Closing the Loophole—Why Intersectional Claims Are Needed To Address Discrimination Against Older Women

JOURDAN DAY*

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* J.D. Candidate, The Ohio State University Moritz College of Law, expected 2014. I dedicate this Note to my mother, Phyllis, for all her sacrifices, and to my fiancé, Jordan, for his never-ending support. I would also like to thank Professor Martha Chamallas for her inspiration and the many members of OSLJ for their guidance and help throughout the note-writing process.

I. INTRODUCTION

Envision a typical American workplace filled with men and women of different ages. Dolores, an older woman, along with a younger woman and an older man are all employed in the same position with the same title and do equal amounts of work. However, Dolores, the only older woman employee in her workplace, begins to feel that she is treated differently from her colleagues and is eventually fired. She decides to file a claim under Title VII of the Civil Rights Act of 1964 and under the Age Discrimination in Employment Act of 1967 for employment discrimination. Yet, she soon runs into a problem: she cannot show that she suffered disparate treatment. Her employer could show that no other women suffered adverse employment action and neither did older male workers. Accordingly, her claims would likely fail and she would be left with no redress. Dolores knows that she was neither discriminated against because she was a woman nor because she was an older employee, but rather because of the combination of those two traits—because she was an older female worker.

Although discrimination in the workplace has been fought, sexism and ageism continue to exist across the country. In challenging such discrimination, Congress enacted two central pieces of legislation to protect workers: Title VII of the Civil Rights Act of 1964 (Title VII),[1] which prohibits discrimination based on a list of factors, including sex,[2] and the Age Discrimination in Employment Act of 1967 (ADEA).[3] Notwithstanding these laws, older women workers like Dolores find it nearly impossible to bring claims when they feel

[1] Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended in scattered sections of 42 U.S.C.).

[2] 42 U.S.C. § 2000e-2(a)(1) (2006) (proclaiming employment behavior is unlawful and discriminatory when it is based on "race, color, religion, sex, or national origin").

[3] Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006).

that they were discriminated against for being an older woman. Rather, older women can bring a claim based on their sex or based on their age, but they cannot bring a claim on the basis of their sex and age combined.

Historically, the ADEA has been seen as a continuation of or addition to Title VII, and thus, the two statutes have been interpreted by courts in the same way.[4] However, in 2009 the United States Supreme Court made clear that the ADEA will no longer be considered under the umbrella of Title VII and its analysis and that mixed-motive claims were not actionable under the ADEA.[5] This creates a problem, seeing that "sex-plus-age" claims have not only had extremely limited success but in some jurisdictions are not even recognized. Now, there seems to be little incentive for courts that have not already done so to allow sex-plus-age employment discrimination claims.

This Note analyzes the necessity of sex-plus-age employment discrimination claims. Part II discusses the history of employment discrimination claims, which bases of discrimination are prohibited, and how interpretations of Title VII and the ADEA have changed over time. Part III introduces intersectional claims and how they relate to employment discrimination. Part IV examines the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, which could have a negative impact on the future of sex-plus-age intersectional claims. Lastly, Part V argues that the proposed Protecting Older Workers Against Discrimination Act,[6] which would overrule *Gross*, must be modified to protect intersectional claims of multiple immutable characteristics and that courts should construe this language as providing protections to older women in the workforce.

II. OLDER WOMEN WORKERS FALL THROUGH THE CRACKS OF FEDERAL EMPLOYMENT DISCRIMINATION LAWS

Federal employment discrimination law in the United States offers protection to employees based on various characteristics and factors, including sex and age. While laws prohibiting discrimination were first developed following the Civil War, they failed to have the impact that they were designed to create.[7] Beginning with the Civil Rights Act of 1964 and the enactment of

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[4] Michael Foreman, Gross v. FBL Financial Services—*Oh So Gross!*, 40 U. MEM. L. REV. 681, 685–86 (2010).

[5] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009) (The majority held that "[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.").

[6] Protecting Older Workers Against Discrimination Act, S. 2189, 112th Cong. (2012).

[7] Supreme Court decisions such as *Plessy v. Ferguson*, 163 U.S. 537 (1896) seriously undermined efforts at combating racial discrimination for which the post-Civil War constitutional amendments and the Civil Rights Act of 1866 were created. *See* DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 2 (8th ed. 2010).

Title VII and its progeny, employees have been given an opportunity to address the discrimination that they have had to face in the workplace.

A. *Title VII of the Civil Rights Act of 1964 Fails To Protect Older Women Workers*

The Civil Rights Acts of 1964[8] was a fundamental step toward addressing discrimination in the workplace. While the Civil Rights Act contains many important provisions, Title VII has been instrumental to the development of employment discrimination law. Importantly, Title VII prohibits discrimination based on an "individual's race, color, religion, sex, or national origin."[9] Part of what has made Title VII so important is that it covers public and private employers, labor organizations, and employment agencies, forbidding all from discriminating against applicants and employees based on one of the five impermissible factors.[10] Title VII was amended in 1991, providing for compensatory and punitive damages, and for jury trials.[11]

Even though several federal laws prohibit discrimination in the employment context when based on certain impermissible characteristics, these laws, with the exception of the Americans with Disabilities Act (ADA),[12] do not define "discriminate." Often, interpretation of the word "discriminate" is taken from the interpretive memorandum written by Senators Clark and Case, which states:

> To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by Section [703] are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.[13]

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[8] Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended in scattered sections of 42 U.S.C.).

[9] 42 U.S.C. § 2000e-2(a)(1) (2006) (declaring that it is an unlawful employment practice for an employer "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").

[10] *Id.* § 2000e(b) (clarifying that "employer" is defined as "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, and any agent of such a person").

[11] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (2006)).

[12] Americans with Disabilities Act (ADA) of 1990, § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (2006) (defining the term "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee").

[13] 110 CONG. REC. 7213 (1964).

Nevertheless, due to Congress's silence on the meaning of "discrimination," the responsibility for defining the term has been left to the federal courts.[14]

Despite any guidance from Congress as to the definition of "discrimination," there are two major theories of discrimination under Title VII: disparate treatment theory and disparate impact theory.

1. *The Disparate Treatment Theory of Discrimination*

Disparate treatment theory, which is by far the most common discrimination theory used by litigants,[15] is based on the interpretation of § 703(a)(1) of Title VII.[16] The Supreme Court has summarized disparate treatment as discrimination in which an employer treats some individuals more negatively based on their race, color, religion, sex, or national origin.[17] While intent to discriminate is important, this intent may be inferred from the mere presence of differential treatment.[18]

Under the disparate treatment theory, the fact finder must determine whether the plaintiff has proven that an adverse employment practice was based on impermissible discrimination.[19] Disparate treatment is likely the key evil that Congress hoped Title VII would eradicate.[20] However, because coming across direct evidence of discrimination based on the impermissible characteristics is very rare, proving such intentional discrimination is not an easy task for

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[14] AVERY ET AL., *supra* note 7, at 88; *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) ("[F]inal responsibility for enforcement of Title VII is vested with federal courts.").

[15] Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 81 (2003).

[16] 42 U.S.C. § 2000e-2(a)(1) (2006) (declaring that it is an unlawful employment practice for an employer "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").

[17] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (explaining that disparate treatment involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity").

[18] *Id.* To establish discriminatory intent, "[t]he plaintiff's evidence must be able to connect the expressed bias to the challenged employer action." Sabina F. Crocette, *Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis—A Pragmatic Model*, 28 GOLDEN GATE U. L. REV. 115, 127 (1998).

[19] AVERY ET AL., *supra* note 7, at 90.

[20] *See, e.g.*, 110 CONG. REC. 13088 (1964) (remarks of Sen. Humphrey) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States.").

plaintiffs. Fortunately, plaintiffs may prove their claim of intentional employment discrimination by either direct or circumstantial evidence.[21]

In the leading case on disparate treatment theory of employment discrimination, the Supreme Court in *McDonnell Douglas Corp. v. Green* established the evidentiary and analytical framework for single motive claims where no direct evidence is available.[22] There are three steps to the traditional *McDonnell Douglas* framework. First, the plaintiff must carry the burden of establishing a prima facie case of discrimination by:

> [S]howing (i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[23]

Establishing a prima facie case gives rise to the rebuttable presumption of discrimination. Next, the burden of production shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment action.[24] However, the case is won or lost based on the final step: the pretext stage. In single motive cases, after the defendant has produced admissible evidence of a legitimate, nondiscriminatory reason, the plaintiff has

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[21] *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003) (stating that the conventional rule of civil litigation that applies in Title VII cases requires a plaintiff to prove intentional discrimination by direct or circumstantial evidence); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983).

[22] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973). The *McDonnell Douglas* framework is only used where a single motive, either lawful or unlawful, is assumed to be the reason for the adverse employment action.

