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# The *Gross* Decision Does Not Impact The Analysis of Sex-Plus-Age Discrimination Claims

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Sex-plus claims fall under the umbrella of Title VII. A plaintiff that alleges a sex-plus claim must demonstrate the defendant discriminated against a subclass of women or men because of either: (1) an immutable characteristic or (2) the exercise of a fundamental right. Most notably sex-plus claims have provided women with a way in which to challenge the numerous stereotypes they face in the workplace, including age. As discussed below, the "but-for" standard set forth by the Court in *Gross v. FBL Financial Services*, 557 U.S. 167 (2009) does not stand in the way of older women bringing a sex-plus-age discrimination claim under Title VII.

## History of Sex-Plus Claims

Sex-plus claims were first recognized by the Supreme Court in *Phillips v. Martin Marietta Corp.* 400 U.S. 542 (1971). Phillips challenged Marietta Corp.'s policy, which would not accept job applications from women with pre-school-children, but employed men with pre-school-aged children. The Court held that "Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualification be given employment

opportunities irrespective of their sex," thus, the Court of Appeals "erred in reading this section permits one hiring policy for women and another for men." *Id.* at 544. The Court concluded that Phillips' discrimination claim could not be defeated on a motion for summary judgment based on the fact that some members of her protected class were not subjected to the discrimination. *Id.* Justice Marshall noted in his concurring opinion, "[b]y adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act, Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.'" *Id.* at 545.

Subsequently, other courts followed the Supreme Court's lead and invalidated company rules, which singled out certain subclasses of women for discriminatory treatment. *See In re Consolidated Pretrial Proceedings*, 582 F.2d 1142, 1145 (7th Cir. 1978) (policy requiring female cabin attendants with children to accept ground duty positions "a clear example of sex discrimination"); *Barnes v. Costle*, 183 U.S. App. D.C. 90, 91, 561 F.2d 983, 984 (D.C. Cir. 1977) (female employee's job was abolished because she repulsed employer's sexual advances); *Jacobs v. Martin Sweets Co.*, 550 F.2d 364, 371 (6th Cir.) (company violated Title VII by firing single women who became pregnant), *cert. denied*, 431 U.S. 917 (1979); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.) (holding no-marriage rule for stewardesses violates Title VII), *cert. denied*, 404 U.S. 991 (1971); *Lansdale v. United Airlines, Inc.*, 437 F.2d 454, 455 (5th Cir. 1971) (following *Phillips*); *Jurinko v. Wiegand Co.*, 331 F.Supp. 1184, 1187 (W.D. Pa. 1971) (refusal to hire married women violates Title VII); *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (decision maker admitted he didn't promote plaintiff "because she had children and he didn't think she'd want to relocate her family, though she hadn't

told him that"); *Santiago–Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000) (finding proof of sex-based discriminatory animus where direct supervisor questioned "whether [the plaintiff] would be able to manage her work and family responsibilities"); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1045 (7th Cir. 1999) (in the context of a Pregnancy Discrimination claim, the court found direct evidence of discrimination where the supervisor told employee "that she was being fired so that she could 'spend more time at home with her children'" because the statement "invoked widely understood stereotypes the meaning of which is hard to mistake").

This issue was more recently addressed in *Back v. Hasting of Hudson Union Free School*, 365 F.3d 107 (2d Cir. 2004). Back argued within the context of a 1983 claim, that she was subjected to sex discrimination. *Id.* at 117. Back asserted that she was terminated because she was a young mother, and her employer did not believe she could continue to provide the level of devotion to her job while at the same time being a good mother. *Id.* at 113. In support of her claim, Back offered direct evidence - her supervisor's comments about a woman's inability to combine work and motherhood. *Id.* at 124. Back did not offer any comparative evidence. *Id.* at 121. The defendant asserted that stereotypes about pregnant women and mothers are not gender discrimination, but rather, "gender plus" thereby requiring "such stereotypes cannot, without comparative evidence of what is was said about fathers, be presumed to be 'on the basis of sex.'" *Id.*

The court disagreed and noted "at least where stereotypes are considered, the notion that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves gender-based" discrimination. *Id.* (citing *Nev. Dep't of Human Res. V. Hibbs*, 538 U.S. 721 (2003)). So, when there is

direct evidence of stereotype discrimination, comparators are **not** necessary in order for the plaintiff to establish a sex-plus discrimination claim.

