Intersectional Discrimination and the Courts: Pleading Combined Biases

By Sara N. Maeglin

Introduction

In 1989, legal scholar Kimberlé Crenshaw published her seminal article on intersectional theory.[1] In it, Crenshaw explained the consequences when courts (and feminist and anti-racist movements) limit identity to single characteristics (e.g., Black or white, male or female).[2] Centering her article on the unique experiences of Black women, Crenshaw highlighted how courts historically excluded or limited Black women from the full protection of anti-discrimination law, either because white women were not so disadvantaged (i.e., no sex discrimination) or Black men fared better (i.e., no race discrimination).[3] Pointedly, Crenshaw argued that past conceptualizations of discrimination had been "so limited" that "sex and race discrimination have come to be defined in terms of the experiences of those who are privileged **but for** their racial or sexual characteristics."[4] And as such, Crenshaw concluded that this conceptualization allowed courts to ignore the "double-discrimination" Black women faced because of their race and their sex and "sometimes… as Black women—not the sum of race and sex discrimination, **but as Black women**."[5]

Crenshaw, therefore, advocated for an "intersectional" approach that embraced the "complexities of compoundedness" and addressed the unique problems faced by the "most disadvantaged" within protected groups.[6] The intersectional approach would "plac[e] those who currently are marginalized in the center [a]s the most effective way to resist efforts to compartmentalize experiences and undermine political collective actions."[7]

Thirty plus years have passed since Crenshaw published her article. And how courts have handled intersectional discrimination, is, in Crenshaw's vernacular, "complex," and luckily, evolving. Using Crenshaw's article as a jumping off point, this article has reviewed over forty cases adjudicated across the United States, involving intersectional claims or, as more commonly known in caselaw, "plus" claims (e.g., "sex plus race" or "sex plus age"). Although many plus cases involve sex plus claims that include a non-protected characteristic, like parenting or marriage, this article focuses only on cases that involve two or more protected characteristics, as the law is more settled in the former than it is in the latter.[8]

As discussed in detail below, in reviewing these intersectional cases, a few practice pointers emerge. First, attorneys must articulate all potential bases for discrimination at the outset. Second, attorneys should plead intersectionality, as an additional or alternative claim. Third, lawyers should educate judges on intersectionality. Do not make the mistake of assuming your judge understands your client's intersectional claim, no matter its prevalence in society. Finally, lawyers should use new caselaw to support their claims.

I. Check the boxes.

This is going to seem obvious, especially to seasoned attorneys, but it cannot be overstated: when drafting the charge of discrimination (hereafter "Charge") for your client, check any and all protected characteristics that potentially apply. Rewinding just a bit, in every consultation, ask your potential client about their protected characteristics, even those not identified in their pre-consultation phone call or web form. Clients, like attorneys, make assumptions about why their employer acted in a particular manner—because of race, for example—but ultimately, clients do not have all of the facts before they meet you in a consultation. So, with that in mind, ask important questions about protected characteristics in your consultations and document that information throughout the administrative process.

Why is this important? Well, the easiest tool in defense counsel's toolkit is to move to dismiss your case based on exhaustion. Title VII of the Civil Rights Act of 1964 ("Title VII")—the current linchpin of intersectionality claims—mandates that employees file a Charge of Discrimination with the Equal Employment Opportunity Commission, or

its state equivalent, before filing a lawsuit in court.[9] Charges require employees to state the protected characteristics implicated in their claim(s) of discrimination. If an employee does not identify a certain protected characteristic as their basis for discrimination, and then tries to bring a claim in court based on the omitted protected characteristic, depending on the circumstances, defense counsel has a decent shot of successfully pleading an affirmative defense based on failure to exhaust.

Effective defense counsel will scrutinize Charges for potential failure to exhaust claims. Indeed, some have used this approach in moving to dismiss intersectional claims.[10] For example, in *B.K.B. v. Maui Police Department*, the Ninth Circuit reviewed whether the district court properly dismissed plaintiff's sex-based discrimination claims where she checked the boxes for "sex" and "race," but her examples throughout her Charge appeared to support only her race claim.[11] There, the plaintiff argued she exhausted her sex discrimination claim with examples from her Charge and pre-complaint questionnaire that supported her intersectional claim of race **and** sex discrimination.[12]

Ultimately, the Ninth Circuit agreed with the plaintiff. Recognizing that Charges must be treated with "utmost liberality" because many are drafted without knowledge of the "technicalities of formal pleading[,]" and that it could consider plaintiff's intersectional claim if it was "consistent with the plaintiff's original theory of the case," the court concluded that plaintiff's sex discrimination claim was exhausted based, in part, on intersectionality theory.[13] Specifically, the court agreed that some harassment examples from plaintiff's pre-complaint questionnaire were based on race and sex, and acknowledged that there were "numerous examples in the federal courts where harassment because of 'race' … [included]… behavior deploying sexual or gender-based idioms in order to express contempt or ridicule or in order to threaten violence."[14] Accordingly, the court reversed the district court's order dismissing the plaintiff's sex discrimination claim.[15]

Importantly, even though the *B.K.B.* court revived an intersectional claim, do not trust other courts to do the same. Instead, encourage your clients to check any applicable box. That way, you avoid inviting a judge to second guess your client's Charge, especially when your client is asserting an intersectional claim that is rarely accepted (or understood) by the courts.