[23] *Id.* at 802. Although the facts of *McDonnell Douglas* concerned an African-American male, the Supreme Court has made it clear that the *McDonnell Douglas* framework is applicable and can be modified to fit other bases for discrimination and facts. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252 (1981). Many courts have adapted the *McDonnell Douglas* framework to fit other types of employment discrimination claims. *See e.g.*, Pa. State Police v. Suders, 542 U.S. 129, 141–43 (2004) (constructive discharge claims); Aulicino v. N.Y.C. Dep't of Homeless Servs., 580 F.3d 73, 80–82 (2d Cir. 2009) (promotions claims); Brady v. Office of the Sergeant at Arms, 520 F.3d 490, 493 n.1 (D.C. Cir. 2008) (demotions claims); Ward v. Int'l Paper Co., 509 F.3d 457, 461 (8th Cir. 2007) (reductions-in-force claims); *see also* Porter, *supra* note 15, at 82.

[24] *McDonnell Douglas Corp.*, 411 U.S. at 802; *see also Burdine*, 450 U.S. at 254–55 ("The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.") (citation omitted).

the opportunity to demonstrate that the reason for the adverse action was merely pretext, a cover-up for a discriminatory decision.[25]

Although not mentioned by the Court in *McDonnell Douglas*, many circuit courts have added another element to the prima facie case. These courts require plaintiffs to demonstrate "that a similarly situated person outside the protected class was treated better."[26] Other courts have held that a similarly situated comparator is one of the ways in which plaintiffs may prove discrimination.[27] Nonetheless, showing that a similarly situated individual was treated differently than the plaintiff is the most common way of establishing discrimination.[28] However, when a comparator cannot be found, or when discrimination is based on two separate impermissible factors, the employee's burden of proving discrimination becomes much more onerous, or even impossible.

While *McDonnell Douglas* assumes a single motive, more often employers rely on both a legitimate, nondiscriminatory reason and an unlawful, discriminatory reason at the moment the adverse employment decision is made.[29] In a plurality opinion, the Supreme Court in *Price Waterhouse v. Hopkins* determined that a plaintiff satisfies his burden by proving that the impermissible discrimination was a "motivating factor" in the employer's decision,[30] and the employer would be able to escape liability by presenting evidence that the same decision would have been made despite the plaintiff's protected class.[31] Because a majority of justices could not agree as to what was required for a mixed-motives case, Justice O'Connor's concurrence became widely adopted by lower courts.[32] In her concurrence, Justice O'Connor reasoned that the burden of proof shifts to the employer only when the

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[25] *McDonnell Douglas Corp.*, 411 U.S. at 805 ("[O]n the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."); *see also* Porter, *supra* note 15, at 83.

[26] Adams v. Wal-Mart Stores, Inc., 324 F.3d 935, 939 (7th Cir. 2003); *see also* Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 849 (2002).

[27] *See* Wells v. SCI Mgmt., L.P., 469 F.3d 697, 700–01 (8th Cir. 2006).

[28] AVERY ET AL., *supra* note 7, at 112.

[29] *Id.* at 134.

[30] Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989); *see also* David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 911 (2010). In proving her case of sex discrimination, Ann Hopkins presented evidence that partners advising her on how to successfully become a partner suggested that she: (1) wear make-up; (2) get her hair done; (3) stop cursing; and (4) walk, talk, and act in a more feminine manner. *Price Waterhouse*, 490 U.S. at 235.

[31] *Price Waterhouse*, 490 U.S. at 252 (explaining the same-decision defense); *see also* Sherwyn & Heise, *supra* note 30, at 911.

[32] AVERY ET AL., *supra* note 7, at 143.

employee proves with direct evidence that the protected class was a "substantial factor" in the employer's decision.[33]

Congress, however, was unhappy with the mixed-motive proof structure established in the *Price Waterhouse* decision. The Civil Rights Act of 1991 effectively endorsed the plurality opinion in *Price Waterhouse*, that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."[34] If the plaintiff can establish that the impermissible factor was one that motivated the employment decision, the employer does not escape liability by proving that the same action would have been taken regardless of the protected class;[35] rather, plaintiffs may receive declaratory and injunctive relief, attorney's fees, and costs.[36]

Although the Civil Rights Act of 1991 clarified the proof structure for mixed-motive cases, Congress did not clarify whether direct evidence is required for a plaintiff to receive a mixed-motive instruction, as expressed in Justice O'Connor's concurrence. This question was finally resolved twelve years after the 1991 Amendments. The Supreme Court in *Desert Palace, Inc. v. Costa* held that direct evidence is not required to establish a mixed-motive claim, clarifying that cases relying on circumstantial evidence may also be brought under the mixed-motive framework.[37] However, the question still remained whether the 1991 Civil Rights Act Amendments would apply to the ADEA.

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[33] *Price Waterhouse*, 490 U.S. at 276–78 (O'Connor, J., concurring); *see* Sherwyn & Heise, *supra* note 30, at 911.

[34] 42 U.S.C. § 2000e-2(m) (2006) (emphasis added). Implicitly, this certifies that whenever a plaintiff is able to prove that a protected category was a motivating factor in the adverse employment decision, the plaintiff is entitled to judgment in her favor. AVERY ET AL., *supra* note 7, at 145.

[35] AVERY ET AL., *supra* note 7, at 145; Sherwyn & Heise, *supra* note 30, at 914.

[36] 42 U.S.C. § 2000e-5(g)(2)(B); *see also* AVERY ET AL., *supra* note 7, at 145; Sherwyn & Heise, *supra* note 30, at 914.

[37] Desert Palace, Inc. v. Costa, 539 U.S. 90, 101–02 (2003) ("In order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice. . . . [D]irect evidence of discrimination is not required in mixed-motive cases . . . ." (internal quotation marks omitted)). Both the majority opinion and Justice O'Connor's concurrence in *Desert Palace* state that Congress's replacement of the word "substantial" with the term "motivating" and its failure to mention direct evidence can only mean that Congress intended plaintiffs to receive a mixed-motive instruction by establishing evidence that discrimination motivated the employer's decision. *See* Sherwyn & Heise, *supra* note 30, at 915. Some scholars have suggested that the *McDonnell Douglas* framework is no longer relevant. *See* AVERY ET AL., *supra* note 7, at 151; Sherwyn & Heise, *supra* note 30, at 915.

2. *The Disparate Impact Theory of Discrimination*

The second major theory of employment discrimination is disparate impact, which was developed during the first wave of Title VII litigation.[38] Liability under disparate impact theory is principally concerned with facially neutral employment practices that nonetheless adversely affect one group more than others and cannot be justified by a business necessity.[39] While disparate treatment claims are concerned with employment practices that involve intentional discrimination, disparate impact claims do not require intentional discrimination.[40] Rather a plaintiff will allege that a facially neutral employment practice actually discriminates against a protected group of workers.[41]

Disparate impact theory is based on judicial construction of § 703(a)(1) of Title VII, which declares that it is an unlawful employment practice to "limit, segregate, or classify" applicants or employees in such a way that would deny an individual employment opportunities or would negatively impact an individual's position based on the individual's race, color, religion, sex, or national origin.[42] Like the disparate treatment theory, disparate impact is available under the ADEA[43] and the ADA.[44]

In the landmark case of *Griggs v. Duke Power Co.*, the Supreme Court determined that disparate impact was a valid theory of discrimination under

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[38] *See* AVERY ET AL., *supra* note 7, at 217.

[39] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (stating that disparate treatment claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity").

[40] *Id.* ("Proof of discriminatory motive, we have held, is not required under a disparate-impact theory."). *Compare, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430–32 (1971), *with* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–06 (1973).

[41] Porter, *supra* note 15, at 83.

[42] 42 U.S.C. § 2000e-2(a)(2) (2006) ("It shall be an unlawful employment practice for an employer . . . 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.").

[43] Smith v. City of Jackson, Miss., 544 U.S. 228, 239–40 (2005) (relying on the text of the ADEA, the "reasonable factors other than age" provision, and the EEOC regulations in determining that the disparate impact theory was applicable to ADEA claims). However, disparate impact theory is not available for employment discrimination claims based on the Equal Protection Clause of the Fourteenth Amendment or the Civil Rights Act of 1866. AVERY ET AL., *supra* note 7, at 89.

[44] Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003). Both disparate treatment and disparate impact theories are available under the ADA. *See* 42 U.S.C. § 12112(b) (2006) (defining "discriminate" to include "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability" and "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability").

