Prejudice And Heterogeneity: An Overview

Akanksha, Amity University, Jharkhand.[*]

Abstract

Conglomerate avow have flatter a unit of worship bias. It is ordinary, if not omnipresent, the invocation for the court belief is "Plaintiff brings his action under Title VII of the Civil Rights Act of 1964 for religious observance and practice." Enlarged heterogeneity in the prayer's enumeration suggests that customarily, contrasting treatment may in fact be embedded in interchange or composite bias: although cliché for "women" have somewhat evaporated. Composite bias dispenses a jetton description to the present depiction of prayers prejudice as fine or insentient. In spite of the ordinary sight conception that the more unidentical a worshipper is, the more likely she will experience bias, factual confirmation shows that vivid assert – which may report for more than the 50 per cent of united court prejudice activity – have very less chance of favourable outcome than single state. A representative of brief judgement commitment reveals that worshipper's triumph on several claims. Getting the better of the courts unwilling to follow this superintendence needs the expansion and initiation of humanities research which set forth the subtlety cliché faced by complex suitor.

[*] The author is a second-year Law Student pursuing B.A. LL.B. (Hons.) from Amity University, Jharkhand.

.

I. Introduction

Is an employee "crying wolf" or, as one judge described it, "throwing spaghetti at the wall to see what sticks" when she asserts sex, age, and race discrimination? Or is she stating the truth about the workplace today, which is that while diversity is tolerated and even encouraged to a point, too much difference increases the risk that a worker will be singled out for unfair treatment? Consider the following examples. A female assistant stage director at the Metropolitan Opera alleges that she was fired due to her age, gender, and sexual orientation in a hostile work environment. A Jehovah's Witness who worked as a file maintenance clerk claims she was fired because she is an older African American lady. A hospital material distribution manager claims he was discriminated against because of his Italian origin, his gender, and his diabetes related impairment. Give me a break, do we think, or maybe more importantly, do judges think it? Or is there any acknowledgment that actual, covert discrimination might be at play?

These types of claims are common in modern job discrimination lawsuits. In fact, it is typical, if not universal, for arguments to start with some variation of the following litany: "Plaintiff makes this claim under Title VII and the ADEA for racial, age, and gender discrimination. According to Equal Employment Opportunity Commission (EEOC) intake procedures, many of these allegations will be submitted without any supporting documentation. Courts have not developed a coherent or completely developed framework to deal with numerous allegations. The "sex-plus" methodology is used by the courts that take such allegations seriously, and it only acknowledges the possibility of subclass discrimination. Although scholars have emphasised the diversity, ambiguity, and fluidity of identity, they have not provided much assistance for how to resolve the common job discrimination case, which is a practical application of postmodern legal theory. Empirical data show that many claims are more troublesome than single claims, practically impossible to win.

This study might be included in the larger corpus of recent studies that expresses the opinion that employment discrimination law is fundamentally flawed at the moment. All of this effort is motivated by the realisation that, at a time when there is still a lot of convincing evidence of workplace bias, the federal courts are increasingly rejecting the vast majority of such claims.

There are several interconnected threads in this criticism. The first examines the idea of "subtle bias," which somewhat informs all of this scholarship: the idea that unconscious sentiments influence workplace decision-making, skewing outcomes in favour of protected groups, but that discrimination law is a crude tool for exposing these biases.

