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Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis - A Pragmatic Model

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COMMENT

CONSIDERING HYBRID SEX AND AGE DISCRIMINATION CLAIMS BY WOMEN: EXAMINING APPROACHES TO PLEADING AND ANALYSIS - A PRAGMATIC MODEL

I. INTRODUCTION

Many mid-life to older women face employment discrimination that does not fit easily into already existing categories under the Age Discrimination in Employment Act of 1967 ("the ADEA"), or the Civil Rights Act of 1964 ("Title VII") because the discrimination often involves a fusion of both age and sex.[1] The discrimination cases brought by older women on the basis of age and sex, however, are scarcely considered by lawyers or courts as a single cause of action concerning the combination of sex-and-age bias.[2] A recent study prepared by the Women's Legal Defense Fund ("WLDF Study") involved 335 cases alleging age and sex discrimination that spanned two decades and reported that women were the overwhelming majority of litigants in those cases.[3] Yet in only ten percent of the opinions

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1. 29 U.S.C. § 621 (1994); 42 U.S.C. § 2000 (1994).

2. *See* HELEN NORTON, et al, EMPLOYMENT DISCRIMINATION AGAINST MID-LIFE AND OLDER WOMEN: HOW COURTS TREAT SEX-AND-AGE DISCRIMINATION CASES [hereinafter "WLDF STUDY"] (AARP, 1996). *See id.* at 2, 3,15.

3. *See* WLDF STUDY, *supra* note 2 at 2, 3. The WLDF STUDY examined all published and unpublished state and federal court opinions on cases involving sex and age discrimination claims between January 1, 1976 and September 30, 1995, for a total of

reviewed were the age and sex discrimination claims evaluated as combined discrimination.[4]

One might therefore speculate that the problem of combined discrimination against older women as "older women" is slight, or has gone virtually unnoticed. However, a steadily increasing body of discourse has considered and found support for the proposition that older women face employment and societal discrimination that is separate and distinct from that of older men and younger women.[5] The WLDF Study points to a long-

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335 cases. *See id.* at 2. The WLDF STUDY did not include jury verdicts that were unaccompanied by a written decision, or out-of-court settlements. *See id.* at 1. Of the total cases reviewed, eighty-one percent of the claims were made by women, while sixteen percent involved male plaintiffs. *See id.* at 3. All other cases involved class actions or multiple plaintiffs of both sexes. *See id.* at 3.

4. *See id.* at 2, 15.

5. *See generally,* FRANCINE WEISS, OLDER WOMEN AND JOB DISCRIMINATION: A PRIMER (Older Women's League 1985), FRANCINE WEISS, EMPLOYMENT DISCRIMINATION AGAINST OLDER WOMEN: A HANDBOOK ON LITIGATING AGE & SEX DISCRIMINATION CASES (Older Women's League 1989); Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where Its Been, Where It Is Today, Where Its Going*, 34 U. RICH. L. REV. 579, 605-12 (1997) [hereinafter "THIRTY YEARS UNDER THE ADEA"] (discussing the dramatic increase in women as plaintiffs under the ADEA and the increasing number of women in the demographics on older workers; suggesting a further increase in their participation under the ADEA); Patti Buchman, Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance,* 85 COLUM. L. REV. 190, 195-203 (1985) (arguing that discrimination against television anchor women on the basis of age-related appearance is sex discrimination under Title VII); Izquierdo Priesto v. Mercado Rosa, 894 F.2d 467 (2nd Cir. 1983) (plaintiff alleged an Equal Protection violation on the basis of age and sex as a result of her termination and subsequent replacement by a younger woman where the employer claimed that it needed "new faces" and that plaintiff's replacement was "young, attractive and refreshing"); Haskins v. Secretary of HHS, 35 Fair Empl. Prac. Cas. (BNA) 256 (W. D. Mo. 1984) (challenging employer policy to consider only that last ten years of experience when selecting employees for promotional opportunities because the practice had a disparate impact on older workers, particularly women who were more likely to interrupt their careers for family responsibilities); Judy Klemesrud, *"If Your Face Isn't Young": Women Confront Problems of Aging*, N.Y. TIMES, Oct. 10, 1980, at A24 (discussing participants and programs at the opening session of a White House Mini-Conference on societal problems facing older women); Bob Levey, *Loads of Bias If You're an Older Woman,* WASHINGTON POST, July 21, 1997, at C10 (discussing experiences of older women with employment discrimination); Sasha Sadan, *Knesset Panel Told of Amindar's Discrimination Against Older Women*, JERUSALEM POST, Feb. 15, 1994, at 3 (discussing claims by older Jerusalem women of being retired early because of their ages, despite government anti-discrimination law prohibiting such conduct and allegations that company gave women lower severance packages than early retired men); Darlene Stevens & Barbara Sullivan, *An Age Old Problem: Job Gains made by Young Don't Translate to Later Years*, CHI. TRIB., May 12, 1991, at 12 (discussing disparaging media images of older women in the workplace); Senator Carol Mosley-Braun, *Women's Retirement Security*, 4 ELDER L.J. 493 (1996) (discussing the

standing problem: lawyers and courts often fail to adequately consider the "hybrid" nature of the discrimination older women experience.[6] As a consequence, older women who experience hybrid discrimination are not fully redressed by the legal system.

The term "hybrid discrimination" is particularly appropriate to describe claims of combined age and sex discrimination against older women because "hybrid" is defined as "a person or group produced by the blending of two diverse cultures or traditions."[7] Hybrid discrimination against mid-life to older women is a hybrid of two long and unfortunate traditions of discrimination against women and older persons.[8] As with the blending of two traditions, hybrid discrimination against older women fuses the experience of two different phenomenon into one, to produce something new: discrimination against older women as "older women." Increased attention to the problem of hybrid discrimination against older women is necessary because the participation of older women in the workforce has increased substantially over the last twenty years and is expected to expand in the next century. [9] This expanding

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standard of living gap between men and women at retirement as a result of their participation in the workforce).

6. Throughout this comment, the author refers to combined claims of age and sex discrimination by older women as "hybrid" discrimination claims. Hybrid discrimination in this context is discrimination against older women as "older women."

7. *See* WEBSTER'S INTERNATIONAL NEW WORLD DICTIONARY 1106 (3d ed. 1993).

8. *See generally*, HAROLD L. SHEPPARD & SARA E. RIX, THE GRAYING OF WORKING AMERICA: THE COMING CRISIS IN RETIREMENT-AGE POLICY (1977); Diane Herz and Phillip L. Rones, *Institutional Barriers to Employment of Older Workers*, 112 MONTHLY LAB. REV. 14 (1989); JUDITH C. HUSHBECK, OLD AND OBSOLETE: AGE DISCRIMINATION AND THE AMERICAN WORKER, 1860-1920 (Garland 1989); JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW (2d Ed. 1990) discussing the experiences of older employees with age discrimination. For a discussion of the experiences of female employees with gender discrimination, *see generally*, CLAIRE BROWN AND JOSEPH A. PECHMAN, GENDER IN THE WORKPLACE (1987); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW (1992); GENDER INEQUALITY AT WORK (Jerry A. Jacobs, ed., Sage Publications 1995).

9. Female Participation in the Civilian Workforce, 1980 – 2005 (millions)

Ages	1980	1990	1995	1996	2000(proj.)	2005(proj.)
35-44	8.6	14.7	16.6	17.0	17.8	17.1
45-54	7.0	9.1	11.8	12.4	14.8	17.1
55-64	4.7	4.9	5.4	5.5	6.6	8.6
65+	1.2	1.5	1.6	1.6	1.8	2.0

workforce participation by older women may also increase potential litigation under both Title VII and the ADEA for hybrid discrimination.[10] However, unless the current analytical structures under Title VII and the ADEA evolve to more adequately consider the hybrid nature of cases brought by many older women, the lack of adequate redress will become worse.

This Comment examines two ways in which the legal system does not adequately consider older women's claims of discrimination. The issues are presented in two conceptual groupings. The first grouping discusses how barriers to the recognition of hybrid age and sex discrimination claims are created when courts do not analyze the evidence of discrimination together as evidence of discrimination against "older women."[11] Often, courts analyze hybrid claims of age and sex discrimination separately under Title VII and the ADEA, even when the evidence of discrimination points to a hybrid claim involving discrimination directed at a subset of a protected group, such as older women, rather than older employees or women generally.[12] This separate analytical approach restricts

Female Participation in the Civilian Workforce, 1980 – 2005 (percent)

Ages	1980	1990	1995	1996	2000(proj.)	2005(proj.)
35-44	65.5	76.4	77.2	77.5	78.7	80.0
45-54	59.9	71.2	75.4	76.4	78.2	80.7
55-64	41.3	45.2	49.2	49.6	53.4	56.6
65+	8.1	8.6	8.8	8.6	9.5	10.2

Source: U. S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 2307 tbl. 620, 397 (1997). *See* last two columns discussing projections of labor force participation into the year 2000.

10. *See* THIRTY YEARS UNDER THE ADEA, *supra* note 5 at 610-12 (discussing expansion of older women as plaintiff's under the ADEA and possible causes for the increase).

11. *See* case illustration, Saes v. Manufacturers Hanover Trust Co., No. 90-0536, 1991 U. S. Dist. LEXIS 14634 (S.D.N.Y. Oct. 11, 1991), *see infra* notes 220-53 and accompanying text.

12. *See e.g.* Murdock v. BF Goodrich, No. 15654, 1992 WL 393158 (Ohio Ct. App. Dec. 30, 1992) (requiring separate analysis of plaintiff's age and sex discrimination claims under Title VII and the ADEA); Scharnhorst v. Independent Sch. Dist. #710, 686 F.2d 637 (8th Cir. 1982), *cert. denied*, 462 U. S. 1109 (1983) (finding error when lower court combined plaintiff's age and sex discrimination claims rather than separately analyze each under Title VII and the ADEA) *See also* Degraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 145 (E. D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977) (requiring separate analysis of Black woman's race and sex discrimination claims).

a court's consideration of how the discrimination intersects and can allow employers to defeat older women's claims by showing older men and younger women are treated favorably, though unfavorable treatment of older women exists.[13]

The second grouping discusses how attorneys can fail to recognize and therefore, effectively present the hybrid nature of the bias in an older woman's discrimination claim.[14] First, an attorney may simply plead discrimination on the basis of age, without sex, or vice versa because lawyers may neither consider nor investigate whether combined sex and age bias is involved in the discrimination claims brought by an older woman. The decision to plead age bias without sex can weaken an older woman's chances of obtaining adequate redress for the discrimination because it does not provide a complete picture of the discrimination she experiences since it takes an either/or approach.[15] Second, lawyers may not examine the benefits of pleading hybrid age and sex discrimination as "sex-plus" discrimination under Title VII in demonstrating to a court that an older woman's claims of age and sex discrimination involves hybrid discrimination against her as an "older woman."[16]

In Part II, the Comment presents the theoretical models used to establish a discrimination claim under Title VII and considers court recognition of multi-factor discrimination claims involving sex-plus-race and sex-plus-age under the stat-

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13. *See Saes*, 1991 U. S. Dist. LEXIS 14634 and *supra* notes 250-54 and accompanying text.

14. *See* case illustration, Crawford v. Medina General Hospital, 96 F.3d 830 (6th Cir. 1996) *infra* notes 261-62 and accompanying text.

15. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of AntiDiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 189 U. CHI. LEGAL F. 139 (discussing the practical and theoretical shortcomings of a "sectional approach" to analyzing combined discrimination claims in the context of race and sex discrimination); Elaine W. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. REV. 793 (1980) (discussing the problems of compound discrimination created when race and sex discrimination claims are not considered in their totality as discrimination against a women as a "woman of color").

16. "Sex-plus" discrimination involves employment practices that treat employees differently on the basis of their sex plus another characteristic. *See infra* notes 96-106 and accompanying text for a discussion of the "sex-plus" model of alleging discrimination under Title VII.

ute.[17] Part II exposes a general presumption in the reasoning of the courts analyzing hybrid discrimination against older women that separately, either Title VII or the ADEA provide adequate protection for their discrimination claims, while the case outcomes repeatedly result in adverse judgment against plaintiffs on one or both claims.[18] Part III introduces the theoretical models for alleging discriminatory treatment under the ADEA and discusses the uniform disfavorable treatment by courts of "age-plus" other factor discrimination claims under the ADEA.[19]

Next, Part IV examines problems created when courts fail to recognize the hybrid nature of many of the age and sex discrimination claims brought by older women because a number of courts separate age and sex discrimination into distinct categories and consider the evidence of discrimination individually. [20] *Saes v. Manufacturers Hanover Trust Co.* is discussed to illustrate one court's use of an individualized analyti-

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17. Specifically, Part II of the comment discusses the theoretical models under Title VII for disparate treatment claims, harassment based upon sex, and "sex-plus" discrimination. *See infra* notes 33-106 and accompanying text. It then examines court treatment of "sex-plus" discrimination involving race and sex claims by women of color. *See infra* notes 107-18 and accompanying text. The comment also discusses current court treatment of age and sex discrimination claims by older women seeking recognition as a protected subclass under the "sex-plus" model available in Title VII actions. *See infra* notes 119-46 and accompanying text.

18. *See* the discussion of *Murdock*, 1992 WL 393158 and *infra* notes 125-29 and accompanying text; *see also* the discussion of *Thompson v. Mississippi Personnel Bd.*, 674 F. Supp. 198 (N.D. Miss. 1987) *infra* notes 120-24 and accompanying text, wherein both courts denied the recognition of discrimination claims by older women as "older women" in analyzing those claims. In those cases, the court's concluded that the ADEA and Title VII provide separate remedies to older women for their discrimination claims. In both instances however, their claims were defeated by evidence of favorable treatment given to other women (under Title VII) and older male employees (under the ADEA). *See also* Lam v. University of Hawaii, 40 F.3d 1551 (9th Cir. 1994) (discussing the inappropriateness of the district court's dismissal of an Asian woman's race and sex discrimination claims by using evidence of favorable treatment of an Asian male and white female), discussed *infra* notes 112-18 and accompanying text.

19. *See* discussion of Kelly v. Drexel University, 907 F. Supp. 864 (E.D. Pa. 1995) *infra* notes 171-90 and accompanying text. *See also* the discussion in Luce v. Dalton, 166 F.R.D. 457 (S.D. Cal. 1996), *infra* notes 191-204 and accompanying text. Both courts held that an "age-plus" theory of discrimination under the ADEA does not exist. *See also* the discussion of *Good v. United States West Communications, Inc.*, No. 93-302-FR, 1995 WL 67672 (D. Or. Feb.16, 1995) *infra* notes 205-13 and accompanying text for a discussion on the question of whether *Good* supports the application of "age-plus" theory to hybrid age and sex discrimination claims under the ADEA.

20. *See, e.g.*, Melnyk v. Adria Laboratories, 799 F. Supp. 301 (W.D.N.Y. 1992).

cal model under Title VII and the ADEA that requires a plaintiff to establish and meet separate requirements under each statute in order to prove that discrimination occurred on either distinct basis.[21] *Saes* demonstrates the ways in which a separate analytical model can cause a court to ignore evidence suggesting a hybrid of age and sex in an older woman's discrimination claims wherein separate analysis of each claim can prove ineffective to address hybrid discrimination.

In Part V, the Comment discusses problems that can occur when lawyers fail to consider the hybrid nature of older women's discrimination claims and as a result, plead age discrimination, without sex discrimination or vice versa.[22] Next, Part V critically analyzes the court rationale in *Murdock v. B.F. Goodrich* and *Thompson v. Mississippi Personnel Bd.* wherein each court refused to recognize older women as a distinct group for protection under Title VII or the ADEA.[23] Part V also argues for the further extension of the "sex-plus" framework under Title VII to include hybrid claims of age and sex discrimination by adopting the reasoning articulated in *Arnett v. Aspin* and argues that "age-plus-sex" claims should be cognizable under the ADEA.[24]

In Part VI, the Comment presents the author's recommendations for an alternative framework to the individualized analytical model used by courts for analyzing hybrid discrimination claims: a hybrid approach.[25] Part VI explains the bene-

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21. *See* No. 90-0536, 1991 U. S. Dist. LEXIS 14634 (S.D.N.Y. Oct. 11, 1991) *infra* notes 220-53 and accompanying text.

22. In this section, the Comment makes reference to various types of statements and conduct that may raise an issue of hybrid age and sex discrimination in an older woman's discrimination claims. *See infra* notes 261-63 and accompanying text for discussion.