Other courts have held that "sex-plus plaintiffs can never be successful unless there is a corresponding sub-class of the opposite gender." *Doucette v. Morrison Cnty., Minn.*, No. 13-2424, 2014 WL 3973082, at *5; *see also Coleman v. B-G Maint. Mgmt. of Colorado, Inc.*, 108 F.3d 1199, 1203-04 (10th Cir. 1997) ("[G]ender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender."); *Fisher v. Vassar College*, 70 F.3d 1420, 1448 (2d Cir.1995) (plaintiff failed to establish gender-plus-child-care claim because she failed to compare the tenure experience of women who took leaves of absence for child rearing with the tenure experience of men who took similar leaves of absence); *Bryant v. International Sch. Servs.*, 675 F.2d 562, 575 (3d Cir. 1982) ("No evidence was before the trial court to show that married males, in circumstances similar to [the married female] appellants, received better, or even different treatment."); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1089 (5th Cir. 1975).

Yet, in each of these cases above, there was **no** direct evidence of discrimination. Consequently, comparators were absolutely necessary. However, if there is direct evidence of discrimination as there was in *Back* (employee's supervisor told her she did not know how she could possibly do this job with children) and the other cases cited above, it is not necessary to conduct an comparative analysis of how the sub-class of the opposite gender are treated in order for the sex-plus plaintiff to be successful. When pursuing a sex discrimination claim on behalf of an employee, we need to keep in mind that the ultimate issue is the reason for our client's treatment, not the relative treatment of

different groups within the workplace. Nevertheless, even if there is direct evidence of discrimination, comparative analysis that demonstrates discrimination should not be omitted in the employee's case in chief, as more evidence typically makes a case stronger.

We also need to be mindful that Courts have held "discrimination against one employee cannot be cured, or disproven, solely by favorable, or equitable, treatment of other employees of the same race or sex." *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001); s*ee also Conn. v. Teal,* 457 U.S. 440, 455 (1982) ("Congress never intended to give an employer license to discriminate against some employees . . . merely because he favorably treats other members of the employees' group."); *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination."); *Carson v. Bethlehem Steel Corp.,* 82 F.3d 157, 158 (7th Cir. 1996) (rejecting the argument that plaintiff's replacement by a worker of the same race precluded the establishment of a prima facie case of race discrimination); *Lam v. University of Hawaii*, 40 F.3d 1551, 1561 (9th Cir. 1994) (favorable treatment of one member of a protected class does not rule out the possibility that another member of the same class suffered discrimination); *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1448 (2d Cir. 1995), *reh'g en banc*, 114 F.3d 1332 (2d Cir. 1997) *abrogated by Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) ("tenure to another female biology professor at the same time Vassar rejected the plaintiff does not exclude the possibility that plaintiff was subjected to discrimination based on her sex").

**Sex-Plus-Race Claims Laid the Foundation for Sex-Plus-Age Claims**

The Fifth Circuit declared that "it is beyond belief that, while an employer may not discriminate against" subclasses of women who have young children, married women, pregnant women, and single women, it would be permitted to discriminate against black females as a class. *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1034 (5th Cir. 1980). The court observed "that this would be a particularly illogical result, since the 'plus' factors in the former categories are ostensibly 'neutral' factors, while race itself is prohibited as a criterion for employment." *Id.* Accordingly, the court recognized black female as a distinct protected subgroup and held that "when a Title VII plaintiff alleges that an employer discriminates against black females, 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.* More specifically, the Court declared, "black males and white females must be treated as persons outside" the plaintiff's class. *Id.* In *Jefferies*, the district court failed to conduct its analysis of the plaintiff's claim in this manner, so the matter was remanded for further consideration.

More recently, the Sixth Circuit addressed the unique entanglement of sex and race. The court observed, "[n]aturally 'where two bases of discrimination exist, the two grounds cannot be neatly reduced to distinct components.'" *Shazor v. Professional Transit Management, Ltd.*, 744 F.3d 948 (6th Cir. 2014) (citing *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010)). The court affirmed that sex-plus cases consist of a subclass combined with a characteristic protected by Title VII, and thus, the courts have required sex-plus plaintiffs to show unfavorable treatment as compared to a

matching subcategory of the opposite sex. *Id.* (citing *Derungs v. Wal–Mart Stores, Inc.*, 374 F.3d 428, 438–39 & n.8 (6th Cir. 2004) (applying Title VII analysis to a sex-plus claim)).

**Sex-Plus-Age Discrimination Claims**

Age is obviously another way an employer can discriminate against some members of one sex, but not others. An employer should not be permitted to discriminate against older females as a sub-class.