There are four sections to this article. I investigate the dilemma they provide in Part I, examine the prevalence of complicated assertions and their relationship to subtle bias, and offer several explanations for their expansion that are related to both demographics and doctrine. I offer empirical data that shows a consistent and appreciable rise in the number of claims filed many times during the EEOC administrative procedure. This section empirically illustrates that these cases have even lower success percentages than single-claim cases after they reach the federal courts, a finding that is mostly attributable to the EEOC's intake procedures. The "sex-plus" analytical framework that courts typically use to consider multiple claims is examined in Part II, which contends that it merely states the issue. I demonstrate that the legal acceptance of complicated claims results in the failure of the employees' claims as a matter of fact in subsequent processes by tracing the history of the most important cases that uphold the "sex-plus" hypothesis. Part III examines the academic literature on complex discrimination and challenges the popular interpretation of intersectionality that emerged from it. Theories of intersectionality state the issue but do not address how courts are to resolve the challenging questions of proof that they produce, similar to courts' "sex-plus" analysis. Finally, in Part IV, I explore these challenges of proof, particularly with regard to the demonstration of pretext, and offer ways of analysis that could help make complex assertions more plausible. I do this by utilising two recent examples.

II. The Rise and Fall of Complex Claims

Finally, some consideration is being given to complex assertions and their connection to subtle bias. Eradicating Racism and Colonism from Employment is the abbreviation for a project that the EEOC recently initiated. The EEOC Commissioner Naomi Earp reaffirmed the notion that has recently come to dominate employment discrimination studies when she announced this initiative: "In the past, discrimination was obvious, [and African Americans] and women were overtly denied job opportunity.

While there are still certain overt forms of discrimination in the workplace, such as nooses in racial harassment instances, there are now a lot more subtle one. Furthermore, complex statements and subtle prejudice are related. However, despite the EEOC's recognition of the rise in complex allegations, there is still no guidance on how to handle them. The Commission published a comprehensive compliance manual as part of the E-RACE initiative to serve as guidance in addressing new forms of discrimination. But it only serves to point out the problem in the case of complex claims.

Although the EEOC does not explicitly provide empirical evidence to back up its allegation that the number of complicated claims has increased, there is some supporting data. According to the type of discrimination alleged—race, sex, national origin, religion, age, or disability—the agency compiles a statistical report of the number of complaints made each year. The term "frequently" is not used lightly, as shown by the statistics in there are currently 20% more allegations of discrimination than charges, and the ratio is rising.

The total number of complaints made to the EEOC between 1993 and 2006, the number of complaints alleging discrimination based on race, sex, national origin, religion, age, or disability, the total number of claims, and the ratio of complaints to claims, expressed as a percentage. Due to the fact that it was the first year when ADA claims had a substantial impact on the EEOC procedure, the year 1993 was chosen as the starting point. The Civil Rights Act of 1991, which permits compensatory and punitive damages as well as jury trials, had also begun to take effect by 1993, significantly boosting the number of claims filed. Despite fewer charges and claims overall throughout this time, the ratio of charges to claims has significantly grown. In 1993, there were 113 claims for every 100 accusations. In 2006, there were 123 claims for every 100 charges.

Unfortunately, it is impossible to gauge the frequency of discrimination lawsuits in federal court that make several claims, or even how they perform in terms of results. The Administrative Office of the United States Courts' data sets only classify cases under the extremely broad heading "civil rights: employment." The type of alleged discrimination in employment proceedings is not consistently recorded by the PACER electronic docket system, according to rule. The only way to evaluate the prevalence of numerous claims, apart from actually going through case files one at a time, 65 is to look at reported opinions, which may raise questions about publication bias.

How are multiple claims handled? Based on recorded decisions and judgements, several empirical studies have examined the success percentages of various claims. According to research by Kevin Clermont and Stewart Schwab, plaintiffs who make it to the trial stage win cases in the field of "civil rights: jobs" at an average rate of 89.5 percent. According to studies on handicap discrimination claims, between 3 and 8% of plaintiffs prevail in their cases. According to a review of instances involving age discrimination, plaintiffs won 8.7% of the time. According to one study, plaintiffs only appear to get close to what should be anticipated in litigated cases in cases involving sexual harassment (45.7% for bench trials and 54.6% for jury trials).

