* stated that “but for’ causation is a ‘sweeping standard’ and that the protected characteristic does not have to be the ‘primary’ cause of the decision for liability to attach.” In fact, the Court noted that events can have multiple “but-for” causes, and therefore, it is irrelevant if other factors influenced the defendant’s decision—as long as sex is a “but-for cause.” Moreover, the Court noted that the statute’s focus has, and always has been on the individual, thus eliminating the need for a plaintiff to prove that the employer treated both sexes equally.

D. Bostock’s Legacy

Due to this broad standard, there have been reverberating consequences following *Bostock* that have helped “beneficiaries . . . far different from those first expected,” which will implicate how the Court will address intersectional age claims in the future. For the Court has long been averse to these kinds of claims, primarily due to “disagreement over whether and to what extent

69. Id. at 1048.
71. *Bostock*, 140 S. Ct. at 1737.
72. Id. at 1753.
73. Id. at 1754.
75. Id. at 4.
76. Id. at 4–5.
discrimination law’s “but-for-cause” standard enables so-called “mixed-motive” claims, in which multiple considerations—both permissible and impermissible—lead an employer to discriminate.”

In the same year as the Bostock decision, the Court, in Babb v. Wilkie rejected the “but-for” test in a federal worker’s ADEA claims, and instead, allowed a mixed motive analysis for an age discrimination claims against the federal government. While working as a pharmacist for the Veterans Affairs (“VA”), Noris Babb (“Babb”) helped develop the Geriatric Pharmacotherapy Clinic (“GPC”), which was dedicated to serving older veterans with diseases or disabilities related to their advanced age and military service. Years later, the VA created a nationwide treatment initiative akin to Babb’s GPC, which rejected applications by current module pharmacists over the age of fifty but granted applications of pharmacists under forty—going against recommendations by Human Resources and requests from doctors. After Babb provided statements and testified in support of their EEOC claims, she later alleged that she was a victim of gender-plus-age discrimination and that the VA retaliated against her for participating in protected EEOC.

The central issue in this case was whether § 633a(a) of the ADEA imposes liability only when age is the “but-for cause” of the personnel action. The Court held that under the ADEA, which applies to federal employees, the “plain meaning of the critical statutory language (‘made free from any discrimination based on age’) demands that personnel actions be untainted by any consideration of age.” The Court further emphasized that “under § 633a(a), age must be the but-for cause of differential-treatment, not that age must be a but-for cause of the ultimate decision.” Thus, the Babb interpretation has made it easier for plaintiffs to prove age discrimination claims against the federal government, although the Court refused to expand this standard to private employers and state and local governments.

78. Id.
80. Id. at 1171.
82. Babb v. Wilkie, 140 S. Ct. at 1171.
83. Id.
84. Id.
While *Frappied, Bostock,* and *Babb* were all decided in 2020, it is notable that prior to this recent trend of expanding sex-plus and age-plus claims, the District of Columbia proposed an Intersectional Discrimination Protection Amendment Act in 2019, which would allow a plaintiff to combine some or all of the twenty-one protected classes under the D.C. Human Rights Act of 1977 ("DCHRA"). These DCHRA protected traits would apply to all D.C. employers, and include: race; color; religion; national origin; sex; age; marital status; personal appearance; sexual orientation; gender identity or expression; family responsibilities; political affiliation; disability; matriculation; familial status; genetic information; source of income; place of residence or business; status as a victim of an intra-family offense; credit information; and status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking. These twenty-one protected classes under the DCHRA are similar to many federal protections, and as such, can serve as a parallel microcosm of the federal level.

Indeed, the main idea behind the DCHRA is simple but potentially broad reaching, for "[t]he legislation makes straightforward changes to the language of the DCHRA, [and] [s]pecifically, in each section where the DCHRA lists the protected traits, the bill would add the phrase, 'or any combination of the foregoing traits.'" Yet, prior to *Bostock,* critics argued that these seven words alone would create a windfall of causes, stating that "[c]ombining some or all of the 21 traits would, of course, lead to an exponentially larger list of protected classes, from 'crazy old Russians' (disability, age, and ethnicity combined) to divorced Republican Hispanic trans workers in graduate school." Of course, this criticism is overly simplistic and crude, and with the recent *Frappied, Bostock,* and *Babb* rulings, this "windfall" or "Pandora’s Box" of potential cases has already been opened. Now the question is not whether intersectional claims can be based on multiple statutes, but rather, what the burden of proof is for a plaintiff when their intersectional claim is based on multiple statutes.

