

DIVERSITY AND DISCRIMINATION: A LOOK AT COMPLEX BIAS

Minna J. Kotkin^{*}

ABSTRACT

Multiple claims are a fixture of employment discrimination litigation today. It is common if not ubiquitous for opinions to begin with a version of the following litany: plaintiff brings this action under Title VII and the ADEA for race, age and gender discrimination. EEOC statistics show the exponential growth of multiple claims, in part because its intake procedures lead claimants to describe their multiple identities, at a time when they have little basis upon which to parse a specific category of bias. But increased diversity in workplace demographics suggests that frequently, disparate treatment in fact may be rooted in intersectional or “complex” bias: while stereotypes for “women” have somewhat dissipated, those for “older African-American women” still hold sway. Complex bias provides a counter-narrative to the currently in vogue characterization of workplace discrimination as “subtle” or “unconscious.”

Despite the common sense notion that the more “different” a worker is, the most likely she will encounter bias, empirical evidence shows that multiple claims—which may account for more than 50% of federal court discrimination actions—have even less chance of success than single claims. A sample of summary judgment decisions on multiple claims reveals that

^{*} Professor of Law, Brooklyn Law School.

employers prevail at a rate of 96%, as compared to 73% for employment discrimination claims generally.

Multiple claims suffer from the failure of courts and “intersectional” legal scholars to confront the difficulties inherent in proving discrimination using narrowly circumscribed pretext analysis. Applying “sex-plus” concepts does not address the underlying paradox inherent in the proof of these cases: the more complex the claimant’s identity, the wider the evidentiary net must be cast to find relevant comparative, statistical and anecdotal evidence. Overcoming the courts’ reluctance to follow this direction requires the development and introduction of social science research that delineates the nuanced stereotypes faced by complex claimants.

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I. INTRODUCTION

When an employee alleges discrimination on the basis of sex, age and race, is she “crying wolf” or, throwing spaghetti at the wall to see what sticks, as one judge put it?¹ Or is she expressing the realities of today’s workplace: diversity is tolerated or may even be valued up to a point, but too much difference opens the possibility that an employee is singled out for disparate treatment?

Take, for example, the follow cases. A female assistant stage director at the Metropolitan Opera claims that she was subject to a hostile work environment and discharged on the basis of her age, gender and sexual orientation.² A file maintenance clerk alleges she was terminated because she is an older black woman who is a Jehovah's Witness.³ A hospital material distribution manager argues that he was fired due to his Italian ancestry, his gender, and his disability as a result of diabetes.⁴ How do we react to these to these factual claims? Do we

1. Michael Bologna, *Judges Warn Employment Lawyers Against Motions for Dismissal, Summary Judgment*, 19 EMPL. DISCRIMINATION REP. (BNA) 595 (December 4, 2002) (quoting federal District Court Judge Ruben Castillo of the N.D. Ill., who criticized plaintiffs' lawyers "for filing wide-ranging claims alleging discrimination on multiple levels - a strategy akin to "throwing a plate of spaghetti at the wall to see what sticks").

2. *See Brennan v. Metropolitan Opera Association*, 192 F.3d 310 (2d Cir. 1999). The plaintiff claimed that she was being discriminated against by younger gay men. The court of appeals affirmed summary judgment in favor of defendants. With regard to plaintiff’s age discrimination and age-based hostile working environment claims, the court found that no evidence existed proving that the defendant executive stage director intentionally discriminated against plaintiff because of her age, that plaintiff failed to show that the defendant’s reason for not offering her work-- inadequate performance--was a pretext, and that the three instances of hostility recounted by plaintiff had nothing to do with age and were, in any event, insufficient as a matter of law to demonstrate a hostile work environment. *Id.* at 317-318. The court also found that no juror could rationally find that the placement of sexually provocative pictures of nude men in a common work area created a pervasive atmosphere of “intimidation, ridicule and insult” adequate to demonstrate that she was subjected to a hostile working environment based on her sex. *Id.* at 319. The plaintiff did not appeal the district court’s refusal to exercise supplemental jurisdiction over her sexual orientation claim.

3. *See White v. Baxter Healthcare Corp.*, 1990 WL 114478 (N.D. Ill. 1990) (summary judgment granted based on plaintiff’s failure to show that the defendant’s legitimate business reason for terminating plaintiff-- her continuing tardiness-- was a pretext for any discrimination.).

4. *See Fucci v. Graduate Hospital*, 969 F. Supp. 310 (E.D. Pa. 1997). The district court granted summary judgment for the employer because the person who made the discriminatory comment regarding Italian males had no involvement in plaintiff’s termination, nor was the decision-maker aware of such comment. *Id.* at 318-319. The court also granted summary judgment on the plaintiff’s

think – or perhaps more importantly, do judges think - “give me a break?” Or is there any recognition that subtle but real discrimination may be at work?

Claims such as these are a fixture of employment discrimination litigation today.⁵ Indeed, it is common if not ubiquitous for opinions to begin with a version of the following litany: plaintiff brings this claim under Title VII and the ADEA for race, age and gender discrimination. EEOC intake procedures guarantee that many such claims will be filed without a factual foundation.⁶ Courts have devised no consistent or fully articulated theory to address multiple claims. Those courts that consider such claims seriously rely on a “sex-plus” analysis that does no more than acknowledge the possibility of sub-class discrimination.⁷ While scholars have made much of the multiplicity, indeterminacy and fluidity of identity, they have offered little in the way of guidance for the resolution of the everyday employment discrimination action that is a concrete manifestation of post-modern legal theory.⁸ Empirical evidence demonstrates that these claims are all but impossible to win, more problematic even than single claim cases.⁹ In this article, I undertake to look more closely at claims brought by “complex subjects,” to use

ADA claim because the evidence did not support a finding that he was more likely than not terminated because of his diabetes. *Id.* at 319.

5. See *Sheridan v. E.I. Dupont de Nemours & Co.*, 100 F.3d 1061, 1086 (3d Cir. 1996) (in his dissenting opinion, then Judge Alito referred to multiples claims as a “rather common tactic,” citing the following cases: “*Roxas v. Presentation College*, 90 F.3d 310 (8th Cir. 1996) (plaintiff alleged race, national origin, gender, and age discrimination); *Lawrence v. Nat'l Westminster Bank of N.J.*, 1996 WL 589189, No. 95-5603 (3d Cir. Oct. 15, 1996); *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996) (age, religion, and retaliation); *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304 (2d Cir. 1996) (race, age, and gender); *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996) petition for cert. filed, 65 U.S.L.W. 3267 (U.S. Sept. 24, 1996) (No. 96-486) (age, gender, and retaliation); *Evans v. Technologies Applications & Ser. Co.*, 80 F.3d 954 (4th Cir. 1996), (age and gender); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3181 (U.S. Aug. 28, 1996) (No. 96-337) (gender and disability); *Americanos v. Carter*, 74 F.3d 138 [**82] (7th Cir. 1996), cert. denied, 134 L. Ed. 2d 953, 116 S. Ct. 1853 (1996) (age, gender, and national origin); *Castillo v. Frank*, 70 F.3d 382 (5th Cir. 1995) (age, gender, and national origin); *Meinecke v. H & R Block*, 66 F.3d 77 (5th Cir. 1995) (age and gender); *Johnson v. Office of Senate Fair Employment Practices*, 35 F.3d 1566 (Fed. Cir. 1994) (gender and religion); *Dashnaw v. Pena*, 304 U.S. App. D.C. 247, 12 F.3d 1112, 1114 (D.C. Cir. 1994), cert. denied, 130 L. Ed. 2d 333, 115 S. Ct. 417 (1994) (age, national origin, religion, and race); *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035 (7th Cir. 1993) (age and gender)”).

6. See Part II.A, *infra*.

7. See Part III, *infra*.

8. See Part IV, *infra*.

9. See Part II.C, *infra*.

Kathryn Abrams' phrase.¹⁰ My goal is not to consider whether such claims should be recognized, as has been the thrust of prior scholarship. By and large, the courts have accepted, either explicitly or implicitly, their legitimacy. Rather, I examine how multiple claims should be analyzed to uncover what I suggest is the complex bias that underlies them.

This project might be considered a part of the more generalized body of recent scholarship articulating the view that there is something very wrong with employment discrimination law today. All of this work stems from the recognition that the federal courts increasingly reject the vast majority of such claims at a time when there is still substantial evidence of bias in the workplace.¹¹

Several interrelated strands of this critique can be identified. The first, which in part underlies all of this scholarship, explores the concept of "subtle bias:"¹² the proposition that decision-making in the workplace is infected by unconscious attitudes, which create skewed results for protected groups, but discrimination law is too crude a vehicle to tease out these biases. This concept was first articulated beginning in the late 1980s. Charles Lawrence, Linda Krieger and David Oppenheimer all wrote ground-breaking articles that variously labeled the phenomenon as "unconscious racism,"¹³ "cognitive bias,"¹⁴ and "negligent discrimination."¹⁵

10. Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994).

11. See Laura Beth Nielson & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663 (2005).

12. I use the term "subtle" rather than "unconscious" bias, because it more accurately reflects workplace practices and keeps within the framework of the anti-discrimination laws, as Michael Selmi notes. See Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COLUM. HUMAN RIGHTS L. REV. 657 (2003). See also Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999) (arguing that negligent discrimination should not be actionable).

"Subtle bias" scholarship has already spawned at least two recent law review symposia. See *Symposium on Behavioral Realism*, 94 CALIF. L. REV. 945 (2006); *Combating Subtle Discrimination in the Workplace*, 34 COLUM. HUMAN RIGHTS L. REV. 529 (2003).

13. Charles Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

14. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1170 (1995).

15. David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993). For other excellent explorations of this theme, see Ann C. McGinley, *!Viva La Evolucion! Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000) Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J.

Another group of scholars has looked at employment discrimination litigation from an empirical perspective, demonstrating that plaintiffs have very little chance of success both at the summary judgment stage and at trial.¹⁶ The skewed outcomes have been attributed not only to the difficulties of proving subtle bias, but also to negative judicial attitudes and doctrinal limitations. Several authors have undertaken these projects explicitly to respond to conservative critics, who see employment discrimination legislation as primarily creating a new kind of lottery for protected classes, adding to the “litigation explosion,” and disadvantaging American business by necessitating the expenditure of resources on frivolous employment claims.¹⁷

A third take on subtle bias comes from the “behavior realism” school. This experimentally based movement relies on social science based principles of implicit cognition: the perceptions and attitudes that motivate action are not under the conscious or intentional control of the actors. Legal scholars exploring the relationship of this branch of social science to employment discrimination find support for subtle bias in the Implicit Association Test, which demonstrates the prevalence of unconscious stereotypes.¹⁸ The IAT measures implicit attitudes by comparing, for example, the response times for associating positive

2009 (1995); Barbara J. Flagg, *“Was Blind, but Now I See”*: White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953 (1993).

16. See Laura Beth Nielson & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 692 (2005); Wendy Parker, *Lesson in Losing: Race and National Origin Employment Discrimination in Federal District Courts*, 81 NOTRE DAME L. REV. 889 (2006); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004); Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 46 (2005); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 514 (2003); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557-61 (2001); Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1 (2006).

17. For a fuller discussion of these empirical studies, see Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111 (2007); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N. CAROLINA L. REV. 927 (2006).

18. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 978-988 (2006). For a critique of the use of the IAT, see Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006).

words with African-American faces, in comparison to European faces. Researchers have found that the IAT reveals far more bias than subjects explicitly express.¹⁹ Among the normative suggestions arising from behavior realism include a reconsideration of affirmative action in the workplace, and a more critical look at doctrine that rests on some untested and intuitive notion of psychology, such as the “same actor” rule, which posits that someone who hires a member of a protected group will not thereafter evince bias toward that person.²⁰

Another branch of the discrimination law critique comes from the “structuralists.” They in essence concede the impossibility of sorting out subtle bias in the individual disparate treatment case, and instead call on the courts to concentrate on the internal mechanisms that employers have put in place to guard against bias.²¹ As Tristin Green describes this effort: “Recognizing that Title VII of the Civil Rights Act of 1964, the mainstay of legal prohibition on discrimination in employment, falls short of addressing the problem, legal scholars have begun to formulate a new paradigm of regulation that would impose an obligation on employers—through legal rights or otherwise—to take structural measures to minimize discrimination in workplace. The goal of this “structural approach” is to push change at the organizational level in work environments and decision-making systems to minimize discriminatory decision-making at the individual level and reduce unequal treatment in the workplace.”²² This approach looks particularly to the “new workplace,” where long-term employment is not presumed, and strict hierarchies have been replaced with team building. In these workplace settings, subtle bias can work to undermine opportunities for protected group members, through day-to-day decisions that may only cumulatively result in a definable adverse employment action, or through harassment that never rises to the level that courts consider cognizable. The structuralists see the role of the courts as

19. See Kang and Banaji, 94 CALIF. L. REV. at 1068.

20. See Greenwald and Krieger, 94 CALIF. L. REV. at 945.

21. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, VAND. L. REV. (2007). For a summary of this literature, see Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5-7 & nn. 10-20 (2006).

22. Green, *supra* note 21, at .

insuring that employers develop internal problem-solving mechanisms that can address these issues.²³

These macro-critiques are all powerful diagnoses of what's wrong with employment discrimination law. Subtle bias undoubtedly infects decision-makers in the courts and in the workplace. It may well account for the meager success rates for plaintiffs. However, in this Article, I want to offer a counter-story, or at least an expanded narrative, that accounts for some significant part of the for the failure of Title VII and its progeny: it is complex bias rather than subtle, unconscious, or implicit bias that is at work.

As the workplace has become more diverse, simple discrimination of the type envisioned by the statute has been somewhat ameliorated. The traditional protected classes may have even achieved degree of equality, assuming that they are in all other respects like their co-workers and supervisors. Today, much of workplace discrimination now centers upon the "complex" subject - those whose identities place them within more than one disadvantaged group and who therefore engender more nuanced stereotypes. In other words, the stereotype for "women" has been loosened while the stereotype for "older, African-American woman" still carries sway. What I will refer to as complex or multiple claims now account for substantial and growing sector in employment discrimination actions.