Title VII.[45] *Griggs* is often viewed as a results-oriented decision in that it was tied to Congress's goal of dismantling hierarchies in the workplace.[46] The *Griggs* decision prompted an ongoing debate concerning the legitimacy of disparate impact theory.[47] Eighteen years later, the Court significantly restricted the scope of disparate impact theory in *Wards Cove Packing Co. v. Atonio*.[48] While *Wards Cove* did not overrule *Griggs*, the opinion made plaintiffs' task of proving a disparate impact claim much more difficult by requiring the plaintiff to show particularity,[49] by only requiring the employer to meet the burden of production for business necessity,[50] and by requiring a plaintiff to prove that an alternate employment practice is equally effective as the disputed practice.[51]

Despite the Supreme Court's attempt to limit disparate impact theory, Congress responded by codifying the disparate impact theory and specifying its analytical framework in the Civil Rights Act of 1991.[52] The Act rejects most of the principles developed in the *Wards Cove* decision. Instead of the employer having the burden of production only as to business justification, Congress determined that the employer must carry both the burden of production and the burden of persuasion to prove business necessity.[53] In addition, the plaintiff's demonstration of alternative employment practices is to be in accordance with the law as of June 4, 1989, the day before the Court issued the *Wards Cove* decision.[54]

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[45] *Griggs*, 401 U.S. at 431 (reasoning that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

[46] *See* Robert Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 229 (1990).

[47] *Id.* at 230. Criticism of the *Griggs* decision often comes from the Court's failure to explain the reasoning behind disparate impact theory. AVERY ET AL., *supra* note 7, at 229.

[48] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660–61 (1989).

[49] *Id.* at 657 (explaining that a crucial part of plaintiff's prima facie case is demonstrating that "it is the application of a specific or particular employment practice that has created the disparate impact under attack").

[50] *Id.* at 659 (clarifying that although the employer has the burden of producing evidence, "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business").

[51] *Id.* at 661. In addition, other burdens such as cost are relevant to whether the alternative practice would be equally as effective. *Id.* (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988)).

[52] Title VII, § 703(k), 42 U.S.C. § 2000e-2(k) (2006).

[53] *Id.* § 2000e-2(k)(1)(A)(i). Whereas the employer's burden was to produce only evidence of a "business justification" in *Wards Cove*, the 1991 Act's requirement that the employer prove the employment practice is "job related for the position in question and consistent with business necessity" operates as an affirmative defense, a much more stringent standard than that proscribed by the Court in *Wards Cove*. *Id.*; *see also* Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 934 (1993).

[54] Title VII, § 703(k), 42 U.S.C. § 2000e-2(k)(1)(C). Interestingly, Congress maintained the particularity requirement found in *Wards Cove*. *See id.* However,

While theories of equality[55] may differ, Congress has made it clear that Title VII is to be interpreted fairly broadly, and the burdens on plaintiffs are not to be so great as to hinder meritorious claims or to create a chilling effect. Nonetheless, Dolores, the older woman worker, will still lose her claim because she cannot prove that sex discrimination was the basis of her termination. Despite Congress's work to assure that plaintiff employees are able to bring and prove their claims, Dolores and many older women workers like her fall through Title VII's cracks.

B. *The Age Discrimination in Employment Act Protects Older Women Workers No Better than Title VII*

Enacted in 1967, the purpose of the ADEA, which protects workers who are at least forty years old, is to promote employment of older persons based on ability instead of age and to prohibit employment discrimination on the basis of age.[56] As the Supreme Court has noted, "The ADEA and Title VII share common substantive features and also a common purpose: the elimination of discrimination in the workplace."[57] Thus, courts have relied on Title VII jurisprudence in deciding ADEA claims.

While the Court has verified that disparate impact theory is applicable to ADEA claims,[58] most ADEA plaintiffs bring their cases under disparate treatment theory.[59] However, the Supreme Court has not resolved whether the analytical framework of *McDonnell Douglas* and its progeny directly applies to

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Section 703(k)(1)(B)(i) provides an exception for plaintiffs who can prove that the elements of the employer's decision-making process are incapable of separation for analysis. In this scenario, the decision-making process may be analyzed as a whole. *Id.* § 2000e-2(k)(B)(i); *see also* AVERY ET AL., *supra* note 7, at 253.

[55] Part of the controversy with *Wards Cove* comes from two differing theories of equality. Equal treatment theory is based on the idea that race, color, religion, sex, national origin, age, and disability should never be a factor in an employment decision. This theory that supports "colorblindness" maps onto disparate treatment claims. *See* AVERY ET AL., *supra* note 7, at 4. On the other hand, many people embrace the theory of equal opportunity, which seeks to improve the position of minorities and women by actively considering race, sex, and other factors in their employment decisions. *See* Belton, *supra* note 46, at 229. Equal opportunity is associated with disparate impact theory first recognized in *Griggs*. This clash of personal philosophies will continue to affect employment discrimination law.

[56] 29 U.S.C. § 621 (2006).

[57] McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (internal quotation marks omitted) (citing Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)).

[58] Smith v. City of Jackson, Miss., 544 U.S. 228, 232 (2005) (holding that "the ADEA does authorize recovery in 'disparate-impact' cases comparable to *Griggs*").

[59] *See* AVERY ET AL., *supra* note 7, at 734; *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) ("The disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear. 'It shall be unlawful for an employer . . . to fail or refuse to hire or to 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)).

ADEA claims.[60] Nonetheless, lower courts continue to apply variations of the *McDonnell Douglas* framework to ADEA cases. The typical prima facie case requires the plaintiff to show that he or she (1) is in the protected age group; (2) suffered an adverse employment action; (3) was qualified; and (4) a person younger than plaintiff was selected.[61] Like the *McDonnell Douglas* framework, if the plaintiff can establish a prima facie case, the defendant has the burden of production to present evidence of a legitimate nondiscriminatory reason for the adverse employment action.[62] Once the employer–defendant has produced evidence of a legitimate, nondiscriminatory reason, the burdens of production and persuasion return to the plaintiff to prove that the employer intentionally discriminated against the plaintiff based on age.[63]

Although courts see many similarities between Title VII and the ADEA, there are a few significant differences that can have substantial impacts on employees' claims based on age discrimination. While the Court did determine in *Smith v. City of Jackson, Mississippi* that disparate impact theory is available to plaintiffs under the ADEA, it also determined that the Civil Rights Act of 1991 Amendments do not apply to the ADEA and that the *Wards Cove* decision that initially limited disparate impact under Title VII was still applicable to the ADEA.[64] This decision significantly narrows the scope of disparate treatment for plaintiffs claiming age discrimination. Additionally, yet another major difference between Title VII and the ADEA further complicates cases in which plaintiffs have claims under both discrimination statutes.[65]

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[60] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) ("This Court has not squarely addressed whether the *McDonnell Douglas* framework . . . also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here.").

[61] AVERY ET AL., *supra* note 7, at 735; *see, e.g.*, Filar v. Bd. of Educ. of City of Chi., 526 F.3d 1054, 1059–60 (7th Cir. 2008); Roeben v. BG Excelsior Ltd. P'ship, 545 F.3d 639, 642–43 (8th Cir. 2008); Mitchell v. Vanderbilt Univ., 389 F.3d 177, 181 (6th Cir. 2004).

[62] AVERY ET AL., *supra* note 7, at 735.

[63] *Id.*

[64] Smith v. City of Jackson, Miss., 544 U.S. 228, 240 (2005) (plurality opinion) ("While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."). Although the *City of Jackson* opinion was a plurality decision, five of the Justices, including Justice Scalia in his concurrence, recognized that disparate impact theory was valid under the ADEA. *See id.* at 240, 242–43. In addition, all of the Justices seem to agree that the *Wards Cove* decision continues to apply to disparate impact under the ADEA. *Id.*

[65] *See infra* Part IV.

III. INTERSECTIONAL CLAIMS—LACK OF SEX-PLUS REMEDIES HARMS OLDER WOMEN'S CLAIMS

A substantial amount of research supports the idea of appearance discrimination in employment.[66] Studies show that the perceptions of attractiveness decline with age, and at a more pronounced rate for females over males.[67] Even in the legal profession, attractive lawyers earn more than their less attractive colleagues, with the wage gap increasing after fifteen years of practice.[68] To make matters worse, older women suffer negative myths and stereotypes in our culture, often being portrayed as "old hags and old bags, frumpy, ditzy, and meddlesome."[69]

More and more often, plaintiffs are bringing discrimination claims that do not easily fit into the prescribed Title VII categories. In addition, some scholars argue for an approach to sex discrimination that "emphasize[s] the complex, intersectional character of the female subject and the variability of the discriminatory animus that subject encounters."[70] Intersectionality theory states that individuals are made of more than the single identities that legal doctrines and statutes address.[71]

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[66] *See* Joanne Song, Between the Cracks: Discrimination Laws and Older Women 9, (Apr. 2011) (unpublished manuscript, Univ. of Cal., Irvine, presented at Dep't of Econ. Applied Microecon. Seminar, 2011), *available at* http://www.asian-studies.uci.edu/files/economics/docs/micro/s11/Song.pdf.