23. *See* No.15654, 1992 WL 393158 (Ohio Ct. App. Dec. 30, 1992), 674 F. Supp. 198 (N.D. Miss. 1987).

24. *See* 846 F. Supp. 1234, 1238-40 (E.D. Pa. 1994) (articulating the reasoning for extension of "sex-plus" to age and sex discrimination claims). *See infra* notes 130-46 and accompanying text for discussion.

25. A hybrid approach is a method of analyzing cases that involve hybrid or multifactor discrimination. Under this approach, courts can consider how the evidence of one type of discrimination supports an inference that another type of discrimination also played a part in the challenged employer conduct. For a discussion of the hybrid approach, with case illustrations, *see infra* notes 276-319 and accompanying text.

fits of a hybrid approach to courts because it allows them to consider how the evidence of one type of discrimination supports an inference of another type of discrimination, in order to provide comprehensiveness, rather than a segmented view of the discrimination.[26] Part VI also articulates a general pragmatic model for assessing older women's hybrid claims of discrimination so as to assist in providing complete relief to victims of hybrid discrimination.[27]

II. THE CIVIL RIGHTS ACT OF 1964 (AS AMENDED BY THE CIVIL RIGHTS ACT OF 1991)[28]

When Congress enacted the Civil Rights Act in 1964, its central focus was to eradicate race discrimination against African-Americans and other minority groups.[29] Yet at the time of its passage, Congress extended Title VII's coverage beyond race to include the historically disadvantaged category of sex under its provisions.[30] One of the purposes of Title VII is to remove

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26. *See* Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104 (9th Cir. 1991); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987); Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985).

27. Part VI also establishes a framework for lawyers and judges upon which to assess whether hybrid discrimination is involved in the discrimination claims of an older woman. *See infra* note 320 and accompanying text.

28. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

29. 78 Stat. 253 (1964), *amended by* 105 Stat. 1071 (1991). *See* United Steelworkers of America v. Weber, 443 U.S. 193, 202-03 (1979) (The primary concern of Congress was the economic conditions of Blacks in society).

30. *See* 42 U.S.C. § 2000e–2002 (a)-(d) (1994) of Title VII sets out the substantive standard of employer liability for employment discrimination. Therein it states in relevant part:

> (a) It shall be an unlawful employment practice for an employer –
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> (b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin.

discriminatory practices and devices that operate in society to deny equality of employment opportunity to those protected by its provisions.[31] To that effect, Title VII makes it an unlawful employment practice for an employer, employment agency, or labor organization to refuse to hire, discharge, or to otherwise discriminate, limit, segregate, or classify employees on the basis of their race, color, religion, sex or national origin.[32]

(c) It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or to otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against any individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in, admission to, or employment in, any program established to provide apprenticeship or other training.

. . .

Id.

Title VII was originally presented as a bill to prohibit employment discrimination based on race, religion and national origin. Civil Rights Act of 1964, Pub. L. No. 88,352, *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401. The prohibition against discrimination on the basis of "sex" was added as a last minute measure. *See* Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HAST. L.J. 305, 310-12 (1968) (noting that sex discrimination was added to Title VII on the last day of consideration in order to block passage of the entire act and not to protect the employment rights of women).

31. *See* International Bd. of Teamsters v. United States, 431 U.S. 324, 328 (1977); McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

32. 42 U.S.C. § 2000e-(b)-(d) (1994). Under 42 U.S.C. § 2000e (b) (1994), the term "employer" under the Act refers to "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . " *Id.*

Under 42 U.S.C. § 2000e (c) (1994), the term "employment agency" in Title VII is defined as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such person. *Id.*

Under 42 U.S.C. § 2000e (d) (1994), the term "labor organization" in Title VII is defined as:

A. TWO THEORIES OF EMPLOYMENT DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The United States Supreme Court has articulated two general theories of employment discrimination for Title VII claims: disparate treatment and disparate impact.[33] In a disparate treatment case, the plaintiff must allege that her employer treated some employees less favorably than others on account of the individual's race, color, religion, sex, or national origin.[34] The plaintiff must also prove that this disparate treatment was manifested by either systemic or individual disparate treatment.[35] In a disparate impact suit, the plaintiff charges that a neutral policy or practice of the employer causes a significantly heavier adverse impact upon a segment of the employees covered by Title VII than other employees.[36]

1. The Disparate Treatment Models of Discrimination and the Requirement of Intent to Discriminate

In order to establish a violation of Title VII under the disparate treatment theory of discrimination, a plaintiff must prove that the employer's action was taken with the intent to dis-

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a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged which employees participate and in which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

Id.

Exemptions from Title VII's coverage are provided to religious corporations associations and educational or social institutions that employ persons of a particular religious affiliation. 42 U.S.C. § 2000e-2001(a) (1994). In addition, tax-exempt private clubs are exempt from Title VII coverage. 42 U.S.C. § 2000e (b) (1994). Indian tribes, businesses on or in the vicinity of Indian reservations where they provide preferences to those persons living therein are exempt. 42 U.S.C. § 2000e –2(i) (1994). Aliens employed outside of the United States are also exempt. 42 U.S.C. § 2000e –1(a) (1994).

33. *See* Hazen Paper Co v. Biggins, 507 U.S. 604, 609 (1993).

34. *See Teamsters*, 431 U.S. at 335–36 n.15 (1977). Intent to discriminate does not require animus or prejudice; benign motivations may also violate Title VII. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282-83 (1976).

35. *See Hazen*, 507 U.S. at 610.

36. *See Teamsters*, 431 U.S. at 335-36 n.15.

criminate.[37] Where systemic disparate treatment is involved, the employer's conduct demonstrates an intent to discriminate when formal policies are adopted that take into account the employee's race, sex, or some other trait protected under Title VII.[38] Systemic disparate treatment may also exist when the employer has no formal policy of discrimination, yet consistently discriminates against members of a protected group under Title VII.[39]

On the other hand, in an allegation of individual disparate treatment, the plaintiff challenges the employer's actions as discriminatory on the basis of a protected characteristic, such as race or sex.[40] Though the plaintiff's proof may include evidence alleging that a general atmosphere of discrimination or discriminatory acts against other individuals existed, a plaintiff in an individual disparate treatment case focuses on the discriminatory conduct which is directed at plaintiff.[41] Both the systemic and individual disparate treatment theories of discrimination require proof that the employer intentionally discriminated.[42]

2. The Disparate Impact Theory: No Requirement of Discriminatory Intent in order to Violate Title VII

Under the disparate impact theory of discrimination, the plaintiff is not required to show that the employer possessed the intent to discriminate against her in order to prove that a violation of Title VII occurred.[43] Disparate impact theory challenges "employment practices that are facially neutral in their

37. *See id.*

38. *See Hazen*, 510 U.S. at 610.

39. *See id. See, e.g., McDonald*, 427 U.S. at 283 (even though no formal policy of discrimination existed, employer violated Title VII by firing white employees, but not black employee for same offense).

40. *See Teamsters*, 431 U.S. at 335-36 n.15.

41. *See e.g.*, Conway v. Electro Switch Corp., 825 F.2d 593 (1st Cir. 1989). The additional evidence showing discrimination against other persons and general bias is often provided in order to bolster the claim by showing that a general atmosphere of discrimination existed and/or that the employer treated individual's similarly situated to the plaintiff unfavorably, such as other women, so that the employer more likely than not treated plaintiff unfavorably. *See id.*

42. *See Teamsters*, 431 U.S. at 335-36 n.15.

43. *See id.*

treatment of different groups, but that in fact fall more harshly on one group than another."[44] In a claim for disparate impact, a plaintiff must establish that the employer's policies creates a class imbalance between the actual workforce composition and what it should be if discrimination had not occurred.[45] To establish that a disparate impact exists, plaintiffs generally rely heavily upon statistical disparities.[46]

B. ESTABLISHING A CASE OF DISPARATE TREATMENT UNDER TITLE VII[47]

In order to establish a case for disparate treatment, the plaintiff must demonstrate that the employer's action was motivated by discriminatory intent.[48] The plaintiff may establish intent to discriminate as a result of either direct, inferential, or patterns and practice evidence proving intent to discriminate.[49]

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44. *Id.*

45. *See id.* at 340 n.20; *see also* Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800 (5th Cir. 1982).

46. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

47. This section discusses only individual disparate treatment claims and models of proof used therein because those cases discussed in the sections following, with the exception of *Thompson v. Mississippi State Personnel Bd.*, 674 F. Supp. 198 (N.D. Miss. 1987), involve discrimination claims alleging individual disparate treatment. Moreover, the WLDF STUDY found that only five percent of the claims alleging age-and-sex discrimination used the disparate impact model to state a claim for discrimination. *See* WLDF STUDY, *supra* note 2, at 12. For a more detailed discussion of the disparate impact model of discrimination under Title VII, *see* Pamela A. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORD. L. REV. 523 (1991); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV 1297 (1987);

48. *See Teamsters,* 431 U.S. at 335-36 n.15. The Supreme Court has held that the question of whether or not the employer intends to discriminate as a result of its actions is a question of fact. *See* United States Postal Service v. Aikens, 460 U.S. 711, 715 (1983) (when defendant responds to a prima facie case by offering reason for plaintiff's rejection; fact finder then determines the ultimate factual issue of whether defendant intentionally discriminated); Pullman Standard v. Swift, 456 U.S. 273, 289 (1982) (whether differential impact on seniority system on Blacks reflect an intent to discriminate is a pure question of fact, not mixed question of law and fact).

49. *See* Lee v. Russell County Bd. of Educ., 684 F.2d 769, 773-74 (11th Cir. 1982); *Teamsters*, 431 U.S. at 335-36 n.15.

1. The Role of Direct Evidence in Satisfying the Intent To Discriminate Requirement

Direct evidence of an illegal motive consists of written or spoken words demonstrating bias against a protected group, such as "women should not work outside of the home," "blacks can't do this job," or "I would never hire a foreigner."[50] The plaintiff's evidence must be able to connect the expressed bias to the challenged employer action in order to establish discriminatory intent.[51] Once direct evidence of discriminatory intent is presented, a prima facie case of discrimination is established.[52] The employer is then subject to liability for the impermissible discrimination.[53]

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50. *See* Slack v. Havens, 7 Fair Empl. Prac. Cas. 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091, 1092-93 (9th Cir. 1975) (court held statements by employer that "colored people should stay in their places" and "colored people are hired to clean because they clean better" as direct evidence of intent to discriminate where non-Black employees were excused from cleaning and cleaning was not in the plaintiff's job description); Buckley v. Hospital Corp. of America, 758 F.2d 1525, 1530 (11th Cir. 1985) (holding that supervisor's comment that the Hospital needed "new blood" and that he intended to recruit younger staff, in conjunction with the conduct that led to plaintiff's termination was sufficient to establish direct evidence of discrimination).

51. *See, e.g.*, Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1568 (2d Cir. 1989).

52. *See* Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985).

53. Where direct evidence of discrimination is proven, an employer may attempt to escape liability by demonstrating that the same employment decision would have been made, absent the impermissible consideration. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In *Price-Waterhouse*, a female employee of an accounting firm alleged sex discrimination in the decision not to promote her to partner. *See id.* at 231-32. Hopkins presented direct evidence that unlawful considerations entered into the employer's decision. *See id.* The employer rebutted plaintiff's evidence by demonstrating legitimate factors were also considered in reaching its decision. *See id.* at 251-52. *Price-Waterhouse's* holding was modified by the passage of the Civil Rights Act of 1991 wherein Congress provided that an unlawful employment practice is established when the complaining party demonstrates that discrimination played any part in the adverse employment action. Pub. L. No. 102-166, 105 Stat. 1071, *codified* at 42 U.S.C. § 2000e–2(m) (1994). Furthermore, Congress provided that a court finding that impermissible discrimination was involved in the employer's decision could award declaratory relief and attorney's fees attributable to the pursuit of the discrimination claim. *See* 42 U.S.C. § 2000e-2005(g)(2)(B)(i) (1994). Congress also provided a defense to a finding of complete liability under the Civil Rights Act of 1991 under 42 U.S.C. § 2000e – 5(g)(2)(B)(ii) (1994). Therein it provides that where an employer that can demonstrate the same decision would have been made in the absence of the impermissible factor, it shall not be subject to an award of damages or a court order requiring "admission, reinstatement, hiring, promotion, or payment" to the plaintiff once it has met this burden. *See id.*

Cases presenting direct evidence of discrimination can also involve proof of both legitimate and illegitimate reasons for the employer's actions. These cases, referred to as "mixed motive" cases, arise where an employer takes into account more than one reason for its decision and the plaintiff proves that at least one of the employer's motives is unlawful.[54] Once the evidence of an illegal motive is connected to the employment action, a burden of production shifts to the employer.[55] The employer must prove that the same decision would have been made, in the absence of the impermissible factor in order to escape complete liability for the discrimination.[56]

2. The Use of Inferential Evidence to Establish an Employer's Discriminatory Intent

A plaintiff may also establish intent to discriminate absent direct evidence, by creating an inference of discriminatory intent through the use of a three-step analytical framework articulated in *McDonnell-Douglas Corp. v. Green*.[57] The *McDonnell-Douglas* framework requires that a plaintiff in a Title VII action must carry the initial burden of establishing a prima facie case of discrimination.[58] The plaintiff must show: (i) membership in a protected group, (ii) that she applied and was qualified for a job which the employer had available, (iii) that she was rejected, and (iv) that following the rejection, the employer continued to seek applicants from individual's with the plaintiff's qualifications.[59]

The three steps articulated in *McDonnell-Douglas* to infer discriminatory intent begin with the establishment of the

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54. *See Price-Waterhouse*, 490 U.S. at 250 (*modified by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071). *See also e.g.*, Miller v. CIGNA Corp., 47 F.3d 586, 597 (3d Cir. 1995).

55. *See Price-Waterhouse*, 490 U.S. at 252. A burden of production requires a party to introduce enough evidence to avoid an adverse resolution by the judge. *See* GLEN WEISSENBERGER, WEISSENBERGER'S EVIDENCE 53 (2d ed., Anderson Publishing Co. 1995) [hereinafter "WEISSENBERGER'S EVIDENCE"]. *See also supra* note 53 for an explanation of what liability attaches at this point.

56. *See* 42 U.S.C. § 2000e-2005(g)(2)(b)(i) & (ii) (1994).

57. 411 U.S. 792 (1973).

58. *McDonnell-Douglas*, 411 U.S. at 802.

59. *See id.*

prima facie case.[60] Next, the burden of production shifts to the employer.[61] The burden requires the employer-defendant to articulate a "legitimate, nondiscriminatory reason" for the employment decision.[62] The employer's reason for the challenged action must be one from which a court could infer a lawful motive for the employment decision.[63] If the employer fails to present a legitimate, nondiscriminatory reason, a judgment in favor of the plaintiff may be entered.[64] However, the inference of discrimination created by the prima facie case is destroyed once the employer carries the burden of producing a legitimate, nondiscriminatory reason for its action.[65] Finally, the burden shifts back to the plaintiff, this time as a burden of persuasion, to prove to the trier of fact that the employer's explanation for its action is not the true reason, or that it is a pretext for the employer's discriminatory motive.[66]

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60. *See id.*

61. *See id.*

62. *McDonnell-Douglas*, 411 U.S. at 802.

63. *See id.* at 802-03. An employer can also challenge the facts used by plaintiff to establish a prima facie case, such as the plaintiff did not meet the minimum qualifications to be considered for the position. *See e.g.,* Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 813 (8th Cir. 1983) (plaintiff need only prove qualifications to the person who received the position to meet her prima facie burden in proving employment discrimination); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253 (8th Cir. 1981) (to establish a prima facie case of discriminatory discharge, appellants must show, *inter alia*, that they were capable of performing the job).

64. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.9 (1981). The Supreme Court decision in St Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) modified the framework discussed in *Burdine*. The Court majority in *Hicks* held that the rejection of an employer's asserted reasons for its actions does not require the trier of fact to render a judgment for the plaintiff. *Hicks*, 509 U.S. at 519.