This Article proceeds in four parts. In Part II, I explore the prevalence of complex claims and their relationship to subtle bias, examine the paradox that they present, and suggest some explanations for their growth that relate both to demographics and doctrine. I provide empirical evidence showing a steady and significant increase of multiple claims in the EEOC administrative process. This section also demonstrates empirically that once they reach the federal courts, these cases have even less likelihood of success than single claim cases, a result that can be traced in the first instance to the EEOC's intake procedures. Part III looks at the "sex-plus" analytical framework that the courts most frequently apply to multiple claims and discusses why it does nothing more than state the problem. Tracing the history of the leading cases that accept the "sex-plus" theory, I show that the

23. *Id.* .

recognition of complex claims, as a matter of law, leads in further proceedings to the failure of the employees' claims as a matter of fact.

Part IV reviews the scholarly consideration of complex discrimination and critiques the dominant formulation of "intersectionality" growing out of that literature. Much like with the courts' sex-plus analysis, theories of intersectionality state the problem but do not address how courts are to sort out the difficult issues of proof that they create. Finally, in Part V, using two recent cases, I consider these issues of proof, particularly with regard to the showing of pretext, and suggest modes of analysis that may lead to making complex claim more viable. I conclude that because of the more specific identity of the complex claimant, the pool from which evidence of pretext is gathered must be expanded, for purposes of comparative, statistical, and anecdotal analysis. Moreover, expert evidence must be developed to provide a nuanced narrative of complex discrimination.

II. THE RISE AND FALL OF COMPLEX CLAIMS

A. THE EEOC AND COMPLEX CLAIMS

Complex claims – and their relationship to subtle bias -- are finally getting some attention. The EEOC recently launched an initiative known as E-RACE, an acronym for Eradicating Racism and Colorism from Employment.²⁴ In announcing this effort, EEOC Commissioner Naomi Earp echoed the thesis that recently has come to dominate employment discrimination scholarship: "In the past, discrimination was explicit, Blacks and women were overtly denied job opportunity. While we still see some overt discrimination like nooses in racial harassment cases, we now see far more subtle forms of discrimination in the workplace."²⁵ Moreover, subtle bias is linked to complex claims. In explaining the need for the E-RACE initiative, the EEOC noted, "New forms of discrimination are emerging. With a growing number of interracial marriages and families and increased immigration, racial

24. http://eoc.gov/initiatives/e-race/why_e-race.html

25. <http://www.eoc.gov/abouteeoc/meetings/2-28-07/transcript.html>

demographics of the workforce have changed and the issue of race discrimination in America is multi-dimensional. Over the years, EEOC has received an increasing number of race and color discrimination charges that allege multiple or intersecting prohibited bases such as age, disability, gender, national origin, and religion.”²⁶

The EEOC’s acknowledgement of the increase in complex claims has not resulted in a clarification of how they should be dealt with, however. As part of the E-RACE effort, the Commission issued a lengthy compliance manual designed to provide guidance in addressing new forms of discrimination. With regard to complex claims, however, it does no more than identify the issue. A section entitled “intersectional discrimination” reads in its entirety as follows:²⁷

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). For example, Title VII prohibits discrimination against African American women even if the employer does not discriminate against White women or African American men. 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.” The law also prohibits individuals from being subjected to discrimination because of the intersection of their race and a trait covered by another EEO statute – e.g., race and disability, or race and age.

This summary of discrimination law doctrine may be somewhat overstated, given some courts’ reluctance to recognize inter-statutory complex claims, as discussed in Part III. But more importantly, no guidance is provided concerning what it actually means to bring such a claim and the pitfalls that lurk in pursuing this path.

26. http://eoc.gov/initiatives/e-race/why_e-race.html

27. <http://www.eoc.gov/policy/docs/race-color.html> (footnotes omitted).

B. EMPIRICAL EVIDENCE OF COMPLEX CLAIMS AT THE AGENCY LEVEL

The EEOC offers no empirical support for its reference to the increase in complex claims. Some evidence is available, however. The agency compiles a statistical report of the number of claims filed each year by type of discrimination alleged: race, sex national origin, religion, age and disability. In its statistical report, it notes “[b]ecause individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of ... types of discrimination listed.”²⁸ As the numbers below reflect, the term “often” is not used lightly: there are 20% more claims of discrimination than charges, and the percentage is increasing.

The following table, Figure 1, shows for the years 1993 through 2006, the total number charges filed with the EEOC; the number of charges that allege claims of race, sex, national origin, religion, age or disability discrimination; the total number of claims; and the ratio of charges to claims, indicated as a percentage. The year 1993 was selected as a starting point because it was the first year that claims under the ADA,²⁹ were a significant factor in the EEOC process. In addition, by 1993, the effect of the Civil Rights Act of 1991, allowing for compensatory and punitive damages, as well as jury trials,³⁰ had made itself felt, substantially increasing the number of cases filed.³¹

Over this period, although the number of charges and claims has decreased, the ratio of charges to claims has increased substantially. In 1993, for every 100 charges filed, there were 113 claims. In 2006, the number of claims per 100 charges rose to 123. Figure 2 charts the steady increase in multiples claim over the 13 year period.

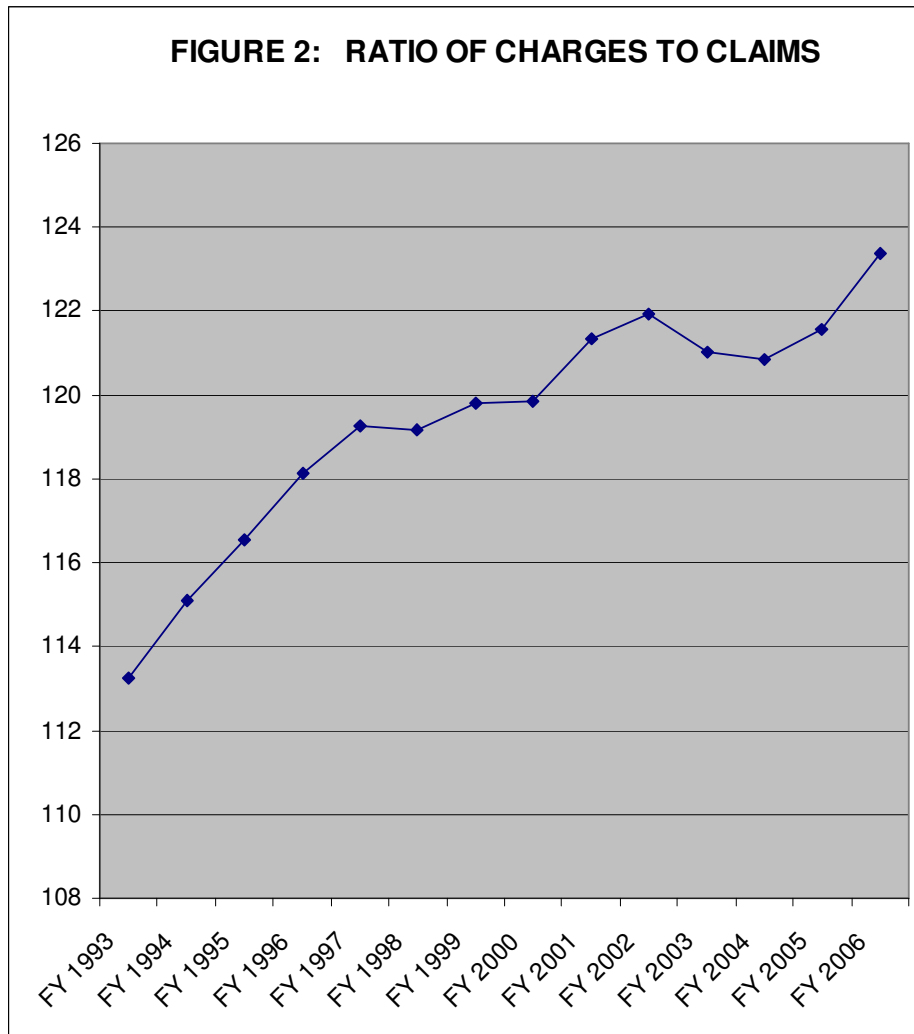
28. The U.S. Equal Employment Opportunity Commission Charge Statistics, FY 1997 Through FY 2006, <http://www.eeoc.gov/stats/charges.html>

29. The ADA was enacted in 1990, but enforcement of the employment discrimination provisions did not go into effect until 1992. Americans with Disabilities Act, Pub. L. No. 101-336, 105 Stat. 327 (1990) (codified at 42 U.S.C. §§ 11201-12213 (2000)).

30. Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (codified as amended at 42 U.S.C. § 1981(b) (2000)).

31. See Clermont & Schwab, *supra* note , at 433.

FIGURE 1	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Total Charges	87,942	91,189	87,529	77,990	80,680	79,591	77,444	79,896	80,840	84,442	81,293	79,432	75,428	75,768
Race	31,695	31,656	29,986	26,287	29,199	28,820	28,819	28,945	28,912	29,910	28,526	27,696	26,740	27,238
Sex	23,919	25,860	26,181	23,813	24,728	24,454	23,907	25,194	25,140	25,536	24,362	24,249	23,094	23,247
National Origin	7,454	7,414	7,035	6,687	6,712	6,778	7,108	7,792	8,025	9,046	8,450	8,361	8,035	8,327
Religion	1,449	1,546	1,581	1,564	1,709	1,786	1,811	1,939	2,127	2,572	2,532	2,466	2,340	2,541
Age	19,809	19,618	17,416	15,719	15,785	15,191	14,141	16,008	17,405	19,921	19,124	17,837	16,585	16,548
Disability	15,274	18,859	19,798	18,046	18,108	17,806	17,007	15,864	16,470	15,964	15,377	15,376	14,893	15,575
Total Claims	99,600	104,953	101,997	92,116	96,241	94,835	92,793	95,742	98,079	102,949	98,371	95,985	91,687	93,476
Percentage	113.26	115.09	116.53	118.11	119.28	119.15	119.81	119.83	121.32	121.92	121.01	120.84	121.56	123.37



C. DEMOGRAPHICS AND COMPLEX CLAIMS

What explains the steady growth in complex claims? I suggest that it can at least in part be traced to the demographics of the workplace, and can be interpreted as reflecting to some degree the success of anti-discrimination law. In a sense, locating discrimination in multiple

differences demonstrates the distance we have come since the enactment of Title VII. Here, a look at the statute's history is helpful. It is well documented that Title VII was primarily intended to address blatant forms of exclusion of African-Americans from the workplace.³² Over the years, however, litigation under the statute has moved from a job opportunity to a job retention focus. Thus, a majority of cases now allege discriminatory termination.³³ In some sense, this change signals at least a partial success in creating equal employment opportunity. Studies have shown significantly increased representation of non-whites and women in all employment sectors following the passage of Title VII.³⁴ The workplace will likely be the most integrated setting in which Americans now finds themselves--more so than in housing, neighborhoods, or schools.³⁵

Shifts in the demographics of the United States have also increased the diversity of the workplace. Since Title VII was enacted, the American workplace has become markedly older, less white, and more female, with the percentage of women participating in the labor force approaching their proportion of the overall population.³⁶ A recent study by the United States Department of Labor documents these significant changes in labor force participation between 1984 and 2004, and projects even more dramatic shifts by 2014.³⁷ Figure 3 summarizes the study's findings:

32. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202 (1979). See also Alfred W. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 465 (1968); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375 (1995); Ronald Turner, *A Look at Title VII's Regulatory Regime*, 16 W. NEW. ENG. L. REV. 219, 230 (1994).

33. 16 W. NEW. ENG. L. REV. at 236. Turner states that by 1985 the relationship of EEOC charges alleging wrongful termination outnumbered hiring charges more than six to one. The ratio during the period 1989 to 1991 was approximately seven to one.

34. John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1110-11 (1991).

35. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L. J. 1 (2000) ("Since the enactment of Title VII, the workplace has become a comparatively integrated social environment--compared, that is, to other places in which adult citizens interact with each other.")

36. Stuart J. Ishimaru, *Fulfilling the Promise of Title VII of the Civil Rights Act of 1964*, 36 U. MEM. L. REV. 25 (2005).

37. Mitra Toossi, *Labor Force Projections to 2014: Retiring Boomers*, <http://www.bls.gov/opub/mlr/2005/11/art3full.pdf>

Figure 3

Table 1. Civilian labor force by sex, age, race, and Hispanic origin, 1984, 1994, 2004, and projected 2014

[Numbers in thousands]

Group	Level				Change			Percent change			Percent distribution				Annual growth rate (percent)		
	1984	1994	2004	2014	1984-94	1994-2004	2004-14	1984-94	1994-2004	2004-14	1984	1994	2004	2014	1984-94	1994-2004	2004-14
Total, 16 years and older	113,544	131,056	147,401	162,100	17,512	16,345	14,699	15.4	12.5	10.0	100.0	100.0	100.0	100.0	1.4	1.2	1.0
16 to 24 years	23,989	21,612	22,268	22,158	-2,377	656	-110	-9.9	3.0	-5	21.1	16.5	15.1	13.7	-1.0	.3	.0
25 to 54 years	74,661	93,898	102,122	105,627	19,237	8,224	3,505	25.8	8.8	3.4	65.8	71.6	69.3	65.2	2.3	.8	.3
55 years and older	14,894	15,546	23,011	34,315	652	7,465	11,304	4.4	48.0	49.1	13.1	11.9	15.6	21.2	.4	4.0	4.1
Men	63,835	70,817	78,980	86,194	6,982	8,163	7,214	10.9	11.5	9.1	56.2	54.0	53.6	53.2	1.0	1.1	.9
Women	49,709	60,239	68,421	75,906	10,530	8,182	7,485	21.2	13.6	10.9	43.8	46.0	46.4	46.8	1.9	1.3	1.0
One race:																	
White	98,492	111,082	121,066	129,936	12,590	10,004	8,850	12.8	9.0	7.3	86.7	84.8	82.1	80.2	1.2	.9	.7
Black	12,033	14,502	16,638	19,433	2,469	2,136	2,795	20.5	14.7	16.8	10.6	11.1	11.3	12.0	1.9	1.4	1.6
Asian ¹	3,019	5,472	6,271	8,304	2,456	799	2,033	81.4	14.6	32.4	2.7	4.2	4.3	5.1	6.1	1.4	2.8
All other groups ²	(³)	(³)	3,406	4,427	...	...	1,021	...	...	30.0	...	...	2.3	2.7	...	...	2.7
Hispanic origin	7,451	11,975	19,272	25,760	4,524	7,297	6,488	60.7	60.9	33.7	6.6	9.1	13.1	15.9	4.9	4.9	2.9
Other than Hispanic origin	106,093	119,081	128,129	136,340	12,988	9,048	8,211	12.2	7.6	6.4	93.4	90.9	86.9	84.1	1.2	.7	.6
White Non-Hispanic	91,296	100,462	103,202	106,373	9,166	2,740	3,171	10.0	2.7	3.1	80.4	76.7	70.0	65.6	1.0	.3	.3

¹ There was a disruption in the series for "Asian and other" and "Asian only" as a result of changes in the definition of the race categories in the 2000 census. Data for 1984-94 represent the "Asian and other" race category with 1990 census weights. Data for 2004-14 represent the "Asian only" race category with 2000 census weights.