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90. *Id.*
E. D.C. Intersectional Discrimination Protection Amendment Act

While ultimately the legislature never enacted the Intersectional Discrimination Protection Amendment Act of 2019, the idea is laudable, as it would have prohibited discrimination wholly or partially because of any combination of statutorily protected characteristics.91 This Act was ahead of its time, and now there is renewed optimism that state and federal agencies will “clarify] that intersectional discrimination is a viable cause of action” and provide examples of “what analytical framework may be best suited for the unique types of harassment intersectional plaintiffs face.”92 Whether the Intersectional Discrimination Protection Amendment Act in 2019 will be revisited by District of Columbia Council is currently unknown, but with the recent holdings of district courts and the Supreme Court, it is clear that some kind of intersectional framework will be needed.

III. ARGUMENT

This Article proposes a two-fold solution to create uniformity across the country by eliminating the current circuit court split regarding intersectional employment discrimination claims at the federal level. First, courts should consider a broader “totality” approach in addition to a sex-plus (race, color, religion, sex, and national origin) discrimination claim under Title VII. To do this, courts should consider claims on a combination of two or more protected categories rather than on whether an employer discriminates based on one category or another. Second, courts should also approach the analogous sex-plus-age claims this way. Likewise, courts should follow Babb v. Wilkie when intersectional claims are comprised of a discrimination claim under the ADEA along with one or more Title VII protected categories. It follows then that these age-plus claims can also be analyzed using mixed-motive approach. The reason for this more inclusive standard and potentially lower burden of proof comes from the fact that individuals who possess a combination of statutorily protected traits are unable to bring intersectional claims forward, instead, they are forced into a “single-axis framework,” which erases an immutable part of their identity.

92. Williams, supra note 45, at 31.
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in the process. And intersectional claims are particularly important for Black women and women over forty-years-old.

A. Criticism

Although some critics argue that Crenshaw’s intersectional discrimination “will open a ‘Pandora’s Box’ of identity,” and thus, lead to “an indefinite proliferation of identity categories,” this expansion is in line with Title VII’s original goal—to protect as many unique identities as possible. For “persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of Title VII.” The original purpose of allowing for “flexibility” and “modifying employment systems” should allow for new social understandings and generally accepted research to guide legislation.

Further, as other intersectional scholars have suggested, to minimize inconsistencies across different jurisdictions, it is not enough that the EEOC simply states that intersectional discrimination is a viable cause of action. The EEOC needs to give concrete examples of what intersectional claims look like and specify what analytical framework may be best suited for the unique types of harassment intersectional plaintiffs face. Another solution is to take the tenants of the District of Columbia’s proposed Intersectional Discrimination Protection Amendment Act of 2019 and have Congress amend Title VII to “prohibit discrimination wholly or partially because of any combination of statutorily protected traits” or at least “include the words ‘or any combination thereof’ at the end of the listed protected categories” within Title VII. Finally, because both Title VII and the ADEA generally allow for compensatory damages, if courts consider the specific harms that come from being discriminated against due to the intersection of multiple identities in

93. Crenshaw, supra note 36, at 140.
97. Id.
98. Williams, supra note 45, at 31.
99. Id. at 10.
their assessment of damages, this “can be a powerful tool for changing employers’ incentives and prompting organizational change.”

Once courts start to recognize sex-plus claims, then sex-plus-age claims will follow suit. Indeed, the Court noted in Trans World Airlines v. Thurston that interpretations of Title VII generally “appl[y] with equal force in the context of age discrimination” when the text of two statutes is the same. For Justice Gorsuch “gleans [that] Bostock’s but-for-cause standard from language that appears identically in both Title VII and the ADEA.” As such, Justice Gorsuch’s interpretation of the these two employment discrimination statutes, coupled with a broader reading of Gross’s “but-for causation” standard established by the Fourth, Fifth, and Tenth Circuits, would create uniformity between the circuit courts.

B. The Totality Approach

Starting with sex-plus claims and the intersection of race and sex, post-Bostock, Black women should now be able to bring a claim forward based on both their sex and race in any court. The injustice perpetuated against this intersectional group stems back to the 1977 case of DeGraffenreid v. General Motors, when five Black women sued General Motors, alleging that their employer’s seniority system perpetuated the effects of prior discrimination against Black women. Yet, the Eighth Circuit ultimately ruled that there was no sex discrimination because while General Motors did not hire Black women before to 1964, it hired white women.