The *Hicks* decision endorses the view that even when a plaintiff has met the *McDonnell-Douglas* burden shifting test and the employer has not come forth with a credible explanation for the employment action, the fact finder can choose to ignore the evidence and find that *some other reason* must have motivated the employer's conduct, although the employer has not put forth such an argument. For further discussion and analysis of the decision in *Hicks*, *see* Michael J. Lambert, *St. Mary's Honor Center v. Hicks: The "Pretext-Maybe" Approach*, 29 NEW ENGLAND L. REV. 163 (1994); Michael C. Phillips, *St. Mary's Honor Center v. Hicks: The Casual Abandonment Of Title VII Precedent*, 23 CAP. U. L. REV. 1054 (1994). For cases applying the *Hicks* standard, *see* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123-126 (7th Cir. 1994); Ellis v. NCNB Tex. Nat'l Bank, 842 F. Supp. 243, 247-49 (N. D. Tex. 1994).

65. *See Burdine*, 450 U.S. at 255.

66. *See Burdine*, 450 U.S. at 256; *McDonnell-Douglas*, 411 U.S. at 804. A burden of persuasion is the burden of persuading the trier of fact of the elements of a claim or

The plaintiff's burden of persuasion may be met "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[67] This burden of persuasion rests at all times with the plaintiff.[68] If the court concludes that the plaintiff's proof is insufficient to prove intent to discriminate, the employer-defendant is entitled to a judgment.[69] If, on the other hand, the plaintiff produces sufficient evidence to raise an issue of fact as to the employer's true motivation, the fact finder must determine whether the plaintiff has carried the burden of persuasion by showing that the employer's actions were illegally motivated.[70] If the fact finder agrees, the plaintiff has met this burden, then the plaintiff must prevail, unless an employer can utilize an affirmative defense to liability.

Title VII permits the use of a bona fide seniority or merit system in establishing differing compensation, terms, privileges and conditions amongst employees, so long as they are "not the result of an intent to discriminate."[71] Employers may also utilize the statutory defense of a "bona fide occupational qualification" ("BFOQ") in disparate treatment actions for policies that take religion, sex, or national origin into consideration.[72] Employer's claims that a "bona fide occupational qualification" exists will be upheld only "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[73]

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defense in accordance with the degree of proof mandated by the substantive law. *See* WEISSENBERGER'S EVIDENCE, *supra* note 55.

67. *Burdine*, 450 U.S. at 256.

68. *See Burdine*, 450 U.S. at 256; *Hicks*, 509 U.S. at 511.

69. *See Hicks*, 509 U.S. at 519; *McDonnell-Douglas*, 411 U.S. at 807.

70. *See Hicks*, 509 U.S. at 509-10; *McDonnell-Douglas*, 411 U.S. at 807..

71. 42 U.S.C. § 2000e–2002(h) (1994).

72. *See* 42 U.S.C. § 2000e–2002(e)(1) (1994).

73. *See id. See e.g.*, Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plan v. Norris, 463 U.S. 1073, 1083-84 (1983) (holding "distinctions based on sex are prohibited under Title VII unless they fall within the narrow scope of a bona fide occupational exception"); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981) (holding that a foreign customer's preference for male employees does not establish a BFOQ).

3. Utilizing the Pattern and Practice Model as a Means to Establish Employer Intent To Discriminate

An individual plaintiff may also utilize a pattern and practice model of proof to establish a violation of Title VII, without having to prove by direct evidence that the employer intended to discriminate.[74] Pattern and practice proof of discrimination is usually involved in class action suits wherein multiple plaintiffs allege discrimination under a disparate impact theory of discrimination.[75] However, pattern and practice discrimination may also be used when an individual plaintiff alleges discrimination.[76] A plaintiff's evidence must show that the challenged conduct was a regular employer practice or pattern and created a disproportionate impact.[77] A prima facie case may be established by the use of statistics alone, or in conjunction with other evidence.[78] The evidence must be able to demonstrate that the employer's practice is a greater barrier to employment opportunities for members of the protected group than other employees.

The BFOQ defense applies to disparate treatment claims of intentional discrimination, but not disparate impact cases where a facially neutral employer practice is involved and a business necessity defense applies. International Union, United Automobile, Aerospace & Agric. Implement Workers, UAW v. Johnson Controls, 499 U.S. 187, 198-200 (1991) (holding that BFOQ defense, not business necessity, is the appropriate standard for disparate treatment cases and because the employer policy was not facially neutral, it could not constitute a disparate impact, therefore only the BFOQ defense was available). *See also* Civil Rights Act of 1991, Pub. L. No. 102-166, 1052 Stat. 1071 (1991), at § 105 ("A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title") *codified at*, 42 U.S.C. § 2000e–2(k)(1)(c)(2) (1994). *See infra* notes 82-84 and accompanying text discussing business necessity.

74. *See Teamsters*, 431 U.S. at 357-59 n.45.

75. *See e.g.*, Franks v. Bowman Transportation Co., 424 U.S. 747, 751 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). *See supra* note 42-46 and accompanying text for an explanation and articles discussing the disparate impact model of discrimination under Title VII.

76. *See* Riordan v. Kempiners, 831 F.2d 690, 698-99 (7th Cir. 1987) (holding that lower court erred in excluding statistical proof in individual discrimination case); Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1559 (11th Cir. 1986) (explaining that individual claims alleging pattern and practice discrimination follows the *Teamsters* format).

77. *See* McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1259 (10th Cir. 1988).

78. *See* Dillion v. Coles, 746 F.2d 998, 1003-04 (3d Cir. 1984).

Once the plaintiff establishes pattern and practice discrimination, the burden of persuasion shifts to the employer.[79] The employer must prove that the plaintiff was not the victim of discrimination.[80] The employer can attempt to rebut the plaintiff's showing of disparity by attacking the statistics introduced by the plaintiff to establish her case.[81] The employer may also claim an affirmative defense to a prima facie showing of pattern and practice discrimination by establishing that its practice is justified as "job related and consistent with business necessity."[82] A business necessity defense requires an employer to prove both a compelling need for the challenged practice and that its lacks effective alternatives that would not produce a similar disparate impact.[83] If the employer fails to produce evidence supporting its business justification, the plaintiff must prevail.[84]

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79. *See Teamsters*, 411 U.S. at 359.

80. *See id.*

81. *See id.* at 360-61 n.46.

82. *See* Roe v. Cheyenne Mountain Conference Resort, 920 F. Supp. 1153, 1155 (D. Colo. 1996). *See also* Dowthard v. Rawlinson, 433 U.S. 321, 329 (1977); *Griggs*, 401 U.S. at 432 (holding that the burden of proving business necessity requires "a manifest relationship to the employment in question"). In rebutting plaintiff's statistics, an employer may choose to argue that the statistics do not actually demonstrate a statistically significant adverse impact upon the protected group, or that the statistics are over-inclusive. *See, e.g.,* EEOC v. Kip's Big Boy, 424 F. Supp. 500 (N.D. Tex. 1977).

The "business necessity" defense is a judicially created defense made available to employers when a facially neutral employment policy has been shown to have a disproportionate impact on members of a protected class. The seminal case addressing "business necessity" is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the United States Supreme Court held that in order to justify the business necessity defense, an employer must show that its practice has "a manifest relationship to the employment in question." *Id.* at 432. The Court, in 1989, reduced the standard in 1989 in *Wards Cove Packing Co. Inc. v. Antonio*, 490 U.S. 642 (1989). The new standard articulated in *Wards Cove* required a demonstration by the employer that the practice "serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 659. The *Wards Cove* holding was expressly overruled by the Civil Rights Act of 1991 amendments to Title VII. Congress expressed its intention "to codify business necessity and job relatedness enunciated in *Griggs* and other Supreme Court decisions prior to *Wards Cove*." *See* § 3, Pub. L. No. 102-166, 105 Stat. 1071. Moreover, amendments to Title VII, under the Civil Rights Act of 1991, specifically codified the circumstances which are demonstrative of a disparate impact under Title VII wherein a business necessity defense applies. *See* 42 U.S.C. § 2000e–2(k)(1)(A)(i) (1994).

83. *See e.g.,* Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 797 (8th Cir. 1993) (applying standard from Civil Rights Act of 1991 amendments codifying business necessity).

84. *See id.*

C. EMPLOYMENT DISCRIMINATION ACTIONS INVOLVING HARASSMENT BASED UPON SEX: TWO TYPES OF ACTIONS CREATE THE PRIMA FACIE CASE

Older women's hybrid claims of age and sex discrimination may involve conduct by the employer that constitutes harassment. Sexual harassment in employment is "the imposition of an unwanted condition on the continued employment or on the receipt of an employment benefit on account of the person's gender."[85] Those acts constituting sexual harassment may be sexual in nature, or they may involve intimidation and hostility on the basis of gender, though no explicit sexual conduct is involved.[86] Two theories address claims of harassment based upon sex: quid pro quo and hostile environment.[87]

In a quid pro quo harassment case, the plaintiff alleges that the employer explicitly or implicitly connects an employment benefit to the grant of sexual favors.[88] A prima facie case of "quid pro quo" sexual harassment requires that the plaintiff show the existence of "unwelcome" sexual conduct and that the response to this conduct was predicated upon the possibility that some adverse management decision would affect the plaintiff's compensation, terms, conditions or privileges of employment.[89] A quid pro quo cause of action is available only when the harasser is a supervisor with actual or apparent authority to cause the plaintiff some economic harm.[90] In those in-

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85. BARBARA S. GAMBLE, SEX DISCRIMINATION HANDBOOK 58 (BNA 1992) [hereinafter "HANDBOOK"]. Although Title VII has included a prohibition against discrimination on the basis of sex since its inception in 1964, court interpretation extending Title VII's protections to sexual harassment was not accepted until 1976. *See id.* at 60. *See* Williams v. Saxbe, 413 F. Supp. 654 (D.C.C. 1976), *rev'd in part, vacated in part,* 587 F.2d 1240 (D.C. Cir. 1978). *See also* Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977).

86. *See* Spain v. Gallegos, 26 F.3d 439, 447 (3d Cir. 1994) (explaining that a plaintiff may demonstrate a sexually charged work place in the absence of blatant unwelcome sexual conduct); Konstantopoulos v. Westvaco Corp., 893 F. Supp. 1263, 1277 (D.Del. 1994) (holding that nonsexual conduct contributed to the creation of a hostile environment for plaintiff, as well as sexually explicit conduct).

87. *See* HANDBOOK, *supra* note 85.

88. *See* Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994).

89. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986); Henson v. City of Dundee, 682 F.2d 897, 903-04 (11th Cir. 1982) (delineating a prima facie case showing of quid pro quo sexual harassment).

90. *See, e.g.,* Karibian v. Columbia Univ., 14 F.3d 773, 777-78 (2d Cir. 1994).

stances, an employer is held strictly liable for the conduct of supervisory employees.[91]

In a harassment case involving a hostile environment, the plaintiff alleges that the adverse treatment is gender based, irrespective of whether the conduct is sexual in nature.[92] Regular and repeated insults, slurs, epithets, jokes based upon gender, increased supervision and criticisms, as well as sexually explicit conduct may all encompass a hostile working environment.[93] The plaintiff in a sexual harassment hostile envi-

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91. *See id.* at 780.

92. *See Gallegos*, 26 F.3d at 447 (holding that a plaintiff can establish a sexually hostile work environment without proving blatant sexual misconduct). Hostile work environment was first established as a cause of action in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972). *Rogers* involved a claim by a Hispanic employee that her employer segregated Hispanic patients from other patients, thereby creating offensive working conditions. *See id.* at 237. *Rogers* held that a violation of Title VII existed because the employer's conduct created a working environment "heavily polluted with discrimination." *Id.* at 238. The court relied on the language "terms, conditions, or privileges" embodied in Title VII's provisions to find a viable claim. *Id.* Since its inception in *Rogers*, courts have applied hostile environment theory to various causes of action, including cases based upon race, religion, sex, and age discrimination.

For cases discussing racial harassment hostile environment, *see* Vance v. Southern Bell Telephone and Telegraph Co, 863 F.2d 1503, 1506 (11th Cir. 1989) (racial hostile environment was proven where incidents included the hanging of a noose hanging over an employee's work station); Harris v. International Paper Co., 765 F. Supp. 1509 (D. Me. 1991) (racial hostile environment established by supervisor's expressed racial hatred of plaintiff); EEOC Report Dec. No. 72-0779, 4 Empl. Prac. Cas. (BNA) 317, 318 (Dec. 30, 1971) (African-American employee repeatedly referred to as "Nigger").

For a case discussing religious hostile environment, *see* Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) (supervisor making demeaning religious slurs). *See also* Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N. Y. L. SCH. L. REV. 719 (1996).

For cases discussing age-based hostile environment, *see* Crawford v. Medina General Hospital, 96 F.3d 830 (6th Cir. 1996) (plaintiff's evidence of hostility amounted to hostility between coworkers, rather than hostility based upon age); Drez v. E.R. Squibb & Sons, Inc., 674 F. Supp. 1432, 1436 (D. Kan. 1987) (holding that harassment was demonstrated by criticisms, confrontations and personnel file memo referring to plaintiff as an "absolute moron"). *See also* Julie Vigil, *Expanding the Hostile Environment Theory to Cover Age Discrimination: How Far is Too Far?*, 23 PEPP. L. REV. 565 (1996).

93. *See Meritor*, 477 U.S. at 66 (explaining that sexual harassment reflecting gender-based animosity is comparable to race or national origin discrimination).

In *Meritor,* the Supreme Court endorsed the use of agency principles in attaching liability to an employer for sexual harassment hostile environment, but did not expressly decide when employer liability attaches for supervisory personnel's actions that amount to harassment. *See id.* at 72. Instead, the Court enunciated guidelines wherein it concluded that employers are not always liable for their supervisor's conduct, but noted that the absence of notice regarding the supervisor's conduct does not necessarily insulate the employers from liability. *See id.* Courts have found *Meritor's*

ronment claim must demonstrate that harassing conduct was unwelcome, and was "sufficiently severe or pervasive so as "to alter the conditions of [the victim's] employment and create an abusive working environment."[94] Factors to be considered in determining whether a sexually hostile work environment exists include the frequency and severity of the conduct, whether it involved physical, verbal assaults or humiliation and whether the conduct created an unreasonable interference with the employee's work performance.[95]

D. "SEX-PLUS" DISCRIMINATION UNDER TITLE VII: PROVIDING A REMEDY FOR DISPARATE TREATMENT OF A SUBCLASS OF WORKERS

The "Sex-plus" theory recognizes disparate treatment by an employer of persons based upon a combination of factors. "Sex-plus" refers to employer conduct whereby the employer treats employees differently on the basis of sex plus another charac-

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guidance difficult to follow, however, and as a result, adopt differing standards for liability. Some courts follow modified, arguably misapplied, respondeat superior principals as articulated in *Henson*, 682 F.2d at 905 to establish when an employer is responsible for supervisory employee conduct as a "knew or had reason to know" test. *See e.g., Nichols* 42 F.3d at 508 (holding correct standard to apply is the "know or should have known" test). Courts have also adopted an agency principle theory to determine when employer liability attaches. *See* Kauffman v. Allied Signal, Inc., 970 F.2d 178, 181-83 (6th Cir. 1992). Still other cases have applied an individual model of liability to supervisory personnel by finding that they act entirely outside of the scope of employment. *See* Dockter v. Rudolf Wolff Futures, Inc., 684 F. Supp. 532, 536 (N. D. Ill. 1988) (holding supervisor's behavior committed solely for his own benefit and enjoyment, not employers). For a discussion on the holding in *Meritor* and methods of determining liability for sexual harassment hostile environments *see* Robert Lukens, Comment, *Workplace Sexual Harassment & Individual Liability*, 69 TEMP. L. REV. 303 (1996); David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers For Sexual Harassment Committed By Their Supervisors*, 81 CORNELL L. REV. 66 (1995); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principals: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229 (1991).

94. *Meritor*, 477 U. S. at 67-68.