This result can be contrasted to more comprehensive empirical research of the success rates of summary judgements in employment discrimination cases. According to Berger, Finkelstein, and Cheung, plaintiffs won 29 percent of defendants' requests for summary judgement. In a recent study on summary judgement in general, the Federal Judicial Centre examined 179,969 cases that were dismissed in the 78 federal district courts that had completely deployed their electronic case and docket management reporting system in Fiscal Year 2006. '° It was discovered that summary judgement motions were filed in 30 out of every 100 employment discrimination cases, and that defendants won those cases in full or in part in 73 percent of those instances. The success percentage was slightly higher—76 percent—in the district courts of the Second Circuit. The similar percentage in my sample of several claims was 96%.

Why are numerous claims so ineffective? I offer various justifications. The first has to do with the formalities of administration. The majority of employees who file complaints with the EEOC do so without legal representation. The claimant must fill out an intake form as the initial step in the procedure. The temptation to check every box that "applies"—in the sense that the employee defines herself—must be overwhelming for many employees. An older African American woman who feels she was unfairly passed over for a promotion can check her age, sex, and race if she has access to facts regarding the decision. The process leading up to multi-claim litigation starts here.

The intake questionnaire and charge form do not differentiate between multiple claims brought in the alternative (for example, discrimination based on sex or on race) and complex or intersectional claims, despite the fact that claimants are asked to provide a narrative describing discriminatory acts (for example, discrimination addressed to a subclass, such as African American women).

According to Berger's research, more than 50% of discrimination lawsuits include multiple claims. In many circumstances, district court judges will not bother to examine past the most basic narrative until the problem of intersectionality is clearly shown. They treat each claim as though it were independent, and in the typical summary judgement opinion, they analyse the evidence in turn for each claim—for instance, first the claim related to race, then the claim related to gender—without even mentioning the possibility of a convoluted theory of discrimination.

One district court judge made an effort to create a procedural framework to deal with the numerous accusations, appearing dissatisfied and antagonistic toward them but at least aware of the various narratives they might represent. It was described as "a very typical approach" in *Harrington v. Cleburne County Board of Education* when the court issued a "special order in cases of differential treatment employment discrimination in which more than one banned motive factor is identified." Prior to the final pretrial conference, the plaintiff was obliged under the order, which was to be followed in all multiple-claim jury cases, to revise the complaint to "remove all claims of unlawful employer conduct save one." In the event that the plaintiff does not comply, she has two options: she may either proceed on the basis of an "intersectional" theory or assert separate grounds for discrimination. In the second scenario, the claims must be presented to the jury individually, and the defendant is free to pick which claim is heard first.

The Court of Appeals for the Eleventh Circuit accepted an interlocutory appeal of the order and overturned the portion of the order that granted the defendant the power to choose the order of the trial, but only because the district court failed to provide a sufficient justification for doing so. The trial court's attempt to "send a signal" that it would pay fees to the defendant if it triumphed in any or both of the separate trials was criticised, and the decision regarding "prevailing" parties was also overruled. While noting that "This court has deplored muddled complaints in employment discrimination and civil rights cases and urged district courts to 'take a firm hand' in ensuring efficient and clear proceedings. The court added that it will evaluate the "special order's" future application on a case-by-case basis.

It is obvious that the Harrington trial court's animosity led it to overstep in its efforts to provide some clarity to a number of issues. After neither Harrington opinion has been cited since the decisions were made, it appears that the "special order" was never implemented. In spite of the proliferation of multiple claims in discrimination cases, the court at least clearly addressed the idea of an international theory, a term that has all but disappeared from published rulings.

III. A Doctrinal Rework for Complex Claims: The "Sex-Plus" Analysis

Courts started to struggle with the analysis of multiple claims soon after the passage of Title VII in 1964. The possibility of combining "two causes of action into a new special sub-category" and resulting in a "super remedy" was outright rejected by some courts, but it was more closely examined by others who considered the possibility that discrimination might be directed at a particular segment of a protected group. The "sex-plus" idea came to be known as the prevailing analytical approach. It was initially utilised in class action or disparate impact lawsuits, where statistical evidence could be efficiently used to illustrate subgroup disparities. Later, it was extended to the standard disparate treatment case. Finally, it was used to sexual harassment cases, where its usage proved more difficult. In this section, I examine the development of "sex-plus" analysis and show that, despite its increasing popularity, it did not take into consideration the inherent proof-related challenges to its formulation.

