

# The ADEA at the Intersection of Age and Race

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*As the population of older Americans grows larger and more diverse, there is a growing need for stronger legal protection against labor market discrimination targeting this group. This paper discusses the existence and effect of such labor market discrimination against older minority workers in the United States and explains how the Age Discrimination in Employment Act (ADEA) fails to adequately protect such workers. Older minority Americans may face labor market discrimination due to their age, their race, and the combination of those two factors. However, the ADEA is not designed to protect against discrimination at the intersection of multiple identities. Although minorities have brought an increasing proportion of age discrimination claims and an increasing number of cases allege multiple bases of discrimination, plaintiffs face legal barriers and a low success rate. The ADEA specifically limits enforcement on claims where age constitutes one of multiple factors, rather than the only factor, leading to an adverse employment action, meaning that the law does not support combined age and race claims. However, other federal and state laws protecting against age discrimination may provide better relief for older minorities facing age and race discrimination.*

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## INTRODUCTION

Older black Americans face a heavy discriminatory burden. In addition to experiencing discrimination throughout their childhoods and adult lives, including the Jim Crow laws and the civil rights movement for those aged fifty-three and older and even pre-*Brown v. Board of Education*<sup>1</sup> schooling for those aged sixty-nine and older, they still face discrimination as older adults. Not only do these black Americans face discrimination because of their race, they now also have the additional burden of facing discrimination because of their age. While black Americans may suffer race and age discrimination separately as multiple forms of discrimination, age and race stereotypes may also combine to create intersectional discrimination, or intersectionality. We define intersectionality as a subset of multiple layers of an individual’s identity interacting in ways that cannot be understood by looking at only one facet of identity.<sup>2</sup> Intersectional discrimination occurs when someone faces discrimination “because of the intersection of two or more protected bases.”<sup>3</sup> That is, an older black woman faces additional discrimination not just because she is older or black or female but rather because the combination of being older, black, and a woman leads to stereotypes of older black women that are different than those of people who fall only in one of the three discrete groups. In this paper, the term “multiple claims” refers to filing a claim for an adverse employment action based on

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2. See 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, 140–41 (introducing the term intersectionality in discussion of issues particularly salient to black women in employment discrimination law).

3. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, OFFICE OF LEGAL COUNSEL, DIRECTIVES TRANSMITTAL, EEOC COMPLIANCE MANUAL 3 (Apr. 19, 2006) at 15-IV, <http://www.eeoc.gov/policy/docs/race-color.pdf>.

multiple factors, and “intersectional claims” are multiple claims that occur only because the plaintiff belongs to both groups.

Although in recent years researchers and practitioners have realized the importance of intersectionality in protection law cases,<sup>4</sup> rarely have these discussions included age as an important element of identity.<sup>5</sup> Age, like race and gender which have gotten more attention, is also a protected class under United States anti-discrimination laws.<sup>6</sup>

Individuals at the intersection of age and race face unique challenges that are becoming particularly salient as the number of older Americans grows and the proportion of older Americans who are white declines.<sup>7</sup> Because older Americans of color are among the most economically fragile,<sup>8</sup> their ability to find and retain employment will have important implications for government programs such as Social Security, Disability Insurance, and Medicaid. Unchecked discrimination can prevent people who need to and are able to work from working, which then puts stress on these government programs. Understanding the different treatment of older adults in employment and legal situations with respect to race is crucial to understanding and ameliorating negative intersectional outcomes for older people of color as well as potential negative outcomes for government programs that may have to support them.

Unfortunately, the ADEA falls short in protecting the needs of older Americans of color, even more so than it does for older white Americans.

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4. See Crenshaw, *supra* note 2. See also Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1993); Bradley A. Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C.R.L.J. 199 (2006); Rosalio Castro & Lucia Corral, Comment, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 LA RAZA L.J. 159 (1993); E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441 (1998); Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439 (2009); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-) History*, 95 B.U. L. REV. 713 (2015); Virginia W. Wei, Note, *Asian Women and Employment Discrimination: Using Intersectionality Theory To Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771 (1996).