[67] LINDA A. JACKSON, PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES 66 (1992); *see also* Song, *supra* note 66, at 8.

[68] Jeff E. Biddle & Daniel S. Hamermesh, *Beauty, Productivity, and Discrimination: Lawyers' Looks and Lucre*, 16 J. OF LAB. ECON. 172, 197–98 (1998).

[69] Nancy J. Osgood & Susan A. Eisenhandler, *Gender and Assisted and Acquiescent Suicide: A Suicidologist's Perspective*, 9 ISSUES L. & MED. 361, 365 (1994) (internal quotation marks omitted). Osgood and Eisenhandler also find that "[a]geism and sexism force many older women to experience self-derogation and to feel dejected, degraded, devalued, useless, and worthless." *Id.*

[70] Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2481 (1994) (footnote omitted). Claims that are based on two separate protected characteristics are not the same as intersectional claims. For example, if an employer only hired white males, a black female plaintiff could have two claims under Title VII: one based on sex, the other based on race. However, if the employer hired white males, black males, and white females, the plaintiff would need to use an intersectional claim; she was discriminated against based on the combination of her sex and her race.

[71] AVERY ET AL., *supra* note 7, at 47 ("Intersectionality theory posits that individuals have multiple identities that are not addressed by legal doctrines based solely on a single identity or status."). The theory of intersectionality is often based on the fact that Title VII protects immutable characteristics. *See* Patti Buchman, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COLUM. L. REV. 190, 195 (1985). Like race, to which courts have extended Title VII coverage based on "plus factors," age is a characteristic over which individuals have no control. *Id.* at 197.

The United States Supreme Court first recognized an intersectional theory of sex-plus discrimination in *Phillips v. Martin Marietta Corp.*[72] In 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.[73] "Older women" would be one such subclass.[74] While plaintiffs continue to bring these sex-plus claims, older women find particular difficulty establishing that they have been treated differently from others in the workplace.

A. *Sex-Plus-Race Theory Is Generally Accepted by Courts*

In a famous article, Professor Kimberlé Crenshaw argues for judicial interpretations of Title VII that are based on the multi-dimensionality of black women.[75] In general, sex-plus-race claims have been more accepted and more successful than other intersectional Title VII claims.[76] The sex-plus-race claim was initially recognized by the Fifth Circuit Court of Appeals in 1980.[77] In *Jefferies v. Harris County Community Action Ass'n*, the plaintiff argued that she was discriminated against on the basis of *both* race and sex.[78] The Fifth Circuit agreed that employers "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 against

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[72] Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam) (holding that the employer's rule that prohibited women who were mothers of preschool-aged children from obtaining certain position was a violation of Title VII).

[73] EEOC Compl. Man. (BNA) § 15-V (Apr. 19, 2006), *available at* http://www.eeoc.gov/policy/docs/race-color.pdf.

[74] *See id.*

[75] 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, 139–40 (signaling that the "single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group").

[76] *See infra* note 93.

[77] Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980). The court declared that recognizing black females as a protected subgroup "is the only way to identify and remedy discrimination directed toward black females." *Id.* The court further stated that "the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff." *Id.*; *see also* AVERY ET AL., *supra* note 7, at 47–48; Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992).

[78] *Jefferies*, 615 F.2d at 1028.

black men or white women."[79] Other courts have followed the *Jefferies* decision in establishing sex-plus-race theories of liability in their own jurisdictions.[80]

Relying on the *Jefferies* decision, the Ninth Circuit Court of Appeals has extended the sex-plus-race theory of liability to recognize a subclass of Asian women.[81] The Ninth Circuit determined that when a plaintiff claims discrimination based on sex and race, the court must decide whether the defendant discriminated on the basis of *both* factors, not simply against individuals of the same sex *or* same race.[82] While the Supreme Court has not addressed the sex-plus-race theory of discrimination, the majority of courts support it and the theory does not seem threatened.

B. *Sex-Plus-Age Discrimination Struggles To Be an Accepted Theory*

The Supreme Court and federal courts of appeals have not yet recognized a sex-plus-age theory of liability for discrimination.[83] Instead, the federal courts of appeals and the majority of federal district courts continue to treat sex discrimination claims and age discrimination claims separately based on the theory that these two causes of action must be brought under two separate statutes: Title VII and the ADEA.[84] While it has been nearly twenty years since the Eastern District of Pennsylvania first recognized sex-plus-age claims,[85] only a few courts seem to allow these types of intersectional claims. Others have ruled that no sex-plus-age discrimination claims exist, and some courts refuse to determine whether these claims should be allowed in their jurisdiction.

1. *Courts That Seem To Recognize Sex-Plus-Age Claims*

The first case in which a federal district court recognized sex-plus-age discrimination as a valid claim under Title VII was *Arnett v. Aspin*.[86] Plaintiff

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[79] *Id.* at 1032.

[80] *See, e.g.*, Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987); Craig v. Yale Univ. Sch. of Med., 838 F. Supp. 2d 4, 8–9 (D. Conn. 2011). However, not all courts have recognized black women as a protected subclass under Title VII. *See* Degraffenreid v. Gen. Motors, 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) (arguing that recognizing black women as a subclass would form a "super-remedy" that was not envisioned by Title VII's drafters).

[81] Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994) (finding that Asian women are victims of stereotypes and assumptions that are not shared by Asian men or non-Asian women).

[82] *Id.*

[83] *See* Sherman v. Am. Cyanamid Co., No. 98-4035, 1999 WL 701911, at *5 (6th Cir. Sept. 1, 1999) ("First of all, no Federal Court of Appeals (including this one) nor the Supreme Court has recognized such a cause of action.").

[84] AVERY ET AL., *supra* note 7, at 765.

[85] Arnett v. Aspin, 846 F. Supp. 1234, 1241 (E.D. Pa. 1994).

[86] *Id.* (finding that sex-plus claims are adequate when the "plus" classification is based on an immutable characteristic, such as age).

Mary Arnett, who was over forty years of age, twice applied for and was referred for a promotion but was passed over in both instances.[87] Arnett learned that both positions were filled by younger women.[88] In her complaint, Arnett stated that she was not promoted on the basis of being a woman over forty, citing that every woman who was chosen for the position was less than forty years of age and that every man selected for the position was over forty years of age.[89] Although the defendant employer admitted in its answer to the complaint "that every woman selected for the position of equal employment specialist has been under the age of forty and every male equal employment specialist has been over the age of forty" and that "women candidates over forty have been referred for the position of equal employment specialist, but have been ultimately rejected in favor of younger women or men over forty," Arnett's employer filed for summary judgment on the basis that the sex-plus-age claim must be treated as two separate claims.[90] As such, the employer argued that Arnett could not establish a prima facie sex discrimination case because the position was ultimately filled by women and that the Title VII age discrimination claim must fail because it was not brought under the ADEA.[91] Nonetheless, the district court found that:

> [T]he current line drawn between viable and nonviable sex-plus claims is adequate—that the "plus" classification be based on either an immutable characteristic or the exercise of a fundamental right. And, although I have uncovered no other case that recognizes a "sex-plus-age" discrimination claim under Title VII, it is clear that age is an immutable characteristic. For purposes of determining whether the defendants[] discriminated against Arnett in violation of Title VII, I find she is a member of a discrete subclass of "women over forty." Accordingly, and without dispute from the defendants on the facts underlying this point, I conclude that Arnett has shown a prima facie case under the *McDonnell Douglas* framework because (1) she is a member of the protected subclass, that is women over forty, (2) she was qualified for and applied for the positions in question, (3) despite her qualifications, she was

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[87] *Id.* at 1236.

[88] *Id.* The personnel office found that both Arnett and another woman, Kelly Williams, were qualified for the first position. *Id.* Williams, who was under thirty years of age, was ultimately selected. *Id.* When Arnett was referred for the second position, Jaima McCabe, a twenty-nine year old woman, received the promotion over Arnett. *Id.*

[89] *Id.*

[90] *Id.* at 1236–37.

[91] *Arnett*, 846 F. Supp. at 1237. The court recognized that if it analyzed the sex and age discrimination claims separately, "[I]t is clear that each would not survive summary judgment because (1) plaintiff fails to state a *prima facie* case of *pure* sex discrimination based on the well-established *McDonnell Douglas* framework, and, (2) complaints alleging only age discrimination are outside the scope of Title VII . . . ." *Id.* at 1238 (footnote omitted).