² The "All other groups" category includes (1) those classified as of multiple racial origin and (2) the race categories of (2a) American Indian and Alaska Native or (2b) Native Hawaiian and Other Pacific Islanders.

³ Data for "All other groups" are not available for 1984 or 1994.

As shown above, the number of workers 55 or older has increased 52% between 1984 and 2004 and is expected to rise another 50% by 2014. These older workers now account for 15% of the workforce and are projected to account for 20% by 2014, with an annual growth rate of 4.1%. Women now represent 46.8% of the workforce, and it is expected that their participation will continue to slowly increase, while male participation will decline. Women who are 55 or older will comprise 10% of the workforce by 2014, a 120% increase since 1984.³⁸

With regard to race, the percentage of white, non-hispanic participation in the workforce was 80% in 1984, decreased to 70% in 2004, and is expected to further decrease to 66% by 2014. Persons of Hispanic origin will account for 16% of the workforce; Blacks, 12%;

38. *Id.* at table 6.

and Asians, 5%. The growth rates from 1984 to 2004 for Hispanics and Asians are well over 100%.

Another Labor Department study found that some 56 million workers will be over 45 years old by the year 2005, a 40% increase since 1994.³⁹ The median age of the population as a whole is expected to move from 34.8 in 1978 to 40.7 by 2008.⁴⁰ As noted, 2008 projections estimate that women will comprise almost 50% or 47.5% of the labor force, up from 46.3% in 1998.⁴¹ The participation of Black, Hispanic, and Asian⁴² workers is projected to increase as well. An additional 6.9 million Black workers are projected to join the labor force between 1998 and 2008, representing 16.5% of all new entrants during that period.⁴³ The Hispanic labor force is projected to increase from 14.3 million workers in 1998 to 19.6 million workers in 2008. By 2008, Asians are expected to increase their participation in the labor force by 40%. Concurrent with the increase in participation of members of all three of these groups, the participation of non-Hispanic White workers is projected to decline. The share of non-Hispanic Whites in the labor force is projected at 71% in 2008- a drop of 3 percentage points from 1996 and down 8 percentage points from 1988.⁴⁴ Although projections estimate an overall decline in non-Hispanic White workers, Non-Hispanic White women are projected to increase their participation in the labor force more than any other group.⁴⁵

This statistical picture of the United States workforce suggests that the prevalence of complex claims will continue to increase. It also indicates, however, as discussed in more detail below, that complex claims will be increasingly difficult to prove.

39. Stephen Labaton, *You Don't Have to Be Old to Sue for Age Discrimination*, N.Y. TIMES, February 16, 2000, at H7.

40. Howard N. Fullerton, *Labor force projections to 2008: steady growth and changing composition*, Monthly Labor Review, Nov. 1999, at 30. Available from U.S. DEPT. OF LABOR, BUREAU OF LABOR STATS at <http://stats.bls.gov/pub/mlr/1999/111art3full.pdf>.

41. *Id.*

42. *Id.* Note that the statistics for Asians include the category "and other."

43. Although this figure is higher than the number that entered between 1988 and 1998, as a group their overall share of the labor force has remained the at 11.5% because 4.8 million Black workers are projected to leave the workforce during the same period *Id.*

44. *Id.* Three fifths of the population expected to enter the labor force between 1998 and 2008 are projected to be non-Hispanic whites, less than their share over the 1986-1996 period. *Id.*

45. *Id.*

D. AN EMPIRICAL LOOK AT COMPLEX CLAIMS IN THE FEDERAL COURTS

Unfortunately, it is impossible to determine the prevalence in federal court of discrimination actions asserting multiples claims, or for that matter how they fare in terms of outcomes.⁴⁶ The datasets available from the Administrative Office of the Court code cases only by the very general category entitled “civil rights: discrimination, jobs.”⁴⁷ The PACER electronic docket system does not reliably record in employment discrimination cases, what type of discrimination is alleged.⁴⁸ Other than to actually examine case files one by one,⁴⁹ the only way to determine the prevalence of multiple claims is to look at reported opinions, which may raise issues of publication bias.⁵⁰

In one empirical study, Berger, Finkelstein, and Cheung reviewed all published opinions deciding summary judgment motions made by the defendant in employment discrimination lawsuits in the district courts of the Second Circuit for the first three-quarters of calendar year 2001.⁵¹ They found that in 154 published cases, there were 275 claims, with 65 single-claim cases and 89 multiple-claim cases.⁵² The fact that 58% of this dataset consists of multiple claim cases does not provide any

46. A new, very detailed empirical study may cast some light on these issues when it is finalized. See Laura Beth Nielson, Robert L. Nelson, and Ryon Lancaster, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* [draft on file— not for publication]

47. Administrative Office of the U.S. Courts, “Table C-4. U.S. District Courts – Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2005,” <http://www.uscourts.gov/caseload2005/tables/C04mar05.pdf>. See generally Laura Beth Nielson & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 692 (2005); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

48. Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. _____ (2008) (forthcoming); Vivian Berger et al., *Benchmarks for Mediators: Probabilities of Summary Judgment in Employment Discrimination Cases in the Second Circuit*, 23 HOFSTRA LAB. & EMP. L.J. 45 (2005).

49. Nielson, Nelson and Lacanster’s study does entail an examination of a sample of case files. See note 46 *supra*.

50. Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC’Y REV. 1133 (1990) (stating that researchers often base their analyses on published cases, while 80-90% of employment discrimination cases filed in federal court do not result in a published opinion).

51. Berger, *supra* note 48, at 48

52. *Id.* at 65.

definitive information about the number of multiple claim cases filed, but it does suggest that these cases represent a significant portion of the employment discrimination filings. .

What happens to multiple claims? Several empirical studies have investigated success rates of various types of claims, based upon reported decisions and verdicts. As a general matter, Clermont and Schwab found that in the category labeled “civil rights: jobs,” plaintiffs who reach the trial stage prevail at a rate of 39.5%.⁵³ Studies of disability discrimination cases have reported plaintiff win rates at between 3% and 8%.⁵⁴ A study of age discrimination actions demonstrated that plaintiffs prevailed in 8.7% of cases.⁵⁵ Only in sexual harassment does it appear that plaintiff approach anything near to what might be expected in litigated matters:⁵⁶ one study found win rates of 45.7% in bench trials, and 54.6% in jury trials.⁵⁷ None of these studies indicates whether actions asserting multiple claims were included or excluded, and if included, how they were coded.

My anecdotal impression, however, is that multiple claims fare even less well than those asserting a single ground for discrimination: the more claims asserted, the less likelihood of success. This may be because the multiple claimant presents a paradox. Without a doctrinal structure from which to analyze complaints of this sort, judges seem to treat the complex subject as the child who cried wolf.⁵⁸ If a person asserts so many grounds for discrimination, it is unlikely that any of

53. Clermont & Schwab, *supra* note , at 441-42

54. Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. ____ (2008); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L. J. 239, 244, 248 (2001); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999); Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 365-66 (2000).

55. George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 513 (1995).

56. The well-known Priest-Klein hypothesis posits that a party going to trial should have a 50% change of success. George Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

57. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 570 (2001).

58. Multiple claims seem to play on the federal judiciary's general hostility to Title VII claims. See Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 757 (1992) (suggesting that Title VII cases overload the federal docket).

them is grounded in fact.⁵⁹ This instinct finds some support in the genesis of discrimination law.

Title VII and its progeny - the Age Discrimination in Employment Act and the Americans with Disabilities Act - were intended to remedy discrimination against particular groups that had suffered a history of exclusion from the workplace. An employee who fails to situate himself firmly within a clear and distinct category, but rather to identify himself as the sum of various ones, may be perceived as not entitled to the group's statutory protection. Common sense and social theory both tell us, however, that the more categories of difference from the norm, the more likely that discrimination will be an issue in the workplace.⁶⁰

In order to test my anecdotal impression, I conducted a limited - but, I suggest, revealing - empirical analysis of multiple discrimination complaints. In the Lexis database, I searched for reported opinions on summary judgment motions in cases alleging either race and gender discrimination or age and gender discrimination in the federal courts for the Southern and Eastern Districts of New York, over a one year period from June 2006 to June 2007. The search yielded 26 decisions in which multiple claims were substantively addressed. Of those, summary judgment was granted to the employer in 22 cases; in three others, only one claim survived. In only one case with a multiple claims, or 3.8% of the sample, did the employee fully defeat the employer's summary judgment motion. If partial success is included, the percentage of plaintiff success increases to 15.3%, but these cases typically will go forward only with a single discrimination claim.

This finding can be compared with more ambitious empirical studies of summary judgment success rates in employment discrimination actions. Berger, Finkelstein, and Cheung found that plaintiffs prevailed in 30.5% of summary judgment motions made by defendants.⁶¹ The Federal Judicial Center recently has undertaken a

59. See, e.g., Michael Bologna, Judges Warn Employment Lawyers Against Motions for Dismissal, Summary Judgment, 19 EMPL. DISCRIMINATION REP. (BNA) 595 (December 4, 2002) (quoting federal District Court Judge Ruben Castillo of the N.D. Ill., who criticized plaintiffs' lawyers "for filing wide-ranging claims alleging discrimination on multiple levels - a strategy akin to "throwing a plate of spaghetti at the wall to see what sticks").

60. See note 18 *supra*.

61. Berger, *supra* note , at .

study of summary judgment generally, analyzing activity in 179,969 cases terminated in the 78 federal district courts that had fully implemented its electronic case and docket management reporting system in Fiscal Year 2006. In the employment discrimination category, it found that summary judgment motions were made in 30 out of every 100 cases, and that defendants prevailed in whole or in part in 73% of those cases.⁶² In the district courts within the Second Circuit, the success rate was slightly higher, 76%.⁶³ In my sample of multiple claims, the comparable figure was 96%.

E. WHY MULTIPLE CLAIMS FARE SO POORLY

Why do multiple claims fare so poorly? I suggest several reasons. The first relates to the administrative process. Many if not most employees file charges with the EEOC without the assistance of counsel.⁶⁴ The first step in this process is the completion of an intake form by the claimant. As shown below, the intake form practically invites the filing of multiple claims that lack a firm foundation. Claimants are asked the following:⁶⁵

Do you believe this action was taken against you because of: (Check the one(s) that apply and specify your race, sex, age, religion or ethnic identity.)

RACE SEX RELIGION NATIONAL ORIGIN AGE
 RETALIATION COLOR

62. Federal Judicial Center Memorandum, *Estimates of Summary Judgment Activity in Fiscal Year 2006*, April 12, 2007 (on file with author). See also Joe S. Cecil, Rebecca N. Eyre, Dean Miletich, David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 JOURNAL OF EMPIRICAL LEGAL STUDIES 861 (2007).

63. Federal Judicial Center Memorandum at .

64. See *Williams v. N.Y. City Hous. Auth.*, 458 F.3d 67, 70 (2d Cir. 2006) ('EEOC charges frequently are filled out by employees without the benefit of counsel . . .'); *Ezell v. Potter*, 400 F.3d 1041 (7th Cir. 2005) ("We recognize that employees often file an EEOC charge without the assistance of a lawyer and we therefore read the charge liberally.");

65. EEOC Form 283. For a discussion of this process, see *Fed. Express v. Holowecki et al.*, 440 F.3d 558 (2d Cir. 2006), *cert. granted*. U.S. (2007). See also Laurie M. Stegman, Note, *An Administrative Battle of the Forms: The EEOC's Intake Questionnaire and Charge of Discrimination*, 91 MICH. L. REV. 124 (1992)

For many employees, the temptation to check all of the boxes that “apply” - in the sense of how the employee identifies herself - must be irresistible. An older African-American woman who believes that she was unfairly denied a promotion, without any information about the decision at her disposal, typically will check race, sex and age. This begins the path to multiple claim litigation. Even if an attorney is involved, the same result is likely, to guard against the risk of dismissal of any potential claim for failure to exhaust the administrative process.

