

**Intersectionality in Title VII Litigation: Plaintiffs'
Class Action Perspective**

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Perspective**

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I. Intersectionality: An Overview

The term “intersectionality” was coined by legal scholar Kimberlé Crenshaw in 1989 in her groundbreaking article *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. In the article, Dr. Crenshaw talks about the “single-axis framework that is dominant in antidiscrimination law” which stems from “the tendency to treat race and gender as mutually exclusive categories of experience and analysis.” *Id.* The key insight of intersectionality is that discrimination and disadvantage are more than the sum of their parts; categories may intersect to produce unique forms of disadvantage.

In a recent podcast, Dr. Crenshaw describes the case law that spawned her article, specifically *DeGraffenried v. General Motors*, 413 F. Supp. 142 (E.D. Mo. 1976). Auto manufacturing jobs are segregated by both race and gender. There are black jobs (heavy lifting, dirtier work) and white jobs (towards the other end of the production line). There are men’s jobs (production plant) and women’s jobs (front office). But there were no blacks allowed in the front office, and there were no women allowed in the production plant, so there were no jobs for black women. The lead plaintiff claimed that she was being discriminated against on the basis of race and gender. The court rejected the

claim, finding she could not prove race discrimination since General Motors hired blacks, and could not prove gender discrimination since it hired women. Dr. Crenshaw says, “If you can’t figure out how to tell your story in the same way a black man tells it, or the same way a white woman tells it, you just don’t have a story to tell. [At least,] the law can’t hear it.” *See* <https://www.acast.com/anotherround/episode-89-sister-girl-bonds-with-dr.-kimberle-crenshaw>. The article discusses several other cases with similar outcomes to *DeGraffenried*.

Dr. Crenshaw’s work, and the substantial scholarship that followed thereon, formed a significant subfield within antidiscrimination scholarship.¹ Title VII’s failure to provide redress for the particular experiences of women of color is prominent in this early literature. For a history of the relationship between Title VII and intersectionality, including the female lawyers of color who helped to get Title VII’s sex amendment passed, see Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. Rev. 713 (May 2015).

¹ Other seminal works include Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

II. Historical Treatment of Intersectional Plaintiffs

A. In General

A 2011 article presented an empirical analysis of a representative sample of judicial opinions in EEO cases in the U.S. federal courts from 1965 to 1999. Best, Edelman, Krieger, & Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 Law & Soc’y Rev 991 (December 2011). Using a generalized ordered logistic regression controlling for numerous variables, the authors found that both intersectional plaintiffs (based on demographic characteristics) and intersectional claims (asserting discrimination on more than one basis) had dramatically reduced odds of plaintiff victory. Nonwhite women are less likely to win their cases than is any other demographic group, and plaintiffs who make intersectional claims are only half as likely to win their cases as are other plaintiffs. *Id.*

Another article found similar results. Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 Wm. & Mary L. Rev. 1439, 1440 (2009). Interestingly, Kotkin found that intersectional claims are increasingly prevalent as the U.S. workforce has diversified, and account for more than 50 percent of federal court discrimination actions. “A sample of summary judgment decisions reveals that employers prevail on multiple claims [more than one basis of discrimination] at a rate of 96 percent, as compared to 73

percent on employment discrimination claims in general.” *Id.* at 1441.

Some courts have been sympathetic to intersectional claims. In *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 1032 (5th Cir. 1980), the court found that “discrimination against black females can exist even in the absence of discrimination against black men or white women.” Similarly, in reversing the district court’s grant of summary judgment in *Lam v. University of Hawai’i*, 40 F.3d 1551, 1562 (9th Cir. 1994), the U.S. Court of Appeals for the Ninth Circuit criticized the district court for imagining that racism and sexism can be evaluated separately. “Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women. In consequence, they may be targeted for discrimination even in the absence of discrimination against [Asian] men or white women.” *See also Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (finding that discrimination against black females can exist even in the absence of discrimination against black men or white women, which presents a claim of discrimination on basis of both race and sex simultaneously).

B. Class Actions

Federal Rule of Civil Procedure 23(a)(3) requires that a named plaintiff in a class action lawsuit have claims that are typical of the class claims. Rule 23(a)(4) requires that a named plaintiff fairly and adequately protect the interests of the class, frequently articulated as requiring no conflict of interest

with the class. These typicality and adequacy requirements have proved problematic for women of color seeking class representative status.

For example, in *Moore v. Hughes Helicopter*, 708 F2d 475 (9th Cir. 1983), the plaintiff alleged race and sex discrimination in promotions to supervisory jobs. Moore introduced statistical evidence showing a significant disparity between men and women and a less significant disparity between black and white men. The Ninth Circuit affirmed the district court's denial of class certification on the grounds that "Moore has never claimed before the EEOC that she was discriminated against as a female, but *only as* a Black female . . . rais[ing] serious doubts as to Moore's ability to adequately represent white female employees." *Id.* at 480 (emphasis added). Moore was left with having to support her claim using statistical evidence of discrimination against black females only, which was too small a sample size to produce statistical significance. Dr. Crenshaw summarizes Moore as follows:

For white women, claiming sex discrimination is simply a statement that but for gender, they would not have been disadvantaged. For them there is no need to specify discrimination as white females because their race does not contribute to the disadvantage for which they seek redress. . . . Discrimination against a white female is thus the standard sex discrimination claim; claims that diverge from this standard appear to present some sort of hybrid claim. More significantly, because Black females' claims are seen as hybrid, they sometimes cannot represent those who may have "pure" claims of sex discrimination.