5. For a discussion of intersectionality of gender and age in protection law cases, see Sabina F. Crocette, Comment, *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 (1998); Jourdan Day, *Closing the Loophole—Why Intersectional Claims are Needed to Address Discrimination Against Older Women*, 75 OHIO ST. L.J. 447 (2014); Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79 (2003).

6. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (2018); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018)

7. In 2014, the U.S. Census projected a 105.2% increase between 2015 and 2060 in the population 65 years and older, compared to a 16.5% increase in the population 64 years and younger. This means that those 65 years and older will go from 14.9% of the population to 23.6%. See U.S. CENSUS, POPULATION DIVISION, TABLE 3. PROJECTIONS OF THE POPULATION BY SEX AND SELECTED AGE GROUPS FOR THE UNITED STATES: 2015 TO 2060 (NP2014-T3) (2014).

8. William R. Emmons & Bryan J. Noeth, *The Economic and Financial Status of Older Americans: Trends and Pprospects*, CENTER FOR HOUSEHOLD FIN. STABILITY FED. RES. BANK OF ST. LOUIS 23–30 (2014).

The separation of the ADEA from Title VII combined with outcomes in court cases like *Gross v. FBL Financial Services, Inc.*<sup>9</sup> make it difficult, or even impossible, for private employees and job seekers to succeed in making claims of commingled age and race discrimination.

Section I provides statistics about the economic situation of older African Americans relative to their white counterparts. These statistics demonstrate that even in the face of alternative explanations, intersectional discrimination based on age and race is real. Section II discusses how minorities have increasingly sought protection under the ADEA despite the traditional lack of such claims. Section II then explores how even with an increase in multiple claims, it is nearly impossible for an older worker or job seeker of color to win an intersectional case against a private company, although it is possible against a federal employer. Finally, Section II discusses hope for the future with increased use of state legislation to push for permitting multiple and intersectional age and race claims.

## I. EMPIRICAL EVIDENCE SHOWING DIFFERENTIAL ECONOMIC OUTCOMES FOR OLDER BLACK AMERICANS

### A. Economic Outcomes by Age and Race

Older black Americans have worse economic outcomes than white Americans across many measures, including mean income, poverty levels, retirement status, job stability, and unemployment. From 2010 to 2017, for full-time workers aged forty and older, and therefore protected under the ADEA, white workers earned an average of \$13,727 more annually than black workers.<sup>10</sup> This translates to an average annual wage of \$50,344 for white women and \$44,388 for black women working full-time.<sup>11</sup> For men working full-time, this translates to an average of \$71,953 for white men compared to \$54,500 for black men.<sup>12</sup> During this same period, black Americans over forty years of age were more likely to be considered poor, with 20.9% of black women and 16.8% of black men below the poverty line compared to only 10.0% of white women and 7.5% of white men in the same age group.<sup>13</sup> Between forty to sixty-five years of age, poverty increases for both black and white people.<sup>14</sup> Then it drops significantly with the availability

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9. *Gross v. Fin. Servs. Inc.*, 557 U.S. 167 (2009) (noting differences between Title VII and the ADEA).

10. IPUMS-CPS, *Current Population Survey: 2010-2017*, <https://doi.org/10.18128/D030.V6.0> (summary statistic using years 2010 to 2017 limited to full-time workers aged 40 or older, summarizing the wage for white workers, the wage for black workers, and subtracting).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

of Social Security and Medicare.<sup>15</sup> But poverty immediately begins to rise again so that by age eighty, the poverty rate for each group is about the same as it was at age sixty—about 10% of white people and 22% of black people.<sup>16</sup> The gap between white and black poverty rates also drops with the availability of public programs, reaching a low difference of 7.58 percentage points at age sixty-six.<sup>17</sup> However, by age eighty, the gap between black and white poverty levels increases again to 12.38 percentage points, larger than the gap of 11.60 percentage points at age sixty.<sup>18</sup>