The intake questionnaire forms the basis of the formal charge prepared by EEOC staff and served upon the employer. EEOC Form 5 (Appendix I) replicates the generality of the questionnaire:

CAUSE OF DISCRIMINATION BASED ON <i>(Check appropriate box(es))</i>									
<input type="checkbox"/>	RACE	<input type="checkbox"/>	COLOR	<input type="checkbox"/>	SEX	<input type="checkbox"/>	RELIGION	<input type="checkbox"/>	NATIONAL ORIGIN
<input type="checkbox"/>	RETALIATION	<input type="checkbox"/>	AGE	<input type="checkbox"/>	DISABILITY	<input type="checkbox"/>	OTHER	<i>(Specify)</i>	

Although claimants are asked for a narrative describing discriminatory acts, neither the intake questionnaire nor the charge form distinguishes between multiple claims brought in the alternative (*e.g.*, discrimination based on sex or on race) and complex or intersectional claims (*e.g.*, discrimination addressed to a sub-class, such as Black women). Assuming no action by the EEOC and the issuance of a “right to sue” letter, some proportion of these cases find their way into federal court, without any clarification of the claims. In fact, using Berger’s finding, more than 50% of discrimination cases present more than one claim. In many cases, unless the issue of intersectionality is clearly presented, district court judges do not bother to look beyond the most simple narrative. They treat each claim as standing alone, and in the typical summary judgment opinion, separately analyze the evidence proffered to support -for example- first the race, and then the gender

claim, without even alluding to the possibility of a complex theory of discrimination.⁶⁶

One district court judge, seemingly frustrated with and hostile to multiple claims but at least cognizant of the different narratives they may represent, attempted to develop a procedural structure to address them. In *Harrington v. Cleburne County Board of Education*,⁶⁷ the court issued a “special order in cases of disparate treatment employment discrimination in which more than one proscribed motivational factor is alleged,” which was referred to as “a rather common tactic.”⁶⁸ The order, which was to be applied in all multiple claim jury cases, required that prior to the final pre-trial conference, the plaintiff must amend the complaint to “eliminate all claims of prohibited employer conduct except one.”⁶⁹ If the plaintiff fails to do so, she has two options: she may proceed on an “intersectional” theory, or she may claim distinct grounds for discrimination.⁷⁰ Under the second option, the claims must be tried separately to the jury, and the defendant may choose which claim is tried first.⁷¹ Presumably for attorney’s fees purposes, the defendant is deemed “prevailing” when a defense verdict is rendered in any partial trial.⁷²

Accepting an interlocutory appeal of the order, the Eleventh Circuit reversed that portion of the order that gave the defendant the right to decide the order of the trial, only because the district court failed to articulate some legitimate reason for taking this tactical decision away from the plaintiff.⁷³ It also reversed the *ex ante* determination regarding “prevailing parties,” objecting to the trial court’s attempt to “send a signal” that it would award fees to the defendant if it prevailed in either or both of the separate trials.⁷⁴ But the court of appeals found that the

66. See Sabina F. Crocette, *Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis--A Pragmatic Model*, 28 GOLDEN GATE U. L. REV. 115, 127 (1998)

67. 2000 U.S. Dist. LEXIS 21805 (N.D. Ala. 2000). The plaintiff, an African-American woman, alleged that she was paid less than whites and males in comparable positions.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. 251 F.3d 935 (11th Cir. 2001)

74. *Id.* at 938.

district court was within its discretion in requiring the plaintiff to choose between an intersectional theory and a bifurcated trial, noting, “This court has deplored muddled complaints in employment discrimination and civil rights cases and urged district courts to “take a firm hand” in ensuring efficient and clear proceedings on claims deserving trial.”⁷⁵ The court commented further that it would review the future application of the “special order” on a case by case basis.⁷⁶

Clearly, the *Harrington* trial court’s hostility led to overreaching in its attempt to bring some clarity to multiple claims. Apparently, the “special order” went nowhere: neither *Harrington* opinion has been cited since the decisions were issued. But at least, the court directly addressed the possibility of an intersectional theory, a concept that the virtually disappeared from reported opinions, despite the proliferation of multiple claims. As I discuss below, the courts have basically given up on the complex subject.

And to some extent, with good reason. Too many cases are brought that do not truly present intersectional claims, but rather assert independent and alternative theories of discrimination. Typically, at the time of her EEOC filing, the “complex” plaintiff has little information upon which to judge the specific nature of the bias she perceives. The EEOC intake procedure invites multiple claims by not specifying the difference between alternative and intersectional theories. Although this is not an easy matter to elucidate to pro se litigants, the agency should take some steps to clarify its questionnaire, and perhaps provide training to its intake workers on the difference. Even more importantly, once cases reach the courts, lawyers must take a careful look at intersectional versus alternative theories, particularly when discovery is concluded, and the case is approaching the summary judgment stage. Although it may seem counter-intuitive, as I explain below, complex claims create problems of proof that may be insurmountable without a substantial investment of additional resources.

75. *Id.*

76. *Id.*

III. A DOCTRINAL FRAMEWORK FOR COMPLEX CLAIMS: THE SEX-PLUS ANALYSIS

A. THE ORIGIN OF SEX-PLUS IN DISPARATE IMPACT CASES

Shortly after the passage of Title VII in 1964, the courts began to grapple with the analysis of multiple claims. Although some courts simply dismissed the possibility of combining “two causes of action into a new special sub-category” and thereby creating a “super remedy,”⁷⁷ others looked more carefully at the likelihood that discrimination could be directed towards a sub-set of a protected group. The dominant mode of analysis became known as the “sex-plus” theory. It was first applied in the context of class action or disparate impact cases, where statistical evidence could be used effectively to show sub-group differences, and then extended to the typical disparate treatment case, and to sexual harassment cases, where its application proved more problematic. In this Part, I trace the history of “sex-plus” analysis, and demonstrate that even as it grew in acceptance, it failed to account for the difficulties of proof inherent in its formulation.

The case consistently cited for the origin of the “sex-plus” doctrine is *Phillips v. Martin Marietta Corp.*⁷⁸ In *Phillips*, a woman who applied for a “assembly trainee” position was told that women with pre-school age children would not be considered, although similarly situated men were eligible for employment. She brought a class action to challenge the policy as per se discrimination. The Fifth Circuit upheld the district court’s denial of class certification and grant of summary judgment on the basis of defendants’ showing that 70 to 75 percent of applicants were women, and 75 to 80 percent of those hired were women, and thus, women as a group were not treated unfavorably.⁷⁹ Apparently, the plaintiff and the EEOC, as amicus, chose not to argue

77. See *Degraffenried v. General Motors Assembly Division*, 413 F. Supp. 142 (E.D. Mo. 1976).

78. 416 F.2d 1257 (5th Cir. 1969), *vacated*, 400 U.S. 542 (1971).

79. 411 F.2d 1,3 (5th Cir. 1969), *reh’g denied*, 416 F.2d 1257 (5th Cir. 1969).

the case under a disparate impact theory. Thus, the Court did not consider whether this policy, neutral on its face, had the effect of excluding women.⁸⁰ In that case, defendants would have had to prove that it was a “bona fide occupational qualification” for women not to have pre- school age children.⁸¹

A petition for rehearing *en banc* was denied with a strong dissent by Judge Brown, in which the term “sex-plus” first appears.⁸² Judge Brown uses the term to describe the defense’s theory: as long as the explicit criterion is not simply sex (i.e., no women may be hired), but sex and an additional job requirement, the discrimination may be lawful based upon the second unprotected criterion, thus making it unnecessary to prove “business justification.”⁸³ The dissent points out the absurdity of this theory, noting that by adding non-sex factors that exclude many women, the “rankest sort” of discrimination would be sanctioned.⁸⁴

The Supreme Court reversed in a *per curiam* opinion, without mentioning “sex-plus.”⁸⁵ In one paragraph, the Court held that the adoption of one policy for women with children and another for men triggered the requirement that a defendant employer prove a “bona fide occupational qualification (BFOQ).”⁸⁶ Justice Marshall concurring, would have gone further - suggesting that any attempt to legitimate this policy would play upon just the stereotypes that Title VII was intended to eliminate - childcare responsibilities cannot be attributed only to women.⁸⁷

In *Phillips*, the “sex-plus” analysis was framed in the context of a clear policy which was only one step removed from a *per se* “no women” rule in hiring. Deciding cases such as this became a clear cut matter: was the additional hiring criterion “job related?” Unlike in the typical “disparate impact” case, plaintiffs did not even need to show that a neutral policy - such as minimum height requirements --

80. *Id.*

81. *Id.* at 5.

82. *Phillips*, 416 F.2d at 1260.

83. *Id.* at 1261.

84. *Id.* at 1260. *See id.* at n.1 (stating, “of course the ‘plus’ could not be one of the other statutory categories of race, religion, national origin, etc.”).

85. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). 27*Id.* at 544.

86. *Id.* at 544.

87. *Id.* at 545.

disproportionately excluded women.⁸⁸ Neither in *Phillips* nor in any case decided since then did the Supreme Court characterize this analysis as a sex-plus theory.⁸⁹

The *Phillips* Court was attempting to analyze three types of policies: (1) no women; (2) only some women, but not others; (3) policies that said nothing about women but had the effect of excluding them. In the first case, there is only one defense - BFOQ.⁹⁰ In the second case, the defense that the policy only excludes some women was rejected, but the Court still found the BFOQ analysis appropriate.⁹¹ In the third case, an employer's defense can be that the policy does not exclude women, as well as the BFOQ defense.

In the wake of *Phillips*, lower courts invalidated other policies that on their face created different employment standards for women than for men. For example, airline policies that required the termination of female but not male flight attendants who married were successfully challenged, and at least one court relied on a "sex-plus" analysis, citing

88. See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (upholding the district court's finding that an Alabama statute specifying minimum height and weight requirements for employment as a state prison guard disproportionately excluded women, and therefore, constituted a Title VII violation. Citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court stated that to establish a prima facie case of discrimination, "a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." *Id.*

89. The very same analysis was used more than twenty years later in a class action suit in *United Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991), in which the Court invalidated a policy barring all fertile women from jobs involving lead exposure, noting that it had faced a "conceptually similar situation" in *Phillips*. *Id.* at 198.

90. *Phillips*, 400 U.S. 542, 544.

91. *Id.*

Phillips.⁹² Other lower courts struck down policies involving refusals to hire married women,⁹³ and terminations of single pregnant women.⁹⁴

These early cases hold in common their largely unspoken reliance on stereotypical thinking about women. The policies at issue represent societal notions of women's appropriate place in the workforce: women with young children should not be working; married women should not be flying around the country and flirting with businessmen.

92. See *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1971). In holding that an airline no-marriage rule imposed exclusively on stewardesses, but never on stewards violated Title VII, the court stated that Title VII analysis is not confined to explicit discrimination based "solely" on sex. *Id.* at 1198. Therefore, discrimination was not to be tolerated under the guise of physical properties possessed by one sex or through unequal application of a seemingly neutral company policy. *Id.* But see *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892, 893 (5th Cir. 1977), cert. denied, 434 U.S. 844 (1977). Rejecting a "sex-plus" analysis, and denying plaintiffs sex discrimination claim, the court determined that one protected class of Title VII was not discountenanced in favor of another such class by the stewardess no-marriage rule. *Id.* at 893. The court focused on the fact that only women were employed in the position of stewardess. Therefore, any discrimination resulting from a rule barring married women from such employment was not between men and women, but only between married women and non-married women. *Id.*

93. See *Jurinko v. Weigand Co.*, 331 F. Supp. 1184 (W.D. Pa. 1971), *aff'd in part and modified in part*, 477 F.2d 1038 (3rd Cir. 1973). In this case, plaintiffs were employed by the defendant company for several years until 1953 when they were fired due to the company policy of discharging and not hiring married women instituted at the close of World War II for the purpose of providing men jobs. *Id.* at 1185. In 1965, after the passage of the Civil Rights Act, plaintiffs sought reemployment by the company, but were told the company was not hiring. *Id.* at 1186. Plaintiffs unsuccessfully pursued reemployment by defendant many times until 1969 and then filed suit alleging they were discriminated against as married women. *Id.* The court rejected the defendant's contention that if it pursued a discriminatory policy, it was directed to married women rather than women and was therefore not on the basis of sex. *Id.* at 1187. The court cited *Phillips v. Martin Marietta*, 400 U.S. 542 (1971), and stated that "[i]f the company discriminates against married women, but not against married men, the variable becomes women, and the discrimination, based on solely sexual distinctions, invidious and unlawful." *Id.* No bona fide occupational qualification distinction between married men and married women was offered by the defendant. *Id.* at n.6. The court then found no general policy of discriminatory hiring of married women based on the statistical evidence of the company's hiring practices, but that the evidence of the company's extensive hiring of men during a period when the plaintiffs, with prior experience and good work records, were actively seeking employment from the company, supported an inference of discrimination for which the defendant was unable to rebut with a BFOQ. *Id.* at 1187-1188.

94. See *Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir. 1977), cert. denied, 431 U.S. 917 (1977). Plaintiff was demoted because she was an unmarried pregnant woman. *Id.* at 367. The court rejected the defendant's contention that in order for plaintiff to succeed on her Title VII claim she needed to prove that had she been a male expectant parent, she would have been treated differently by the defendant company. *Id.* at 370. The court determined that pregnancy could not be equated with the condition of "expectant parent" in a male, and that pregnancy was a condition unique to women, so that termination of employment because of pregnancy has a disparate and invidious impact on women. *Id.*

But see *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *Gilbert* held that the failure of an employer to provide insurance for pregnancy was not sex discrimination but discrimination against pregnant persons, thus leading Congress to adopt the Pregnancy Discrimination Act of 1978, as an amendment to Title VII. Pub.L. No. 95-555, 92 Stat. 2076 (1978).

Doctrinal problems arise, however, when the stereotypes become less clear. The courts put the brakes on “sex-plus” analysis, as the gender-based sub-group stereotypes became less obviously apparent.

Hair style was one such breaking point: when male plaintiffs challenged policies that required short hair for them but not for women, the line drawing began. In several cases, it was held that because hair length is not an immutable sex characteristic or a constitutionally protected activity such as marriage or child rearing, these grooming policies were not a violation of Title VII.⁹⁵ In *Willingham v. Macon Telegraph Publishing Co.*, the male plaintiff was denied a position with a newspaper company because a grooming code was interpreted to exclude men with long hair.⁹⁶ Here, unlike the earlier sex-plus cases, the policy was neutral on its face, but there was no dispute about its disparate application. Willingham argued that the “plus” was failure to conform to male sexual stereotypes, just as in the first wave of cases where women were barred based on female stereotypes.⁹⁷ The Fifth Circuit repeatedly refers to “whether a line can be drawn,” and relies heavily on legislative history that the Congressional intent of Title VII’s enactment was to provide equal job access for men and women.⁹⁸ But hair length is not an immutable trait, nor does it implicate a fundamental right, and grooming requirements -- albeit different ones -- were applied to both men and women.

The hair cases do not rest on any doctrinal foundation. The gloss added to the “sex-plus” analysis seems to stem from the courts’ reluctance to consider whether male stereotypes should bar employment opportunities. Would the result have been the same if, for example, a grooming code was interpreted to require that women - but not men - have shoulder-length hair, thus excluding a sub-class of women who preferred short hair? Or consider a policy that required women but not men to have college degrees. It would be difficult to imagine an employer arguing that this kind of policy was not sex discrimination since it would not exclude all women, nor would lack of a degree be considered an immutable trait or impinging upon a fundamental right. If

95. See *Earwood v. Continental Southeastern Lines, Inc.* 539 F.2d 1349 (4th Cir.1976); *Willingham v. Macon Telegraph Publishing Co.* 507 F.2d 1084 (5th Cir. 1975).