95. *See* Harris v. Forklift Sys. Inc., 510 U.S. 17, 23 (1993). The U.S. Supreme Court, in *Harris*, clarified what level of subjective impact a plaintiff need demonstrate in order to establish that an abusive hostile environment exists. Though the Court concluded that psychological injury was not required in order to establish a sufficiently severe or pervasive hostile environment, it determined that psychological injury could be considered as one factor, among others in the plaintiff's case. *See id.*

teristic.[96] In a claim for "sex-plus" discrimination, a plaintiff alleges that the employer does not discriminate against men or women generally, but against a subclass of men or women.[97] The focus in a "sex-plus" claim is on the analysis used to evaluate the discrimination against members of a subset of the protected group, rather than on a distinct method of pleading. Discrimination claims alleging "sex-plus" discrimination may encompass the direct, circumstantial, or pattern and practice method of proof.[98] Such discrimination is covered by Title VII's prohibitions because Title VII is not limited to employment discrimination "solely" upon the basis of sex.[99]

A large number of "sex-plus" cases involve employer policies or practices that disparately treat subclass members of a group protected under Title VII.[100] An example may be an employer

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96. Courts have held that distinctions between employees based upon certain categories of characteristics establish the resulting "sex-plus" job requirement as sexually discriminatory in violation of Title VII. Most often these include requirements that directly or indirectly involve: 1) immutable physical characteristics, 2) characteristics which while mutable involve fundamental, legally protected rights, such as the right to have children or marry, and 3) characteristics which although mutable, significantly effect employment opportunities or conditions of employment for members of one sex because their use perpetuates the effects of sexual stereotypes. *See infra* note 100 for case examples.

A mutable characteristic is defined as a thing that is capable of change or being changed in form, quality or nature. WEBSTER'S INTERNATIONAL NEW DICTIONARY 1492 (3d Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principals: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229 (1991) ed. 1993). An immutable characteristic is defined as a thing that is not capable or susceptible to change. *See id.* at 1131.

97. The term "sex-plus" was introduced by Judge Brown of the Fifth Circuit in a dissent to the denial of a petition of rehearing en banc in *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir.), *reh'g denied*, 416 F.2d 1257, 1260 (5th Cir. 1969), *vacated and remanded*, 400 U.S. 542 (1971) (per curium).

98. *See e.g. Price-Waterhouse*, 440 U.S. 228 (1989) (direct evidence); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (pattern and practice case); Graham v. Bendix Co., 585 F. Supp. 1036 (N.D. Ind. 1984) (circumstantial evidence).

99. During Title VII's passage, an amendment was proposed that would have limited the scope of Title VII"s reach in the context of sex discrimination by placing the word "solely" before the word "sex" into its provisions. The proposal was specifically rejected. *See* 110 CONG. REC. 2728 (1964). The first court to interpret this legislative history as authorizing sex plus other factors is *Jeffries v. Harris Community Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir 1980). *See infra* notes 108-11 and accompanying text for a discussion of *Jeffries*.

100. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (holding that an employer policy that provided less coverage for pregnancy-related conditions to the spouses of male employees than female employees of the company constituted sex discrimination against male employees); *Nashville Gas*, 434 U.S. 136

policy that excludes all women of childbearing age from certain job classifications.[101] Employment classifications involving "plus" factors are considered impermissible "because they present obstacles to employment of one sex that cannot be overcome."[102]

The U.S. Supreme Court recognized that disparate treatment against a subclass of a protected group violates Title VII in *Phillips v. Martin Marietta Corp.* [103] *Phillips* involved an established employer practice of refusing to hire women with pre-school age children but not similarly situated men with young children.[104] Though the majority of applicants hired by Martin Marietta were women, the Court recognized that the plaintiffs could still establish a violation of Title VII.[105] Since the U. S. Supreme Court's initial treatment of "sex-plus" in *Phillips*, the doctrine has been extended to cover other classifications under Title VII.[106]

(holding that an employers policy of denying accumulated seniority benefits to female employees returning from maternity leave, although facially neutral, imposed a significant burden on female employees that male employees do not experience); Wanbeheim v. J.C. Penney Co., Inc., 642 F.2d 362 (9th Cir. 1981) (holding that employer's benefits rule that allowed medical insurance to a spouse only if the employee earned more than 5% of the families combined income could demonstrate a disparate impact against women where 63% of the married females employees could not obtain spousal benefits); Jacob v. Martin Sweets Co., 550 F.2d 364, 371 (6th Cir. 1980) (holding that company policy that fires single women who become pregnant violates Title VII); Sprogis v. United Airlines Inc., 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971) (holding that employer's policy of terminating married female flight attendants, but not males, violates Title VII).

101. *See Johnson Controls*, 499 U.S. 187 (holding that excluding women of childbearing age from certain job classifications, in order to protect unborn fetuses from potential birth defects, discriminates against women on the basis of sex).

102. *See* Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976).

103. 400 U.S. 542 (1971).

104. *Phillips*, 400 U.S. at 544. *See also* Sprogis, 444 F.2d at 1198 (refusal to retain married women as flight attendants, but not men).

105. *See Phillips* 400 U.S. at 543-44.

106. *See infra* notes 106, 110 for additional case cites.

1. Treatment of Combined Race and Sex Discrimination Claims of "Sex-Plus" Under Title VII: General Acceptance By The Legal Community of The Model

Various courts have recognized that women of color may experience a unique form of discrimination that is separate and apart from the experiences of white females or males of color.[107] For example, *Jeffries v. Harris County Community Action Ass'n* held that sex and race discrimination against black women could establish a violation of Title VII, absent discrimination against black males or white females.[108] *Jeffries* involved a suit by Dafro Jeffries against her employer in which she alleged race and sex discrimination in promotional opportunities for black women in violation of Title VII.[109] The employees promoted to the positions sought by Jeffries were a black male and a white female.[110] In holding that Jeffries could establish a claim of discrimination against black women on the basis of sex and race, the court noted that in light of the rationales articulated in the "sex-plus" case law, distinctions in employment practices on the basis of an immutable characteristic or a protected trait violate Title VII.[111]

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107. *See* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987) (black women could establish discrimination absent discrimination against black males and non-black females); Graham v. Bendrix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) (black women are protected against discrimination on the grounds of race and a sex). *See also* Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL L. REV. 1467 (1992), Crenshaw, *supra* note 15; Shoben, *supra* note 15; Judith Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1991*, 79 CAL. L. REV. 775 (1991).

108. *See* 615 F.2d 1025, 1032 (5th Cir. 1980).

109. *See Jeffries*, 615 F.2d at 1029.

110. *See id.*

111. *See id.* at 1033. The *Jeffries* court also relied on *Phillips*, 400 U.S. 542, and cited to other courts treatments of subclass discrimination following the Supreme Court's decision in *Phillips*. The court cited *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142, 1145 (7th Cir. 1978) (holding that employers' policy requiring female flight attendants with children to accept ground duty positions, but not men, is sex discrimination); *Barnes*, 561 F.2d at 984 (female employee's job was abolished as a result of rebuffing unwanted sexual advances of employer); *Jacobs*, 550 F.2d at 371 (company practice of firing single women who became pregnant violates Title VII); *Sprogis*, 444 F.2d at 1198 (no-marriage rule for female stewardesses violates Title VII); and *Jurinko v. Wiegand Co.*, 331 F. Supp. 1184, 1187 (W.D. Pa 1971) (refusal to hire married women, but not men violates Title VII). The court also explained that the majority of case law rejecting "sex-plus" involved hair-length regulations for men. *See*

Similarly, in *Lam v. University of Hawaii,* the Ninth Circuit sustained a race and sex claim by holding that when a plaintiff alleges that two bases for the discrimination simultaneously exist, they should not be reduced into distinct categories for analysis.[112] The plaintiff in *Lam* was a woman of Vietnamese descent, who was considered and ultimately rejected for the position as director of the University Law School Pacific Asian Legal Studies program.[113]

As proof of discrimination Lam offered statements by members of the Selection Committee, demonstrating bias against Lam and toward women and Asians in general.[114] The district court granted the University's summary judgment motion on Lam's claims of age and sex discrimination because it concluded that the University had given favorable consideration to an Asian male and white female for the directorship position.[115]

The Appellate Court for the Ninth Circuit held that Lam's allegations were sufficient to establish a prima facie case of discrimination under Title VII.[116] The Appellate Court reasoned that because Lam's claims alleged combined race and sex bias, a determination as to whether the alleged discrimination

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Phillips, 400 U.S. at 1033. The court cited *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976) and *Knott v. Missouri Pacific Railroad Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975).

In reaching its decision, the *Jeffries* court examined the legislative history of Title VII where the House of Representatives explicitly refused to adopt an amendment to the bill that would have added the word "solely" to modify "sex," in the list of prohibitions under Title VII. *See Jeffries*, 615 F.2d at 1032, citing 110 CONG. REC. 2728 (1964). *Jeffries* holding recognized that race and sex are both immutable characteristics. *But see* Degraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 145 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977) (holding that black women do not constitute a protected subclass under Title VII, thus separate analysis of their sex and race claims is required).

112. *See* 40 F.3d 1551 (9th Cir. 1994).

113. *See Lam*, 40 F.3d at 1554-55 (Lam's parentage was both French and Vietnamese). Lam also alleged national origin discrimination. *See id.*

114. *See id.* at 1560. One professor who chaired the selection committee during the first of three searches initiated by the University made disparaging comments about Lam's abilities before the selection committee and the campus faculty, while another member remarked that the directorship should be given to a male, as a result of stereotyped assumptions on the part of the professor that some Asian cultures would not accept a female chairperson. *See Lam*, 40 F.3d at 1560.

115. *See id.* at 1561.

116. *See id.* at 1561-62.

against Lam occurred on the basis of the combination of factors, rather than a separate consideration of whether the employer discriminated against people of Lam's same sex or race was necessary.[117] Accordingly, the Appellate Court reinstated Lam's age and sex discrimination claim.[118]

2. Treatment of Combined Age and Sex Discrimination Claims as "Sex-Plus" under Title VII

Although a series of appellate decisions involving race and sex discrimination claims by women of color have established them as a protected group under Title VII, no federal appellate court has extended subclass protection under Title VII to "older women."[119] Several lower courts have considered the question of whether or not older women can constitute a protected subclass of persons over forty who are female. The decisions have produced mixed results.

a. Cases Refusing To Recognize Older Women As a Protected Subclass Under Title VII

In *Thompson v. Mississippi State Personnel Bd.*, a Mississippi district court refused to recognize women over forty as a protected class for disparate impact analysis.[120] The plaintiff in *Thompson* alleged both sex and age discrimination and sought to introduce evidence comparing herself to men forty and over and women under forty in order to prove that the employer's requirements for consideration to a management position had a disparate impact upon her as an older woman.[121] The district court for the Northern District of Mississippi refused to consider this evidence as properly demonstrative of age and sex

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117. *See id.* at 1562.

118. *See id.* at 1566.

119. *But see* Scharhorst v. Independent Sch. Dist. #710, 686 F.2d 637 (8th Cir. 1982) (finding that the trial court committed harmless error when it combined plaintiff's age and sex claims).

120. 674 F. Supp. 198 (N.D. Miss 1987). For an explanation of disparate impact, *see supra* notes 43-46 and accompanying text.

121. *See Thompson*, 674 F. Supp. at 202. Specifically, Thompson alleged that the educational requirements discriminated against both women and persons over forty and that the combination of her sex and age was impacted by the employer's policy. *See id.* at 201.

discrimination against Thompson because it concluded that "neither Title VII, nor the ADEA recognized older women as a protected class for adverse impact analysis."[122]

The district court, in holding that plaintiff's statistical evidence was insufficient to show a disparate impact against older employees or women, considered as the proper pool for analysis only the statistical evidence comparing all men with all women and all employees over forty with one another.[123] Moreover, the court analytically separated the sex and age evidence, without considering what relationship combined age and sex played in the alleged disparate impact. Under this analysis, the court held that the plaintiff had failed to establish that a disparate impact existed on the basis of the employee's ages or sexes.[124]

Similarly, in *Murdock v. B.F. Goodrich,* the Ohio Appellate Court rejected the plaintiff's combined age and sex allegations of hostile environment discrimination against "older females" in promotional and training opportunities in favor of younger men.[125] The Ohio Appellate Court held that "older females are not a separate protected class under state or federal law," and therefore, reasoned that an older woman's age and sex claims must be analyzed separately from one another because separate anti-discrimination statutes were implicated in the claims.[126] As a result of this reasoning, the defendant obtained a summary judgment on both claims.[127] The sex discrimination claim was rebutted through the employer's showing that other women had been promoted.[128] Because the court determined

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122. *Id.* at 203-04. At the time of the action, plaintiff was fifty-nine years old. *See id.* at 201. The requirements included either a college degree, plus one year of experience, or two years of college, plus three years of experience. *See id.*

123. *See Thompson*, 674 F. Supp. at 207-8.

124. *See id.* at 211.

125. *See* No. 15654, 1992 WL 393158 (Ohio Ct. App. Dec 30, 1992) at *3. For a discussion of hostile work environment, *see supra* notes 92-95 and accompanying text.

126. *Murdock*, 1992 WL 393158 at *3.

127. *See id.*

128. *See id.* The court's analysis of Murdock's evidence infers that the female employees promoted over Murdock were younger women. After rejecting Murdock's claim alleging discrimination against "older females," the court commented:

> Our review of the recent history of promotions in Murdock's deparment with respect to the two protected classes does not reveal evidence of either age or sex discrimination. While Murdock contends that no women

that Murdock did not present evidence that all individuals over forty were not promoted, the Appellate Court concluded that the evidence of age discrimination against older women was insufficient to establish a claim of pure age discrimination.[129]

Both *Thompson* and *Murdock* represent the current view that Title VII provides a separate remedy for discrimination against older women, apart from the ADEA. These courts consider Title VII and the ADEA protections to be mutually exclusive. Yet in each case, neither woman prevailed when the court considered the evidence of sex and age discrimination individually, rather than on the basis of the combination of both factors.

b. Cases Recognizing Older Women As a Subclass Under Title VII

In *Arnett v. Aspin,* however, the Pennsylvania district court for the Eastern District recognized that sex and age discrimination against older women could constitute protected subclass discrimination under Title VII. [130] In *Arnett*, the federal government employed plaintiff, Mary Arnett, a forty-nine year old woman, as a computer specialist.[131] Arnett sought two promotions to the position of equal employment specialist.[132] Each time, the position went to a woman under the age of forty.[133] The employer admitted that every other person in the position was a woman under forty or a man over the age of forty.[134] Ar-

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have ever been promoted above her in her department, according to Murdock's exhibit 2 attached to her response to Goodrich's motion for summary judgment, Kin Singleton was promoted above her. Also, according to her exhibit, another female, Joanne Mahebakken was hired into a position above Murdock. *As for individuals over forty*, Murdock has neither presented any evidence that individuals in that class were not promoted (emphasis added).

Id.

129. *See Murdock*, 1992 WL 393158 at *3. Because the court did not recognize older women as a protected group, it gave no weight to the evidence presented of discrimination against older females as indicative of subset discrimination. *See id.*

130. *See* 846 F. Supp. 1234 (E.D. Pa. 1994).

131. *See Arnett*, 846 F. Supp. at 1236.

132. *See id.*

133. *See id.* The first position went to a woman under 30 years old. *See id.* The second position was given to a 29-year-old woman. *See id.*

134. *See Arnett*, 846 F. Supp. at 1236-37.

nett alleged sex-plus-age discrimination in promotional opportunities for older women under Title VII.[135]

Defendants moved for summary judgment on the sex-plus-age claim.[136] They argued that Arnett's claim was not cognizable under Title VII because age discrimination is afforded protection under a separate statute and all other "sex plus" classifications involve either an already protected classification under Title VII or an unprotected classification.[137] Defendants also argued that Arnett's claim of sex-plus-age discrimination should be considered as two separate claims.[138] In considering the defendants' motion, Judge Reed noted that the acceptance of defendants' construction of Title VII would result in neither of plaintiff's claims surviving summary judgment.[139]

Judge Reed observed that Arnett's claim of "sex-plus-age" discrimination failed to establish a claim for *pure* sex discrimination.[140] Moreover, Judge Reed acknowledged that Arnett's age discrimination claim alone was insufficient to state a cause of action because pure age discrimination is not cognizable under Title VII, and age discrimination under the ADEA was not separately plead.[141] In denying defendant's motion, the court recognized that "[i]n a "sex-plus" discrimination case, the Title VII plaintiff does not allege that an employer discriminated against a protected class as a whole, but rather that the employer disparately treated a subclass within the protected class."[142] Judge Reed explained that this approach closes a "loophole" in Title VII's protections that allow an employer to

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135. *See id.*

136. *See id.* at 1238.

137. *See id.* at 1240. The court concluded that without supporting authority mandating the limitations argued by defendant, the distinctions in the prior case law were insignificant. *See id.*

138. *See Arnett,* 846 F. Supp. at 1238.

139. *See id.*

140. *See id.*

141. *See id.* For a discussion of the ADEA, *see infra* notes 147-70 and accompanying text.