Black Americans aged forty and older are less likely to be in the labor force than white Americans. Of black Americans, 45.2% are not in the labor force compared to 38.1% of white Americans in that age range.<sup>19</sup> Black Americans aged forty and older in the labor force are also more likely to be unemployed than similarly aged white Americans, who have only a 4.9% unemployment rate compared to 8.5% of black Americans.<sup>20</sup> Furthermore, unemployed black Americans aged forty and older have longer durations of unemployment: black workers average 41.4 weeks unemployed compared to 33.4 weeks for white workers.<sup>21</sup> This difference in duration directly implicates one of the primary motivations for the ADEA: to combat the difficulty of regaining employment for older Americans.<sup>22</sup> And black workers over sixty-five years of age are less likely to report being retired than their white counterparts, 75.7% of whom are retired compared to 71.9% of black Americans.<sup>23</sup>

### *B. Reasons for Economic Disparities Other than Discrimination*

Discrimination is not the only potential explanation for differences in labor market outcomes between older black and older white workers in the United States. Different average levels of education account for some of the disparate economic outcomes between these two groups. Racial gaps in education have narrowed for both women and men, but they have not disappeared. For example, in 1965, among people aged 50 to 54, African-American women averaged only 6.73 years of education compared to 9.49 years for white women.<sup>24</sup> By 2007, among people aged 50 to 54, black

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15. *Id.*

16. IPUMS-CPS, *supra* note 10.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. See W. WILLARD WIRTZ, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, 89 (1965).

23. IPUMS-CPS, *supra* note 10.

24. *Id.*

women averaged 12.26 years compared to 13.12 years for white women.<sup>25</sup> Similarly, the average years of education was 6.09 and 9.30 for black and white men, respectively, in 1965 compared to 12.10 and 13.50 in 2007.<sup>26</sup> By 2017, the gap in education had decreased to less than a year's difference on average with black women averaging 13.36 years of education compared to 13.82 years for white women and black men averaging 13.05 years compared to 13.65 years for white men.<sup>27</sup> However, after controlling for differences in education, the racial wage gap is still not fully explained.<sup>28</sup>

Furthermore, gaps in economic and employment outcomes still remain for individuals within each education group. Among workers over age forty who did not graduate high school, the annual wage gap between black men and white men is \$2,348, whereas no similar statistically significant wage gap exists between black women and white women.<sup>29</sup> For high school graduates, white men outearn black men by an average of \$7,542 per year, and white women outearn black women by \$1,981.<sup>30</sup> For those with a bachelor's or higher degree, the wage gap between races is even larger at \$24,652 for men and \$7,324 for women.<sup>31</sup> Although unemployment decreases with education, racial differences in unemployment exist for adults aged forty and older across all education groups.<sup>32</sup> The continued existence of the unemployment gap across education groups indicates that differences in education are not the sole cause of racial disparities in economic outcomes.<sup>33</sup>

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25. *Id.*

26. Patrick L. Mason, *Moments of Disparate Peaks: Race-Gender Wage Gaps Among Mature Persons, 1965–2007*, 38 THE REV. OF BLACK POL. ECON. 1, 12 (2011).

27. IPUMS-CPS, *supra* note 10.

28. See Susan Williams McElroy, AFRICAN AMERICANS IN THE US ECONOMY 133 (Cecilia A. Conrad, et al., ed., 2005); Kevin Lang & Michael Manove, *Education and Labor Market Discrimination*, 101 THE AM. ECON. REV. 1467 (2011); see generally Peter McHenry & Melissa McInerney, *The Importance of Cost of Living and Education in Estimates of the Conditional Wage Gap Between Black and White Women*, 49 J. OF HUM. RESOURCES 3 (2014).