Since this 1977 case, courts have slowly started to recognize the intersection of multiple sources of discriminatory animus when considering Title VII claims by women of color—but not uniformly. In her work, legal scholar Dr. Jamillah Williams analyzed how courts of appeals have unevenly addressed these types of intersectional claims. Dr. Williams found five different approaches across the First through Eleventh Circuit Courts of Appeals and the D.C.
Court of Appeals when analyzing the intersectional claims of Black and colored women.\textsuperscript{108} Of these approaches, Williams noted that the “aggregate” or “totality” framework adopted by the Sixth and Ninth Circuits may be a better way to analyze an intersectional claim.\textsuperscript{109}

Using the Ninth Circuit case of \textit{Lam v. University of Hawaii} and the Sixth Circuit case of \textit{Shazor v. Pro. Transit Mgmt.}, Williams illustrates how various circuits have applied an “aggregate approach.”\textsuperscript{110} For example, in \textit{Lam}, the court held “that it is necessary for courts to consider a plaintiff’s claim of discrimination based on a combination of two or more protected categories rather than focus solely on whether an employer discriminates based on one category or another.”\textsuperscript{111} In turn, the Sixth Circuit adopted this same rationale in \textit{Shazor} when “specifying that Title VII is meant to protect plaintiffs who ‘fall between two stools’ when claims involve multiple protected characteristics.”\textsuperscript{112}

Specifically, in \textit{Lam}, the Ninth Circuit reviewed a case in which a Vietnamese woman applied for a directorship position at the University of Hawaii School of Law, and despite being a finalist, was rejected after an alternate candidate declined the offer and the position was canceled.\textsuperscript{113} Lam filed suit against the University, the Dean of the Law School, and the President of the University, alleging discrimination on the basis of race, sex, and national origin with regard to their initial job search, as well as subsequent retaliation.\textsuperscript{114} Ultimately, the district court granted summary judgment to the University, reasoning that the University favorably considered an Asian man and White woman as candidates for the position.\textsuperscript{115} However, upon review, the Ninth Circuit criticized the lower court:

In assessing the significance of these candidates, the court seemed to view racism and sexism as separate and distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman became a simple matter of performing two separate tasks:

\begin{flushright}
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.} at 20.
\textsuperscript{110} \textit{Id.} at 18–19 (citing \textit{Lam v. Univ. of Haw.}, 40 F.3d 1551, 1561–62 (9th Cir. 1994); \textit{Shazor v. Pro. Transit Mgmt.}, 744 F.3d 948, 957–58 (6th Cir. 2015)).
\textsuperscript{111} \textit{Id.} at 18–19 (citing \textit{Lam}, 40 F.3d at 1561–62).
\textsuperscript{112} \textit{Id.} at 18–19 (citing \textit{Shazor v. Pro. Transit Mgmt.}, 744 F.3d 948, 957–58 (6th Cir. 2015)).
\textsuperscript{113} \textit{Lam}, 40 F.3d at 1557.
\textsuperscript{114} \textit{Id.} at 1558.
\textsuperscript{115} \textit{Id.}
looking for racism “alone” and looking for sexism “alone,” with Asian men and white women as the corresponding model victims. The court questioned Lam’s claim of racism in light of the fact that the Dean had been interested in the late application of an Asian male. Similarly, it concluded that the faculty’s subsequent offer of employment to a white woman indicated a lack of gender bias. We conclude that in relying on these facts as a basis for its summary judgment decision, the district court misconceived important legal principles.  

By underscoring the “mathematical treatment” of compartmentalizing Lam’s identity, the Ninth Circuit echoes the same nuances in Crenshaw’s writing which warns against the erasure of identity by placing institutional and inappropriate nonintersectional contexts on the minority woman.  

It is also important to distinguish what Williams labels an “aggregate” or “totality” framework is distinct from an additive, or single-axis approach that Crenshaw warns against. A key component of an intersectional analysis regards oppression as multiplicative—not additive—for “oppressions combine in complex and interwoven ways to create novel interaction effects.” An additive approach also “treats marginalized identities separately, causing one to be viewed as primary, while the others are treated as secondary.” This type of view implies that people experience their positionalities independently from one another, which can lead to the erasure of lived experiences as well as the minimization of the power of privilege and oppression. Instead, intersectionality advances the idea that “experiences at an intersection are co-constituted and must be considered jointly.”