142. *Arnett*, 846 F. Supp. at 1238.

escape liability for subset discrimination by showing that it does not discriminate against all women or older employees.[143]

In support of this approach, the *Arnett* court cited *Phillips v. Martin Marietta Corp.*, wherein the Supreme Court first recognized discrimination against a subset rather than all individuals within a protected class as actionable discrimination.[144] The *Arnett* court concluded that Title VII "sex-plus" case law applies where the plaintiff demonstrates that the defendant discriminated against a subclass of women or men based on either (1) an immutable characteristic or (2) the exercise of a fundamental right.[145] Moreover, the *Arnett* court analogized "sex-plus" case law involving race-plus-sex to reason that the extension of "sex-plus" claims to sex-plus-age is permissible under Title VII.[146]

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143. *See id.* at 1240.

144. *See id.* at 1238-39. The *Arnett* court cited to *Phillips*, 400 U.S. at 544. The court also considered *Willigham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1091-092 (5th Cir. 1975) (holding that distinctions between men and women in employment standards based upon something other than immutable characteristics or legally protected rights do not violate Title VII); *Sprogis*, 444 F.2d at 1194-98 (holding that defendant's policy requiring female flight attendants to be unmarried, but not male attendants violated Title VII); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 609 n.15 (S.D.N.Y. 1981) (noting that employer does *not* have unfettered discretion to require employees to wear any uniforms the employer chooses where the employer knows that such outfits subject female employees to sexual harassment); and *Valdes v. Lumbermen's Mut. Cas. Co.*, 507 F. Supp. 10, 11 (S.D. Fla. 1980) (holding that where employers policy against hiring homosexuals was not uniformly applied to male and female employees, the plaintiff may be entitled to relief under Title VII, where it can be established that the asserted reason is merely pretext for sex discrimination). *See Arnett*, 846 F. Supp. at 1238-39.

145. *See id.* at 1239.

146. *See id.* at 1239-40. The *Arnett* court cited *Jeffries*, 612 F.2d 1025, 1032 (holding that discrimination against black women could exist in the absence of discrimination against black men or white women), and *Graham v. Bendrix Corp.*, 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) (holding that the duty not to discriminate may be violated where discrimination is directed at one member of a protected class and not all members); *Hicks*, 833 F.2d at 1406 (holding that black women can constitute a protected sub-class under Title VII). *Id. See also* discussion in *Good*, 1995 WL 67672 *infra* notes 205-13 and accompanying text involving an allegation of age and sex discrimination by an "older woman."

III. EMPLOYMENT DISCRIMINATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

The purposes of the Age Discrimination in Employment Act ("the ADEA") are to promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment, and to help employers and workers find ways of meeting problems arising from the impact of age on employment.[147] The prohibitive language of the ADEA was modeled after Title VII.[148] Accordingly, courts give

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147. *See* 29 U.S.C. § 621(b) (1994).

148. *See* 29 U.S.C. § 623 (a)-(e) (1994). The substantive provisions of the ADEA are identical to those of Title VII, with the exception of the protected classification. *See supra* notes 29, 31 for comparison of Title VII's substantive provisions. The prohibitive provisions in the ADEA state in relevant part:

> (a) It shall be unlawful for an employer-
>
> (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *age* (emphasis added);
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's *age* (emphasis added); or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.
>
> (b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.
>
> (c) It shall be unlawful for a labor organization-
>
> (1) to exclude or to expel from its membership, or to otherwise discriminate against, any individual because of his age;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.
>
> (d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because of such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.
>
> (e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an

parallel construction to similar or identical language in both statutes.[149]

Under the ADEA, discrimination against individuals who are at least forty years of age is prohibited.[150] Like Title VII, the ADEA reaches workplace discrimination by employers, employment agencies, and labor organizations in hiring, promotions, work assignments, compensation, environment, and discharge.[151] A violation of the ADEA can occur when an employer imposes on workers of one age group requirements or conditions not imposed on other age classes.[152]

> employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.
> *Id.*

149. *See* Western Airlines, Inc. v. Criwsell, 472 U.S. 400, 411-12 (1985) (adopting the narrow construction of BFOQ from Title VII to the ADEA because of identical language in the substantive provisions of both statutes).

150. *See* 29 U.S.C. § 631(a) (1994). ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age"). *Id.*

151. *See* 29 U.S.C. § 630(b)-(d) (1994). Under 29 U.S.C. § 630(b) (1994), the term "employer" under the ADEA is defines as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." *Id.*

Under 29 U.S.C. § 630(c) (1994), the term "employment agency" refers to "any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States." *Id.*

Under 29 U. S. C. § 623(d) (1994), the term "labor organization" means:

> a labor organization engaged in an industry affecting commerce and any such agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.
> *Id.*

Exemptions from the ADEA's coverage are provided for foreign persons not controlled by an American employer. *See* 29 U.S.C. § 623(h)(2). Elected officials and their staff members not covered by the civil service laws of the state are also exempt from the ADEA. *See* 29 U.S.C. § 630(f) (1994).

152. *See* Shager v. UpJohn Co., 913 F.2d 398, 401 (7th Cir. 1990).

A. THEORIES OF DISCRIMINATION UNDER THE ADEA

Both disparate treatment and disparate impact theories of discrimination can apply to claims asserted under the ADEA.[153] As in Title VII, a plaintiff may offer direct evidence, in the form of verbal or written admissions by the employer to establish intent to discriminate under the ADEA.[154] Even in a mixed-motives case, where an ADEA plaintiff's proof demonstrates direct evidence of discrimination, she may be awarded declaratory relief and attorney fees.[155] Unless the employer proves that the same decision would have been made despite the illegitimate motive, the plaintiff may also be awarded other forms of relief.[156]

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153. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (disparate treatment case). The proposition that disparate impact claims are cognizable under the ADEA is not an uncontroversial one. In 1993, the U.S. Supreme Court decided *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), which involved a claim of a discriminatory discharge on the basis of age by a sixty-two year old employee. *Hazen*, 507 U.S. at 607. Although *Hazen* did not involve a claim of disparate impact under the ADEA, the Court, first in the majority opinion delivered by Justice O'Connor, then in a special concurrence filed by Justices Kennedy, Rehnquist and Thomas, explicitly stated that the Court had "never decided whether a disparate impact theory of liability is available under the ADEA" and that it did not address the issue in *Hazen*. *See id.* at 610, 614, 618. Some courts and commentators have interpreted the peculiarity of the special concurrence to represent Court hostility to disparate impact claims under the ADEA. For a discussion of the decision in *Hazen* and a review of those Circuit courts that recognize or deny the application of disparate impact to actions brought under the ADEA, *see* Jan W. Henkel, *Age Discrimination: Disparate Impact Under the ADEA After Hazen Paper Co. v. Biggins: Arguments in Favor*, 47 SYRACUSE L. REV. 1183 (1997); Jonas Saunders, *The Age Discrimination in Employment Act: Disparate Impact Analysis and the Availability of Liquidated Damages After Hazen Paper Co. v. Biggins*, 73 U. DET. MERCY L. REV. 591 (1996).

154. *See e.g.*, Naton v. Bank of California, 649 F.2d 691, 698 (9th Cir. 1981) (statement that plaintiff is "over the hill"); Hodgson v. First Fed. Savings & Loan Ass'n of Broward Fla., 455 F.2d 818, 821 (5th Cir. 1972) (interview notes stating that the plaintiff was "too old").

155. *See* Miller v. Cigna Corp., 47 F.3d 586, 598, n.10 (3d Cir. 1995) (en banc) (applying amendments to the Civil Rights Act of 1991, modifying employer burdens in mixed-motives cases and liability under Title VII to the ADEA). *See supra* notes 50-56 and accompanying text for discussion of how changes to Title VII as a result of the Civil Rights Act of 1991, modify the liability and proof requirements of employers in mixed-motive cases under Title VII when impermissible discrimination is demonstrated by the use of direct evidence.

156. *See id.* Comments by employers expressing a general preference for or against a particular age class that are descriptive, rather than evaluative in nature (such as noting the ages of employees under review) or that are remote in time or connection to

As under Title VII, the *McDonnell-Douglas*-based model and its progeny apply in ADEA cases to establish a prima facie case.[157] In those cases where a plaintiff utilizes the *McDonnell-Douglas* framework, she must establish: membership in the protected age group, that she was qualified for the position and was discharged or otherwise discriminated against despite her qualifications, and the position remained open for applications from individual's with the plaintiff's same qualifications.[158]

Once the plaintiff establishes the prima facie case, the burden of production shifts to the employer to articulate a "legitimate, non-discriminatory reason" for the employment decision.[159] The burden is only a burden of producing a reason, from which the court may infer that the employer did not discriminate.[160] If the defendant fails, a judgment in favor of the plaintiff may be entered.[161] However, the presumption of intent to discriminate is destroyed once the employer comes forth with a legitimate, nondiscriminatory reason for the decision.[162] The ultimate burden shifts back to the plaintiff, as a burden of persuasion.[163] The plaintiff must prove to the trier of fact that the employer's explanation is a pretext for its discriminatory motive.[164] As with Title VII, the burden of persuasion of the employer's motive rests at all times with the plaintiff under the ADEA and if the plaintiff fails to convince the trier of fact, a judgment for defendant is entered.[165]

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the challenged employment action, have been held not to conclusively establish direct evidence of age bias by the employer. *See, e.g., Shager*, 913 F.2d at 402.

157. *See McDonnell-Douglas*, 411 U.S. 792. *See, e.g., Hazen*, 507 U.S. at 612; *Miller* 47 F.3d at 598 n. 10. Even though the *McDonnell-Douglas* test is a standard framework for proving discrimination, some courts have held that age discrimination suits should be decided on a case by case basis without rigid adherence to *McDonnell-Douglas*. *See e.g.,* McDonald v. Union Camp Corp., 898 F.2d 1155, 1161 (6th Cir. 1990).

158. *McDonnell-Douglas*, 411 U.S. at 802. Under the ADEA, the plaintiff must be at least forty years of age. *See* 29 U.S.C. § 631(a) (1994).

159. *See McDonnell-Douglas*, 411 U.S. at 802.

160. *See supra* note 62 and accompanying text.

161. *See supra* note 63 and accompanying text.

162. *See supra* note 64 and accompanying text.

163. *See supra* note 65 and accompanying text.

164. *See id.*

165. *See supra* note 68 and accompanying text..

Several statutory defenses are available to counter a charge of age discrimination. They include the use of a bona fide occupational qualification ("BFOQ") defense under which an employer may lawfully take age into account.[166] To establish a BFOQ, an employer must prove that it is "reasonably necessary to the normal operation of the particular business."[167] Employers may also defend against a claim of age discrimination by demonstrating that a bona fide employment benefits plan, or seniority system is in place.[168] Additionally, employers may affirmatively defend against a claim of age discrimination by showing that the action taken is "based upon reasonable factors other than age."[169] A "reasonable factor" is one that must not present any considerations of age.[170]

B. MULTI-FACTOR DISCRIMINATION CLAIMS UNDER THE ADEA: "AGE-PLUS" OTHER FACTOR CLAIMS GENERALLY HELD NOT VALID UNDER THE ADEA

Several courts have explicitly addressed the issue of whether age, in addition to another characteristic, or "age-plus" discrimination exists under the ADEA. Those courts flatly reject the proposition that an "age-plus" cause of action is valid under the ADEA.

In *Kelly v. Drexel University*, for example, a former employee of Drexel University ("University") alleged discrimination on the basis of his combined age and disability in the University's decision to terminate him during a reduction in workforce.[171] At the time of the discharge, plaintiff, Francis

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166. *See* 29 U.S.C. § 623 (f)(1) (1994).

167. *Id.*

168. *See* 29 U.S.C. § 623 (f)(2) (1994).

169. 29 U.S.C. § 623 (f)(1) (1994).

170. *See id.* "Reasonable factors other than age" include uniformly required credentials such as education, prior experience, and employment policies that measure merit or the quality or quantity of performance. Those not meeting the standards may be discharged "for good cause" regardless of their age. 29 U.S.C. § 623(f)(3) (1994).

171. 907 F. Supp. 864 (E.D. Pa. 1995). The decision in *Kelly* was rendered by the same district court judge that issued the opinion in *Arnett v. Aspin.*, 846 F. Supp. 1234 (E. D. Pa. 1994). *Kelly*, 907 F. Supp. at 869. Plaintiff brought actions under the Age Discrimination in Employment Act, 29 U.S.C. § 621, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 - 12213, and its state counterpart, Pennsylvania Human Relations Act, 43 PA. CONST. STAT. ANN. §§ 951–963. *Kelly*, 907 F. Supp. at 869. The

Kelly, was sixty-eight years old.[172] Kelly worked in the University's purchasing department as Senior Buyer for twelve years.[173] Kelly's employment began in 1981 when he was fifty-six years old.[174]

As proof of age discrimination, Kelly relied on a conversation with his supervisor in which he was asked when he intended to retire.[175] Kelly also presented a letter he received from the University shortly after his termination, referring to Kelly as a "retiree."[176]

The district court considered the supervisor's question regarding Kelly's intent to retire.[177] The Court noted that the question arose within the context of a conversation regarding Kelly's son and his recent graduation from college and how that would affect Kelly's decision to retire.[178] Under those circumstances, the *Kelly* court concluded that the statement did not demonstrate any age-related animus.[179] With respect to the letter, the University's policy defined a former employee over fifty-five with ten or more years of service as a retiree entitled to retirement benefits.[180] The court found that the University's policy did not provide a sufficient inference of discrimination against Kelly since his employment at the University did not commence until he was fifty-six.[181]

Americans with Disabilities Act of 1990 [hereinafter "ADA"], at section 12112(a) provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharges of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Id.

172. *See Kelly*, 907 F. Supp. at 869.

173. *See id.* at 869. The ages of the two other buyer employees in the department who retained their positions were fifty-four and forty-six. Plaintiff's supervisor was aged fifty. *Id.* at 869-870.

174. *See id.* at 869.

175. *See id.* at 872.

176. *See Kelly*, 907 F. Supp. at 872.

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.*

181. *See Kelly*, 907 F. Supp. at 872.

Kelly's proof of disability discrimination consisted of circumstantial evidence that included expert testimony regarding the role of stereotypes about disabled persons in employment decisions.[182] Kelly argued that the court could infer intent to discriminate as a result of possible stereotypical assumptions as to Kelly's ability to effectively perform his position because the employer was aware that Kelly walked with a limp.[183]

The district court granted the University's motion for summary judgment on both the age and disability claims.[184] The district court concluded that there was no evidence of age bias and that Kelly's injury did not meet the definition of a disability under the ADA.[185] In a footnote to the opinion, the Court addressed Kelly's contention that his "age-plus-disability" created a protected subclass of older workers with disabilities for analysis of his claims.[186] Although the district court agreed that subclass discrimination against a subclass of protected workers is cognizable under Title VII, it concluded that the doctrine applies only when the allegation involves sex plus some other form of discrimination.[187] The court resolved its prior decision in *Arnett v. Aspin* with its reasoning in *Kelly* when Judge Reed clarified that the decision in *Arnett* recognized a claim of combined age and sex discrimination as "sex-plus" discrimination under Title VII, not "age-plus" discrimination under the ADEA.[188] In *Kelly*, Judge Reed stated that he

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182. *See id.* at 871.

183. *See id.* Plaintiff's limp was caused by a hip injury in 1987. The condition was diagnosed as severe post-traumatic degenerative joint disease of his right hip. *See id.* at 870. Plaintiff's argument suggested that given the widespread stereotyped perceptions of disabled persons in society, knowledge of a physical impairment alone, was sufficient to raise an inference that impermissible discrimination based upon stereotyped assumptions about persons with disabilities existed in Kelly's claim. *See id.* at 871-72.

184. *See Kelly*, 907 F. Supp. at 878. Summary judgment is a judgment granted on a claim about which there is no genuine issue of material fact and upon which the party seeking summary judgment is entitled to prevail as a matter of law. This allows a speedy disposition of a controversy without the need for trial. *See* FED. R. CIV. P. 56.

185. *See Kelly*, 907 F. Supp. at 873-74. The court determined that plaintiff's hip and subsequent difficulty walking did not constitute a "substantial limitation" on his ability to walk within the meaning of 42 U.S.C. § 12102(2) and its regulations, at 29 C.F.R. § 1630.2(g). *See Kelly*, 907 F. Supp. at 874.