96. 507 F.2d 1084 (5th Cir. 1975).

97. *Id.* at 1089-1090.

98. *Id.* at 1090-1092.

not struck down on its face, at the very least, such a policy would be analyzed on the basis of whether the requirement was job related. Moreover, the hair cases demonstrate that “sex-plus” analysis is merely a shorthand for looking at policies that affect some portion of one gender group but not another. It is noteworthy that dress codes were never litigated under “sex-plus” theories - i.e., women who prefer to wear pants to work.

Thus, with regard to employment policies - the classic disparate impact type cases - the “sex-plus” doctrine came to an early end. The Supreme Court invalidated policies that could have been viewed under a “sex-plus” theory, but were not: the denial of accumulated seniority to female employees returning from maternity leave, for example.⁹⁹ In fact, as has been widely noted, few disparate impact, class based discrimination cases are litigated today.¹⁰⁰

B. THE EXPANSION TO DISPARATE TREATMENT CLASS

Perhaps spurred by references to immutable characteristics, sex-plus was reincarnated in an entirely different formulation: to address claims of individual discrimination involving black women. The so-called “sex plus race” theory was first clearly articulated in *Jefferies v. Harris County Community Action Association*.¹⁰¹ There, the plaintiff worked in personnel for a non-profit organization, served as a union steward and filed many grievances on her own and others' behalf, and unsuccessfully sought several promotions.¹⁰² In the last instance, she responded to a job posting for two field representatives, positions that were filled by a white female and a black male.¹⁰³ When she learned that the black male had received a permanent appointment, Jefferies circulated an internal personnel document to a board member whom she

99. See *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (holding an employer's facially neutral policy allowing employees forced to take a leave of absence from work because of disease or any disability other than pregnancy to retain accumulated seniority and accrue seniority while on leave, but disallowing an employee who takes a leave for any other reason, including pregnancy, to retain accumulated seniority or accrue seniority violated Title VII.).

100. See *Donohue & Seligman*, *supra* note , at .

101. 615 F.2d 1025 (5th Cir. 1980).

102. *Id.* at 1029.

103. *Id.*

thought would be sympathetic, but who in turn alerted the executive director that confidential material was being disseminated.¹⁰⁴ The executive director then terminated Jefferies, who among other claims, argued that she was not promoted “because she is a woman, up in age, and because she is Black.”¹⁰⁵

The age claim was dropped, but the court stated that at trial “the claims of race discrimination, sex discrimination and discrimination based on both race and sex were properly raised...”¹⁰⁶ Because a Black person received the promotion, the court found no evidence of race discrimination, but on the sex claim, it reversed the district court's dismissal.¹⁰⁷ The lower court had relied only on defendant's evidence that 16 of 36 supervisory positions were held by women, and one of the two field positions had previously been held by a woman. It did not consider the comparative qualifications of the candidates for the position plaintiff sought.¹⁰⁸

The significant aspect of the opinion relates to the dual claims, however. Jefferies argued that the only statistics relevant to her claim that she was discriminated against as a Black women were the number of Black women promoted.¹⁰⁹ The court adopted the argument for two reasons. First, it noted that unless black women are treated as a separate class from black men and white women, black women could not prove that the reason for the personnel action was pretextual, and no remedy would exist for discrimination against black females.¹¹⁰ Second, the court found that this result was “mandated by the holdings of the Supreme Court and this court in the 'sex-plus' cases.”¹¹¹ Discussing the *Phillips* case, the court in *Jefferies* stated its holding as “persons of like qualifications [must] be given employment opportunities irrespective of their sex,” and then noted that “other courts invalidated company rules which singled out certain subclasses of women for discriminatory

104. *Id.*

105. *Id.* at 1029.

106. *Jefferies*, 615 F.2d at 1030.

107. *Id.*

108. *Id.* at 1030-1031.

109. *Id.* at 1032.

110. *Id.* at 1032.

111. *Id.* at 1033.

treatment,” citing a series of “no marriage” and “no children cases.”¹¹² *Jefferies* distinguishes the hair cases as not involving immutable characteristics.¹¹³ Finally, the court concluded that if an employer cannot discriminate against a subclass of women who are married, he obviously cannot discriminate against a subclass of black women.¹¹⁴ Therefore, the promotion of a black man does not defeat plaintiff’s prima facie showing, since he is not part of the protected subclass of black women.¹¹⁵ Moreover, proof of pretext is not defeated by the more favorable treatment of black men and white women.¹¹⁶ The case was remanded for “appropriate findings of fact and conclusions of law in light of this opinion concerning *Jefferies*’ claim of discrimination in promotion based on both race and sex.”¹¹⁷

Despite its favorable holding for the plaintiff, there are several glaring problems with the *Jefferies* opinion that set multiple claim cases down the wrong course. First, the court did not distinguish between disparate impact and disparate treatment Title VII doctrine. The “sex-plus” rationale grew out of the examination of policies that were not in dispute. The notion of sub-class discrimination was drawn from a defense that because not all women were excluded, there was no Title VII violation. From that defense, the principle was derived that a policy that excludes on its face only some women - particularly based on sub-categories that raise stereotypes - is impermissible. The equivalent in *Jefferies* would have been a policy that excluded from promotion not all women or all blacks, but only black women. The class is not obviously defined by a policy. Instead, the sub-class is a posited theory of discrimination, in part in response to the defense of diversity in promotion, and resting on a stereotype that must be proved. Thus, Ms. *Jefferies* must demonstrate that other black women were treated similarly. In essence, she must prove a pattern, in order to overcome the employer’s justification for its decision.

112. *Id.*

113. *Id.*

114. *Jefferies*, 615 F.2d at 1034.

115. *Id.*

116. *Id.* at 1034.

117. *Id.* at 1035. *Jefferies* was quoted with approval, although in dicta, by the Supreme Court in *Olmstead v. Georgia Dept. of Human Res.*, 527 U.S. 581, 598 (1999) (“ ‘Discrimination against black females can exist even in the absence of discrimination against black men or white women.’ ”).

Why did the Jefferies court take this leap? Indeed, Judge Randall dissents from the portion of the opinion addressing multiple claims, taking the view that none of the “sex-plus” cases addresses two statutorily protected criteria, and the recognition of such subclasses raises unanswered questions about the operation of the traditional evidentiary framework. “In light of the novelty and difficulty of a combination discrimination claim and the serious ramifications that recognition of such a claim would have on the ways in which it would be both proved and defended against,”¹¹⁸ she suggests that the case be remanded for fuller factual development before appellate review.

I suggest that the *Jefferies* court perceived that there was real discrimination at work in the case, but was stymied by traditional Title VII analysis. Race discrimination could not be proved, and although the court remanded for additional factual findings on the sex discrimination claim, it doubted that bias could be shown either, given the number of women supervisors. Nevertheless, the narrative points to discrimination. This 50 year old black woman was a troublemaker: she advocated vigorously for herself and others, repeatedly sought promotions, and in this instance went over the executive director's head to a board member when she felt that she had hard evidence of discrimination. On the basis of standing up for her rights in this manner, she was fired. Would a white man have been treated in the same way? Rather than being perceived as a trouble-maker, would he be viewed as a go-getter, perhaps a bit ambitious, but deserving of consideration for advancement? Would he have been fired for having a confidential conversation with a friendly board member about personnel policies? These questions form the sub-text of the opinion, and the court latched on to the idea of “sex-plus” as a way to address them.

It was, however, a doomed effort. The district court's dismissal on remand was affirmed by the Fifth Circuit, with only Judge Randall sitting from the opinion panel.¹¹⁹ The *per curiam* opinion notes that the district court found credible the employer's evidence that Jefferies was less qualified than the black man who received the promotion, and says

118. *Id.*

119. 693 F.2d 589 (5th Cir. 1982).

nothing about the possible outcome of the case if evidence was introduced to mount a “sex-plus” theory.¹²⁰

Similarly, in *Judge v. Marsh*,¹²¹ a black female civilian Army employee sought several promotions, and in one instance was ranked third behind a white women and a black male. Although her job evaluations were good, she had been labeled by various supervisors as “abrasive,”¹²² “difficult to deal with,”¹²³ and a “troublemaker.”¹²⁴ Following trial, the court accepted the “sex-plus” theory of *Jefferies*, but with dire warnings and only in the form of dicta. It noted that the doctrine “turns employment discrimination into a many headed Hydra ... Following the *Jefferies* rationale to its extreme, protected subgroups would exist for every possible combination of race, color, sex, national origin and religion For this reason, the *Jefferies* analysis is appropriately limited to employment decisions based on one protected, immutable trait or fundamental right, which are directed against individuals sharing a second protected, immutable characteristic... The benefits of Title VII thus will not be splintered beyond use and recognition...”¹²⁵

After this arbitrary doctrinal limitation, the court went on to find that Judge had not proved that she was discriminated against on that basis. Judge introduced some statistical evidence showing that black women were inadequately represented at higher grade levels- evidence not described by the court. The Army’s expert testified, however, that no significant statistical difference had been shown. In addition, the Court noted, “the generally small sample size and lack of historical data further undermined the evidentiary value of statistics.”¹²⁶ *Judge* is typical of the fate of “gender plus race” cases after *Jefferies*: the courts are highly wary of the doctrine, fail to indicate what kind of proof would make out a violation, and dismissive of evidence that is introduced.

120. *Id.* at 590-591.

121. 649 F. Supp. 770 (D.D.C. 1986).

122. *Id.* at 778.

123. *Id.*

124. *Id.* at 776.

125. *Id.* at 780.

126. *Id.*

Despite *Judge's* injunction against the use of more than two protected categories, the Ninth Circuit recognized the possibility that discrimination may involve three immutable traits. In *Lam v. University of Hawaii*,¹²⁷ a female of Vietnamese descent sued the University's Law School for discrimination on the basis of race, sex and national origin, when she was not hired for a position as director of a Pacific Asian legal studies program. In its original search, the hiring committee named Lam as one of four finalists, but one faculty member opposed her on grounds that may have reflected bias. Because no consensus was reached, a second search process began, while Lam challenged the procedures administratively within the University and complained in many outside for a, garnering a good deal of press coverage. Lam did not make it to the top 15 candidates, only one of whom had a last name denoting non-European ancestry, and two of whom were women. The position was offered to a white non-Asian woman, who declined, and the search was again canceled.¹²⁸

Lam challenged both searches in court. The trial judge granted summary judgment to the University as to the first search, and after a bench trial entered judgment for the University as to the second search.¹²⁹ The Ninth Circuit upheld the judgment after trial as not clearly erroneous, but reversed the summary judgment ruling. One of the district court's justifications was that among the four recommended candidates were an Asian male and a white female. It was error, however, to look at racism and sexism separately, the court of appeals found, following the *Jefferies* analysis, and reversed the summary judgment.¹³⁰

The opinion is noteworthy in that it specifically confronts the issue of particular stereotypes: "Asian women are subject to a set of stereotypes and assumption shared neither by Asian men nor by white women," and draws on legal theory to note that "the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences."¹³¹ Other than recognizing the complexity of multiple bias, the court offers only the merest suggestion of evidentiary directions in suggesting that while non-

127. 40 F.3d 1551 (9th Cir. 1994).

128. *Id.* at 1558-1559.

129. *Id.* at 1559.

130. *Id.* at 1560-62.

131. *Id.* at 1562.

discriminatory treatment of Asian males and white women is irrelevant here, evidence of discrimination against either group may be differently considered: “we express no view on whether such a one-way bar is justified in either some or all cases.”¹³²

As in *Jefferies*, the *Lam* case came back to the Court of Appeals after a judgment as a matter of law was entered.¹³³ The only issue on appeal was whether the district court erred in excluding the testimony a female professor because it merely recounted isolated comments not contemporaneous with the decision-making process. The court reversed, apparently deciding the evidentiary question it earlier raised. In so holding, the court indicated that a wide net should be cast in ferreting out bias. The faculty member would have testified about significant examples of bias against women by male colleagues not directly implicating Lam: for example, remarks that she was too aggressive and emotional; concerns about that class being more than 50% women; a suggestion that the two women on the faculty bring food for a gathering; one professor's objection to sexual harassment policies as interfering with “natural” interactions.¹³⁴ In the court's view, this evidence was sufficient to require a trial.¹³⁵

Lam represents the high-water mark in this entire saga – it is one of very few “plus” claims to meet with success. That success rests on the Court of Appeal's understanding that a “wide net” is necessary to capture complex bias.

C. SEX-PLUS AND SEXUAL HARASSMENT

The third category in the “sex-plus” story concerns a different form of disparate treatment: sexual harassment. In *Hicks v. Gates Rubber Co.*,¹³⁶ a black female security guard alleged racial and sexual harassment and retaliatory termination, and a bench trial resulted in a verdict for the employer. The Tenth Circuit reversed on the sexual

132. *Id.*

133. 164 F.3d 1186 (1998).

134. *Id.* at 1188.

135. *Id.* at 1189.

136. 833 F.2d 1406 (10th Cir. 1987).

harassment claim, primarily because the district court did not fully consider hostile environment, which had been recognized by the Supreme Court after the trial court decision.¹³⁷

Significantly, the court of appeals begins its opinion by noting a fact not generally relevant to a harassment claim. Hicks was the only black female out of 30 guards, and one of only two black guards. The evidence of racial harassment consisted of plaintiff's testimony that one supervisor, Gleason, referred to blacks as "niggers" and "coons," and made one reference to "lazy niggers" that was apparently directly to Hicks, and that a co-worker called her "Buffalo Butt."¹³⁸ The sexual harassment claims were that a supervisor rubbed her thigh and said, "I think you're going to make it,"¹³⁹ during her probationary period, and on one occasion Gleason grabbed her breast, saying "I caught you" after which she fell over and he got on top of her.¹⁴⁰ Another incident involved Gleason telling Hicks that he was going to "put his foot so far up her ass that she would have to go to the clinic to take it out."¹⁴¹ Other harassment was not obviously sexual or racial: she was required to jump off a loading platform; sit in a wet chair; not permitted to take a lunch break on one occasion; not permitted to sit, as was typical, during a plant inspection; was not warned of a broken step which caused her to fall and be out of work for six days, and to suffer persistent pain thereafter.¹⁴²

From the employer's viewpoint, Hicks was not adequately performing her job. She required four weeks instead of one week of training; she had a heated verbal exchange with a female co-worker and allegedly challenged another co-worker to a fight, which resulted in a three day suspension. She received two reports of unsatisfactory job performance, and was then fired. During her eight months of employment, Hicks filed five charges of discrimination with the EEOC, the last charge claiming that her discharge was retaliatory.¹⁴³

137. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 56 (1986).