II. Plead intersectionality, strategically

There is no need to tell you how to draft a Complaint. However, when pleading intersectional claims, there are at least two pitfalls to avoid. First, plead intersectionality outright, regardless of whether this is your only theory of discrimination or your alternative theory to a single protected characteristic claim. In the "claims for relief" section, draft a separate claim for relief for the intersectional claim. And ensure that the language for the intersectional claim is crystal clear, using language like "intersectional," "plus," or at a minimum "and" as in "race and sex."

Second, use Title VII to protect your intersectional claim. Of course, this point is moot for claims like race plus sex where both protected characteristics are covered under Title VII. But claims like sex plus age or sex plus disability ostensibly implicate laws beyond Title VII, such as the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA"). Indeed, courts traditionally decline to move plus cases forward under the ADEA or ADA and permit such plus cases only through Title VII.[16] In *Cartee v. Wilbur Smith Associates, Inc.*,[17] one United States District Court recognized as much, stating: "[N]o United States Supreme Court opinion nor any Fourth Circuit published opinion appears to have explicitly addressed the propriety of an age plus suit under the ADEA. Moreover, courts that have addressed the question have expressly declined to extend plus claims to the ADEA."[18]

Most recently, in *Frappied v. Affinity Gaming Black Hawk, LLC*,[19] the Tenth Circuit suggested that sex-plus-age claims could be pleaded only under Title VII, stating:

> Though Affinity appears to argue that all discrimination claims with some age-related component must be brought only under the ADEA, the ADEA includes no such requirement. Nothing in the ADEA limits a plaintiff's ability to bring a claim under Title VII. To the contrary, by passing the ADEA, Congress intended to broaden protections against employment discrimination to cover older workers . . . It did not intend to limit existing protections provided under Title VII.[20]

So, if litigating in the Tenth Circuit, keep *Frappied* in mind and connect your age-related intersectional claims to Title VII.

In sum, when asserting a plus claim involving age or disability in your Complaint, one would be wise to at least plead such a claim under Title VII.

III. Educate your judge.

Inequality and violence against certain subgroups, like Black men or Asian or Asian-American women, is (unfortunately) not new. Even still, we cannot take for granted that others around us understand this unsurprising

fact about subgroup treatment. Similarly, you cannot assume judges share your knowledge of recent events or have drawn the same conclusion from them. Importantly, you must remember that some judges almost certainly will not consider subgroup discrimination if allegations of such discrimination are neither asserted in the Complaint nor subsequent briefs before those judges.

Simply put, you must educate your judges on intersectionality. Seems obvious, right? But many courts dismiss intersectional claims because attorneys fail to explain how their particular client fits within a "most disadvantaged" group.

To illustrate, courts generally understand the special disadvantages faced by Black women and older women and accept claims involving the same. In the 1980 case *Jefferies v. Harris County Community Action Association*,[21] the Fifth Circuit first recognized intersectional claims made by Black women, stating:

> The essence of Jefferies' argument is that an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females. We agree that discrimination against black females can exist even in the absence of discrimination about black men or white women.[22]

Since then, courts, including the Tenth Circuit, have relied on *Jefferies* to accept intersectional claims made by Black women.[23]

And courts have begun to accept claims based on the discrimination of older women.[24] Approval for sex-plus-age claims under Title VII has gained momentum over time.[25] Most recently, the Tenth Circuit in *Frappied*, discussed above, held that sex-plus-age claims were viable under Title VII.[26]

Even with the acceptance of claims made by Black women and older women, courts are reluctant to find "plus" claims viable under Title VII when they involve less common intersectional claims, unless plaintiffs thoroughly explain the context of their claims to those courts. In fact, this was true in *Frappied*.[27] There, the court was persuaded by research showing older women were subjected to "unique discrimination" based on sex stereotypes about older women. This research influenced the court to conclude, in part, that: "if discrimination is targeted more at older women than at older men, that differential treatment is not merely a manifestation of 'stronger' age discrimination—it is itself a form of sex discrimination aimed at older women."[28]