186. *See id.* at 875 fn.8.

187. *See id.*

188. *See id.*

found no authority for an "age-plus" discrimination claim under the ADEA, while ample precedent for "sex-plus" claims existed.[189] Accordingly, Judge Reed held that Kelly's claim for discrimination as a result of membership in a subclass of older workers was not cognizable under the ADEA.[190]

Similarly, in *Luce v. Dalton,* the District Court for the Southern District of California addressed the viability of "age-plus" claims, alleging age-plus-disability and age-plus-religion discrimination.[191] Luce's termination from his position with the Navy's Meteorology Engineering Centers occurred in 1982.[192] At the time Luce commenced his action in 1993, the separate claims of disability and religious discrimination were time barred.[193] Luce moved for leave to amend his complaint alleging age discrimination to include allegations of "age-plus-religion" and "age-plus-disability" discrimination.[194] The Appellate Court, after considering Luce's arguments on the existence of a viable "age-plus" theory, held that both claims were unsupported by Luce's argument.[195]

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189. *See Kelly*, 907 F. Supp. at 875 fn.8.

190. *See id.*

191. *See* 166 F.R.D. 457 (S.D. Cal. 1996).

192. *See Luce*, 166 F.R.D. at 462.

193. *See id.* Plaintiff had improperly filed an appeal of his termination to the U.S. Merit System Protection Board, claiming age discrimination without first exhausting all administrative remedies within the U.S. Navy. The complaint was subsequently dismissed for lack of jurisdiction. In 1987, plaintiff retained counsel and filed an action for age discrimination in the present court which was again dismissed and remanded to the U.S. Navy EEO officer in 1990 for investigation and determination. In 1993, the Navy's EEO officer dismissed plaintiff's complaint for lack of jurisdiction and shortly thereafter, plaintiff instituted this proceeding, pro se, alleging violations of the ADEA, and religious discrimination, under 42 U.S.C. § 1981. The court dismissed plaintiff's religious discrimination claims under 42 U.S.C. § 1981, as pre-empted by provisions of Title VII, without leave to amend because the claim was then time barred. *See Luce*, 166 F.R.D. at 462. Moreover, plaintiff conceded that his disability discrimination claim, standing alone, would not satisfy the definition of disability within the meaning of 42 U.S.C. § 12102(2). *See Luce*, 166 F.R.D. at 459.

194. *See id.* at 458. Because the age discrimination claim was not time barred, plaintiff may have believed his allegation of "age-plus" disability and religion were theoretically cognizable as arising out of the age discrimination under the ADEA. *See id.*

195. *See id.* at 461. Plaintiff cited only one secondary source, ERNEST C. HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW & PRACTICE 750 (1995 Ed.), for the proposition that being over forty and a member of a Title VII class may state a cause of action for discrimination in support of his "age-plus" claim. *See id.*

In determining that an "age-plus" claim was not possible under the ADEA, the district court considered the sex-plus theory available under Title VII, as articulated in *Phillips*, *Jeffries*, *Hicks*, and *Lam*.[196] According to the *Luce* court, the explicit language relied upon by courts interpreting Title VII's bar against race, sex, national origin, or religion as inclusive to all forms of discrimination under its provisions could not be extended to support an "age-plus" theory of discrimination.[197] The court reasoned that unlike Title VII, no argument exists that Congress intended to include any group for protection, *other than* age in any of the provisions of the ADEA.[198] The *Luce* court explained that courts supporting an expansive view of Title VII's protections have relied upon the language of Title VII protecting multiple groups, such as race, religion, sex, and national origin simultaneously to argue that multi-factor discrimination is both prohibited and cognizable under Title VII.[199] In contrast, the ADEA provides but one classification for protections under its provisions.[200] The *Luce* court held that

196. *Luce*, 166 F.R.D. at 459-60. *See Phillips*, 400 U.S. 542, *supra* notes 103-06 and accompanying text; *Jeffries*, 615 F.2d 1025, *supra* notes 107-11 and accompanying text; *Hicks*, 833 F.2d 1406, *infra* notes 309-19 and accompanying text; *Lam*, 40 F.3d 1551, *supra* notes 113-18 and accompanying text.

197. *See Luce*, 166 F.R.D. at 461.

198. *See Luce*, 166 F.R.D. at 459-61. The *Luce* court considered the reasoning in *Jeffries* wherein the *Jeffries* court noted that Congress placed the word "or" in between the prohibitive provisions of race, color, religion, sex and national origin in Title VII as evidence of its intent to cover each classification inclusively. *See Luce*, 166 F.R.D. at 459-60, citing *Jeffries*, 615 F.2d at 1032. The *Luce* court also cited to *Hicks*, 833 F.2d at 1416, applying *Jeffries* reasoning to hold that a black female plaintiff could aggregate the evidence of race and sex discrimination in her claim. *See Luce*, 166 F.R.D. at 460-61.

199. *See Luce,* 166 F.R.D. at 459-61, discussing the opinion in *Jeffries, Hicks, Lam*. *See supra* note 196 for case cites. Under 42 U.S.C. § 2000e–2(a)(1) (1994), the relevant language in Title VII reads, "It shall be an unlawful employment practice for any employer to fail or refuse to hire or discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions and privileges of employment *because of such individual's race, color, religion, sex or national origin* . . .(emphasis added)." *Id.*

200. The text of the ADEA reads in relevant part, "It shall be an unlawful employment practice for any employer to fail or refuse to hire or discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions and privileges of employment *because of such individual's age* (emphasis added)." 29 U.S.C. § 623(a)(1) (1994). *See also supra* notes 148-51 for other substantive provisions under the ADEA.

recognition of "age-plus-religion" or "age-plus-disability" as an extension of "sex-plus" would amount to judicial legislation.[201]

Moreover, in reaching its decision, the court considered the opinions in *Arnett* and *Kelly* involving combination of age with other factors in a "plus" theory.[202] The *Luce* court noted that *Arnett* explicitly recognized that "sex-plus-age" discrimination is available under Title VII and not the ADEA.[203] Furthermore, the *Luce* court considered that the court in *Kelly* determined that no authority to recognize "age-plus-disability" discrimination exists under the ADEA. [204]

Both *Luce* and *Kelly* explicitly reject the notions that an "age-plus" model of discrimination is available under the provisions of the ADEA. Therefore, plaintiffs with hybrid or multi-factor discrimination claims encompassing age, obtain incomplete relief under the ADEA alone. Some commentators have read the decision of an Oregon district court judge in *Good v. United States West Communications Inc.* to authorize an "age-plus" model to allege discrimination on the basis of age and sex under the ADEA.[205] The next section analyzes the likelihood that *Good's* holding recognizes as cognizable an "age-plus" claim under the ADEA.

1. *Good v. United States West Communications, Inc.*: The Implications For An "Age-plus" Claim

In *Good v. United States West Communications, Inc.*, an Oregon district court reinstated the age discrimination claim under the ADEA of a forty-five year old former employee of West Communications.[206] The plaintiff, Good, alleged a dis-

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201. *See Luce*, 166 F.R.D. at 461.

202. *See id.* at 460. *See Arnett*, 846 F. Supp. 1234, 1240; *Kelly*, 907 F. Supp. 864, 875 n.8.

203. *See Luce*, 166 F.R.D. at 460, citing *Arnett*, 864 F. Supp. at 1240.

204. *Luce*, 166 F.R.D. at 460. *See* discussion of *Kelly*, *supra* notes 171-90 and accompanying text.

205. *See* Mary E. Powell, Comment, *The Claims Of Women of Color Under Title VII: The Interaction of Race and Gender*, 26 GOLDEN GATE U. L. REV., 413, 434-36 (1996). *See also*, WLDF STUDY, *supra* note 2, at 17 (arguing that theoretically Good's claim could be brought as "age-plus" under the ADEA).

206. *See* No. 93-302-FR, 1995 WL 67672 (D. Or. Feb. 16, 1995).

criminatory termination on the basis of her age and sex.[207] In the proceeding below, the Magistrate Judge granted defendant's motion for summary judgement on Good's age, but not sex claim holding that the age difference of two and one-half years between Good and her replacement was legally insufficient to establish that she was replaced by a substantially younger individual.[208]

Good moved for reconsideration and reinstatement of her age claim by arguing that her replacement by a "younger man" was sufficient to create an issue of fact as to whether she was discriminated against on the basis of her combined age as well as sex status.[209] On reconsideration, the district held that Good's age claim should be reinstated where Good could demonstrate that the *combination* of her age and sex resulted in her termination.[210]

In its one page opinion, the *Good* court reached its decision to reinstate Good's age discrimination claim by relying on the recent decision in *Lam v. University of Hawaii* as authority.[211] *Lam* was analyzed by the Court of Appeals for the Ninth Circuit as a combined race and sex allegation under Title VII.[212] It is arguable that *Good* is the first case to recognize that an "age-plus" theory of liability is cognizable under the ADEA. However, because the *Good* court's opinion relied on the "sex-plus" theory applied in *Lam* to hold that Good should be allowed to demonstrate that the combination of her age and sex played a role in her treatment, the opinion in *Good* supports the conclusion that the court used a "sex-plus," rather than establishing an "age-plus" rational to resolve *Good's* claim.[213]

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207. *See Good*, 1995 WL 67672 at *1.

208. *See id.* Good's replacement was a forty-two year old male. *See id.*

209. *See id.*

210. *See id.*

211. *See Good*, 1995 WL 67672 at *1. *See Lam*, 40 F.3d at 1551. For a discussion of *Lam*, *supra* notes 112-18 and accompanying text.

212. *See Lam*, 40 F.3d at 1561-52.

213. It might be more accurately stated that the decision in *Good*, rather than *Arnett* was then first to recognize that "sex-plus-age" discrimination is cognizable as "sex-plus" discrimination under Title VII since Good was decided before *Arnett*.

The effect of *Good* on establishing a valid "age-plus" doctrine is currently speculative since the court did not explicitly address the issue. However, the *reasoning* applied to both Lam and Good's claims: that where multi-factor discrimination is alleged, a plaintiff should be allowed to demonstrate that the *combination* of factors resulted in discriminatory treatment which should be adopted to resolve "age-plus-sex" discrimination claims under the ADEA, as well as Title VII. However, courts like *Kelly* and *Luce* that have explicitly addressed the viability of "age-plus" factors *other than sex* under the ADEA have responded negatively to the claims.

IV. TREATMENT OF HYBRID DISCRIMINATION CLAIMS BY COURTS: THE SEPARATE ANALYTICAL MODEL AND ITS NEGATIVE IMPACT ON HYBRID AGE AND SEX DISCRIMINATION CLAIMS

Compounding the problems created by hybrid discrimination when courts do not accept older women as a protected subclass under Title VII, thereby causing courts to refuse to consider any multi-factor discrimination claims under the ADEA, is court treatment of hybrid age and sex discrimination once an allegation of discrimination under the ADEA and Title VII is advanced. Courts use a separate analytical model ("separate basis approach") to analyze age and sex claims as separate and distinct causes of action, even if the pleading suggests hybrid discrimination.[214]

Pleading hybrid sex and age discrimination claims can take one of several forms. First, a plaintiff may make explicit references to discrimination as specifically directed at "older women or females," with supporting proof.[215] This model may be adopted where disparate treatment or impact against older

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214. *See* Davis v. Richmond, Fredericksburg & Potomac R. R. Co., 803 F.2d 1322 (4th Cir. 1986); WLDF STUDY, *supra* note 2, at 19-21. *See, e.g., Murdock*, 1992 WL 39318; *Thompson*, 674 F. Supp. 198, 203-04; *Sharnhorst*, 686 F. 2d 637.

215. *See* WLDF STUDY, *supra* note 2, at 12-13. *See e.g.,* Dugan v. Pennsylvania Miller Mut. Ins. Co., 871 F. Supp. 785 (M.D. Pa. 1994), *aff'd* 68 F.3d 456 (3d Cir. 1995); Blonder v. Evanston Hosp. Corp., No. 91-C-3846, 1992 WL 44404 (N.D. Ill. 1992); Rielly v. Prudential Prop. & Casualty Ins. Co., 653 F. Supp. 725 (D.N.J. 1987).

women is present, but general age or sex bias is not. A second pleading form for hybrid discrimination claims may adopt the "sex-plus" model, by arguing that older women are a protected subclass under Title VII, in conjunction with the proof of discrimination directed at older women as "older women."[216] Third, a hybrid discrimination claim may allege discrimination as a result of age, under the ADEA *and* sex under Title VII, and present evidence of disparate treatment against plaintiff on the basis of both, in conjunction with evidence of a general atmosphere of sex and age bias.[217]

A separate basis approach to analyzing the evidence of age and sex discrimination requires a plaintiff to prove that discrimination occurred on the basis of age or sex, independent of one another.[218] Under a separate basis approach, a court allocates the evidence applicable to the age and sex claims into individual categories.[219] This approach does not provide adequate protections for litigants with hybrid discrimination claims because the approach fails to recognize the interrelatedness of the evidence of age and sex bias, or how each piece of evidence of age discrimination may support the sex discrimination claim under the circumstances presented in the claim. *Saes v. Manufacturers Hanover Trust Co.* illustrates this potential.[220] In *Saes*, Alice Saes sued her former employer, Manufacturers Hanover Trust Co. ("Manufacturers Hanover"), for age and sex discrimination in its termination decisions during a reduction in the workforce.[221] Manufacturers Hanover terminated Saes, four other women, and two men from their

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216. *See* WLDF STUDY, *supra* note 2, at 16-18. *See e.g., Arnett*, 846 F. Supp. 1234; Soggs, 603 N.Y.S.2d 21; *Palmero*, 809 F. Supp. 341; *Comway*, 825 F.2d 593.

217. *See*, WLDF STUDY, *supra* note 2, at 30-31. *See e.g.*, Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104 (9th Cir. 1991); Rollins v. TechSouth Inc., 833 F.2d 1525 (11th Cir. 1987).

218. *See* WLDF STUDY, *supra* note 2, at 19. Courts can also analyze combined sex and age discrimination claims under a protected subclass model and a hybrid, or multi-discrimination approach. For a discussion of the protected subclass approach, *see id.* at 16-19, and notes 119-46 and accompanying text. For a discussion of the hybrid approach used by courts, *see id.*, at 21-22, and *infra* notes 276-319 and accompanying text.

219. *See id.* at 19.

220. No. 90-0536, 1991 U S Dist. Lexis 14634 (S.D. N.Y. Oct. 11,1991).

221. *See Saes*, 1991 U.S. Dist. LEXIS 14634 at * 1 -2.

positions as underwriters, but retained three substantially younger males in the remaining positions.[222]

At the time of her termination, Saes was fifty-five years old and had been employed in various capacities with Manufacturers Hanover for thirty-nine years.[223] Of the six other employees dismissed, four were over the age of forty.[224] The district court for the Southern District of New York granted Manufacturers Hanover's motion for summary judgment on the sex claim, but not the age discrimination claim.[225] The district court considered each cause of action individually and allocated the evidence separately to analyze the strength of each of Saes' claims.[226]

For the sex discrimination claim, the court considered a memo prepared by the head of Saes' former department that noted the sex of each employee to be terminated.[227] Saes also alleged "various acts of discrimination" in which female employees were not invited to intra-departmental meetings of bank officers.[228] Saes also demonstrated that the five female underwriters that were terminated represented the entire number of women employed in the department.[229] Relying on this evidence, the court held Saes' allegations were insufficient to establish a claim of sex discrimination.[230] The court then dismissed Saes' sex discrimination claim.[231]

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222. *See id.* at * 2.

223. *See id.* at *1-2. Saes began her employment in 1949. From 1985, until the time of her separation from the company, Saes worked as an underwriter in the banks Hicksville, New York facility. The court did not specify what other positions Saes held within the bank prior to 1985. *See id.* at *1.

224. *See Saes,* 1991 U.S. Dist. LEXIS 14634 at *2.

225. *See id.* at *5-6.

226. *See id.* at *6-11.

227. *See id.* at *6-7. The notations were "b" for "boy" and "g" for "girl" pencilled in besides the last names of the underwriters. Manufacturers Hanover claimed that the notations were added after it made the termination decisions, in order to comply with federal regulations requiring the personnel department to provide an analysis for discrimination purposes. *See id.* at *7.

228. *See Saes,* 1991 U.S. Dist. LEXIS 14634 at *7.