When analyzing a sex-plus-age discrimination case, the common characteristic of the two classes being compared, e.g. older men and older women, is age, and when it is cancelled-out, only sex remains. It is only logical that Title VII analysis should be applied to sex-plus-age discrimination claims. The courts, however, have yet to reach a consensus that sex-plus-age is a recognized subclass under Title VII.

**Sex-Plus-Age Recognized as a Subclass under Title VII**

In *James v. Teleflex, Inc.*, No. Civ. A. 97-1206, 1998 WL 966009 (E.D. Pa. Dec. 23, 1998) the court conducted an analysis of a sex-plus-age claim under Title VII. The plaintiff was required to show that: (1) she is a member of a protected class: (2) she was qualified for the position; (3) she was terminated, denied a position or suffered adverse employment consequence; and (4) non-members of the protected class were treated more favorably. *Id.* at *8. James defeated summary judgment because she demonstrated direct evidence (the owner said that he wanted "that old bitch fired") she was terminated because she was an older woman. *See also McGrane v. Proffitt's Inc.*, No. C 97-221-MJM, 2000 WL 34030843, *7 (N.D. Iowa Dec. 26, 2000) (analyzing the plaintiff's sex-plus-age claim "like any other Title VII claim" and denying summary judgment); *Hall v.*

*Missouri Highway and Transp. Com'n*, 995 F. Supp 1001 (E.D. Mo. 1998), *aff'd on other grounds*, 235 F. 3d 1065 (8th Cir. 2000).[1]

The Plaintiff in *Arnett v. Aspin,* 846 F. Supp. 1234, 1237 (E.D. Pa. 1994), entitled her Title VII claim "Sex Plus Age Discrimination." *Id.* Arnett asserted she had a viable sex-plus discrimination claim under Title VII because age is an immutable characteristic.[2] *Id.* at 1240. The defendants argued that the plaintiff's case was different from the line of cases following the Court's holding in *Phillips v. Martin Marietta Corp.* because it combined two classifications that are afforded protection by two distinct statutes. *Id.* The court found the distinction to be insignificant. *Id.* More importantly the court recognized that age is an immutable characteristic and analyzed Arnett's sex-plus-age claim under Title VII.

More recently, the court in *Thompson v. City of Columbus*, 2:12-CV-01054, 2014 WL 1814069, at *5 (S.D. Ohio May 7, 2014), noted the "[c]ourts generally agree that "sex plus" discrimination is "ultimately premised on sex" and therefore should be analyzed like any sex discrimination claim under Title VII. *Id.* (citing *Gee–Thomas v. Cingular Wireless*, 324 F. Supp. 2d 875, 882 (M.D. Tenn. 2004)); *see also Coleman v. B–G Maint. Mgmt. of Colorado, Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997) ("when one proceeds to cancel out the common characteristics of the two classes being compared ([e.g.,] married men and married women), as one would do in solving an algebraic

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[1] In the following cases the court recognized sex-plus-age discrimination and applied the Title VII analysis, but dismissed the plaintiffs' claims for failure to establish a prima facie case of sex-plus-age discrimination: *Flaherty v. Metromail Corp.* 59 Fe. Appx. 352 (2d Cir. 2002); *Poteat v. PSC Automotive Group, Inc.*, No. 3:03CV129, 2006 WL 2828836 (W.D.N.C. Sept. 29, 2006); *Best v. GTE Directories Service Corp.*, No. Civ.A. 3:92–CV–0163, 1993 WL 13144123 (N.D. Tex Apr. 8, 1993); *Sherman v. American Cyanamid Co.*, 188 F.3d 509 (6th Cir. 1999).

[2] The progeny of the Court's decision in *Phillips* "is a rule which allows plaintiffs to bring a Title VII claim for sex discrimination if they can demonstrate that the defendant discriminated against a subclass of women (or men) based on either (1) an immutable characteristic or (2) the exercise of a fundamental right." *Arnett v. Aspin,* 846 F. Supp. 1234, 1237 (E.D. Pa. 1994).

equation, the cancelled-out element proves to be that of married status, and sex remains the only operative factor in the equation.")

One could argue that the same the same rules of proof for sex-plus claims based on stereotypical characterizations of sex set forth above also apply to sex-plus-age discrimination cases.