A newspaper corporation refused the male plaintiff a job in *Willingham v. Macon*[1] Telegraph Publishing Co. because a grooming rule was deemed to prohibit men with long hair. In contrast to prior "sex-plus" cases, the policy in this instance was neutral on its face, but there was no disagreement on how differently it was applied. As in the previous wave of cases where women were denied work based on feminine preconceptions, Willingham contended that the "plus" was failing to adhere to male sexual stereotypes. The Fifth Circuit referred to "whether a line can be drawn, several times. and significantly drew from legislative history to show that the congressional There is no doctrinal basis for the hair cases. The "sex-plus" approach' extra gloss appears to be a result of judges' unwillingness to explore whether male stereotypes should preclude employment prospects.

[1] Willingham v. Macon 507 F.2d 1084 (5th Cir. 1975)

Would the outcome have been the same, for instance, if a grooming rule was construed to forbid men from having shorter hair than shoulder length, eliminating a class of women who liked shorter hair? Or think about a rule that mandated college degrees for women but not for men. Objective behind Title VII's enactment was to give men and women equal access to the workforce. Since this policy would not exclude all women, a lack of a degree is not an inflexible characteristic, and requirements for degrees do not violate a basic right, it is difficult to see an employer contending that this kind of policy does not constitute sex discrimination. Such a policy would be scrutinised based on whether the requirement was connected to the employment, if it wasn't rejected outright. Furthermore, the hair cases demonstrate that "sex-plus" analysis is essentially a catchall term for examining policies that only affect a subset of one gender group. It is interesting to note that "sex-plus" theories were never used to argue against clothing rules, such as women who want to wear slacks to work.

Therefore, "sex-plus" analysis came to an early end when it came to employment policies—the classic disparate impact-type situations. The Supreme Court struck down rules that, if supported by a "sex-plus" premise, may have been upheld, such as denying female workers returning from maternity leave accumulated seniority. In reality, as has been extensively reported, there aren't many incidents of class-based discrimination with differential impacts today.

Sexual harassment is a different type of unfair treatment that is covered in the "sex-plus" story. In *Hicks v. Gates Rubber Co*.[2], a security guard who was African American claimed she had been subjected to racial and sexual harassment as well as being fired in retaliation. The employer won the bench trial. The district court's failure to adequately analyse whether the claimed conduct produced a hostile atmosphere, which had been acknowledged by the Supreme Court following the trial court's ruling, was the main reason why the Tenth Circuit overturned the sexual harassment judgement. Hicks was the only African American female guard out of thirty guards, and one of only two African Americans, which is significant because the court of appeals noted this fact at the beginning of its ruling despite it not normally being relevant to a harassment allegation. The plaintiffs' testimony that one supervisor, Gleason, called African Americans "niggers" and "coons" and once made a remark about "lazy niggers" that was ostensibly addressed at Hicks served as the basis for the allegations of racial harassment.

[2] Hicks v. Gates 833 F.2d 1406

During her probationary time, a supervisor allegedly commented, "I think you're going to make it," and on one occasion, Gleason allegedly grabbed her breast and shouted, "I caught you," causing her to fall over and be trampled by him. In another occasion, Gleason threatened to "push his foot up her ass so deep that she would have to go to [the] clinic to take it out," according to Hicks. She was forced to leap from a loading platform, sit in a damp seat, was once prevented from taking a lunch break, and was not allowed to sit down during a plant inspection, among other acts of harassment that were not blatantly sexual or racial.

According to the employer, Hicks was not performing her job properly because she needed four weeks of training instead of the standard one week, engaged in an argument with a female co-worker and allegedly challenged another employee to a fight, which led to a three-day suspension, and received two reports of subpar work performance before being terminated. Hicks reported five instances of discrimination to the EEOC during her eight months of employment, with the fifth alleging that her termination was motivated by retaliation.

