Published on *The National Law Review* https://natlawreview.com

Do Federal Civil Rights Laws Prohibit Discrimination Based on Sex and Age?

Article By:

Sarah E. Nesbitt

Carolyn Wheeler

Harvard Business Review's recent survey, "Women in Leadership Face Ageism at Every Age," shines a bright light on the bleak reality of age discrimination against women in the workplace. The survey of 913 women leaders from across the United States in the higher education, faith-based nonprofit, legal, and health care industries found that supervisors and colleagues find women of every age unfit for leadership roles based on their age. Young women leaders are subjected to head pats and pet names and are often mistaken for students, interns, or support staff. Middle aged women leaders are discounted as having too many family responsibilities or being on the runway to menopause. Older women are largely erased from the work environment, facing assumptions that they are on their way out. This stands in stark contrast to older men, whom employers tend to regard as "wells of wisdom." In short, when it comes to the workplace, age-related bias perpetually stands between women and recognition as leaders.

Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits discrimination in employment, identifies certain "protected classes" upon which bases employers may not discriminate: race, color, religion, sex, and national origin. A separate statute, the Age Discrimination in Employment Act ("the ADEA"), outlaws age discrimination in the workplace. Plaintiffs filing a lawsuit challenging employment discrimination typically must articulate a specific statute their employer has violated. In the case of sex-

plus-age discrimination—that is, mistreatment based on the intersection of sex and age—neither statute standing alone captures the plaintiff's experience.[1] This raises the question of how women facing uniquely gendered age bias in the workplace—like that outlined in the Harvard Business Review survey—can state legal claims a court will consider viable.

For the most part, federal courts have been skeptical of such claims.

A recent case, however, brought a new perspective to the question of sex-plus-age discrimination under federal law. On July 21, 2020, the United States Court of Appeals for the Tenth Circuit, the appellate court that covers Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, addressed the question "whether sex-plus-age claims are cognizable under Title VII."[2] In *Frappied v. Affinity Gaming Black Hawk LLC*, nine female plaintiffs brought (among other claims) sex-plus-age claims for disparate impact and disparate treatment under Title VII, alleging they were terminated because Affinity discriminated against women over forty.[3] The older women, who had worked at the Golden Mardi Gras Casino, were laid off after the defendant purchased the casino in 2012. The terminations were largely unexplained. After the lower court dismissed their claims, the plaintiffs appealed.

The Tenth Circuit ruled in the plaintiffs' favor, affirming the validity of sex-plus-age claims under Title VII alone. The court noted that it had allowed claims based on a combination of race and sex discrimination in *Hicks v. Gates Rubber Co.*[4]In *Hicks*, the court considered the combined effect of racial slurs and sexual harassment in a hostile work environment case. In *Frappied*, however, the court had to decide a novel question—whether an intersectional discrimination claim could be based on a second characteristic that is *not* protected by Title VII: age. Most courts that have considered such claims have refused to decide whether a plaintiff can challenge discrimination under an intersectional theory that the combination of the two protected characteristics led to the adverse action, or they have decided the plaintiff can prevail under one statute so the court does not have to decide whether the intersectional claim is viable. For instance, both the Second and Sixth Circuits have sidestepped the issue, making dispositive rulings based on other claims in plaintiffs' complaints.[5]

In *Frappied*, the Tenth Circuit noted that the Supreme Court had long held that Title VII prohibits "sex-plus" discrimination where the "plus" factor is not protected under the statute.[6] In *Phillips v. Martin Marietta Corp.*[7]the Supreme Court held that a policy against hiring women with preschool-age children violated Title VII, because men with preschool-age children were not subject to that policy. Even though "people with preschool-age children" is not a protected class, the Supreme Court recognized this to be a form of sex discrimination. The Tenth Circuit used the same reasoning to hold that if sex—which is protected under Title VII—"play[ed] a role in the employment action," then the termination was impermissible even though the "plus" factor, age, is in another statute.[8] Borrowing from the Supreme Court's analysis in *Bostock*,[9] which held that Title VII's sex discrimination provision prohibits sexual orientation and gender identity discrimination in employment, the Tenth Circuit held that "if a female plaintiff shows that she would not have been terminated if she had been a man—in other words, if she would not have been terminated but for her sex—this showing is sufficient to establish liability under Title VII.[10]

While the outcome in *Frappied* is a positive development for civil rights in employment, in most jurisdictions there is no clear protection under federal law against sex-plus-age discrimination. The EEOC has long acknowledged the availability of such intersectional claims, but as mentioned, other sex-plus-age claims have made their way through the courts on occasion without success. The Tenth Circuit is the first and only federal appellate court to formally recognize these claims as viable under federal law.

However, there are state laws that prohibit sex and age discrimination in the same provision,[11] so the federal courts' unwillingness to combine the effects of discrimination prohibited by two separate statutes is not always a concern. Given the Harvard Business Review's exposure of the dire state of workplace age bias against women, and the Tenth Circuit's groundbreaking decision in *Frappied*, more women experiencing workplace age discrimination may want to consider challenging their employers' decisions. Because of the variations in protections in different jurisdictions, employees should consider seeking legal advice. If you or someone you know has experienced sex-plus-age bias, contact the experienced lawyers

at Katz Banks Kumin today.

---

[1] The legal standards, particularly the causation standards, also differ under the two statutes. Under Title VII, it is sufficient to prove that sex was a "motivating factor" in an employment decision. Under the ADEA, however, age must be the but-for cause, *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167 (2009). Many courts have interpreted this but-for causation standard to mean that if any *other* reason—even sex, which is a protected class under Title VII—played a role in the employment decision, then the age claims fail. The Supreme Court recently clarified that "but-for cause" does not mean "sole cause," *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), but the idea has yet to trickle down through the federal courts—and into ADEA claims.

[2] *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1045 (10th Cir. 2020).

[3] *Id*.

[4] 833 F.2d 1406, 1416-17 (10th Cir. 1987)

[5] *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010) ("Having determined that Gorzynski has provided sufficient evidence of age discrimination to reach a jury, there is no need for us to create an age-plus-sex claim independent from Gorzynski's viable ADEA claim."); *Schatzman v. Cty. Of Clermont, Ohio*, No. 99-4066, 2000 WL 1562819, at *9 (6th Cir. 2000) ("[W]e decline the invitation to decide the 'sex plus [age]' charge partly because it is unnecessary for us to do so.").

[6] 966 F.3d at 1046.

[7] 400 U.S. 542 (1971).

[8] *Id*. at 1046.

[9] 140 S. Ct. 1731.

[10] *Id*. at 1047.

[11] *See, e.g., D.C. Code Ann.* § 2-1401.1.

National Law Review, Volumess XIII, Number 297

Source URL:https://natlawreview.com/article/do-federal-civil-rights-laws-prohibit-discrimination-based-sex-and-age