229. *See id.*

230. *See id.* at *7-8.

231. *See id.* at *17.

In analyzing Saes' evidence of sex bias, the court noted that Saes did not provide evidence on the sex composition of the other two thousand bank employees that were terminated from other departments during the reduction in workforce.[232] Moreover, in rebutting Saes' prima facie showing of sex discrimination, the district court relied on evidence that within a month of Saes' termination, the bank rehired a younger female underwriter.[233] The court also considered that, a year later, Manufacturers Hanover hired another younger woman as an underwriter.[234] The court concluded that Manufacturers Hanover did not discriminate on the basis of sex because it hired these other women.[235] The *Saes* court did not specify the ages of the other terminated female underwriters in its opinion, but simply stated that of the six terminated employees "four were over forty."[236] The significance of the information to Saes in creating an inference of bias against her as an older woman, rather than bias against women in general was significant, particularly because the underwriters retained by Manufacturers Hanover following the reduction were all men, age thirty-nine, forty-two, and forty-eight.[237] Yet, the court failed to consider how the sexes of the other terminated underwriters over forty, impacted Saes' sex discrimination claim, particularly if all four of the other females underwriters were forty or older.[238]

Next, the district court separately analyzed Saes' age claim.[239] The court considered the termination of a disproportionate number of employees over the age of forty in the underwriter's group.[240] Moreover, the court noted, but did not

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232. *See id.* at *8.

233. *Saes*, 1991 U.S. Dist. LEXIS 14634 at *8. The woman rehired was forty at the time of her dismissal and subsequent rehire. *See id.* at n.3.

234. *Id.* at *8. The new hire was twenty-eight years old at the commencement of her employment. *See id.*

235. *See id.* at *8-9.

236. *See id.* at *2.

237. *See Saes*, 1991 U.S. Dist. LEXIS 14634 at *2.

238. The evidence in the opinion showed that Saes and *at least* one of the other women terminated during the employee reductions was at least forty at the time they were dismissed. *See id.* at *8 n. 3. *See supra* note 233.

239. *See id.* at *10-11.

240. *See id.* at *10.

factor into its determination the memorandum prepared for the personnel department listing the age of each employee considered for discharge or retention.[241] The district court also relied on the alleged statement by the personnel manager that the reason for Saes' termination was her age.[242] Additionally, the court cited the ages of new hires it had previously used to rebut Saes' sex discrimination claim in analyzing the age claim.[243] The court also considered that Saes' had thirty-nine years of experience with Manufacturers Hanover and that her qualifications and expertise surpassed all of the male retained underwriters who were substantially younger than Saes.[244] The court concluded that this evidence raised an inference of age discrimination sufficient to survive summary judgment.[245] Thus, the court sustained Saes' age discrimination claim.[246]

With the exception of the contested statement by the personnel manager that Saes' termination occurred because of her age, the evidence for both Saes' age and sex claims was nearly identical.[247] Saes was much older than both the male retained underwriter employees and every female and male hire.[248] The contested statement that Saes' firing occurred because of her age could easily be interpreted as a statement that *Saes*, as an "older woman," rather than simply an older employee was terminated because of her age, given the supporting inferences of other proof. For example, Saes demonstrated that within a month of her termination, Manufacturers Hanover rehired one of the terminated female underwriters who was forty at the time of her dismissal and rehire.[249] All of the retained male

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241. *See Saes,* 1991 U.S. Dist. LEXIS 14634 at *10. The court gave no weight to this evidence because of defendant's proffered reason for maintaining such records that it discussed in ruling on the sex claim. *See id.* at *11 n. 5. *See also supra* note 227 for the employer's explanation.

242. *See id.* at *10.

243. *See id.* at *10. In addition to the allegations involving the two younger women, the court also considered a third allegation, involving a younger male of thirty-two at the time of his hire. *See id.*

244. *See Saes,* 1991 U.S. Dist. LEXIS 14634 at *14.

245. *See id.* at *16.

246. *See id.* at *18.

247. *See id.* at *6-11.

248. *See id.* at *2, 8.

249. *See Saes,* 1991 U.S. Dist. LEXIS 14634 at *2, 9-10 n..3.

underwriters were significantly younger than Saes.[250] Moreover, all of the subsequent hires of both genders were substantially younger and had much less experience than Saes.[251]

The court did not consider how the *combination* of the ages and sexes of the terminated employees as compared to the retained and new hire employees might support Saes' combined age and sex discrimination claim. Though the court was willing to narrow the question of age bias to the underwriter positions, it refused to do so for the sex claim.[252] Further, while the court considered Saes' thirty-nine years of experience with Manufacturer's Hanover and superior credentials as compared to the younger retained and newly hired employees, it did not use the same analysis in considering the sexes, in conjunction with the ages of those employees.[253]

An argument can be made that Saes' evidence raised an inference of hybrid sex and age discrimination against her as an older woman in the reduction decisions sufficient to survive summary adjudication. However, unless courts have a flexible approach to use in analyzing the evidence of hybrid sex and age discrimination, overlaps in the evidence can be overlooked.

Applying a separate basis approach to consider the evidence of discrimination, no matter how much it suggests hybrid discrimination, necessarily limits a court's attention to an analysis based solely upon the categories to which the evidence is placed and supports a rigid analytical structure that is inappropriate for hybrid claims. Moreover, an older woman's efforts to obtain complete redress for hybrid discrimination is harmed when a separate analytical model is used because this

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250. *See id.* at *2.

251. *See id.* at *10, 14. Though the court did not compare Saes' experience and credentials to that of the other female rehire and new hire. However, it is reasonable to assume that neither the forty, nor the twenty-nine year old had comparable experience or expertise as Saes since Saes had thirty-nine years of experience. *See id.*

252. *See id.* at *8. *See supra* note 231 and accompanying text wherein the court required proof of the sex composition of the two thousand other bank employees terminated in the workforce reduction. *See id.*

253. *See Saes*, 1991 U.S. Dist. LEXIS 14634 at notes 239-46 and accompanying text for recap of analysis the court used in separately analyzing Saes sex and age discrimination claims.

approach repeatedly ignores the inter-relatedness of the claims and can allow a defendant to obtain a summary judgment simply by showing how younger women and older men are not subject to the adverse treatment.[254]

White men alleging discrimination on the basis of their status as "white males" illustrate the incompatibility of a separate analytical model for hybrid discrimination claims.[255] Those claims have not been subjected to the bifurcated analytical framework that other "sex-plus" claims experience, nor have they been resolved on summary judgment for lack of evidence of sex discrimination against men of color, or race discrimination against white women.[256] As ineffective as evidence of discrimination directed at men of color and white females would be to providing redress for claims of discrimination by white males as "white males," so too is the evidence of discrimination against older male employees or younger women to resolve the claims of discrimination by older women. Because neither category of evidence involving persons outside of the plaintiff's class (i.e. race, sex, or age) *directly addresses discrimination against plaintiff*, it should not be summoned in order to defeat a showing of discriminatory treatment directed at the plaintiff as an older woman. A separate analytical model applied to hybrid discrimination suits is not only inappropriate to resolve those claims, but may also create a negative impact by allowing evidence of treatment of persons who are not similarly situated to the older woman to defeat her hybrid claims.

Courts may be unaware of how to weigh the evidence of age and sex discrimination against older women as "older women."[257] Or, as in *Saes*, use of a separate basis approach may prevent a court from considering how each piece of evidence of age discrimination supports the sex discrimination claim and vice versa. In either case, the failure to apply an analytical model that examines the inter-relatedness of age and sex discrimination has resulted in court treatment that

254. *See* WLDF STUDY, *supra* note 2, at 20.
255. *See Lam*, 40 F.3d at 1562, fn. 19 for similar observations made by the court.
256. *See, e.g.*, Wilson v. Bailey, 934 F.2d 301 (11th Cir. 1991).
257. *See* WLDF STUDY, *supra* note 2 at 34.

does not adequately resolve the particular experience with hybrid discrimination that older women face.

V. CRITIQUE

A. HOW LAWYERS CAN INEFFECTUALLY TREAT HYBRID OR DUAL DISCRIMINATION CLAIMS

The ability of older women to obtain adequate redress for claims of discrimination is also significantly hampered by the failure of their attorneys to investigate the potential of combination discrimination.[258] An attorney may assume that the treatment an older female employee receives is largely the result of her age or sex, rather than her combined status as an "older woman."[259] As a consequence, lawyers may wholly ignore the potentially stronger claims of hybrid age and sex discrimination or discrimination against older women that are available on the facts underlying the plaintiff's claim, than a pure age or sex discrimination claim alone.[260]

For instance, in one case, a sixty year woman alleged discriminatory treatment by her employer consisting of statements made by her supervisor that "*women* over 55 should not be working", in conjunction with conduct alleged to be directed only at "older ladies," as well as evidence of general age bias.[261] The claim, however, was brought as pure age discrimination under the ADEA.[262] Other claims may present evidence of discrimination against older women that implicates both sex and age bias, such as comments that an older woman is a "battle ax", "old war horse", "old hag", "Grandma", "little old lady", "witch", "Old Maid", "old prune", and so on; while these claims may be presented as pure sex discrimination. Attorneys must be cognizant of the potential that more than simply age or sex

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258. *See id.* (noting that plaintiff's attorneys have a particular opportunity to educate courts about hybrid discrimination against mid-life to older women).

259. *See id.* The WLDF STUDY points out that some lawyers may lack an understanding of how age and sex are connected for older women in limiting job opportunities. *See id.*

260. *See id.* at 34.

261. *See* Crawford v. Medina Gen. Hosp., 96 F.3d 830, 832 (6th Cir. 1996).

262. *See Crawford*, 96 F.3d at 832.

discrimination is involved in an older woman's discrimination claims in order to fully develop the evidence supporting a hybrid of age and sex discrimination where it exists.[263] The benefits derived from such potential evidence are that it may provide a stronger claim than that of age or sex discrimination standing alone because it better supports the evidence of discrimination directed against an older woman, than evidence of pure age or sex discrimination can. Attorneys dealing with cases presenting evidence of the potential that both age and sex discrimination are involved in an older woman's claims must fully explore the potential that a hybrid of both exists before deciding to plead age or sex discrimination alone.[264]

B. THE *MURDOCK* AND *THOMPSON* DECISIONS DENYING RECOGNITION OF OLDER WOMEN AS A PROTECTED SUBCLASS UNDER TITLE VII AND THE FALLACY OF ADEQUATE SEPARATE PROTECTIONS FOR HYBRID DISCRIMINATION UNDER EITHER TITLE VII OR THE ADEA.

The decisions in both *Thompson* and *Murdock* expressly refuse to recognize older women as a protected subclass for protection under Title VII or the ADEA, explaining that neither federal, nor state law has extended protection to older women as "older women."[265] However, in relying on the lack of immediate precedent for recognizing subset discrimination directed at older women, neither court actually analyzed the reasoning applicable to subset discrimination in order to determine whether or not that reasoning should be applied to those claims.

Subset discrimination under Title VII, as first identified in *Martin Marietta Corp., v. Phillips*, involves allegations that an employer disparately treats a subclass within a protected class, rather than the protected class as a whole.[266] Accordingly,

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263. *See* WLDF STUDY, *supra* note 2 at 34.

264. *See id.*

265. *See Thompson*, 674 F. Supp. at 203-04; *Murdock*, 1992 WL 393158 at *3.

266. *See Phillips*, 400 U.S. at 544 (wherein the U.S. Supreme Court vacated summary judgment in favor of defendants and held that although not all women were affected by the employer's practice of refusing to hire women with pre-school age chil-

where "a Title VII plaintiff can show that she would have been offered the position if she were a man, she can show a prima facie case of discrimination, *even if other women were offered the same position*" (emphasis added).[267] In *Phillips*, the "other women" offered such positions were not be similarly situated to plaintiff's alleging the disparate treatment in terms of their sex plus another characteristic being affected by the employer's practice.[268] In determining whether there is a violation of Title VII, the plaintiff's class is defined as a "subclass of women (or men) [that are subjected to disparate treatment] based on either (1) an immutable characteristic or (2) the exercise of a fundamental right."[269]

Older women are clearly a subset of women within the protected class of "sex" under Title VII, and a subset of older employees within the protected class of "age" under the ADEA who are subjected to disparate treatment based upon their combined or hybrid identity as "older women." Accordingly, where an older woman can show that she would have been offered a position if she were a man, she can show a prima facie case of discrimination, *even if other women were offered the same position*. This reasoning, applied here to "sex-plus-age" discrimination claims, is a major component of the theoretical underpinnings in the subset or "sex-plus" discrimination context. There is no salient justification for denying the application of subset discrimination to claims by older women as "older women" under Title VII since the reasoning underlying those claims is applicable in a "sex-plus-age" context.

Moreover, an immutability argument is present under both Title VII and the ADEA for older women's status as "older women" that is comparable, albeit different in origin, to the

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dren, plaintiffs could still establish a violation of Title VII because similarly situated men were not disparately treated). *See id.*

267. *See Arnett*, 846 F. Supp. at 239.

268. *See Phillips*, 400 U.S. at 543-44, (noting that although over 70% of applicants hired for the position at issue were women, plaintiffs could still state a claims for discrimination under Title VII). *See id.* The women hired were not similarly situated to the plaintiffs in *Phillips* because they did not have pre-school age children. *See id.*

269. *Arnett*, 846 F. Supp. at 1238-40, explaining the rule that has emerged from *Phillips* and its progeny in analyzing "sex-plus" discrimination claims. *See id.*

existence of an immutable identity for women of color recognized under Title VII.[270] In an allegation of employment discrimination brought by an African-American woman based upon her status as a "black woman," courts have recognized that both components of a black woman's identity are immutable, and therefore create a subset of both African-American and female employees for protection under Title VII.[271] Similarly, an older woman's gender identity is clearly immutable and therefore not subject to change. However, an older woman's status as an "older woman" under both Title VII and the ADEA is an immutable identity that is not subject to change because once a woman reaches forty years of age, she becomes protected by the provisions of the ADEA for the rest of her life. Therefore, whether an older woman is forty or eighty years of age, she will always be protected under the ADEA, and the protections afforded to her under Title VII because of her gender, likewise, are not subject to change. The immutability in an older woman's identity as an older woman not only strengthens the argument for the extension of "sex-plus" under Title VII to claims brought by older women, but moreover, provides support for the proposition that an "age-plus" theory is cognizable under the ADEA.

As distinguished from the claims in *Kelly* and *Luce* seeking recognition of "age-plus-disability" and "age-plus religion" discrimination, an older woman's identity as an "older woman" is legally *created* by her admission into the protected group under the ADEA and cannot arise before she reaches forty.[272] As a result, an older woman's status as an older woman in an employment context is both defined and solidified by her entrance into the protected age group under the ADEA. On the other hand, the development of a disability or a religious belief can

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270. *See supra* notes 107-18 discussing "sex-plus" discrimination claims of women of color. *See also supra* note 15 for articles on the subject of combined race and sex discrimination.

271. *See Jeffries*, 615 F.2d at 1032-33; *supra* notes 108-11, holding that black women could establish a discrimination claim absent discrimination against black men or white women.

272. The ADEA protects persons who are forty or older. *See* 42 U.S.C. § 631(a) (1994).

theoretically occur at any time in a plaintiff's employment.[273] The ADEA should therefore expand its protections to cover older women as "older women" since her status is "born" or arises out of her inclusion in the protected classification under the ADEA.

The opinions in *Thompson* and *Murdock* expressed reservations about considering older women as a protected subclass for Title VII or the ADEA purposes because no authority existed upon which to find that a viable age "age-plus-sex" theory exists, and the court in *Murdock* concluded that judicial attempts to establish such a theory would amount to judicial legislation.[274] But the problem of inadequate remedy for "specialized" forms of discrimination has been faced by other courts at one time or another. Those courts used the underlying rationales in Title VII or the ADEA to support new applications of existing theories in order to meet the needs of significant subsets of women and men whose claims of discrimination were not being adequately redressed by the then current structures available.[275] Similarly, Title VII and the ADEA must continue to evolve and expand in order to meet the needs of persons protected by its provisions that experience subset discrimination on multiple basis, rather than just because of their age or sex. The rationales supporting the existence of the "sex-plus" doctrine also support its further extension to "age-plus-sex" discrimination under Title VII and the ADEA. Accordingly, courts

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273. Generally there is a much stronger correlation between age and disability than age plus religion or other factors where degenerative conditions increase with a person's age. *See, e.g., Blonder*, 1992 WL 44404 (discussing age and sex discrimination claims brought by an older woman on the basis of an employer practice that required the largely female nursing staff, but not the largely male physician staff to undergo rubella inoculations and the relationship between inoculations and arthritic conditions that are triggered by the vaccinations in adult women that increase with their ages). The correlation between age and an age-related disability however, does not arise out of admittance into the protected age group to the same extent that one's status as an older woman does. This argument is not put forth here to argue that a claim for age-plus-disability should not cognizable under the ADEA, but only to illustrate the differences in such claims.

