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Intersectionality Problems with Gendered Disability Discrimination

Thomas E. Simmons*

Title I of the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in the context of employment, but it has not always worked flawlessly. In fact, empirical data has suggested that its effect on overall employment for individuals with disabilities has been neutral to negative. The ADA has worked even less well for women with disabilities than for men. Why would this be so? Professor Jennifer Bennett Shinall's forthcoming law review article, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination* considers this question.¹ In answering it, she confronts the widespread problems of what legal scholars call "intersectionality."

In the twenty-six years now since the ADA was enacted by Congress and signed by President George H.W. Bush in 1990, men with disabilities have fared better in the job market than women.² Several labor economists have demonstrated this fact empirically. One leading study found that following the passage of the ADA, the average number of weeks worked per year for women with disabilities declined more than the average number of weeks worked for men with disabilities.³ Another, examining the impact of state disability discrimination laws, concluded that in terms of workers with

Intersectionality
(Continued on page 9)



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Intersectionality

(Continued from page 8)

disabilities, women's earnings declined more than men's earnings.⁴ Both studies are unfortunately consistent with other studies which have uniformly concluded that the ADA's impact on the employability of individuals with disabilities generally was either neutral or negative.⁵ A possible explanation of these disappointing results in general might be that the costs imposed on employers (such as providing reasonable accommodations) outweigh any compliance incentives (e.g., avoiding an ADA lawsuit). An explanation for why women with disabilities would suffer more negative consequences than men is more elusive.

Discrimination is frequently multidimensional. Consider an older wheelchair-bound African-immigrant Islamic woman applying for a job in a paint brush factory. If she is otherwise qualified for the job and is turned down in favor of a younger white male applicant, what might a deeper study of the employer's bias reveal? Could prejudices against individuals with disabilities, Blacks, immigrants, women, older persons, and Muslims have combined forces to defeat an objective hiring decision? Restating the question: Can we concede that workers with more than one traditionally disadvantaged characteristic will frequently face greater bias in the workplace than those with a single characteristic?

The overlapping discriminatory effects on individuals with membership in several protected classes are known as intersectionality. Intersectionality theorists claim that the effect of having more than one protected characteristic is not merely additive but multiplicative. As Professor Shinall explains:

Intersectionality problems may arise whenever an individual possesses multiple, traditionally disadvantaged identities or minority statuses. Intersectionality implies that employment discrimination is compounded or exacerbated in the presence of multiple protected statuses; in other words, the whole discrimination experienced by a multiple-protected-status individual is more than the sum of its parts.⁶

The heart of Professor Shinall's article extrapolates from a large data sampling of nearly ten years' worth of Equal Employment Opportunity Commission (EEOC) filings from across the country.⁷ Considering the absolute number of ADA charges filed each year by sex, women on average file just slightly more charges each year than men. However, more men work full-time than women. The ADA claim gender gap widens considerably when this difference between men and women's full-time employment rates is taken into account. Using a metric of ADA charges per full-time worker reveals that female workers file 42 percent more claims than men. In the most recent year of data, the rate is more than 50 percent higher.

This gender differential is even more dramatic given the fact that some disabilities arise on the job (i.e., from workplace injuries). Women typically work in less risky jobs than men. So women should, to some degree, be filing fewer ADA claims than men insofar as they are less likely to develop dis-

abilities from on-the-job accidents. In addition, the overall labor force penetration gap between men and women should result in even fewer ADA claims by women. There are fewer female workers *overall* in the labor market – 14 percent fewer according to recent labor statistics.⁸

"Indeed, after viewing this sizable, yet previously undocumented, difference between men's and women's charge-filing rates, one question looms large – *why* are disabled women filing more ADA charges per worker?" asks Shinall. She then posits and explores two potential answers.⁹

First, it may be that women file more ADA claims than men because women are more likely to be incapacitated by an impairment. Second, women may be more likely to complain about a disability than men. If neither of these explanations can be supported, then intersectionality may be to blame. Perhaps women file more ADA claims because they simply encounter more disability discrimination than men.

By carefully sifting the data, Shinall is able to deconstruct and dismiss the first two possible explanations. She concludes that the multiplicative effect of gendered discrimination coupled with bias against individuals with disabilities is the causative agent for higher levels of ADA claims by women. Women with disabilities file more ADA claims than men with disabilities because women suffer greater rates of disability discrimination than disabled men. Women with disabilities also suffer greater rates of disability discrimination simply because they are women.