> denied the positions, and (4) other employees outside her protected class were selected, in this case two women under forty.[92]

While the court did recognize the sex-plus-age claim under Title VII, the claim was not recognized under the ADEA.[93]

Although a few courts seem to recognize sex-plus-age discrimination claims, only the Eastern District of Pennsylvania has analyzed such claims and provided detailed reasoning for allowing sex-plus-age claims.[94] However, some courts have followed the hybrid approach used in *Arnett*, where the fact finder considers evidence of discrimination under one statute as probative of discrimination under another statute.[95]

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[92] *Id.* at 1241.

[93] *Id.* at 1240. In *Kelly v. Drexel University*, the same judge that allowed the sex-plus-age intersectional claim under Title VII refused to allow an "age-plus-disability" claim brought under the ADEA. 907 F. Supp. 864, 875 n.8 (E.D. Pa. 1995), *aff'd*, 94 F.3d 102 (3d Cir. 1996); *see also* Luce v. Dalton, 166 F.R.D. 457, 461 (S.D. Cal. 1996), *aff'd*, 167 F.R.D. 88 (S.D. Cal. 1996). In *Luce*, the court found that the plaintiff's age-plus theory of discrimination was a combination of four separate statutes: the ADEA, Title VII, the ADA, and the Rehabilitation Act. *Luce*, 166 F.R.D. at 461. The court's reasoning was based on the fact that:

> If Congress had intended to allow plaintiffs to mix and match theories of liability for employment discrimination, regardless of whether such claim was based upon race, sex, religion, national origin, age, or disability, it could have amended Title VII to provide protections to older Americans and Americans with disabilities within the confines of that statute. However, Congress chose to pass entirely separate legislation, providing for an entirely different basis for relief to persons who believe they have been discriminated against in employment based upon their age or disability.

Id. The court further stated that allowing plaintiffs to extend sex-plus discrimination based on multiple separate statutes "would amount to judicial legislation." *Id.*

[94] *See* DeAngelo v. DentalEZ, Inc., 738 F. Supp. 2d 572, 584–85 (E.D. Pa. 2010); *Arnett*, 846 F. Supp. at 1237–41; *see also* Hall v. Mo. Highway & Transp. Comm'n, 995 F. Supp. 1001, 1005 (E.D. Mo. 1998), *aff'd*, 235 F.3d 1065 (8th Cir. 2000) (citing *Arnett v. Aspin* as reasoning for allowing sex-plus-age discrimination claims); Renz v. Grey Adver., Inc., 135 F.3d 217, 221 (2d Cir. 1997) (mentioning that plaintiff's sex-plus-age claim failed in the trial court because she failed to present sufficient evidence that her status as an older woman affected her termination).

[95] AVERY ET AL., *supra* note 7, at 765; *see, e.g.*, Wittenburg v. Am. Express Fin. Advisors, Inc., No. Civ.04-922 JNE/SRN, 2005 WL 3047785, at *2–*5 (D. Minn. Sept. 19, 2005), *aff'd sub nom.* Wittenburg v. Am. Express Fin. Advisors, Inc., 464 F.3d 831 (8th Cir. 2006) (granting employer's motion for summary judgment based on lack of evidence of pretext); Good v. U.S. W. Commc'ns, Inc., Civ. No. 93-302-FR, 1995 WL 67672, at *1 (D. Or. Feb. 16, 1995). In *Good*, the district court found that the holding in *Lam*, a case that involved a hybrid discrimination case of race and sex, was applicable to age and sex hybrid claims as well and that "if Good can prove that her age, when combined with her sex, was a substantial and motivating factor in the adverse employment decision, she may prevail." *Id.*

2. *Courts That Do Not Recognize Sex-Plus-Age Claims*

Because so few courts have taken the opportunity to analyze whether sex-plus-age claims by plaintiffs ought to be allowed, only the Sixth Circuit Court of Appeals has outright rejected sex-plus-age claims.[96] In *Sherman v. American Cyanamid Co.*, plaintiff Caryl Sherman, who was fifty years old at the time of the adverse employment action, challenged her termination, alleging that two younger women were transferred into her area.[97] Despite the employer agreeing that one of the younger women employees did not perform as well as Sherman, the Sixth Circuit was still unwilling to recognize her sex-plus-age claim because she could not prove that her termination was pretext for discrimination.[98] The Sixth Circuit reasoned that it was not necessary to recognize a sex-plus-age claim because neither the Supreme Court nor any United States circuit court had yet recognized the claim, nor would the plaintiff have prevailed even if the Sixth Circuit did allow such a claim.[99]

Rather than assessing sex-plus-age claims, the federal courts of appeals and many district courts maintain that separate causes of actions that must be brought under separate statutes are to be considered distinct from one another.[100] However, too many older women workers like Dolores have no remedy for the discrimination they face. Congress must act so that this loophole is closed.

3. *Courts That Have Not Declared Either Way*

Several courts have had an opportunity to discuss sex-plus-age claims; however, they have declined to address the issue.[101] The Eleventh Circuit Court of Appeals decided a sex-plus-age discrimination case as recently as 2011.[102] The court stated that "[a]lthough the parties contest whether Morrison can make

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[96] Sherman v. Am. Cyanamid Co., No. 98-4035, 1999 WL 701911, at *5 (6th Cir. Sept. 1, 1999) (declining plaintiff's invitation to "recognize a separate cause of action for 'sex plus age' discrimination").

[97] *Id.* at *1.

[98] *Id.* at *5. The Sixth Circuit held that Sherman had not established pretext because the weight of the evidence did not make it more likely than not that the employer's reasons for the adverse action were pretextual. *Id.* Caryl Sherman's evidence of pretext was likely hampered because she was not able to demonstrate a similarly situated comparator.

[99] *Id.* (declining plaintiff's invitation to recognize sex-plus-age discrimination).

[100] *See, e.g.*, Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277, 283 (4th Cir. 2004) (en banc). Despite being called a "useless old lady" and a "troubled old lady," the Fourth Circuit decided against Hill on the separate sex and age discrimination claims because she could not prove pretext separately. *Id.* at 298, 300.

[101] *See* Morrison v. City of Bainbridge, Ga., 432 F. App'x 877, 882 (11th Cir. 2011); Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 110 (2d Cir. 2010); Gorski v. Myriad Genetics, No. 06-11631, 2007 WL 1976167, at *1–*2 (E.D. Mich. July 3, 2007).

[102] *Morrison*, 432 F. App'x at 882. Morrison appealed the district court's holding that sex-plus-age discrimination claims are not actionable under 42 U.S.C. § 1983. *Id.* at 880.

a § 1983 claim for sex-plus-age discrimination, we will assume she can. But even having made that assumption, we conclude that the district court properly dismissed her complaint because it does not sufficiently allege a cause of action."[103] Similarly, the Second Circuit Court of Appeals in *Gorzynski v. JetBlue Airways Corp.* determined that because the plaintiff could reach a jury on her age discrimination claim alone, there was no need to create a sex-plus-age claim separate from her ADEA claim.[104]

Even when given a chance to address this important claim, courts seem to take the easy route and wait until the Supreme Court or Congress makes a decision as to sex-plus-age discrimination claims. While these courts have not expressly denied sex-plus-age discrimination claims, it remains to be seen if these courts will accept such a claim or if they will continue skirting the issue.

IV. A *GROSS* PROBLEM—OLDER WORKERS MUST MEET A HIGHER BURDEN OF PROOF TO PROVE DISCRIMINATION BASED ON AGE

Before the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, plaintiffs seeking to establish age discrimination claims under the ADEA had two possible frameworks: the three-prong *McDonnell Douglas* framework and the burden-shifting, mixed-motives analysis recognized in *Price Waterhouse*.[105] In the aftermath of the Civil Rights Act of 1991[106] and the *Desert Palace v. Costa*[107] decision, the question still remained whether the 1991 Amendments would apply to the ADEA, the ADA, and in retaliation cases. Seventeen years later, the Supreme Court partially addressed this question.

The employee in *Gross v. FBL Financial Services, Inc.*, who was fifty-four years old, alleged that his reassignment was a demotion and violated the ADEA,[108] which prohibits employers from taking adverse employment actions "because of such individual's age."[109] The district court instructed the jury that it must return a verdict for Gross if he proved by a preponderance of the evidence that FBL had demoted him and that Gross's age was a motivating

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[103] *Id.* at 881–82.

[104] *Gorzynski*, 596 F.3d at 110 (claiming that "there is no need for us to create an age-plus-sex claim independent from Gorzynski's viable ADEA claim").

[105] Leigh A. Van Ostrand, *A Close Look at ADEA Mixed-Motives Claims and* Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399, 399 (2009).

[106] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (2006)).

[107] Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

[108] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 170 (2009).