138. *Id.* at 1409.

139. *Id.*

140. *Id.* at 1410.

141. *Id.*

142. *Id.*

143. *Id.* at 1411

The district court concluded that neither the racial nor the sexual incidents were sufficiently pervasive to make out a Title VII violation. The court of appeals upheld the finding with regard to racial harassment, but remanded for additional findings on the sexually hostile work environment claim. It held that the evidence of physical and verbal abuse, although nonsexual, and the evidence of sexual harassment against other employees by the supervisor Gleason, should be considered along with sexual incidents pertaining to Hicks in determining whether the environment was hostile.

Finally, the court held that in considering pervasive, incidents of racial and sexual harassment, evidence could be “aggregated.”¹⁴⁴ The court relied on *Jefferies* for the proposition that discrimination can exist against black females in the absence of discrimination against white females or black men, and then incorrectly cites *Phillips* for the proposition that disparate treatment of a sub-class of women can constitute a Title VII violation.¹⁴⁵ The district court was instructed to consider Gleason's racial slurs along with the incidents of sexual conduct, to determine whether a hostile work environment was created.¹⁴⁶ Judge Seth, in dissent, suggests that because the court affirmed the finding that there was not a racially hostile environment, it was unclear what was to be aggregated: “the majority would have the trial court evaluate the impact of the overall working conditions arising from whatever cause ...”¹⁴⁷

Four years later, the *Hicks* case made its way back to the Tenth Circuit, the district court having again held for the employer, and Hicks claiming that the circuit court's instructions had not been followed.¹⁴⁸ The district court saw its task as follows: “the *incidence* of ... racial harassment and sexual harassment must be considered in combination to determine whether there's a pervasive pattern of discriminatory harassment against the plaintiff as a black female, considering black females as a sub- class of females,”¹⁴⁹ but did so merely on a review of the trial transcript without new evidentiary hearings. The district court's

144. *Id.* at 1416.

145. *Id.*

146. *Id.* at 1417.

147. *Id.* at 1420.

148. 928 F.2d 966 (10th Cir. 1991).

149. *Id.* at 969-970.

conclusion that all of the incidents, taken together, did not demonstrate an abusive work environment, was held to be not clearly erroneous.¹⁵⁰ Not surprisingly, without a more explicit examination of what was meant by “aggregation” or an exploration of what discrimination means in this context, the district court could easily circumvent the intention that the case be remanded to be looked at more carefully.

What is the sub-text that led to the remand here? It seems fairly obvious. A black woman takes a non-traditional position - she is the only woman and one of two blacks. The supervisors are all white males. There are other women security guards - white - with whom Hicks gets into verbal and physical conflict. After the first of these, Hicks files an EEOC charge - she is another troublemaker. And we can posit that Hicks may have been a heavy woman - thus the “buffalo butt” comment, and the instance which she characterized as harassment that involved physical activity - being required to jump, to stand instead of sit. Perhaps the court of appeals perceived the stereotypes at work here - all the racial and sexual hostility of a white supervisor was directed at Hicks.

But other than pointing out the possibility of sub-group stereotyping, the application of “sex-plus” analysis makes no doctrinal sense in harassment cases. “Sex-plus” in the gender-race context is necessary to distinguish a plaintiff from Black men and white women who receive a promotion, for example. On the other hand, harassment claims are individually fact specific and do not require comparative evidence. *Hicks* and cases like it simply highlight the courts’ failure to think seriously about complex claims.

D. COMPLEX CLAIMS UNDER DIFFERENT STATUTES

The next stage of the “sex-plus” saga involves the aggregation of age¹⁵¹ and disability¹⁵² discrimination claims, brought under separate statutes, with Title VII claims. Both these statutes hold much in common with Title VII, but have as a significant distinction the fact that they define a precisely protected group. Under Title VII, men and women,

150. *Id.* at 971-73.

151. Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

152. Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

blacks and whites are entitled to non-discriminatory treatment. The ADEA protects only those over 40; the ADA, only those who meet the statutory definition of having a disability.

In *Arnett v. Aspin*,¹⁵³ a district court recognized for the first time a “sex plus age” claim, in denying a motion for summary judgment. The plaintiff, a government employee, was denied a promotion and argued that all those promoted were women under forty or men over forty. After an extensive tracing of the sex-plus doctrine, the court relied on the immutable characteristic theory elucidated in the hair cases, and found that the fact that separate statutes were involved was “insignificant,” but it did not consider the question of particular stereotypes. The analysis it proposed simply requires a finding of a sub-class demonstrating that women over forty were treated differently than men over 40.¹⁵⁴ Shortly thereafter, in the same district, a university employee unsuccessfully argued that he was terminated on the basis of age and disability, the court finding “no authority to recognize an “age-plus-disability” discrimination claim under the ADEA.”¹⁵⁵ However, that issue need not have been reached since the court found that the plaintiff was not disabled under the Act, by virtue of a hip injury that limited his walking to one mile and to climbing stairs slowly.

Indeed, the age plus disability interaction has not yet caught on. Another district court rejected such a claim, as well as one for “age plus religion,” with some attempt at reaching a reasoned conclusion.¹⁵⁶ The court made much of the fact that Congress did not amend Title VII to add age and disability categories, but enacted two new statutes, and to allow for aggregate claims would amount to “judicial legislation.”¹⁵⁷ But the court recognized a “more important” rationale: “Unlike African-American or Asian women, there can be no argument that there are unique discriminatory biases against older workers with disabilities or older non-Mormon workers.”¹⁵⁸ Whether or not that conclusion is

153. 846 F. Supp. 1234 (E.D. Pa.1994). One earlier case, *Thompson v. Mississippi Personnel Bd.*, 674 F. Supp. 198 (N.D. Miss. 1987) (did this case also recognize)

154. The same result was reached in *Good v. U.S. West Communications*, 1995 WL 67672 (D. Or. 1995), in a one paragraph holding.

155. *Kelly v. Drexel Univ.*, 907 F. Supp. 864 (E.D. Pa. 1995), *aff'd*, 94 F.3d 102 (3d Cir. 1996).

156. *Luce v. Dalton*, 166 F.R.D. 457 (S.D. Ca. 1996), *aff'd*, 167 F.R.D. 88 (S.D. Ca. 1996).

157. *Id.* at 461.

158. *Id.*

factually based, the court at least acknowledged that the perception of stereotypes is at the heart of the “plus” claims. In this case also, however, the court expressed some skepticism about the plaintiff’s degree of disability.¹⁵⁹

As many courts have commented, the permutations of multiple claims are many. But as multiple claims have proliferated, few courts engage in any systematic or rigorous analysis of the possibility of complex discrimination. As the above cases illustrate, the courts have given little in the way of evidentiary guidance on how such claims might be proved. With the sole exception of *Lam*, which presumably was settled following the Court of Appeal’s second remand, the recognition of the viability of complex claims has not resulted in successful resolutions for plaintiffs. In the next part, I suggest that intersectional scholarship has not filled this gap.

IV. INTERSECTIONAL SCHOLARSHIP

The subject of multiple claims of discrimination has not gone unnoticed by legal scholars. Throughout the 1990’s, a number of articles addressed the question of the interplay of race and gender bias in employment as well as in other contexts. Largely written from a critical and feminist perspective, these authors all call for a more nuanced interpretation of Title VII that permits the aggregation of claims. Some authors use narrative to convey a sense of the stereotypes at play in these types of claims. But this body of work actually is of little use in analyzing the quality of proof needed to successfully bring such a claim. Indeed, the courts have followed the direction suggested by these scholars in at least recognizing multiple claims, but as discussed above, plaintiffs still do not prevail. Moreover, these articles focus primarily on the race/gender paradigm and do not provide a framework for the recognition of differently conjoined classes: age and disability for example.¹⁶⁰ In this part, I will examine several significant pieces addressing multiple claims.¹⁶¹

159. *Id.* at 459.

160. For a consideration of age/sex claims, see Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DEN. U.L. REV. 79 (2003); Sabina F. Crocette, *Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis--A Pragmatic Model*, 28 GOLDEN GATE U. L. REV. 115, 127 (1998).

Kimberle Crenshaw was among the first to call attention to the difficulties inherent in analyzing claims addressing race and gender discrimination.¹⁶² Crenshaw argues that “intersectional experience” of Black women is greater than the sum of racism and sexism.¹⁶³ Thus, she suggests that when a Black woman claims discrimination, her experience is compared to that of sex-privileged blacks (*i.e.* male); when Black women charge gender discrimination, the group against which they are measured is race privileged women. As one example, she relies on an early decision in a case that challenged seniority based layoffs, in a company that did not employ any Black women prior to 1964. The layoff resulted in all Black women losing their jobs, but the court refused to recognize what it called a “super remedy” based upon combined statutory classifications - not all women were laid off, and the race claim should be consolidated with an action already pending. She concludes that Black women may experience discrimination similar to that of white women or Black men, but often they experience double discrimination, and sometimes they experience a unique form of bias - one explicitly directed toward Black women.¹⁶⁴ In later articles, Crenshaw plays out the theme of intersectionality in several contexts, but does not return to employment discrimination law.¹⁶⁵

Kathryn Abrams argues that assumptions underlying Title VII doctrine operate to limit the relief that complex claimants seek, and

Regarding discrimination against African-American men, see D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against African-American Males*, 86 NEB. L. REV. ____ (2008) (forthcoming).

161. For other articles in this vein, see Bradley Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEORGE MASON CIV. R. L. J. 199 (2006); Rosalio Castro & Lucia Corral, *Comment, Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 LA RAZA L.J. 159 (1993); Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender, and National Origin*, 37 B.C. L. REV. 771, 776 (1996); Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE. & L. 285, 308–09 (2001)

162. For earlier discussion of some of these issues, see ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN* (Boston, Beacon Press 1988); Elaine W. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. REV. 793 (1980).

163. Kimberle 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).

164. *Id.* at 149.

165. See Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

demonstrates the extent to which they operate to influence courts to require such plaintiffs to disaggregate and choose among the elements of their identities.¹⁶⁶ To this end, she analyzes the judicial response to multiple claims, focusing specifically on employment cases involving complex plaintiffs with “race and sex” claims as well as cases involving “ambivalent plaintiffs,” which she describes as individuals who fit uneasily within the category established for statutory protection because they manifest characteristics associated with one category and also characteristics associated with the category statutorily assumed to be the opposite.¹⁶⁷ With a discussion of shifting characterizations of the female subject in feminist theory as her foundation,¹⁶⁸ Abrams focuses her inquiry on the willingness of courts to accept the complex subjectivity of these plaintiffs and whether they have offered an intelligible account of the kinds of discrimination such claimants have suffered. She ultimately concludes that courts are reluctant to accept the complex subjectivity of these plaintiffs and that they offer no real account of discrimination of that either explains the complexity of intersectional claims on their own terms or helps explain how they relate to the forms of race or gender discrimination traditionally protected under the statute. This shortcoming, according to Abrams, does not provide stable or insightful precedent for the recognition of similar future claims.

166. Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2520-26 (1994). She outlines four assumptions underlying Title VII cases. (1) Members of a protected group are easily identifiable. (2) In order to be considered discrimination against a member of a certain group, the employer's judgment must be applicable to the group as a whole. When Title VII does target discrimination against a subgroup, its goal is said to be ancillary to, and less important than, stopping the implementation of discriminatory judgments applicable to the group as a whole. (3) Actions or judgments that are most readily understood as discriminatory are performed or made by members of another group. Thus, when confronted with actions or judgments made by an individual in the same category as the person being discriminated against, it is assumed to be the result of personal antagonism, rather than group based beliefs shaped by broader social structures. (4) Discriminatory actions or judgments are workplace specific barriers that hinder employment opportunity, rather than part of a system of discrimination that shape the consciousness of those subject to it

167. 92 MICH. L. REV. at 2492-93. Abrams gives the examples of a Black person who might be viewed as White, and a man who expresses a socially female response to sexualized talk or conduct in the workplace as fitting into this second category. *Id.*

168. 92 MICH. L. REV. at 2482-93. Abrams addresses different academic movements in feminism, including equality, difference, and dominance theories and how the conceptualization of female subjectivity has evolved *Id.* She notes the trend over time for a less unitary characterization of women as a group centering her discussion on the work of Kimberle Crenshaw, and Judy Scales-Trent, two anti-essentialist theorists who combine poststructuralism's emphasis on the multiplicity and intersection of constructing 'discourses' and its depiction of a multi focal, decentered self, whose articulation is variable and dependent on context. *Id.* at 2487-93.

Abrams provides an insightful discussion of the societal forces at work in employment discrimination cases. She describes employment discrimination as being both influenced by and reinforcing the societal hierarchy of racism and sexism, and addresses the complexity of intra-group discriminatory dynamics by describing how social forces of sexism and racism are internalized by groups and serve to create an intra-group hierarchy. Although her discussion adroitly examines the societal influences that give rise to the type of discrimination faced by complex plaintiffs, ultimately, she seems most concerned with the lack of explication provided by courts and her interpretation of their failure seems to be one of clarity and direction.¹⁶⁹ While this assessment is convincing, and elucidates much of what is not said or addressed in employment discrimination cases involving multiple claim cases, her suggestions are not overly remedial.