**_Gross_ Should Have No Impact on Sex-Plus-Age Subclass Claims**

Some courts are of the opinion that post *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), plaintiffs can not plead alternate theories to an ADEA claim. *See McFadden v. Krause*, 357 F. App'x 17, 19 (9th Cir. 2009); *Whitaker v. Tennessee Valley Auth. Bd. of Directors*, 3:08-1225, 2010 WL 1493899, at *9 (M.D. Tenn. Apr. 14, 2010); *Culver v. Birmingham Bd. of Educ.*, 646 F. Supp. 2d 1272, 1272 (N.D. Ala. 2009).

In *Gross*, the Court set forth that, "a plaintiff must prove that age was the 'but-for' cause for the employer's adverse decision" to establish a claim under the ADEA. *Gross,* 557 U.S. at 167. In contrast, in order to establish a sex discrimination claim under Title VII, the discriminatory motive need not have been the only factor in the decision to terminate.

In *DeAngelo v. Dentalez, Inc.*, 738 F. Supp. 2d 572, 574 (E.D. Pa. 2010), the plaintiff asserted an ADEA claim and a Title VII claim. The Title VII claim did not specifically state a "sex-plus" claim. However, in her complaint, the plaintiff asserted that her employer has engaged in discrimination against older workers and older female workers. *Id.* at 585. The defendant argued the plaintiff's ADEA claim fails under *Gross* because the plaintiff asserted age and gender discrimination, and thus, as a matter of logic, age cannot be the sole reason for the adverse employment decision. *Id.* at 578. The

court, however, found "the line of cases permitting a plaintiff to continue to plead both age and gender discrimination through summary judgment stage to be more persuasive" and denied the employer's motion for summary judgment. *Id.*

The plaintiff in *Siegel v. Inverness Med. Innovations, Inc.*, 1:09-CV-01791, 2010 WL 1957464, at *2 (N.D. Ohio May 14, 2010), asserted in her complaint that her employer disproportionately discharged women and older employees. The court concluded the employee could pursue alternative claims of discrimination through the summary judgment stage of the case. *Id.* at *6; *see also Belcher v. Service Corp. Int'l.* No. 07-285, 2009 WL 3747176 at *3 (E.D. Tenn. Nov. 4, 2009) (finding *Gross* may make it impossible for a plaintiff to ultimately recover on an age and a gender discrimination claim in the same case, however, *Gross* has not taken away a litigant's right to plead alternate theories under the Federal Rules); *Houchen v. Dallas Morning News, Inc.*, CIV. A. 308-CV-1251-L, 2010 WL 1267221, At *3 (N.D. Tex. Apr. 1, 2010) (the court held that the plaintiffs "are entitled to plead alternative theories, even if they are inconsistent. Fed.R.Civ.P. 8(d)(3). While issues of proof may prevent Plaintiffs from prevailing on both theories, the court does not find the mere fact of pleading sex and age discrimination claims together a basis for dismissing the age discrimination claims.")

The plaintiff in *Gorzynski v Jetblue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010), did not assert a Title VII claim explicitly on sex-plus-age, but rather brought separate age and gender discrimination claims. The court acknowledged the elements of the two claims cannot be neatly divided, but diverted addressing the issue any further. *Id.* The court found sufficient evidence of age discrimination to allow the case to survive summary judgment. *Id.* at 111.

In *Siegel*, *Belcher*, *Houchen*, *Whitaker*, *Culver*, and *McFadden*, the parties' asserted **alternative** theories to their age discrimination claims. None of the plaintiffs in these cases argued their Title VII claim as sex-plus-age discrimination. Perhaps that is why the Courts in these cases expressed that the plaintiff would be unable to ultimately succeed on both age and gender discrimination at trial.

Notably the court in *DeAngelo* stated, "*Gross* certainly prohibits plaintiffs from alleging, in the same count, a combined age/gender discrimination claim." *DeAngelo*, 738 F. Supp. at 579. If the plaintiff cited sex in the ADEA count of her complaint, this would certainly make it challenging for the plaintiff to demonstrate age was the but-for cause of adverse employment action she experienced. However, this problem is not reciprocal if the plaintiff asserts age in her Title VII claims because the standard is not "but-for," but rather motivating factor.

When a plaintiff brings a sex-plus-age claim, she is not asserting an alternate theory to an ADEA claim. She is asserting a Title VII claim with an additional immutable characteristic – age. Accordingly, the *Gross* standard is not applicable to the analysis of the claim. As advocates for employees bringing sex-plus-age claims, it is our responsibility to make this argument so that courts are not distracted by the "but-for" standard in their evaluations of cases.