[109] 29 U.S.C. § 623(a)(1) (2006) (declaring that it is an unlawful employer practice "to fail or refuse to hire or to 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").

factor in the decision.[110] After the jury returned a verdict for Gross,[111] FBL Financial appealed to the Eighth Circuit Court of Appeals, which reversed and remanded for a new trial on the basis that the jury was improperly instructed under the *Price Waterhouse* standard.[112] The Eighth Circuit determined that the district court's jury instructions that allowed the burden to shift to the employer upon the showing of any type of evidence—not just direct evidence—demonstrating age as a motivating factor were flawed.[113] Thus, because Gross had not presented any direct evidence, the mixed-motives instruction should not have been given and Gross should have retained the burden of persuasion.[114]

However, upon hearing the case, the Supreme Court clarified that a plaintiff must prove that age was the "but-for" cause of the adverse employment action in order to prevail on a disparate treatment claim under the ADEA, eliminating mixed-motives age discrimination claims.[115] Further, plaintiffs may not shift the burden of persuasion to the defendant, even after establishing that age was a motivating factor in the adverse employment action taken by the defendant.[116] The Supreme Court reasoned that despite the *Price Waterhouse* decision that allowed a mixed-motive framework, Congress had subsequently amended Title VII to explicitly provide for claims in which a forbidden factor, such as sex, was a "motivating factor" in the adverse employment action.[117] Because Congress did not also amend the ADEA to explicitly allow such motivating factors to be actionable, the Court held that the *Price Waterhouse* and *Desert Palace* decisions do not apply to the ADEA, and thus no mixed-motive framework is available to ADEA plaintiffs.[118] In his dissent, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, argued that "the most natural

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[110] *Gross*, 557 U.S. at 170–71. The district court also instructed the jury that Gross's age would be a "motivating factor if [it] played a part or a role in [FBL]'s decision to demote [him]." *Id.* at 171.

[111] *Id.* (stating that the trial jury awarded Gross $46,945 in lost compensation).

[112] *Id.* The *Price Waterhouse* decision was only a plurality opinion, and like most U.S. circuit courts, the Eighth Circuit used Justice O'Connor's opinion as controlling. *Id.* at 171–72. In applying that standard, plaintiffs are required to present direct evidence sufficient to show that an impermissible factor actually motivated the decision. *Id.* at 172.

[113] Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 362 (8th Cir. 2008) ("Under our court's interpretation of *Price Waterhouse*, the final instruction in this case was not correct. Because the instruction shifted the burden of persuasion on a central issue in the case, the error cannot be deemed harmless.").

[114] *Gross*, 557 U.S. at 172–73.

[115] *Id.* at 177–78 ("[T]he plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action. Indeed, we have previously held that the burden is allocated in this manner in ADEA cases.").

[116] *Id.* at 180.

[117] *Id.* at 174 ("Congress has since amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision.").

[118] *See id.* at 175 n.2 ("In this instance, it is the textual differences between Title VII and the ADEA that prevent us from applying *Price Waterhouse* and *Desert Palace* to federal age discrimination claims."); *see also* Van Ostrand, *supra* note 105, at 429–30.

reading of ['because of'] proscribes adverse employment actions motivated in whole or in part by the age of the employee," meaning that Congress had provided for a mixed-motive ADEA framework.[119] Because the relevant language is the same in the ADEA as in Title VII, the dissent found no reason to depart from the precedent established in *Price Waterhouse*.[120]

After *Gross*, employees must meet a higher burden to successfully make out an age discrimination claim.[121] Significantly, employers need only to show that factors other than age led to the adverse employment action.[122] Lower courts have followed the *Gross* reasoning, which will be sure to have a devastating effect on the ability of older workers to achieve redress for the discrimination they have suffered.[123] Not only does the *Gross* decision negatively affect plaintiffs seeking to show age discrimination under the ADEA, but it also affects the ability of employees to bring sex-plus-age claims.[124]

V. CONGRESS MUST ENACT LEGISLATION TO ADEQUATELY PROTECT OLDER WOMEN WORKERS FROM DISCRIMINATION

The *Gross* decision suggests that the Court is not willing to allow a "motivating factor" causation and a mixed-motive framework into the ADEA statute. Without congressional action to explicitly determine that plaintiffs may recover under a mixed-motive analysis, plaintiffs who cannot prove that age was the but-for factor are without a remedy. While the Supreme Court has the ability to overrule its decision in *Gross* so that mixed-motive theory would be available in ADEA claims, stare decisis and judicial restraint will most likely keep the Court from overturning such a recent opinion.[125]

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[119] *Gross*, 557 U.S. at 182 (Stevens, J., dissenting).

[120] *Id.* at 186 (stating that "*Price Waterhouse*'s construction of 'because of' remains the governing law for ADEA claims"). In support of this argument, Justice Stevens referred to the *Smith v. City of Jackson, Miss.* decision in which the Court applied pre-1991 Act precedent, from *Wards Cove*, to the ADEA. *Id.*

[121] *See* Simon Lazarus, *Hertz or Avis? Progressives' Quest To Reclaim the Constitution and the Courts*, 72 OHIO ST. L.J. 1201, 1216 (2011) (surmising that "this is a standard that is in most cases literally impossible to meet").

[122] *See Gross*, 557 U.S. at 184 (Stevens, J., dissenting).

[123] *See* Foreman, *supra* note 4, at 682; *see also* Mora v. Jackson Mem'l Found., Inc., 597 F.3d 1201, 1204 (11th Cir. 2010) (recognizing that after *Gross*, there is no such thing as a mixed-motive ADEA case because an ADEA plaintiff must establish that he suffered an adverse employment action "because of" his age).

[124] *Gross* is likely to create a chilling effect as to the initiation of sex-plus-age claims. Older women employees seeking recovery for discrimination they have faced will be dissuaded from filing based on the fact that sex-plus-age claims are rarely approved, and, if brought under the ADEA, plaintiffs lose the ability to use the less stringent mixed-motives framework.

[125] While "judicial restraint" has many definitions, Judge Richard A. Posner describes separation of powers judicial restraint as being more deferential to the decisions of Congress or other branches of government. Richard A. Posner, *The Meaning of Judicial Self-restraint*, 59 IND. L.J. 1, 11–12 (1983). Because Congress has not explicitly provided for a mixed-

Because the Court is unlikely to allow mixed-motive analysis under the ADEA, Congress will have to act to ensure that the purpose of the ADEA, to eliminate discrimination in the workplace based on an employee's age, is fulfilled. Congress should pass an amended Protecting Older Workers Against Discrimination Act (POWADA) to ensure that workers are being adequately protected. Despite the benefits of the proposed POWADA legislation, the flaws that are present would prevent older women workers from being able to fully succeed on a sex-plus-age mixed-motivation claim. Only by amending POWADA to explicitly provide that intersectional claims based on characteristics protected by both Title VII and the ADEA can these older women recover for the discrimination they have endured. In addition, a wider understanding and recognition of employment issues faced by older women need to be promoted and undertaken. The combination of Congress's approval of sex-plus-age claims and understanding of the discrimination older women face will help ensure that employers can no longer escape through the loophole.

A. *Congress Should Pass an Amended Protecting Older Workers Against Discrimination Act To Allow Sex-Plus-Age Discrimination Claims*

Members of the Senate have recognized that the Supreme Court's decision in *Gross* unfairly harms older workers and limits their ability to achieve redress for mixed-motive claims.[126] In particular, the drafters of POWADA make clear that the ADEA, which is similar in text and purpose to Title VII, should be interpreted consistently with the ways courts have interpreted Title VII provisions.[127] The proposed bill's central purpose is to protect older workers by restoring the availability of mixed-motive claims.[128] While there are some clear

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motive framework under the ADEA, but has done so under Title VII, stare decisis combined with this principle of judicial restraint make it almost certain that the Supreme Court will not act on its own to overturn the *Gross* decision and provide a mixed-motive proof structure for ADEA plaintiffs.

[126] Representative George Miller, Chairman of the House Education and Labor Committee, stated that the *Gross* decision "will make it even more difficult for workers to stand up for their basic rights in the workplace. A narrow majority of the Supreme Court has once again overturned decades of precedent and congressional intent." Press Release, Comm. on Educ. & the Workforce Democrats, Congress To Hold Hearing on Supreme Court's "*Gross*" Ruling Regarding Age Discrimination, Says Chairman Miller (June 30, 2009), *available at* http://democrats.edworkforce.house.gov/press-release/congress-hold-hearing-supreme-court's-'gross'-ruling-regarding-age-discrimination-says.

[127] Protecting Older Workers Against Discrimination Act, S. 2189, 112th Cong. § 2(a)(3) (2012) (noting that the decision in *Gross* "departed from this intent and circumvented well-established precedents").