Using an entirely different approach, E. Christi Cunningham addresses the difficulty of defining complex plaintiffs under Title VII, focusing on the first prong of proof required in a discrimination claim—the “protected class” criterion that is applied by courts in evaluating a plaintiff’s prima facie case in a disparate treatment context¹⁷⁰ Cunningham focuses on the complexity and individuality of personal identity, and asserts that the first prong serves to limit complex plaintiffs by ignoring the complexities of their identities in an artificial manner. Specifically, she asserts that the inquiry into whether an individual is a member of a “protected class” distorts the substance and form of the prima facie test by evaluating whether defendants knew that plaintiffs were members of the class, which in turn leads to denial of standing to

169. 92 MICH. L. REV. AT 2512. For example, when dealing with “ambivalent plaintiffs” in the context of sexual harassment cases, she notes “what the courts explicitly decline to do is to look beneath biological or unitary classification at the more complex social interactions they seek to describe and regulate. Were they to do so, they might see that not all men share the unambivalently in the qualities socially connected with maleness and that discrimination by men against men does not parallel gender discrimination against women but is, in fact, strongly colored by it.” *Id.* at 2516. Although Abrams concedes that some courts have made some promises advances in the direction of recognizing the complexity of the discrimination faced by multiple claim plaintiffs, she notes that their failure is one that relates to an inability to “come to terms with the complex, and often unstable, arrangement of seemingly contradictory characteristics that comprise the subjectivity of any individual.” *Id.* at 2517. She suggests that these complex notions of subjectivity should be “permitted to recast the courts’ image of the Title VII claimant” and “linked to a theory of discrimination that could locate them within the world of wrongs Title VII is intended to right” in a move toward what she describes as a “transformative understanding.” *Id.*

170. E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441 (1998).

plaintiffs deserving protection and aligning plaintiffs' identity with the form of discrimination alleged, which limits the likelihood of success of multiple claim plaintiffs.¹⁷¹ Cunningham also asserts that the alignment of identity with the form of discrimination alleged causes courts to create protected sub-classes to fit a plaintiffs specific identity,¹⁷² limits plaintiffs' ability to be recognized as self-defined individuals and a court's ability to recognize combined forms of discrimination that an individual may experience.¹⁷³ Her solution to these problems involves a rejection of intersectional theory¹⁷⁴ and the promotion of what she describes as "wholism."¹⁷⁵

According to Cunningham, intersectional theory is limited- it does not capture the experience of everyone who may experience race and gender discrimination, focuses on group experience, with a specific focus on the categories of race and gender, and forecloses the possibility of taking into account other aspects of a person's identity, such as discrimination based on beauty, weight or ethnicity.¹⁷⁶ By advocating "wholism" as opposed to intersectionality, Cunningham attempts to account for the complexity of human identity by not separating or parsing out aspects of it according to the parameters of oppressive

171. E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441 (1998). Cunningham illustrates this point with several cases, including a case where a Black gay man alleged race discrimination because White gay male employees were not dismissed for engaging in similar conduct. In that case, the 8th Circuit held that the plaintiff could not be identified and protected under Title VII as a gay Black man because the statute does not prohibit discrimination on the basis of homosexuality. *Id.* at 487, discussing Williamson, 876 F.2d at 937.

172. E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441 (1998). For example, if a court was presented with an Asian woman plaintiff of French- Vietnamese ancestry from Vietnam, it would have to find that her particular identity was protected as a subclass under the statute. Cunningham criticizes this practice in that at some point in time courts may find the complexities of identity unmanageable.

173. Cunningham asserts that because plaintiffs are treated as members of a group defined by a category of unlawful discrimination, the identities of plaintiffs are artificially limited by courts. For example, a woman of an unidentified race and age alleging sex discrimination is limited to the identity of her sex. Cunningham notes, "[n]evertheless, she may also have identified herself, for the purpose of her sex discrimination claim, as a woman of her race, as a person over forty, as a woman over forty, as a woman of her race over forty, or in some other fashion." *Id.* at 480-481. She notes that "these categories would not reflect a category of prohibited behavior but would reflect plaintiffs self-identification and how she, as an individual, may have experienced sex discrimination." *Id.*

174. *Id.* at 496-501.

175. *Id.* at n.3 (1998) (defining "wholism" as the theory that identity, when subjective and empowered, is unified rather than multiple or splintered).

176. *Id.* at 496-501.

behavior, and instead allowing for plaintiffs to engage in self-definition of their own identities, and presumably for courts to recognize the validity of their claims.¹⁷⁷ This presumption suffers from a lack of foundation, however, as Cunningham fails to clearly integrate her theory of “wholism” into her “prima facie” prong analysis. She offers no guidance to courts on how to handle the task of examining and understanding the “whole” plaintiff’s particular, and potentially multifaceted, experience of discrimination.

Crenshaw, Abrams, and Cunningham all provide highly valuable insights into the nature of complex claims, and their work, whether or not acknowledged,¹⁷⁸ has undoubtedly influenced the increasing acceptance of intersectional theory by the courts. Their work enriches our understanding of the complex subject. But they do not confront the serious proof issues that arise when litigants attempt to assert their complexity in discrimination litigation.

V. PROBLEMS OF PROOF: A LOOK AT TWO CASES

More and more courts have accepted complex claims from a doctrinal perspective, either explicitly and implicitly, in the disparate treatment context.¹⁷⁹ Nevertheless, both empirical and anecdotal evidence, based upon a reading of reported opinions, suggests that these cases are all but un-winnable, even more so than single claim cases. In this part, I consider whether multiple claim cases lose for legitimate reasons - that is, they are brought unthinkingly or even out of desperation, when it is necessary to distinguish the plaintiff from other

177. Cunningham discusses “wholism” as a “theory of radical individualism” which “asserts that there are no intersections.” *Id.* at 500..

178. A Lexis search reveals that the only case citing Crenshaw’s article is *Lam*, but it is referred to in 634 law review articles; Abrams, only *Doe v. City of Belleville*, 199 F.3d 563, 593 (7th Cir. 1997) (involving male on male sexual harassment) and 90 law review articles; and Cunningham, in no cases and 39 law review articles.

179. In addition, there has been a recent growth of “sex plus” cases relating to sub-classes of women with young children. *See, e.g.*, *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107; (2d Cir. 2005); *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 n.8 (6th Cir. 2004); *Philipsen v. Univ. of Mich. Bd. of Regents*, 2007 U.S. Dist. LEXIS 25898 (E.D. Mich. 2007); *Gee-Thomas v. Cingular Wireless*, 324 F. Supp. 2d 875, 884 n.6 (M.D. Tenn. 2004)

“single” protected group members who it can be shown were not victims of discrimination. Alternatively, do multiple claim cases fail because the courts have so constrained the universe of available proof that it is impossible for plaintiffs to tease out a culture of subtle bias against those who bring the most diversity to the workplace. The following two cases are illustrative of this conundrum.

A. *JEFFERS V. THOMPSON*

Jeffers v. Thompson is a case in which the court seems to have perceived some form of subtle discrimination at work, but nevertheless dismissed the complex claim. Jeffers, an African-American woman aged 55, claimed that she had been denied a promotion “because of her race, her gender, and race-and-gender combined, and her age.”¹⁸⁰ While she was serving as the co-director of the Office of Program and Organizational Services in the Medicaid Bureau, Health Care Financing Administration, she applied for two different promotions at the US Department of Health and Human Services. She was only African-American and the oldest person among the seven persons ranked as “best qualified” for the position.¹⁸¹ A 44 year old white man was appointed to one position; a 50 year old white woman to the other.¹⁸² Considering HHS’s motion for summary judgment, the court analyzed each of the claims separately. Because there was direct evidence of discrimination -- one of the decision-makers, a recently appointed African-American man, told the plaintiff that he couldn’t “come here in an acting position and start promoting a lots of blacks”-- the court denied summary judgment on the race claim.¹⁸³

With regard to the race/sex claim, the court, citing *Jeffries* and *Lam*, recognized the possibility that distinct stereotypes may create bias. But it went on the point out the problem of proving what it called composite claims: “the more specific the composite class, the more

180. 264 F. Supp. 2d 314, 320 (D. Md. 2003).

181. *Id.* at 321.

182. *Id.*

183. *Id.* at 325.

onerous [the plaintiff's burden of persuasion] becomes."¹⁸⁴ Indeed, the *Jeffers* court is one of the very few to acknowledge that the recognition of complex claims does not necessarily ease the way for employees.¹⁸⁵

Looking at the racial and gender composition of employees at what it viewed as the two relevant grade levels, the court found that at the grade 14 level, out of 19 employees, there were two African-American women, 13 white men, and four white women. In the next higher grade level which would have come with the promotion, there were eight men and three women, all white.¹⁸⁶ On the basis of what the court itself characterizes as "sparse" statistical evidence, it concluded that no rational jury could find "special bias" against African-American women. Similarly, the age claim was dismissed for lack of any evidence of animus.¹⁸⁷

B. *WITTENBURG V. AMERICAN EXPRESS*

In *Wittenburg v. American Express*,¹⁸⁸ the district court implicitly and without discussion recognized a claim for combined sex-age discrimination. The plaintiff was a 51 year old financial analyst who lost her job as part of a reduction in force (RIF), which required the elimination of three out of four positions in her department. In addition

184. *Id.* at 327. See also *Johnson v. Dillard's Inc.*, 2007 U.S. Dist. LEXIS 71176 (D. S. Car. 2007) (quoting *Jeffers* with approval).

185. Is it significant that the *Jeffers* judge, William D. Quarles, Jr., is African-American? A fair amount has been written about the effect of gender, and to a lesser extent race, on decision-making in the federal courts. See Sarah Westergren, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L. J. 689 (2004); Kulik, Perry and Pepper, *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Court Decisions*, 27 LAW & HUMAN BEHAVIOR 69 (2003). A number of other empirical studies conclude that the party affiliation of the president appointing a federal judge is highly predictive of the result in all civil rights matters. See Cass R. Sunstein *et al.*, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004); Tracey E. George, *Developing a Positive Theory of Decision-making in U.S. Courts of Appeals*, 58 OHIO ST. L. J. 1635, 1678-86 (1998). See also Daniel R. Pinello, *GAY RIGHTS AND AMERICAN LAW* (New York, 2003) (on issues of gay rights, this factor dwarfed all other personal characteristics, including race, religion, and sex, in predicting outcomes).

186. *Jeffers* at 330

187. *Id.* at 331.

188. *Wittenburg v. Am. Express Fin. Advisors, Inc.*, 2005 U.S. Dist. LEXIS 29471 (D. Minn. Sept. 19, 2005), *aff'd*, 464 F.3d 831(8th Cir. 2006), *cert. denied*, 127 S. Ct. 2936 (2007). Interestingly, , although the Eighth Circuit affirmed, it separated out the sex and age claims, and considered them individually, without commenting on the district court's alternative analysis.

to herself, two men, aged 41 and 36, were terminated; a male analyst aged 40 was retained. In the previous year, two male analysts over 40 were terminated. The plaintiff offered evidence that a 39 year old male analyst had been recently hired, and after her discharge, two male analysts, aged 45 and 49, were transferred into her department.¹⁸⁹ She also relied on a number of comments made to her and other employees; there was a reference to the employer's interest in hiring "younger portfolio managers" and "junior" people; another manager laid off a year earlier was told that a decision had been made to retain younger workers with more years of service ahead of them. Wittenburg's supervisor asked her at the time of termination: "Your husband has a job doesn't he?"¹⁹⁰

In granting defendant's motion for summary judgment, the court dismissed these and other comments as requiring "too great an inferential leap" to demonstrate discriminatory animus.¹⁹¹ Instead it credited the fact that the plaintiff received a lower evaluation in 2002 than the male who was retained, even though the plaintiff maintained that the employer ignored more recent performance data and that the 2002 data was purposely manipulated so that women were ranked lower.¹⁹²

C. WHY PLAINTIFFS LOST AND HOW MIGHT THEY HAVE WON

Looking at the courts' opinions in these cases, it is easy to see how the plaintiffs went down to road to alleging a complex claim, and how that decision ultimately led to defeat. Jeffers was passed over for a promotion by a younger white male and a younger white woman. Wittenburg was laid off while a younger male was retained. These facts are sufficient for a plaintiff to make out a prima facie case of discrimination.¹⁹³ But as the Second Circuit noted in a case alleging both age discrimination and discrimination against married women:

189. *Id.* at 9-10.

190. *Id.* at 14-18.

191. *Id.* at 20.

192. *Id.* at 11-12.

193. The burden shifting mode of analysis in employment discrimination actions was established in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and somewhat modified in *Desert Place, Inc. v. Costa*, 539 U.S. 90 (2003). For a discussion of the intricacies of Supreme Court doctrine in this

In our diverse workplace, virtually any decision in which one employment applicant is chosen from a pool of qualified candidates will support a slew of prima facie cases of discrimination. The rejected candidates are likely to be older, or to differ in race, religion, sex, and national origin from the chosen candidate. Each of these differences will support a prima facie case of discrimination, even though a review of the full circumstances may conclusively show that illegal discrimination played no part whatever in the selection.¹⁹⁴

Once the employer comes forward with a legitimate non-discriminatory reason for the employment action, the plaintiff's burden of proving that the reason was a pretext for intentional discrimination is overwhelmingly difficult to overcome.¹⁹⁵ In fact, a complex claim makes it more – not less – difficult to show pretext, as the *Jeffers* court suggested in a less judgmental and conclusory manner than the Second Circuit.

Plaintiffs will first to attempt to discredit the employer's legitimate non-discriminatory reason, but even in that case pretextual evidence is still required.¹⁹⁶ Proof of pretext falls into four primary categories. The most common method is to show that similarly situated employees of a different race or sex received more favorable treatment.¹⁹⁷ But who is a "comparator" when a complex claim is asserted? With a single race claim, it is enough to show that, for

area, see Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L. J. 1887 (2004). See also Michael J. Zimmer, *Slicing & Dicing Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001) (suggesting that lower courts have continued to be skeptical of victims of discrimination).

It appears, however, that in cases without "direct evidence" of discrimination, the courts still apply the basic McDonnell Douglas framework. A plaintiff must establish a prima facie case by showing: (1) that she belongs to a racial minority; (2) that she applied and was qualified for a job for which the employer was seeking applicant; (3) that, despite her qualifications, she was rejected; and (4) that, after her rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at . at 796. The test has been adopted and appropriately modified across protected categories and adverse employment employ actions.

194. *Fisher v. Vassar College*, 114 F.3d 1332, 1337 (2d Cir. 1997) (en banc).

195. *McDonnell Douglas v. Green*, 411 U.S. at 796.

196. See *St. Mary's Honor v. Hicks*, 509 U.S. 502 (1993) (even if the employer's reason is disbelieved, the employee bear the ultimate burden of proving intentional discrimination).