C. Sex-Plus-Race & Race-Plus Sex Claims

As an alternative to the “totality” framework used to analyze intersectional claims, Williams also discussed that the Second, Third,
Increasing Representation

and Tenth Circuits have recognized sex-plus-race and less commonly, race-plus sex claims. This sex-plus framework was first established in the 1971 case of Phillips v. Martin Marietta Corp., when a female plaintiff brought a Title VII sex discrimination action after the defendant refused to accept job applications from women with preschool aged children. Phillips not only experienced discrimination based on her sex, but also “because of her sex plus the additional trait of her having preschool aged children.” Although the Court ended up applying a disparate treatment theory and Phillips won her case, the Court acknowledged that sex-plus discrimination was nevertheless discrimination for the first time.

While recently a sex-plus analysis has become more prevalent post-\textit{Frappied} and is better than analyzing claims separately, nonetheless, there are problems with this type of framework. One primary issue is that in sex-plus claims “sex discrimination is still the heart of the claim which de-centers racial identity and experiences.” As a result, this causes women of color to divide their identity and choose sex as before their other traits within a sex-plus jurisdiction. Although race-plus claims also exist, although less frequently, this model still places one trait above others. Therefore, Crenshaw’s goal of avoiding identity erasure is unresolved with this kind of analysis alone.

In line with Williams and Crenshaw’s reasoning, intersectional claims cannot be fully accounted for through any kind of trait-plus claim. To fully encompass an intersectional approach would not relegate any one trait, as co-constituted traits must be considered jointly. However, this framework has also helped women over forty-years-old, or sex-plus-age claims that have recently been brought by lowering the burden of proof on the plaintiff. Thus,

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122. Williams, \textit{supra} note 45, at 13 (noting that various courts of appeals have approached intersectional claims by: analyzing protected traits separately; recognizing intersectional claims as sex-plus race and/or race-plus sex; recognizing intersectional claims and finding Black woman to be a protected category; recognizing intersectional claims though an “aggregate” or “totality” framework; and finally, being inconsistent/undecided).

123. \textit{Id.} (citing Phillips v. Martin Marietta Corp., 400 U.S. 542, 543 (1971)).

124. \textit{Id.}

125. Martha Chamallas, \textit{Mothers and Disparate Treatment: The Ghost of Martin Marietta}, 44 \textit{VILL. L. REV.} 337, 342 (1999) (noting that, under a disparate treatment theory, the Court in \textit{Phillips v. Martin Marietta Corp.} ruled that Title VII did not permit an employer to have two different hiring policies, one for men and one for women).

126. Williams, \textit{supra} note 45, at 16.

127. \textit{Id.}

128. \textit{Id.}

129. \textit{Id.} at 13.

130. \textit{Id.}

131. See \textit{Frappied v. Affinity Gaming Black Hawk}, LLC, 966 F.3d 1038 (10th Cir. 2020).
the sex-plus and race-plus frameworks should not be abandoned in its entirety until the Babb precedent which allows for a mixed motive ADEA claim is similarly incorporated into an alternative framework.132

D. Proposed Statutory Changes

Ideally, if the added language proposed by the D.C. Council was applied to Title VII and the ADEA instead of the proposed DCHRA, then this added statutory language would mean that more than one trait could be used in an employment discrimination claim. Another solution would be to take provisions from the “Justice for All Act,” which did not receive enough votes in October 2020, and add them into another bill.133 The original Act’s purpose was to “to amend the Civil Rights Act of 1964 to clarify that disparate impacts on certain populations constitute a sufficient basis for rights of action under such Act, and for other purposes.”134 This bill is expansive and would amend Title VII and the Civil Rights Act of 1964 by stating that more than one trait could be used in an employment discrimination or harassment claim.135

In addition to these changes, judges should take plaintiffs’ multiple identities into account in their assessment of damages for emotional harm and economic losses.136 Monetary damages would incentivize employers to create institutional changes in their future hiring and employment policies for both compensatory and punitive damages.137 And, although the EEOC does authorize these types of damages, the list is neither comprehensive nor exhaustive.138 Moreover, while the EEOC has acknowledged intersectional discrimination as a viable cause of action, to date, the EEOC has “offered no guidance to courts in interpreting Title VII to allow for an actionable intersectional claim.”139 Indeed, only identifying intersectional claims and providing one example, without providing how a court or the Commission might approach and analyze an intersectional claim under Title VII, is insufficient.140