274. *See Thompson*, 674 F. Supp. at 203-04; *Murdock*, 1992 WL 393158 at *3.

275. *See e.g., Rogers*, 454 F.2d 234, *supra* note 92 (establishing hostile environment claim by utilizing the "terms, conditions and privileges language" in Title VII); *Jeffries*, 615 F.2d 1032 *supra* note 108-11 and accompanying text (first holding that black women could establish a claim under Titile VII for discrimination absent discriminatory treatment directed at white females or males of color).

should apply that reasoning to sex-plus-age discrimination claims under either statute.

VI. RECOMMENDATIONS

Judges and attorneys can consistently recognize the potential for hybrid discrimination in the claims brought by older women by considering the ways in which the evidence of discrimination may support a hybrid of both age and sex. The following section discusses approaches that courts and attorneys should adopt in analyzing and presenting hybrid discrimination claims.

A. COURTS SHOULD USE A HYBRID APPROACH TO ANALYZE HYBRID AGE AND SEX DISCRIMINATION

Instead of following a separate basis model, some courts have adopted a hybrid approach to analyze dual claims of age and sex discrimination.[276] In contrast to a separate basis approach, a hybrid approach considers how the evidence of one type of discrimination, such as age bias, supports an inference that another type of discrimination, such as sex bias exists.[277] Under this approach, courts consider the evidence of other types of discrimination as demonstrative of a workplace that is generally infected or tainted with impermissible bias.[278]

A hybrid approach provides flexibility and comprehensiveness with regard to hybrid claims of sex and age discrimination because it considers the ways in which the evidence of discrimination overlaps, instead of using an either/or approach. Thus, courts can see the larger context of the dis-

276. *See* WLDF STUDY, *supra* note 2 at 21. *See Hicks*, 833 F.2d at 1416 (holding that racial slurs directed at Black female employees that were tainted with sex discrimination sufficient to create a sexually discriminatory environment); Spanier v. Morrison's Management Servs., 822 F.2d 975 (11th Cir. 1987) (holding that sexist statements by plaintiff's supervisor supported its findings of age discrimination); Hoth v. Grinnell College, 23 Fair Empl. Prac. Cas. (BNA) 528 (S.D. Iowa 1980) (holding that although the plaintiff was not yet forty and thus not entitled to the protections under the ADEA, her age discrimination allegations were too closely tied with her claims under other anti-discrimination laws to dismiss).

277. *See* WLDF STUDY, *supra* note 2, at 16.

278. *See id.* at 21.

crimination claims by considering the evidence for analysis in light of all of the claims presented. A hybrid approach is particularly appropriate when the evidence of discrimination is equally compelling and applicable to both claims, in which case, the evidence should not be mechanically allocated to only one claim or the other. The decisions in *Sischo-Nownejad v. Merced Community College Dist.*,[279] *Lowe v. City of Monrovia*,[280] and *Hicks v. Gates Rubber Co.*[281] illustrate a hybrid approach and how plaintiffs can prevail in cases where courts adopt this approach.

In *Sischo-Nownejad*, the Court of Appeals for the Ninth Circuit reconsidered the grant of a summary judgment motion for defendant, Merced Community College District ("Merced") in which the district court determined that plaintiff failed to establish a case of intentional discrimination.[282] At the time the action arose, the plaintiff, Edina Sischo-Nownejad, was fifty-eight years old.[283] Sischo-Nownejad's employment as an art instructor at Merced commenced in 1968.[284] The plaintiff alleged sex and age discrimination consisting of a series of established practices followed by the college for all faculty members except Sischo-Nownejad.[285] Such practices included failing to consult with Sischo-Nownejad about the courses she wished to teach, reassigning classes to others that Sischo-Nownejad developed and taught for years, and giving her undesirable teaching assignments.[286] Moreover, the college failed to consult with Sischo-Nownejad about her need for supplies and did not to provide her with any supplies from 1982 to 1988, while it provided supplies for all other faculty members during this pe-

279. 934 F.2d 1104 (9th Cir. 1991).

280. 775 F.2d 998 (9th Cir. 1985).

281. 833 F.2d 1406 (10th Cir. 1987).

282. *Sischo-Nownejad*, 934 F.2d at 1106-07. The claims on appeal included sex and age discrimination under Title VII and the ADEA, equal protection violations, under 42 U.S.C. § 1983, and sex and age discrimination in violation of the California Fair Employment and Housing Act. *See id.* at 1108.

283. *See id.* at 1106.

284. *See id.* at 1107.

285. *See id.* at 1106-07.

286. *See Sischo-Nownejad*, 934 F.2d at 1107. The college ordinarily based its assignments and scheduling classes on faculty member input. The senior faculty is normally given the first chance to teach classes they have developed or taught for long periods of time. *See id.*

riod.[287] The enrollment in Sischo-Nownejad's courses was constantly monitored, although enrollment of classes taught by other instructors was not.[288] When Sischo-Nownejad complained about course assignments, the college did not take action to facilitate her request.[289] On the other hand, while conducting investigations into allegations of misconduct by Sischo-Nownejad, the ethics committee violated its own policies.[290]

The school repeatedly criticized Sischo-Nownejad by alleging that she failed to fulfill her required office hours under her contract, rarely attended division meetings, and was absent from her scheduled office hours.[291] The college also denied Sischo-Nownejad's request for leave.[292] Sischo-Nownejad requested reconsideration of this decsion.[293] The college failed to respond and after seven months, she withdrew her request for reconsideration.[294] Sischo-Nownejad's proof also included statements from her department chairs that indicated age and sex bias.[295] The statements included references to Sischo-Nownejad as an "old warhorse", "a women's libber", and repeated characterizations of her students as "little old ladies [who] have their own art studio."[296] Finally, Sischo-Nownejad

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287. *See id.*

288. *See id.*

289. *See id.*

290. *See Sischo-Nownejad*, 934 F.2d at 1107. After Sischo-Nownejad made a verbal complaint to the dean of the college about her course assignments being unilaterally taken over by the division head of the art department, she submitted a written complaint to the dean and sent a copy of the letter to the president of the college and the board of trustees. The art department head responded by filing an ethics complaint against Sischo-Nownejad, alleging that Sischo-Nownejad charged him with unprofessional conduct by her actions, in distributing the letter to the president and board of trustees, in violation of the established procedures for lodging such complaints. The department head also charged that Sischo-Nownejad violated art department procedures by copying and selling art department works, as well as physically abusing another instructor. In response, the ethics committee, in violation of established policy, conducted an investigation of the charges in open senate, rather than closed committee, and formally reprimanded Sischo-Nownejad in a letter included in her personnel file. *See id.*

291. *See Sischo-Nownejad*, 934 F.2d at 1107. Sischo-Nownejad denied each allegation as untrue. *See id.*

292. *See id.*

293. *See id.* at 1107-08.

294. *Id.* at 1108.

295. *See Sischo-Nownejad*, 934 F.2d at 1108, 1112.

296. *See id.* at 1108.

presented two letters from the president of the college and a statement from the dean of personnel urging Sischo-Nownejad to retire.[297]

The Ninth Circuit analyzed the evidence of discrimination under Title VII and the ADEA simultaneously.[298] In reviewing the facts, the Ninth Circuit relied on *Lowe v. City of Monrovia* ("Lowe").[299]

In *Lowe*, a black woman applied for a position with the Monrovia police department.[300] The personnel manager responded that the department had "no black or women officers" and therefore, had "no facilities" in which to serve her.[301] Lowe's initial complaint alleged both race and sex discrimination but the district court dismissed the sex claim because it was time barred.[302] The district court concluded that the personnel manager's statement did not raise an inference of race discrimination sufficient to survive summary judgment.[303] On review, however, the Ninth Circuit concluded that the statement, taken in conjunction with the fact that Monrovia did not employ black police officers, created an inference of race discrimination sufficient to establish a prima facie case.[304] The Ninth Circuit did not explicitly address the overlaps in the evidence of race and sex bias apparent in the statement by the personnel manager. The Ninth Circuit recognized, however,

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297. *See id.*

298. *See id.* at 1109-12.

299. 775 F.2d 998 (9th Cir. 1985).

300. *See Lowe*, 775 F.2d at 1002.

301. *See id.* The personnel manager suggested that Lowe seek a position with the Los Angeles Police Department where they were "begging for women and minorities." *Id.* at 1002-03

302. *See id.* at 1003. The district court ruled that Lowe's sex claim was time barred because Lowe failed to allege sex discrimination in her amended EEOC complaint. *See id.*

303. *See Lowe*, 775 F.2d. at 1003. Presumably, the lower court attributed the "facilities comment" to Lowe's sex, rather than her race.

304. *See id.* at 1007. Had Lowe's sex discrimination claim survived summary judgment, it is reasonable to assume that the Ninth Circuit would have applied the same reasoning because the department also had no women officers and the personnel manager's statement implicated Lowe's status as a woman and an African-American. Moreover, the question of whether or not the statement should be attributed to her sex, race, or a hybrid of both, is not an appropriate consideration for summary judgment because it potentially involves a disputed question of fact.

that the comment could have applied equally to Lowe's claim of race or sex biases and applied the statement accordingly to the remaining race claim.[305]

The Ninth Circuit followed the *Lowe* approach to analyze Sischo-Nownejad's case. The Ninth Circuit recognized that Sischo-Nownejad's evidence could be attributed to her status both as an older employee and as a woman.[306] In reversing the district court, the Ninth Circuit held that the statements that Sischo-Nownejad was an "old warhorse", "women's libber", and the repeated references to Sischo-Nownejad and her students as "little old ladies", in conjunction with the overall treatment she received, supported both the age and sex claims.[307] Accordingly the Ninth Circuit remanded the case for trial on Sischo-Nownejad's age and sex discrimination claims.[308]

Similarly, in *Hicks v. Gates Rubber Co.*, a race and sex discrimination case brought by an African-American woman, the Tenth Circuit recognized that the evidence of race and sex discrimination against plaintiff could be aggregated for analysis in order to demonstrate a violation of Title VII.[309] The plaintiff, Marguerite Hicks, worked for Gates Rubber Company ("Gates") as a security guard for less than a year.[310] Hicks was the only

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305. *See id.* at 1009. In concluding that Lowe's evidence was sufficient to meet the prima facie burden of establishing race discrimination, the *Lowe* court stated:

> According to plaintiff's sworn affidavit, Logans, the Personnel Division Manager for the City made a point of telling Lowe that the Monrovia police force had *no women and no Blacks*. Logans then encouraged Lowe to apply for a position as a police officer in Los Angeles rather than Monrovia. Logans explained that Lowe should do so because the Los Angeles police force was "literally begging for minorities and especially females." One clear inference that could reasonably be drawn from this statement is that the Monrovia police force was not begging for-or even interested in-such applicants. (emphasis added).

Id. at 1009.

306. *See Sischo-Nownejad*, 934 F.2d at 1111-12.

307. *Id.* at 1112.

308. *See id.* at 1114.

309. *See* 833 F.2d 1406, 1416 (10th Cir. 1987). The Appellate Court explained that aggregation was permissible because "Title VII prohibits an employer from discriminating against any individual because of race or because of sex." *Id.* The *Hicks* court then cited *Jeffries*, 615 F.2d, at 1032, wherein the *Jeffries* court explained that "the use of the word 'or' evidences Congress' intent to prohibit employment discrimination based on any or all of the listed characteristics," in arguing that aggregation of the evidence to determine if race and sex bias existed is possible. *Hicks*, 833 F.2d at 1416.

310. *See id.* at 1408.

African-American woman employed by Gates and one of only two African-American employees.[311]

During Hicks' employment, she complained that improper racial and sexual remarks and conduct created a hostile environment.[312] Supervisory and regular personnel made racial remarks referring to African-Americans as "niggers," and "coons."[313] Coworkers also referred to Hicks as a "lazy nigger" and "Buffalo Butt."[314] The unwelcome sexual conduct involved a supervisor rubbing Hicks' thigh and grabbing her breast while jumping on top of her.[315] The district court held that Hicks' claims did not establish a hostile environment based upon her race.[316]

Although the Tenth Circuit sustained the lower court's findings that Gates did not create a hostile environment for black employees, it nevertheless concluded that the evidence of racial harassment could be combined with the evidence of sex bias to determine whether a sexual harassment hostile environment existed.[317] The court relied on the reasoning in *Jeffries v. Harris County Community Action Ass'n* which held that a black female could establish sex and race bias in the absence of discriminatory treatment against black males or white females.[318] The *Hicks* court then remanded the case to the lower court for consideration of Hicks' sexual harassment hostile environment claim.[319]

Sischo-Nownejad, Lowe, and *Hicks* demonstrate the benefits to plaintiffs when courts use a hybrid approach to analyze the evidence of discrimination in cases containing the potential that more than one type of discrimination is involved in the claim. Moreover, a hybrid approach allows courts to consider

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311. *See id.* at 1408-09.
312. *See id.* at 1409-11.
313. *See id.* at 1409.
314. *Hicks*, 833 F.2d at 1409.
315. *See id.* at 1409-10.
316. *See id.* at 1411.
317. *See id.* at 1416-17. For a discussion of sexual harassment hostile environment, *see supra* notes 92-95 accompanying text.
318. *See Hicks*, 833 F.2d at 1416, citing *Jeffries*, 615 F.2d, at 1032.
319. *See Hicks*, 833 F.2d at 1419.

the ways in which the plaintiff's complete identity factors into the treatment she receives. A hybrid approach encourages greater scrutiny by courts of the overlaps in the evidence of sex and age discrimination as indicative of multi-factor, rather than single factor discrimination. This approach may increase a plaintiff's chances of prevailing when hybrid discrimination is present.

B. COURTS AND ATTORNEYS MUST USE A COMPREHENSIVE MODEL TO ASSESS HYBRID AGE AND SEX DISCRIMINATION

This comment discussed several obvious ways to address the problems of hybrid discrimination. The first step begins with attorneys who handle hybrid discrimination cases. Attorneys must consider and investigate whether an older woman's status as an "older woman", rather than just her age or sex, played a part in the treatment she experienced. Next, attorneys should plead both sex and age discrimination whenever the facts suggest the possibility that a hybrid of both age and sex exists, rather than take an either/or approach to pleading these claims. Moreover, lawyers should adopt the "sex-plus" pleading model under Title VII, in addition to alleging age discrimination under the ADEA, whenever an older woman's status as an "older woman" contributes to the discrimination she experiences. This pleading posture focuses a court's attention on the evidence of discrimination directed at older women, absent general age and sex discrimination. However, because all courts have not yet accepted older women as a protected subclass under Title VII, a separate allegation of age discrimination is still necessary in order to avoid the possibility of multiple summary adjudication discussed in *Arnett*.[320]

Finally, courts should adopt a hybrid approach to analyze sex and age discrimination claims, whenever the evidence of discrimination suggests a hybrid. A hybrid approach is neces-

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320. *See Arnett*, 846 F. Supp. at 1238; *see also* supra notes 130-46. See also *Murdock*, 1992 WL 393158 at *3; *see also supra* notes 125-28, wherein the State Appellate Court refused to consider the evidence of combined age and sex discrimination directed at older women and accordingly held that no evidence of *pure* age or sex discrimination was presented.

sary in these cases because it allows a court to consider how the proof of discrimination directed at an older woman supports both the sex and age discrimination allegations.

VII. CONCLUSION

Lawyers and judges faced with hybrid age and sex claims must consider the particular issues that arise in these claims by older women. Alternative analytical models, such as "sex-plus" and "hybrid approach analysis" are necessary to effectively resolve hybrid discrimination claims. There are challenges inherent in the next century where older women will become an expanded group of older employees and potential litigants under both Title VII and the ADEA for hybrid claims of discrimination. The reality requires the development of a comprehensive approach to the problem of hybrid discrimination. This comment provides but a starting point for that development.

*Sabina F. Crocette**

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