In order to establish a Title VII violation, the district court found that neither the racial nor the sexual occurrences were sufficiently prevalent. The court of appeals upheld the racial harassment judgement but remanded for more information about the claim of a sexually hostile work environment. It was decided that in establishing whether there was a hostile work environment, sexual occurrences involving Hicks should be taken into account with evidence of physical and verbal abuse, even though it was nonsexual, and evidence of supervisor Gleason's sexual harassment of other employees.

Finally, the court ruled that evidence might be combined when evaluating widespread cases of racial and sexual harassment. The court incorrectly cited Phillips for the proposition that disparate treatment of a subclass of women can result in a Title VII violation and relied on Jefferies for the proposition that discrimination against African American females can exist in the absence of discrimination against white females or African American men.

After the district court once more ruled in favour of the employer, the Hicks case returned to the Tenth Circuit four years later with Hicks arguing that the circuit court's directives had not been implemented. The district court described its task as follows: "The incidence of sexual harassment and racial harassment must be considered in combination to determine whether there is a widespread pattern of discriminatory harassment against the plaintiff as [an African American] female, considering [African American] females as a sub-class of females, but did so merely on the basis of a review of the trial transcript without holding new evidentiary hearings. It was determined that the district court's decision that the instances did not together show an abusive workplace was not obviously incorrect. Not unexpectedly, the district court successfully avoided the purpose that the case be remanded to be more thoroughly considered without a clearer assessment of what was meant by "aggregate" or an exploration of what discrimination meant in that context.

However, the use of "sex-plus" analysis in harassment situations has no doctrinal justification other than to highlight the potential for subgroup stereotyping. To distinguish a plaintiff from, say, African American males and white women who are promoted, "sex-plus" in the gender-race context is required. Contrarily, allegations of harassment are fact-specific and do not need for comparison proof. These cases serve only to illustrate the courts' inability to give complicated claims significant consideration.

The combination of age and disability discrimination claims, brought under separate legislation, with Title VII claims marks the next phase of the "sex-plus" tragedy. The laws allowing for age and disability discrimination claims share many similarities with Title VII, but they differ significantly in that they designate a specific protected group. Men and women, African Americans and whites, and both genders are entitled to non-discriminatory treatment under Title VII. Only people over 40 are protected by the ADEA, and only people with disabilities who fit the legal description are protected by the ADA. Multiple claims can be combined in numerous ways, as many courts have shown. However, as the number of claims has increased, few courts have conducted a thorough or systematic examination of the potential for sophisticated discrimination.

The aforementioned instances demonstrate how little evidentiary guidance has been provided by the courts regarding how such claims can be substantiated. The viability of complex claims has not led to effective resolutions for plaintiffs, with the lone exception of Lam, which likely was resolved after the court of appeals' second remand. I argue that intersectional scholarship has not filled this void in the next section.

IV. Intersectional Scholarship

Legal experts have taken note of the topic of numerous claims of discrimination. The issue of how racial and gender bias interact in different contexts, including workplace discrimination, was covered in a number of papers throughout the 1990s. These authors, who mostly wrote from a critical and feminist perspective, all argued for a more complex reading of Title VII that allows for the combination of claims. A feeling of the stereotypes at work in these kinds of statements was conveyed by some authors through narrative. However, this corpus of work is not very helpful in determining the standard of evidence required to support such a claim. Although the courts have at least acknowledged several claims in the direction advocated by these professors, plaintiffs still lose, as was previously mentioned.