[128] *Id.* § 2(b)(1) ("The purposes of this Act include (1) to restore the availability of mixed motive claims and to reject the requirements the Supreme Court enunciated in *Gross* . . . that a complaining party always bears the burden of proving that a protected characteristic or protected activity was the 'but for' cause of an unlawful employment practice . . . ." (citation omitted)).

benefits of the proposed POWADA legislation, flaws remain. In order to effectively protect older women workers from sex-plus-age discrimination, changes must be made to POWADA.

1. *The Benefits of the Proposed POWADA Legislation*

POWADA is beneficial in several respects. Primarily, it serves as Congress's official disapproval of *Gross* and would effectively overturn the Supreme Court's decision.[129] The Act remedies Congress's failure to expressly include a mixed-motives framework to the ADEA in the Civil Rights Act of 1991. The ADEA would be amended by adding the following subsection: "(g)(1) Except as otherwise provided in this Act, an unlawful practice is established under this Act when the complaining party demonstrates that age or an activity . . . was a motivating factor for any practice, even though other factors also motivated the practice."[130] This essentially equates the new ADEA mixed-motives provision with that of the well-established mixed-motives remedy under Title VII, making employment discrimination law more consistent.[131]

POWADA is farther reaching than simply overruling *Gross*. In addition to adding a mixed-motives framework to the ADEA, it also indicates that the "motivating factor" language would apply to Title VII, the ADA, and the Rehabilitation Act of 1973.[132] Thus, POWADA creates an overarching mixed-motives claim across several key pieces of federal employment discrimination legislation, in turn bringing more consistency to the complexity of employment discrimination law.

2. *The Flaws of POWADA Leave Older Women Workers Unprotected from Sex-Plus-Age Discrimination*

Although POWADA does possess some beneficial aspects, flaws remain. One problem with the Act is that it maintains the *McDonnell Douglas* framework but does not provide when such framework is applicable. The Act

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[129] *Id.* § 2(a)(3)–(4) ("Congress disagrees with the Supreme Court's interpretation, in *Gross*, of the ADEA and with the reasoning underlying the decision . . . .").

[130] *Id.* § 3(a)(1).

[131] 42 U.S.C. § 2000e-2(m) (2006) (providing that "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

[132] Protecting Older Workers Against Discrimination Act, S. 2189, § 2(b)(3)(B) (enunciating that a purpose of the Act is "to establish that under the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), and the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.), complaining parties . . . are not required to demonstrate that the protected characteristic or activity was the sole cause of the employment practice").

declares that an ADEA plaintiff "may demonstrate an unlawful practice through any available method of proof, including the analytical framework set out in *McDonnell Douglas Corp. v. Green*."[133] Congress gives no indication of when a plaintiff ought to proceed under the *McDonnell* analysis or under the 1991 Act.[134] In preserving *McDonnell Douglas*, Congress has not simplified employment discrimination. Rather, it has set it back with two possible frameworks and no indication of when either should be used.

Further, the Act contains no explicit approval of intersectional claims based on age and another protected characteristic. Because the courts have generally been reluctant to recognize sex-plus-age claims, many older women are still unprotected under POWADA. Even if mixed-motive cases are allowed under both Title VII and the ADEA, women like Dolores still must prove that sex or age was a motivating factor in the adverse employment decision. Dolores's employer will be able to show that women as a group did not receive any adverse employment action. Likewise, Dolores's employer can show that older employees had not suffered discrimination. The fact that all of the women happen to be younger and all of the older employees happen to be men will provide no support for Dolores's claim; she will simply not be able to win. Women like Dolores will continue failing to prove discrimination based on sex and age because neither younger women nor older men suffered any discrimination. Without support from Congress, Dolores may never recover from the adverse employment action she suffered based on her intersectional and cross-statute claim.

3. *How POWADA Should Be Modified So that Older Women Workers Are Protected Against Discrimination*

Even if the current version of POWADA is adopted, the Act still does not directly address plaintiffs who may want to bring an intersectional sex-plus-age claim. Congress must explicitly approve of intersectional claims and guarantee that older women have the opportunity to seek available remedies. In addition, Congress must eliminate the circuit courts' requirement of proving that a similarly situated employee was treated more favorably by removing the *McDonnell Douglas* burden-shifting framework from the disparate treatment analysis. Finally, to clarify that the mixed-motive framework is the appropriate proof structure for ADEA claims, the catch-all language must be omitted.

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[133] *Id.* § 2(b)(3)(C).

[134] *See* Mark R. Deethardt, *Life After* Gross*: Creating a New Center for Disparate Treatment Proof Structures*, 72 LA. L. REV. 187, 222 (2011).

a. *An Explicit Guarantee that Combinations of Age and Other Protected Factors Would Constitute Discrimination Is Necessary*

First, POWADA, when adopted, should include unambiguous language that age in combination with another protected characteristic can constitute age discrimination under the Act. Absent this language, courts may face the same problems of ambiguity as have already existed and may continue to deny plaintiffs the opportunity to successfully bring an intersectional claim based on sex-plus-age. Sex-plus-age claims have not had much success in courts and need Congress's explicit approval to be fully implemented and embraced by courts.

The current proposed Act amends Section 4 of the ADEA in part by adding the following language:

> (2) In establishing an unlawful practice under this Act, including under paragraph (1) or by any other method of proof, a complaining party—
>
> (A) may rely on any type or form of admissible evidence and need only produce evidence sufficient for a reasonable trier of fact to find that an unlawful practice occurred under this Act; and
>
> (B) shall not be required to demonstrate that age or an activity protected by subsection (d) was the sole cause of a practice.[135]

While POWADA amends Section 4 of the ADEA, this amendment does not go far enough to protect older women workers. To address the issue of sex-plus intersectional discrimination claims, the following subsection needs to be inserted after the proposed subsection (g)(2)(B): "(g)(2)(C) may demonstrate that race, color, religion, sex, or national origin combined with age as a motivating factor in an employer's adverse employment action." This language unambiguously permits a plaintiff–employee to bring an intersectional claim based on age and any of the five impermissible factors outlawed in Title VII, including sex. With this language, courts would have no room to deny a plaintiff the opportunity to bring an intersectional claim that is based on multiple protected characteristics, such as age and sex. This language also permits plaintiffs to base their claims on factors found in multiple statutes. Courts would no longer be able to deny older women workers a remedy for their claims simply because age and sex are protected by separate statutes. Congress must amend POWADA to explicitly allow older women workers the opportunity to bring their claims based on sex-plus-age and to achieve redress.

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[135] Protecting Older Workers Against Discrimination Act, S. 2189, 112th Cong. § 3(a)(2) (2012).

b. *The* McDonnell Douglas *Framework Hinders Older Women Worker Plaintiffs and Needs To Be Removed*

Second, the *McDonnell Douglas* framework is not necessary to protect older workers and is in fact a more difficult burden for plaintiffs to prove.[136] Section 2(b)(3)(C) of POWADA currently states that the purpose of POWADA is to establish that the complaining parties under the ADEA, Title VII, the ADA and the Rehabilitation Act of 1973 "may demonstrate an unlawful practice through any available method of proof, including the analytical framework set out in *McDonnell Douglas*."[137] Not only would eliminating the *McDonnell Douglas* framework make the employment discrimination proof structure much more streamlined, but it would also eliminate the excessive, and sometimes impossible, burden of establishing a similarly situated employee as a comparator.

POWADA when adopted should reject the *McDonnell Douglas* framework and instead adopt the *Price Waterhouse* framework. The mixed-motive analysis provided for Title VII under the 1991 Act Amendments would give all plaintiff–employees an adequate opportunity to prove discrimination, whether it was solely based on discrimination or whether the impermissible factor was only one of the influences in making the adverse employment decision. There is no reason that the proof structure outlined originally in *Price Waterhouse* or in the 1991 Act for mixed-motive decisions could not also apply to decisions in which the plaintiff alleges that the impermissible factor was the sole reason for the employment action. Most employment decisions are based on multiple motives.[138] The language should be amended to provide that this framework, where the impermissible classification is a "motivating factor" for liability and burden shifting, is the appropriate proof structure in all disparate treatment ADEA cases. Section 2(b)(3)(C) as it appears in POWADA should be stricken, and the following should be added in its place:

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[136] *See, e.g.*, William R. Corbett, McDonnell Douglas, *1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 213 (2003) ("Once a defendant produces evidence of a legitimate, nondiscriminatory reason, the case has at least two motives at issue, and [*McDonnell Douglas*] analysis, with its higher standard of causation, is irrelevant."); Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 888 (2004) (stating that the Supreme Court had diluted the *McDonnell Douglas* framework into ineffectuality "by holding that if a plaintiff disproves the defendant's explanation, the defendant might nevertheless win. *McDonnell Douglas* remained necessary only because it governed circumstantial cases. Now that *Costa* has held that the circumstantial evidence may be used under the *Price Waterhouse* framework, one must question whether *McDonnell Douglas* serves any purpose at all.").