In evaluating the validity of the first hypothesis – that disabilities themselves manifest more frequently in women – it is first necessary to identify conditions which disproportionately affect women. Women obviously experience pregnancy with starkly more frequency than men and some pregnancies do result in substantially limiting impairments.¹⁰ Yet, under one percent of ADA claims by women involve maternity. Other impairments, such as rheumatoid arthritis, also occur more frequently with women. Other impairments (like hearing loss) are statistically more common with men. Shinall's analysis of government statistics reveals that the percentage of men who report one or more functional limitations is slightly higher than women.¹¹ Thus, she concludes, women are no more likely to experience a disability than men.¹²

The second hypothesis – that women are more likely to complain about a disability – also lacks evidentiary support. Stereotypes suggest that women complain more than men. The psychological literature does not bear this out.¹³ Still, perhaps men are more hesitant to raise the issue of a disability with a supervisor than women. If this were true, then men's disability discrimination charges would turn out to be, on average, more meritorious than women's, since men would be filing EEOC complaints only in more egregious cases. The data refutes this idea as well. No systematic difference can be discerned between the outcomes of men's and women's ADA claims; neither sex tends to file more meritorious claims than the other.

Intersectionality
(Continued on page 14)

Intersectionality

(Continued from page 9)

By process of elimination, then, Professor Shinall convincingly concludes that women with disabilities simply encounter greater rates of disability discrimination on account of their sex.¹⁴ Moreover, her analysis demonstrates that as instances of disability discrimination increase, the likelihood of sex discrimination also increases. This is intersectionality demonstrated empirically. Sex discrimination and disability discrimination are not merely additive; they are compounding. Women working in male-dominated industries like construction, for example, file 176.4% more ADA charges per worker than men.¹⁵ This is not because women have more disabilities than men, nor can it be explained on the basis that women are more willing to file an ADA claim than men. This is because of sex discrimination.

These are sobering conclusions in view of the fact that neither Title VII nor the ADA account for this social reality. Both acts require strict categorization of claims, meaning one cannot claim discrimination based on sex *and* disability in either a Title VII or an ADA claim. The devastating effects of sex discrimination's intersection with disability discrimination merit further study. Discrimination law reform should take account of intersectionality, and it should do so with some urgency.

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¹ Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINNESOTA LAW REVIEW --- (2017) (forthcoming), available at <http://ssrn.com/abstract=2759457>.

² Pub. L. 101-336, 104 Stat. 327, enacted July 26, 1990, codified at 42 U.S.C. § 12101 *et seq.* (2015); Shinall, *supra* note 1, at 6.

³ Daron Acemoglu and Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 920-57 (2001).

⁴ Kathleen Beegle and Wendy A. Stock, *The Labor Market Effects of Disability Discrimination Laws*, 38 J. HUM. RESOURCES 806, 810-59 (2003).

⁵ See Shinall, *supra* note 1, at 13 n. 52 (listing studies).

⁶ *Id.* at 4.

⁷ *Id.* at 18. The data included every charge filed between 2000 and 2009 but because of differences in the way the EEOC itself collected the data, most of Shinall's analysis focuses on the 2000-2006 time period. *Id.* The data was obtained through a Freedom of Information Act request. *Id.*

⁸ *Id.* at 20.

⁹ *Id.* at 21 (emphasis in original).

¹⁰ The Pregnancy Discrimination Act – an amendment to Title VII – categorizes employment discrimination on the basis of pregnancy as unlawful sex discrimination. 42 U.S.C. § 2000e(k).

¹¹ *Current Population Survey (CPS) Supplement Files*, NATIONAL BUREAU OF ECONOMIC RESEARCH, <http://nber.org/data/current-population-survey-data.html>.

¹² Professor Shinall also dismantles the possibility that *when* women develop disabilities has a greater impact on their ability to work. If this is the case, then a parallel trend in rates of SSDI (Social Security Disability Insurance) enrollment by sex ought to exist. It does not. “In fact, ... the opposite pattern is apparent in SSDI receipt by sex, with men consistently collecting disability payments at higher rates than women.” Shinall, *supra* note 1, at 24.

¹³ See Shinall, *supra* note 1, at 25 n.86 (citing sources).

¹⁴ *Id.* at 29-31.

¹⁵ *Id.* at 31.

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