Additionally, these papers mostly focus on the race/gender paradigm and do not offer a framework for the acknowledgment of classes that are not traditionally linked, including age and disability. This section will look at a number of notable works that have addressed several claims. One of the first people to draw attention to the challenges in assessing allegations concerning racial and gender discrimination was Kimberle Crenshaw. Crenshaw contends that African American women's "intersectional experience" is larger than the combined effects of racism and sexism. As a result, she suggests that when African American women complain about gender discrimination, their experiences are compared to those of sex-privileged (i.e., male) African Americans, while when they complain about race discrimination, their experiences are compared to those of privileged (i.e., white) women. She cites an early ruling in a case that contested seniority-based layoffs at a business that had no African American women employees before 1964 as one illustration.

All African American women who were put off lost their employment as a result of the layoffs, but the court declined to accept what it called a "super remedy" based on combined statutory classifications because not all women were let go and the race claim should be joined with an existing action. She comes to the conclusion that while African American women may encounter discrimination similar to that experienced by white women or African American men, they frequently encounter double discrimination, and occasionally they encounter a particular type of bias that is specifically directed at African American women. Later writings by Crenshaw explore intersectionality in a variety of circumstances, but they do not touch on employment discrimination law.

Kathryn Abrams makes the case that the assumptions underpinning the Title VII theory limit the redress that complex claimants are eligible for and show how they can persuade judges to order such plaintiffs to separate and prioritise the components of their identities. In order to achieve this, she examines the judiciary's handling of multiple claims, paying particular attention to employment cases with complex plaintiffs asserting "race and sex" claims as well as situations involving "ambivalent plaintiffs." The latter, according to her, are people who awkwardly fall into the category for statutory protection since they not only exhibit traits connected with the protected category but also traits associated with the category that is statutorily supposed to be the opposite.

Abrams bases her investigation on a consideration of how feminist theory has characterised the female subject in various ways. She then focuses on whether or not these plaintiffs have provided an understandable explanation for the types of discrimination they have experienced. In the end, she comes to the conclusion that courts are reluctant to accept the complex subjectivity of these plaintiffs and that they provide no real account of discrimination that either "helps explain how they relate to the forms of race or gender discrimination traditionally protected under the statute" or explains the complexity of intersectional claims in their own terms. " This flaw, in Abrams' opinion, does not establish a solid or instructive precedent for the acceptance of similar claims in the future. Abrams offers a perceptive analysis of the sociocultural factors at play in incidents of employment discrimination.

She addresses the complexity of intragroup discriminatory dynamics by describing how groups internalise the social forces of sexism and racism and how these forces serve to create an intragroup hierarchy. She describes employment discrimination as being both influenced by and reinforcing the societal hierarchy of racism and sexism. Although she skilfully examines the societal factors that contribute to the type of discrimination experienced by complex plaintiffs in her discussion, she ultimately seems most concerned with the lack of justification provided by courts; her assessment of their failure seems to be one of clarity and direction. Her ideas are not particularly remedial, despite the fact that her assessment is compelling and clarifies much of what is not mentioned or addressed in employment discrimination cases involving many claims.

V. Problems Of Proof: A Look at Two Cases

In the context of uneven treatment, an increasing number of courts have implicitly or expressly accepted difficult claims from a doctrinal standpoint. However, based on a reading of documented viewpoints and empirical as well as anecdotal information, it appears that these cases are virtually hopeless, even more so than single-claim situations. In this section, I examine whether multiple-claim cases fail for justifiable reasons, that is, are they brought by claimants impulsively or even in desperation when it is necessary to set the plaintiff apart from other "single" protected group members who can be proven not to have been the targets of discrimination? Alternatively, do multi-claim lawsuits fall short because plaintiffs are unable to uncover a culture of covert bias against people who bring the most diversity to the workplace because the courts have severely limited the universe of evidence that may be used to support their claims? The next two situations serve as examples of this problem.

A. Jeffers v. Thompson[3]

Tliompson v. Jeffers in the instance of "0, the court appeared to have detected a subtle type of workplace discrimination, but it rejected the complex claim. Affirming that she had been passed over for a promotion "because of her colour, her gender, her race and gender, together, and her age," Jeffers, an African American woman in her fifties, made this assertion.