Elsewhere, intersectional claims survive or die based on stereotypes about certain subgroups. For example, in *Kimble v. Wisconsin Department of Workforce Development*,[29] the district court extended the viability of a sex-plus-race claim to an African-American man.[30] In doing so, the court acknowledged that "scholars have long recognized that black males are subject to distinct stereotypes," like being less intelligent than other groups, including black females, and having bad tempers.[31] In light of these stereotypes, the court held that plaintiff established he was a member of a protected class.[32]

Similarly, in *Craig v. Yale University School of Medicine*,[33] the district court determined that the plaintiff, an African-American male doctor, pleaded a cognizable race-plus claim once he explained his differential treatment compared to white male doctors (*e.g.*, calling him "boy" and failing him for surgeries he did not perform) and stereotypes directed at black men, such as historical "social taboos towards African American men, particularly when they are involved in interpersonal relationships with Caucasian of race and white of color women."[34] Where plaintiff's sex-only claim would have been dismissed because white men were treated favorably, the court allowed the plaintiff to move forward with his race-plus claim.[35]

Another example is set forth in *Lam v. University of Hawaii*,[36] where the Ninth Circuit reversed summary judgment on the plaintiff's sex-plus-race discrimination claim after the district court impermissibly separated her intersectional claim into sex discrimination and race discrimination claims.[37] Significantly, the court stated that dividing the claim ignored "the particular nature" of the plaintiff's experience as an Asian woman. Specifically, that: "[l]ike other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared

neither by Asian men nor by white women. In consequence, they may be targeted for discrimination 'even in the absence of discrimination against [Asian] men or white women.'"[38]

But not every court embraces intersectional claims with open arms. In *Marshall v. AT&T Mobility Services, LLC*,[39] the federal district court rejected the plaintiff's claim of discrimination based on his race (white) and sex (male), because he had not identified any cases within the Fourth Circuit that supported a discrimination claim for a white man and because the cases that supported sex-plus-race claims involved "stereotypes and assumptions" about subgroups, of which plaintiff presented none in his case.[40] Moreover, in *Luce v. Dalton*,[41] the district court denied plaintiff's motion to amend the complaint to add intersectional claims of being an older non-Mormon and an older individual with a hearing disability.[42] The *Luce* court recognized that unlike *Lam*, *Jefferies*, or *Hicks*, the plaintiff did not explain how his intersectional subgroup was historically or stereotypically treated, stating:

> In addition, and perhaps more importantly, the 'sex-plus' theories of discrimination are based upon a recognition of unique discriminatory biases against certain subclasses of individuals under Title VII. Unlike African–American or Asian women, there can be no argument that there are unique discriminatory biases against older workers with disabilities or older non-Mormon workers.[43]

Whether you agree with these cases, what is clear is that to have a successful, non-typical intersectional claim, you must educate your judge about why your client, as a member of an intersectional group, was marginalized.

Note, too, that similar to *Marshall* and *Luce*, some courts hesitate to recognize intersectional claims based on three or more protected characteristics. In *Anderson v. New York City Health and Hospitals Corporation*,[44] the United States District Court for the Southern District of New York stated in a footnote that it would limit the plaintiff's intersectional claim to an African-American male, as opposed to an older African-American male, because "this Court is unaware of cases in this Circuit that evaluate a plaintiff's intersectional discrimination claim on the basis of three or more protected characteristics, and [p]laintiff cites to none" and "[i]n any event, [p]laintiff has also not explained why, in this case, this Court should draw a distinction between African-American males and African-American males over 40."[45]

In *Johnson v. Napolitano*,[46] another case out of the Southern District of New York, the district court also rejected a plaintiff's intersectional claim of being an older, dark-skinned, Black male, in part because it involved four protected characteristics across two statutes.[47] The court appeared befuddled by such an intersectional claim, stating:

> Plaintiff would have the court create the protected category of 'dark-skinned black male of a certain age who has previously spoken out against purportedly discriminatory policies.' But no court has cobbled together so many protected characteristics as a viable subgroup on which to establish a prima facie case. As in *Luce,* to avoid judicial legislation, I decline to do so.[48]

While the *Anderson* and *Johnson* courts declined to stretch the intersectional framework, it is possible that part of their hesitation arose from plaintiffs' lack of explanation for why additional protected characteristics, such as age, put them in a separate marginalized group. Apparently, neither plaintiff addressed specific stereotypes or remarks about their protected characteristics.[49] So, even though *Anderson* and *Johnson* may be discouraging—some people have three or more protected characteristics that place them in a marginalized position—attorneys should not fear bringing these meritorious, multi- intersectional claims, especially if they can tie their client's specific marginalization to stereotypes about their subgroup.