197. See LEX R. LARSON, EMPLOYMENT DISCRIMINATION § 8.04.

example, a similarly situated white person was not laid off. In a race/sex claim, however, courts take the view that the comparator must fall within none of the protected categories that the plaintiff alleges.¹⁹⁸ For example, the only appropriate comparator is a white male. In the typical “reduction-in-force” situation, as long as one woman or one minority group member survives the RIF, it will be difficult to rely on comparator evidence alone. In neither *Jeffers* nor *Wittenburg* was the plaintiff able to identify an appropriate comparator, within the narrow confines of the “similarly situated.”

A plaintiff can also use statistical evidence to show pretext, however.¹⁹⁹ But as the above cases demonstrate, a small statistical sample will often yield some diversity in those who also suffered the adverse employment action. The *Wittenburg* court looked only at the status of a half-dozen employees. In addition, statistical evidence is easily manipulated, depending upon the pool of workers analyzed. In *Jeffers*, for example, the court considered the racial and gender make-up of two grade levels in the small department to which the plaintiff was assigned, rather than the one level for which the plaintiff sought a promotion, thus weakening her statistical showing.²⁰⁰ Moreover, some courts refuse to rely on a small statistical sample, even when it clearly supports the plaintiff’s claim.²⁰¹

Another type of evidence that can be used to show pretext is the testimony of other employees concerning how they also were treated in a discriminatory manner. The admissibility of so-called “me too” evidence stems from the Supreme Court’s recognition that: “evidence that may be relevant to any showing of pretext includes . . . [the

198. See *Philipsen v. University of Michigan*, 2007 U.S. Dist. Lexis 25898 (E.D. Mich. 2007)

199. See *LARSON*, *supra* note at § 9.

200. *Jeffers* at .

201. See, e.g., *Causey v. Balog*, 929 F. Supp. 900 (D. Md. 1996), *aff’d*, 162 F.3d 795 (4th Cir. 1998). The plaintiff was a deputy commissioner for the Department of Transportation. When the Department was eliminated in 1992, its duties were subsumed into another department. Six managers were given the option of being laid off or taking a position in the new department. In 1994, six managers, including the plaintiff, were laid off from the new department. The plaintiff filed suit under Title VII and the ADEA, contending that he was discriminated against as an older, white male. He presented evidence showing that he was the only manager who did not receive a lateral transfer, that the only other manager who received a lower-paying position was also white, and that when six managers were subsequently laid off from the new department, all were over 40 and five of the six were white. Recognizing that the Fourth Circuit has held it improper to rely on statistical evidence of this nature involving small numbers of terminated employees, the court held that the plaintiff failed to present sufficient evidence to reliably support an inference of discrimination.

employer's] general policy and practice with respect to minority employment,"²⁰² and that "personal experiences with the company [bring] the cold numbers to life."²⁰³ But "me too" evidence poses several problems in multiples claims. First, just as with statistical evidence, the employee must identify other employees who fall within the same sub-class: for example, other older women who were subject to a RIF. On the other hand, employers can use "me too" evidence in an exculpatory fashion, to show that some older workers and some women were retained.²⁰⁴ In addition, a number of circuit courts have limited "me-too" evidence by virtue of the "same supervisor" rule: testimony of other workers is admissible only if the adverse employment action was taken by the same supervisor who made the decision challenged by the plaintiff.²⁰⁵

It was widely anticipated that the Supreme Court would provide a definitive ruling on "me too" evidence when it granted certiorari in *Sprint/United Management Co. v. Mendelsohn*.²⁰⁶ In *Mendelsohn*, the plaintiff alleged age discrimination in a RIF, and sought to offer testimony of five over-40 employees laid off by other supervisors. The Tenth Circuit reversed the district court's per se exclusion of the evidence, even though the case was not specifically brought as a "pattern and practice" action, noting:

Applying Aramburu's "same supervisor" rule in the context of an alleged discriminatory company-wide RIF would, in many circumstances, make it significantly difficult, if not impossible, for a plaintiff to prove a case of discrimination based on circumstantial evidence. Conceivably, a plaintiff might be the

202. *McDonnell Douglass*, 411 U.S. at 804-05 (footnote omitted).

203. *International Bd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

204. *See Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), in which the Supreme Court noted that employers must be allowed some latitude to introduce evidence which bears on its motive; proof that its work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent. *See also Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223 (10th Cir. 2006), cert. granted, 127 S. Ct. 2937 (2007), in which the court allowed the employer to use statistical evidence to find examples of older workers it had retained.

205. *See Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984); *Moorhouse v. Boeing Co.*, 501 F.Supp. 390 (E.D. Pa.), *aff'd mem.*, 639 F.2d 774 (3d Cir. 1980); *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982); *Williams v. Nashville Network*, 132 F.3d 1123 (6th Cir. 1997); *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180 (4th Cir. 2004).

206. *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223 (10th Cir. 2006), cert. granted, 127 S. Ct. 2937 (2007).

only employee selected for a RIF supervised by a particular supervisor. Meanwhile, scores of other employees within the protected group also selected for the RIF might work for different supervisors. In such cases, the constraints of *Aramburu* would preclude a plaintiff from introducing testimony from those other employees. Applying *Aramburu* to cases of discrimination based on an alleged company-wide discriminatory RIF would create an unwarranted disparity between those cases where the plaintiff is fortunate enough to have other RIF'd employees in the protected class working for her supervisor, and those cases where the plaintiff is not so fortunate. We do not think such disparity should exist.²⁰⁷

In an amicus curiae brief filed on behalf of Mendelsohn by a number of public interest organizations, the need to allow “other supervisor” evidence is explicitly linked to empirical data showing how poorly employment discrimination plaintiffs fare in court, “even under existing standards.”²⁰⁸ Amici also argue that the prevalence of “subtle bias” militates in favor of “other supervisor” evidence: “As discriminatory practices become less overt, the evidentiary problems for employees adversely affected by discrimination have become more pronounced. . . . It is precisely because the forms of discrimination have changed that broad evidentiary exclusions . . . are inappropriate.”²⁰⁹

But in something of a surprise move,²¹⁰ the Supreme Court ducked the issue, in a unanimous opinion by Justice Thomas.²¹¹ The Court found that the district court’s *in limine* ruling was ambiguous as to whether it was establishing a per se exclusionary rule. Thus, the circuit court erred in engaging in its own balancing of relevance and prejudice, and instead should have remanded the matter for clarification. But in dicta that surely will be the subject of much debate, Justice

207. 466 F.3d at 1229.

208. Amicus Curiae Brief of Lawyers’ Committee for Civil rights Under Law, *et al.*, available at www.abanet.org/publiced/oreview/briefs/dec07.shtml, at 11 (citing Clermont & Schwab, *supra* note , at 429, 444, 452).

209. *Id.* at 12-13.

210. According to reports of the December 2007 oral argument, it seemed likely that, at the least, the Court would require a nexus between the decision-makers: a connection between the supervisors in the sense that they conferred or were given the same directions. See www.scotusblog.com/wp/commentary-and-analysis.com

211. 2008 U.S. Lexis 2195 (Feb. 26, 2008).

Thomas noted that relevance and prejudice are fact specific inquiries, and “not generally amenable to per se rules Whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.”²¹²

Thus, “me too” evidence will remain a battleground in the proof of pretext in all employment discrimination cases. But like the other modes of proof, it poses even greater challenges for the multiple claim plaintiff. Difficult as it is to find employees willing to come forward with similar allegations of discrimination, the complex employee must theoretically find someone from the same sub-set: not just a women or an African-American, but an African-American woman. If “me too” evidence is limited to employees under the same supervisor, narrowly construed, it means that this mode of proof will be all but useless to those with multiple claims. Jeffers produced no “me too” evidence and Wittenburg offered only a hearsay comment made to an older male, which the court gave no credence.

Finally, there is the possibility of introducing expert testimony regarding stereotypical thinking to show pretext. In its 1989 *Price Waterhouse* plurality decision, the Supreme Court found expert testimony probative on the issue of sexual stereotyping in an employment discrimination context.²¹³ Many commentators have called for the increased use of expert testimony, but it remains exceedingly rare,²¹⁴ and perhaps because of the expense of retaining an expert, it has been utilized – when at all -- in class or disparate impact actions.²¹⁵ Moreover, given the changes in the composition of the

212. *Id.* at 15-16.

213. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

214. See Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 573 (2001).

215. See *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257 (N.D. Cal. 1997). In this class action, alleging both disparate treatment and disparate impact, the district court denied Home Depot’s motion to exclude sexual stereotype expert testimony under *Daubert*. After plaintiffs defeated Home Depot’s motion for summary judgment, 1997 U.S. Dist. LEXIS 16296 (N.D. Cal. 1997), the case was settled for \$87.5 million. See www.lieffcabraser.com/pdf/resume.pdf, at 14. See also *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004)

Court, and its subsequent decision in *Daubert*,²¹⁶ restricting the use of expert testimony in general, any attempt to use this mode of proof undoubtedly would be hotly contested. Not surprisingly, no expert testimony was offered in *Jeffers* or *Mendelsohn*, nor in any of the earlier sex-plus cases discussed in Part III. In *Lam*, the only successful sex plus race case, the court relied on its own understanding of sub-group stereotyping.²¹⁷

Nevertheless, expert evidence holds out great promise for the complex claimant. With regard to the traditional “sex-plus” type cases – those alleging discrimination against married women or women with children – significant progress has been made in this regard. With foundation support, the Cognitive Bias Working Group of the Program on Worklife Law, a group of social psychologists, law professors and practicing lawyers spent two years studying and documenting what has come to be called “the maternal wall.”²¹⁸ In a recent article, Joan Williams provides the resources to help employment lawyers use social psychology in maternal discrimination cases. She reviews and digests over 100 works by social scientists.²¹⁹ In addition, she challenges the notion that, given this body of scholarship and evidence that automatic stereotypes can be consciously changed, maternal wall discrimination in the workplace is a specie of unconscious or subtle bias. She labels it instead “unexamined” bias.²²⁰

Indeed, it appears that this project is having its desired effect. As notions of the maternal wall are introduced into popular discourse, plaintiffs are beginning to achieve significant victories in court, even without expert evidence.²²¹ If other types of complex claims are to be

216. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993) (requiring the trial court to determine whether expert testimony is “scientifically valid” and will assist in understanding or determining a fact in issue).

217. 40 F.3d at 1562.

218. Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMPL. RTS & EMPLOY. POL’Y J. 401 (203); see also, *Symposium: Litigating the Glass Ceiling and the Maternal Wall: Using Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 350 (2003).

219. Williams, *supra* note 215, at 427 *et seq.*

220. *Id.* at 448-49. In his article for this symposium, Marc Poirer suggests the term “unreflective bias.” Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land*, 7 EMPL. RTS & EMPLOY. POL’Y J. 459, 463 (2003).

221. See, e.g., *Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973 (W.D. Wis. 2003), *aff’d*, 383 F.3d 580 (7th Cir. 2004) (alleging failure to promote based on family responsibilities, plaintiff was awarded over a

taken seriously and have any chance of success, similar efforts must be mounted to examine and document complex stereotypes and cognitive bias.

Could Jeffers or Wittenburg have prevailed on their complex claims? Were they in fact the victims of complex bias, or rather the victims of lawyers who failed to understand the pitfalls of multiple claims? Or perhaps these employers were free of any bias? It is impossible to tell from the facts before us. What is clear, however, is that they could have never prevailed, given the cramped evidence of pretext put forward.

In order to have a fighting chance in a complex claim, it seems obvious that the evidentiary net must be cast wide. In fact, the more specific the complex claim, the wider the net must be to prove pretext. Both Jeffers and Wittenburg worked for large, hierarchal organizations: HHS and American Express. In all likelihood, at any one time, many employees would be seeking promotions at Jeffers' grade level. Similarly, the RIF that resulted in Wittenburg's termination presumably went beyond the four members of her department. Both Jeffers' and Wittenburg's supervisors had supervisors above them. To determine whether there was complex discrimination was at work, the pool of possible comparators would have to be expanded, as would the database from which statistical evidence could be gathered. "Me too" evidence would have to be sought up the chain of supervisory command.

There is nothing in discrimination law doctrine that necessarily prevents some expansion of the evidentiary pool in this manner. Again, it is impossible to tell whether the limited evidence submitted in these cases was the result of lost discovery battles or poor lawyering. In either case, change lies with education. As demonstrated by the maternal wall effort, it is critical that social scientists and lawyers begin to carefully examine and document complex stereotypes. Only then will the judiciary and fact-finders begin to take complex claims seriously.

million dollars in damages, later reduced); *Walsh v. National Computer System, Inc.*, 332 F.3d 1150 (8th Cir. 2003) (alleging hostility from her supervisor when she returned from maternity leave, including scrutiny of her work hours when no other employee's hours were scrutinized, refusal to allow her to leave to pick up her sick child from daycare, plaintiff was awarded \$625,000) .

VI. CONCLUSION

In the almost 45 years since the passage of Title VII, there surely has been progress towards achieving the goal of equal opportunity in the workplace. Blatant discrimination may well be rare, but it is a mistake to relegate remaining bias solely to the realm of the subtle, unconscious or implicit. I contend that there a good portion of workplace discrimination today that finds its roots in complex bias.

Complex bias claims show exponential growth at the EEOC level, and given workplace demographics, it can be predicted that they will continue to do so. EEOC procedures encourage the filing of complex claims, whether or not grounded in fact, because of its crude intake instruments. Once they reach the federal courts, complex claim loss rates closely approach 100%.

Those courts that even bother to engage in an intersectional analysis of complex claims do little more than acknowledge an obvious proposition: actionable discrimination can be addressed to sub-class of a protected group. The corollary of that proposition is never explored, however. The more specific the identity of the sub-class member, the more difficult it becomes to prove that she has been singled out for discriminatory treatment. For comparative purposes, courts do not look beyond a narrow segment within the employer's hierarchy. Employers can point to singly protected workers who have not suffered the adverse employment action complained of by the complex claimant. To prove that the assert reason for the adverse action is pretextual, the complex claimant is hard pressed to find comparative, statistical or anecdotal evidence within these confines.

Lawyers should advocate for and courts should recognize the need to cast a wider evidentiary net in complex claims. Moreover, social science data relating to the nuanced stereotypes confronted by the complex subject must become part of the public and judicial consciousness if complex claims are to be treated with the seriousness that they deserve.