[3] Jeffers v. Thompson, 264 F. Supp. 2d 314 (D. Md. 2003)

She applied for two distinct promotions at the U.S. Department of Health and Human Services while she was co-director of the Office of Program and Organizational Services in the Medicaid Bureau. Human Services and Health (HHS). She was the only African American and the oldest of the seven candidates who were considered to be "most qualified" for the job. The appointment of a white woman, age fifty, to one position and a white man, age forty-four, to the other was examined separately by the court as it considered HHS's petition for summary judgement. The plaintiff was warned he could not "come here in an acting role and start promoting a bunch of African Americans" by one of the decision-makers, an African American man who had recently been appointed, therefore the court granted summary judgement on the race issue.

Regarding the race/sex claim, the court acknowledged the likelihood that certain preconceptions may lead to bias by quoting Jefferies and Tom. "The more specific the composite class in which the Plaintiff claims membership, the more onerous [the plaintiff's burden of persuasion] becomes," it continued, pointing out the difficulty of proving what it called "composite claims."' The Jeffers court is one of the few, if not the only one, to admit that the recognition of complex claims does not always make things easier for employees.

B. Wittenberg v. American Express[4]

The district court tacitly and without explanation recognised a claim for combined sex-age discrimination in *Wittenberg v. American Express*. As part of a reduction in force (RIF), which entailed the removal of three out of the four posts in her department, the plaintiff, a 51-year-old financial analyst, lost her job. She was the only woman retained; two men, ages 41 and 36, were let go; a male analyst, ages 40, was terminated. Two male analysts over the age of forty were fired in the preceding year. The plaintiff provided proof that two male analysts, aged forty-five and forty-nine, were transferred into her department after she was fired. This occurred after a thirty-nine-year-old male analyst had just been hired. She also cited a number of remarks made to her and other workers, including one that mentioned the employer's interest in hiring "younger portfolio managers" and "junior" individuals, and one that stated that a decision had been made to keep younger employees who had more years of service ahead of them. Another manager had been let go a year earlier.

[4] Wittenberg v. American Express 464 F. 3d 831 (8th Cir. 2006)

When Wittenberg was fired, her boss questioned her, "Your husband has a job doesn't he? The court rejected these and other comments in granting the defendant's petition for summary judgement because they demanded "too wide an inferential leap" to establish racial animus. Even though the plaintiff claimed that the employer overlooked more current performance data and that the 2002 data was intentionally altered so that women were rated lower, it credited the fact that she had a worse rating in 2002 than the guy who was kept.

VI. Why Plaintiff's Cost and How They Might Have Won?

It is simple to see how the plaintiffs proceeded down the path of establishing a complex claim by looking at the opinions of the courts in these cases, and how that decision finally resulted in defeat. For instance, a younger white guy and a younger white woman passed Helaine Jeffers up for a promotion. While a younger man was kept on, Bonnie Wittenberg was let go. These details are sufficient for a plaintiff to establish a case of discrimination on the surface. However, as the Second Circuit noted in a case alleging both age discrimination and discrimination against married women, practically any decision in which one employment applicant is selected from a pool of qualified candidates will support a slew of prima facie cases of discrimination in today's diverse workplace. The rejected candidates are probably older or different from the chosen candidate in terms of ethnicity, religion, sex, and country origin. Even though a study of all the relevant facts may convincingly demonstrate that illegal discrimination had no role at all in the selection, each of these differences will support a prima facie case of discrimination.

The plaintiff faces an extraordinarily tough task in demonstrating that the employer's stated non-discriminatory rationale for the employment action was actually a cover for intentional discrimination. In fact, as the Jeffers court emphasised in a less judgemental and conclusory manner than did the Second Circuit, a complex claim makes it more—not less—difficult to prove pretext. Plaintiffs will initially try to prove that the employer's non-discriminatory policy is invalid, but even in that situation, pretextual evidence is needed. Pretext proof can be divided into four main categories. The most popular strategy is to prove that employees of a different race or sex were treated better than similarly situated employees of the same race or sex. "But when a sophisticated claim is made, who counts as a "comparator"? It suffices to demonstrate, for a single-race claim, that a white individual in a comparable situation was not fired.