[137] S. 2189, § 2(b)(3)(C).

[138] *See* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 655 (2008) (describing "the near impossibility" of a plaintiff proving discrimination was the sole cause for an adverse employment decision). Aside from admissions made by the defendant, it is extremely difficult to prove that discrimination was the but-for cause in the employment action. *Id.* at 656–57.

> a plaintiff may demonstrate an unlawful employment practice based on age through the method of proof established in Section 4(g)(1) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) and as originally set out in Section 703(m) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2).

This language assures that the appropriate framework for disparate treatment age discrimination claims is that from the 1991 Act, and it re-assures that it is illegal for age to influence any part of the employment decision.[139] Using this language will eliminate the necessity for plaintiffs to identify a similarly situated comparator, which often proves impossible and is detrimental to a plaintiff's intersectional claim.

Employers may argue that the mixed-motive framework provided in the 1991 Amendments is too burdensome. Nonetheless, Congress has approved the mixed-motive framework for Title VII claims and intends to do so for ADEA claims as well, as evinced by the proposed Act. Eliminating *McDonnell Douglas* as a possible framework will serve to simplify and streamline disparate treatment litigation for both plaintiffs and defendants. Combined with the explicit approval of intersectional claims based on the ADEA and Title VII discussed above, this amendment will also underscore the ADEA's prohibition of using age as an employment decision, even when age is only a motivating factor and when it is combined with another protected characteristic.

c. *The "Except as Otherwise Provided" Clause Causes Confusion and Must Be Deleted To Maintain Similarity Between Title VII and the ADEA*

Finally, POWADA when adopted should eliminate the catch-all language of "[e]xcept as otherwise provided in this title" that appears at the beginning of POWADA's amendment to Section 703(m) of the Civil Rights Act of 1964.[140] If this language remains, problems and confusion could ensue.

Historically, the courts have analyzed Title VII and its progeny in a similar manner. However, the amendment proposed above rejects the *McDonnell Douglas* framework in favor of the mixed-motive proof structure codified under the Civil Rights Act of 1991. If the "[e]xcept as otherwise provided" clause is

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[139] *See* H.R. REP. NO. 102-40, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 695 ("[Section 5 of the Civil Rights Act of 1991] responds to *Price Waterhouse* by reaffirming that any reliance on prejudice in making employment decisions is illegal.").

[140] Congress has indicated that the statutes that have been modeled after Title VII should be interpreted consistently with Title VII decisions. H.R. REP. NO. 102-40, at 4, *reprinted in* 1991 U.S.C.C.A.N. 694, 696–97 ("The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act."). As the Supreme Court's decision in *Gross* demonstrates, however, the Court is unwilling to read language from one statute into another statute if Congress has not explicitly provided that language. For all statutes based on Title VII to be read consistently as to the proper proof structure, Congress will have to amend each statute to provide for mixed-motive analysis or will need to draft a statute that covers all discrimination in employment.

not struck, Title VII would allow a plaintiff to establish an unlawful employment practice under either *McDonnell Douglas* or the 1991 Act, but ADEA plaintiffs would only have the 1991 Act available to them. Leaving in this loophole puts at risk the streamlining effect that the amended POWADA will have on disparate treatment claims. As they did with the mixed-motive framework for ADEA claims before *Gross*, lower courts may read Title VII frameworks into ADEA cases. This would cause a revival of the similarly situated comparator evidence, which older women workers often do not have, thus denying these older women workers their sex-plus-age claim.

Using solely the mixed-motive framework for both Title VII and the ADEA will not unfairly burden plaintiffs or defendants, who may prove that they would have made the same decision without the impermissible factor.[141] Removing this language will help guarantee that older women plaintiffs will not have to establish a similarly situated comparator in order to be granted remedies for their sex-plus-age claim. In sum, striking this language also further streamlines employment discrimination proof structures.

B. *There Is a Need for Wider Recognition and Understanding of Intersectional Sex-Plus-Age Claims*

Although POWADA would fix the problems caused by *Gross*, it does not go far enough. The intersectionality of two immutable characteristics is not the same as simply possessing two separate characteristics. While an individual can be both "old" and be a "woman," being an "older woman" is substantively different.[142] An older woman who is fired when younger women and older men are retained presents a dilemma for the plaintiff: Whether to bring a claim under Title VII or the ADEA. However, neither of these statutes adequately addresses the fact that the employee was discriminated against on the basis of both her sex and her age.

Older women should not be boiled down to two separate and distinct traits, each one with a separate remedy. Requiring a woman to separate her age from her sex, when she may have suffered adverse employment action on the basis of their combination, allows employers to escape punishment for discriminating against older women. Sex-plus-age remedies are needed to close the loophole.

The fact that sex-plus-age theories are not widely accepted is even more unsettling for older women who want to bring a mixed-motives claim. Even

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[141] Desert Palace, Inc. v. Costa, 539 U.S. 90, 94–95 (2003) ("In order to avail itself of the affirmative defense, the employer must demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor." (internal quotation marks omitted)).

[142] Being an older woman comes with its own set of stereotypes. Osgood & Eisenhandler, *supra* note 69, at 365. These stereotypes arise not because a person happens to be two things at once—a woman and over forty years of age. Rather, these stereotypes are based on the interconnectedness of that person's sex and age, both immutable characteristics over which the person has little influence.

though POWADA may overrule *Gross* and allow for mixed-motive claims under the ADEA, it still does not address the fact that many older women with intersectional sex-plus-age claims would not satisfy the requirements. Because she would have to address them separately, sex as a motivating factor under the ADEA or age as a motivating factor under Title VII would not likely be strong enough to demonstrate discrimination. However, if courts recognized sex-plus-age intersectional claims, the older woman plaintiff's mixed-motive claim would have a much better chance of being successful.

Accordingly, Congress must adopt the proposed changes to POWADA to fully protect older women workers. Courts need to understand sex-plus-age theories of discrimination and realize that subgroups of traditional protected groups are now the targets of discrimination in the workplace. The proposed amendments to POWADA would clarify that sex-plus-age is an actionable theory under the ADEA, which would allow plaintiffs to recover for discrimination based on multiple protected characteristics from both Title VII and the ADEA. Without Congress's adopting the additional provisions, employers are able to avoid any punishment for discriminating against older women, especially in mixed-motive contexts. In recognizing sex-plus-age claims, this loophole would be closed and employment discrimination law would better serve Title VII and the ADEA's purpose of protecting workers against discrimination.

While POWADA is an improvement for employment discrimination law, it is not the perfect solution as written. Despite overruling *Gross* and making mixed-motive claims available for a wider range of plaintiffs who fall under different federal statutes, the Act does not clarify when, or if, *McDonnell Douglas* should apply. However, the *McDonnell Douglas* framework only acts to confuse employment discrimination proof structures and disadvantage plaintiffs who cannot locate a similarly situated employee who was treated better. In addition, older women workers who are surrounded by females under forty and males over forty that did not suffer adverse employment action find it extremely difficult to prove discrimination based on either sex or age. The proposed amendment to POWADA is necessary and would explicitly provide for intersectional claims based on sex and age, so that older women employees who suffer discrimination can achieve redress.

VI. CONCLUSION

While federal employment discrimination laws such as Title VII and the ADEA protect many workers from discrimination in the workplace, older women often fall through the cracks in this protection. Subsequently, employers are able to exploit this loophole; they are able to discriminate against the older women workers they consider to be "old hags" and "old bags"[143] and have a good chance that they will not face liability.

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[143] *Id.*

The best way that an older woman can recover for the discrimination she has suffered is through an intersectional sex-plus-age claim, which has only been explicitly approved as a theory in one jurisdiction. Most courts skirt the issue altogether and will likely continue to do so until the Supreme Court or Congress acts to fill this gaping hole in protection.

The fact that the Supreme Court has ruled in *Gross* that the mixed-motive framework is not available under the ADEA is detrimental. Plaintiffs have few avenues for recovery, especially when they have been discriminated against on the basis of a subclass, such as older women. *Gross* will likely have a chilling effect as to plaintiffs' likelihood to file sex-plus-age intersectional claims. Combined with courts' reluctance to recognize sex-plus-age claims, older women will continue to suffer without remedy.

Congress must pass an amended Protecting Older Workers Against Discrimination Act with an explicit guarantee that intersectional claims based on protected characteristics in Title VII and the ADEA are allowed. Further, the *McDonnell Douglas* framework should be removed from both the ADEA and Title VII to create cohesion and eliminate older women's near impossible task of finding a similarly situated comparator. Without Congress's action, the loophole will not be closed and older women will not be able to recover for the discrimination that they too often face.


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