134. Id.
135. Id.
137. Id.
139. Pappoe, supra note 100, at 17.
140. Id.
Another way the EEOC can further educate the courts is to incorporate “the sociopolitical history of Black women in its guidelines to provide a reference point for courts to accurately conceptualize Black women as their whole selves when analyzing their claims.” Finally, the EEOC should emphasize the original purpose of Title VII and the Civil Rights Act which were hard-won during the 1960s by reiterating that Title VII’s goal is to protect employees from discrimination based on any of the listed protected categories, regardless of whether it is based on one or all of the categories. Now in a post-*Bostock* landscape, reintroducing provisions from the Justice for All Act and having the EEOC provide additional guidance seems like a less remote possibility.

Recently, news of Justice Stephen Breyer’s retirement and departure from the Supreme Court has pushed Moya Bailey’s terminology of “misogynoir” into the common discourse across media outlets. One of the primary reasons that neologism is growing in popularity is its frequent usage regarding President Biden’s Supreme Court Justice nomination. Biden’s choice of a Black woman on the Supreme Court, Ketanji Brown Jackson, has sparked debate on both sides of the aisle. For example, journalist Kali Holloway noted that Fox News’ Tucker Carlson “mockingly suggest[ed] that Bridget Floyd—sister of George Floyd, who was murdered by police—should be nominated[,] . . . she is not a judge or a lawyer or whatever, but in this case, who cares?” Holloway opined that this criticism is unfounded:

This is all fueled by *misogynoir*, pure and simple . . . We’re actually likely to see Biden choose a candidate whose talents, expertise, and skill are unassailable, because she will have already been scrutinized in ways her White and male peers never had to face. To have arrived at the point of being picked for a SCOTUS seat is to have already navigated a racist and sexist career minefield for any Black woman. The problem isn’t that we’re going to have a Black woman nominated to the Supreme Court, it’s that it took

141. Id. at 18.
this long for us to get here, and people are still effectively claiming it shouldn’t happen.\footnote{144}

This type of public rhetoric that surrounds highly educated Black women who are in contention for the highest court in the United States is evidence of how our judicial system separates and marginalizes Black women. With this kind of pervasive rhetoric throughout the country, is it not difficult to imagine how other kinds of plaintiffs belonging to other protected classes may be treated by a judicial system that has yet to address intersectional persons within employment discrimination law.

IV. CONCLUSION

In conclusion, it has long been this country’s policy to protect all classes of people equally, regardless of the possible legal hurdles. The proposed ban by the Council of the District of Columbia and the Supreme Court’s recent \textit{Bostock} and \textit{Frappied} decisions offer hope that other councils, circuit courts, and even the Supreme Court, will continue to follow the research on and ideas about intersectionality, as proposed by Crenshaw.\footnote{145} Only if we embrace intersectionality and the inclusive language offered in \textit{Gross}, as well as the more lenient burden of proof if brought under Title VII sex-plus-age claims, will we achieve Congress’ original goal of antidiscrimination law to remedy the harms of those most at risk.\footnote{146}

\footnote{144. \textit{Id.}; see also Renée Graham, \textit{A Black Woman Will be the Next Supreme Court Justice. It’s About Time}, BOS. GLOBE (Feb. 1, 2022, 3:40 PM), https://www.bostonglobe.com/2022/02/01/opinion/black-woman-will-be-next-supreme-court-justice-its-about-time/ (“It’s misogynoir, that distinct hatred of Black women that has been an American pastime since long before Moya Bailey, a Northwestern University professor, coined that term.”); Natasha Ishak, \textit{The Possibility of First Black Woman SCOTUS Nominee Prompts Misogynoirist Pushback}, PRISM (Feb. 2, 2022), https://prismreports.org/2022/02/02/the-possibility-of-first-black-woman-scotus-nominee-prompts-misogynoirist-pushback/ (quoting Dr. Niambi Carter, an associate professor of political science at Howard University, who described the Supreme Court furor as disingenuous and a “textbook misogynoir”).} 

\footnote{145. D.C. Council “Intersectional Discrimination Protection Amendment Act of 2019,” B23-0498; \textit{Bostock} v. Clayton Cnty., 140 S. Ct. 1731 (2020); \textit{Frappied} v. Affinity Gaming Black Hawk, 966 F.3d 1038 (10th Cir. 2020).} 

\footnote{146. \textit{Gross} v. FBL Fin. Serv., 557 U.S. 167 (2009).}