IV. Bolster with *Bostock*

The United States Supreme Court's 2020 seminal *Bostock v. Clayton County, Georgia*[50] decision could be a game changer for intersectional claims. *Bostock* furnishes cautious lower courts with a more digestible framework for analyzing intersectional claims. And that this framework concerns the causation element for Title VII claims means that district courts **must** confront intersectional claims head on.

For reference, the *Bostock* Court held that an employer violates Title VII when it takes an adverse action against an individual based on their protected characteristic, regardless of whether other factors besides the individual's protected characteristic contributed to the decision.[50] In other words, the plaintiff's protected characteristic "need not be the sole or primary cause of the employer's adverse action."[51] The Court further explained that within the context of sex discrimination: "If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."[52]

Bostock assists intersectional claims because it prevents employers from slipping out of liability when the discriminated against employee does not

fit the typical, one-protected-characteristic model. To demonstrate, you have an initial consultation with a woman who describes sex, race, and color discrimination. She tells you she did not receive a promotion because she is a darker-complexed Black woman. She states that a less-qualified, white man and a less-qualified, lighter-complexed Black woman received promotions instead of her. When she asked the hiring committee how they reached their decision, they told her she was not promoted because it was reported she was too direct and confrontational with subordinates, she received a lower interview score for not answering the questions as "quickly" as other candidates, and because her last research project was good, but not great.

Because intersectional claims involving darker-complexed Black women are not as common as claims made by Black women or older women, you should educate your judge on the myriad of reports showing disparate treatment between lighter and darker complexed individuals within the African American community.[53]

Then, you should use *Bostock* to explain causation. You might argue that the hiring committee did not hire your client because of stereotypes about Black women (*i.e.*, being "direct" and "confrontational"). You might also argue that your client was not hired because of stereotypes that women with darker skin are less smart than women with lighter skin (*i.e.*, not answering as "quickly"). With *Bostock*, so long as your client can prove that the stereotypes about Black women and women with darker skin tones each **caused** her employer to fail to promote her, she need not choose one of these bases out of concern that more than one cause would kill her claim. Under *Bostock*, that any **one** of these characteristics played a role in the employer's promotion decision should be sufficient to support a Title VII violation.[54]

In fact, in *Frappied*, the Tenth Circuit used *Bostock* like the aforementioned hypothetical. In *Frappied*, several older female plaintiffs claimed they were laid off because of their sex and age.[55] One plaintiff claimed he was laid off based on his age alone.[56] The Tenth Circuit reversed the district court's dismissal of plaintiffs' sex-plus-age claim, finding that it was cognizable under Title VII because of past caselaw approving intersectional claims **and** because of *Bostock*.[57] With respect to *Bostock*, the Tenth Circuit rationalized that the older female plaintiffs needed only to prove that they were discriminated against based in part on their sex—that, the outcome would have changed if they were a different sex.[58] The Tenth Circuit did not require them, as it did in the past, to prove that their entire subgroup was treated differently than all younger women or all men.[59] Instead, the plaintiffs needed only to show they were treated differently than a relevant comparator.[60] *Bostock*'s expansive reading of causation altered the viability of their claim under Title VII, especially where, in the past, the addition of "plus age" could have killed the theory of the case, or the fact that a single older man, out of a group of favored older men, could have ruined the plaintiffs' prima facie case.

Frappied evinces that the Tenth Circuit is willing to approve the viability of untested or contentious intersectional claims under Title VII by relying on *Bostock*.

Conclusion

We know our clients are not one dimensional. And we know that their multidimensionality sometimes—like in the case of Black women or older women—subjects them to discrimination different and apart from their one-dimensional peers. Knowing all this, as lawyers and advocates, we must do whatever we can to grow and foster these claims. We must identify these claims early on. We must support them through the administrative process. We must strategically bring them before courts. Even with the best facts, we cannot predict how courts will rule on our claims. Still, using the tools addressed in this article, we give our clients the best chance to successfully prove intersectional claims. ▲▲▲

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Endnotes:

[1] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139.

[2] *See id.*

[3] *Id.* at 141–48.

[4] *Id.* at 151 (emphasis in original)

[5] *Id.* at 149 (emphasis added).

[6] *Id.* at 167.

[7] *Id.*

[8] *See, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (sex plus pre-school age children).

[9] 42 U.S.C. § 2000e-5(e)(1).

[10] *See B.K.B. v. Maui Police Dep't*, 276 F.3d 1091 (9th Cir. 2002); *Lovell v. Staten*, 1:17-cv-6874 (ALC), 2019 WL 4601665, at *1, 3, 4 (S.D.N.Y. Sept. 23, 2019) (granting defendant's motion to dismiss on plaintiff's sex and age discrimination claims because, although sex and age could be part of her intersectional claim,