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, 145.

Mirroring the same logic, other courts have held that black women claiming race discrimination could not represent a class that included black men, because the sex disparities between men and women created a conflict of interest for the female named plaintiffs. *See, e.g., Payne v. Travenol*, 673 F2d 798 (5th Cir. 1982); *Strong v. Arkansas Blue Cross & Blue Shield, Inc.*, 87 F.R.D. 496 (E.D. Ark. 1980); *Edmonson v. Simon*, 86 F.R.D. 375 (N.D. Ill. 1980). Critiquing these decisions, Dr. Crenshaw wrote that:

Judicial decisions which premise intersectional relief on a showing that Black women are specifically recognized as a class are analogous to a doctor's decision at the scene of an accident to treat an accident victim only if the injury is recognized by medical insurance. Similarly, providing legal relief only when Black women show that their claims are based on race or on sex is analogous to calling an ambulance for a victim only after the driver responsible for the injuries is identified. . . . [Black women] experience discrimination as Black women – not the sum of race and sex discrimination, but as Black women.

1989 U. Chi. Legal F. at 149.

III. Current Litigation Issues

The “sex-plus” analysis as well as the concept of “pure” versus “hybrid” discrimination remains salient today. Unfortunately, as practitioners we must

take into account how the court or jury will receive our clients' claims; although we might believe that our clients have faced an intersectional form of discrimination, we might choose to bring a "pure sex" or "pure race" claim for strategic reasons. As Minna Kotkin, *supra*, stated:

Courts have devised no consistent or fully articulated theory to address multiple claims. The courts that consider such claims seriously rely on a "sex-plus" analysis that does no more than acknowledge the possibility of subclass discrimination. Although scholars have made much of the multiplicity, indeterminacy, and fluidity of identity, they have offered little in the way of guidance for the resolution of the everyday employment discrimination action that is a concrete manifestation of postmodern legal theory. Empirical evidence demonstrates that multiple claims are all but impossible to win, more problematic even than single claims.

50 Wm. & Mary L. Rev. at 1443.

There can be no doubt that individuals alleging multiple forms of discrimination face a skeptical audience. One judge even accused such a plaintiff of "throwing spaghetti at the wall to see what sticks."² There is a tendency to assume that if a person asserts multiple grounds for discrimination, none of them are grounded in fact. *Id.* The EEOC charge form may be partially to blame. Plaintiffs are invited to check all boxes that apply. Even if a

² Michael Bologna, Judges Warn Employment Lawyers Against Motions for Dismissal, Summary Judgment, 19 Empl. Discrimination Rep. (BNA) 595, Dec. 4, 2002 (quoting criticism of plaintiffs' lawyers by United States District Court Judge Ruben Castillo of the Northern District of Illinois).

lawyer is involved, he or she will likely do the same thing so as to guard against the risk of dismissal of any potential claim for failure to exhaust the administrative process.

Unless the claim is specifically and carefully articulated as intersectional, courts will treat each claim as standing alone; e.g., as race plus sex. In a typical summary judgment opinion, the court will separately analyze the evidence presented to support first one claim and then the other. But that approach will run into the problems identified in *DeGraffenried* and many other cases: that is, if black men have been promoted, and white women have been promoted, you won't be able to prove race or sex discrimination.

Conversely, if the claim is articulated as intersectional, that poses its own practical problems with respect to the burden of proof. First, the pool of comparators is limited. In a race claim, for instance, pretext can be shown if a similarly situated white person was not laid off. But in a race/sex claim, courts take the view that the comparator cannot fall within any of the categories that the plaintiff identifies as.³ This has repercussions for the major source of evidence of pretext in class actions: statistical evidence. When only narrow pools of comparator data may be considered, the sample size may well be too

³ See, e.g., *Jeffers v. Thompson*, 264 F. Supp. 2d 314 (D. Md. 2003); *Wittenburg v. Am. Express Fin. Advisors, Inc.*, No. 04-922, 2005 U.S. Dist. LEXIS 29471 (D. Minn. Sept. 19, 2005), aff'd, 464 F.3d 831 (8th Cir. 2006); *Philipsen v. Univ. of Mich.*, No. 06-CV-11977-DT, 2007 U.S. Dist. LEXIS 25898, at **25-27 (E.D. Mich. Mar. 22, 2007).

small to be of use in proving up discrimination, as in *Moore v. Hughes Helicopter*, 708 F2d 475 (9th Cir. 1983), *supra*.

As one court put it in characterizing the difficulties of proof in what it called “composite claims,”: “the more specific the composite class in which the Plaintiff claims membership, the more onerous [the plaintiff’s burden of proof] becomes.” *Jeffers v. Thompson*, 264 F. Supp. 2d 314,327 (D. Md. 2003).

Due to these difficulties, in the class action context we must sometimes ask our clients to make difficult choices. A plaintiff may have been discriminated against because of both gender and disability, but not only might that raise potential conflict issues under Rule 23(a), it also complicates the narrative of the case. Courts are more likely to certify where the facts are straightforward. When you get into overlapping theories of discrimination, how do you provide “a common answer to the crucial question *why was I disfavored?*” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352, 131 S. Ct. 2541, 2552, 180 L. Ed. 2d 374 (2011). The usual solution has been to subclass various types of employees, but then you run into the added burden of separate statistical analyses, separate sociological or psychological expert evidence, and added complication for the court, which always works to plaintiffs’ disadvantage. As a result, it is rare now to see a Title VII class action alleging multiple categories of discrimination.