However, courts hold that the comparator in a race/sex claim must not belong to any of the protected classes that the plaintiff claims." For instance, a white male is the sole eligible comparator in a case involving an African American female. In the normal "reduction in force" situation, it will be challenging to depend solely on comparator evidence as long as one woman or one member of a minority group survives the RIF.

The plaintiff was unable to find a suitable comparison within the limited parameters of Wittenberg or Jeffers "similar positions in order to prove pretext, a plaintiff may also employ statistical evidence '" However, as the aforementioned cases show, there will frequently be some variability among people who likewise experienced the adverse employment action in a small statistical sample. In Jeffers, for instance, the court took into account the racial and gender makeup of two pay-grade levels in the small department to which the plaintiff was assigned rather than the overall gender makeup of HHS across the one level for which the plaintiff sought a promotion, which undermined her statistical case. Additionally, even though a small statistical sample unmistakably supports the plaintiff's claim, some courts will not rely on it.

The testimony of other employees on their own discriminatory treatment is another sort of evidence that can be utilised to demonstrate pretext. The Supreme Court has acknowledged that "material that may be relevant to any finding of pretext includes... [the employer's] general policy and practise with respect to minority employees," which is the basis for the admissibility of so-called "me too" testimony. First, the employee must identify additional employees who belong to the same category, just like with statistical evidence, such as other older women who were subject to a RIF. Employers can also utilise "me too" information to their advantage by demonstrating that some older workers and certain women were kept on.

Finally, a number of circuit courts have restricted "me too" evidence due to the "same supervisor" rule, which states that testimony from other employees is only admissible if the decision that the plaintiff is currently contesting was made by the same supervisor who took the adverse employment action.

The idea of discrimination legislation does not foreclose any increase of the available evidence in this way. Once more, it is impossible to determine whether the scant evidence presented in these cases was the consequence of unsuccessful discovery efforts or subpar legal representation. Education is the key to change in either scenario. It is crucial that social scientists and attorneys start to carefully investigate and record complicated preconceptions, as demonstrated by the "maternal wall" initiative. The judiciary and fact-finders won't start treating complex allegations seriously until then.

VII. Conclusion

There has undoubtedly been progress made toward establishing equal opportunity in the workplace in the nearly 45 years since Title VII was passed. Although overt bias may be uncommon, it is incorrect to confine any lingering prejudice to the realm of the subliminal, unconscious, or implicit. I argue that complex bias is a significant contributor to today's employment discrimination.

Complex bias allegations have shown exponential increase at the EEOC level, and given the demographics of the workforce, it is expected that this trend will continue. Due of its rudimentary intake tools, EEOC procedures encourage the filing of complicated claims, whether or not they are supported by facts. Complex claim loss rates very nearly reach 100% after they are heard in federal court. Courts that even attempt to conduct an intersectional analysis of complex allegations only acknowledge the obvious fact that a subclass of a protected group may be the target of actionable discrimination. However, the implication of that statement is never investigated. It gets harder to demonstrate that a subclass member has been picked out for discriminatory treatment the more particular her identify is. Courts don't look beyond a specific area of the employer's hierarchy when making comparisons. Employers can cite single-protected employees who have not experienced the unfavourable employment action that the complicated claimant has complained about.

The sophisticated claimant will have a difficult time locating comparative, statistical, or anecdotal evidence within these restrictions to demonstrate that the claimed reason for the adverse action is a ruse. Courts and attorneys should both support the need for a larger net of evidence in complex claims. If courts are to consider complex claims with the seriousness they merit, social science evidence pertaining to the subtle prejudices that the complex topic must confront must enter the public and judicial consciousness.