29. IPUMS-CPS, *supra* note 10.

30. *Id.*

31. *Id.*

32. Black men who did not graduate from high school have an unemployment rate of 15.6% compared to 9.5% for similarly educated white men. The gap is somewhat smaller for black women who did not graduate high school, with an unemployment rate of 12.1%, compared to white women at 9.4%. As education increases, the unemployment rates drop for both black and white Americans, but black people are still more likely to be unemployed than their white counterparts. For those with only a high school education, 11.4% of black men and 8.6% of black women are unemployed compared to 6.6% and 5.4% of white men and women respectively. Among those with a bachelor's degree or more, unemployment rates are again lower overall, but the gap in unemployment rates still persists to a significant degree (5.6% for black men, 4.9% for black women, 3.0% for white men, and 2.9% for white women). *Id.*

33. For a discussion of the employment and wage gap between black and white men of various ages and education levels, see Kevin Lang & Jee Lehmann, *Racial Discrimination in the Labor Market: Theory and Empirics*, 50 J. OF ECON. LITERATURE 959 (2012).

Another explanatory variable for racial differences in older people's propensity to remain in the labor force is health status, particularly disability status. Older black and Hispanic Americans are more likely to have a disability than their white counterparts.<sup>34</sup> However, while this difference in health status contributes to differences between older black and white Americans' propensities to remain in the labor force, it cannot fully explain these differences.<sup>35</sup> While acute health shocks are more likely to increase black men's labor force exits compared to white men's, acute health shocks have little to no effect on women's labor force participation for either race.<sup>36</sup> Additionally, although health status is correlated with economic status, it is not clear that poor health leads to poor socioeconomic status instead of the reverse.<sup>37</sup> Indeed, lower socioeconomic status early in life or at the time of disability explains some of the racial differences between who has a disability and who does not.<sup>38</sup>

The incentives for continued work during older age also differ for black and white workers. Social Security Retirement Income (SSRI) encourages people to retire at different rates depending on how much SSRI replaces their wage because there is less incentive to work when work does not provide much more income than would SSRI benefits.<sup>39</sup> SSRI is a major source of income for Americans over age sixty-five, especially black Americans.<sup>40</sup> In 2014, Social Security benefits made up over 90% of family income for 32.5%

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34. See David F. Warner & Tyson H. Brown, *Understanding How Race/Ethnicity and Gender Define Age-Trajectories of Disability: An Intersectionality Approach*, 72 SOC. SCI. & MED. 1236, 1237 (2011); Jersey Liang et al., *Ethnicity and Changing Functional Health in Middle and Late Life: A Person-Centered Approach*, 65B J. OF GERONTOLOGY: PSYCHOL. SCIS. AND SOC. SCIS. 470, 476 (2010); Carlos F. Mendes de Leon et al., *Racial Disparities in Disability: Recent Evidence from Self-Reported and Performance-Based Disability Measures in a Population-Based Study of Older Adults*, 60B J. OF GERONTOLOGY: PSYCHOL. SCIS. AND SOC. SCIS. S263, S268 (2005); Jeremy Pais, *Cumulative Structural Disadvantage and Racial Health Disparities: The Pathways of Childhood Socioeconomic Influence*, 51 DEMOGRAPHY 1729, 1746 (2014).

35. See Tyson H. Brown & David F. Warner, *Divergent Pathways? Racial/Ethnic Differences in Older Women's Labor Force Withdrawal*, 63B J. OF GERONTOLOGY: PSYCHOL. SCIS. AND SOC. SCIS. S122, S132 (2008); John Bound et al., *Race and Education Differences in Disability Status and Labor Force Attachment in the Health and Retirement Survey*, 30 J. OF HUMAN RE. S227, S252 (1995); John Bound et al., *Race Differences in Labor Force Attachment and Disability Status*, 36 THE GERONTOLOGIST 311, 318 (1996). Researchers speculate that this gender difference could be caused by intersectional race-gender differences in labor market elasticity, occupation, family income, or wealth.

36. Dalton Conley & Jason Thompson, *The Effects of Health and Wealth Shocks on Retirement Decisions*, 95 FED. RES. BANK OF ST. LOUIS REV. 389, 402 (2013).

37. See David M. Cutler, Adriana Lleras-Muney & Tom Vogl, *Socioeconomic Status and Health: Dimensions and Mechanisms*, in OXFORD HANDBOOK OF HEALTH ECON. (Sherry Glied & Peter C. Smith, ed., 2011).

38. See Mendes de Leon et al., *supra* note 34; Warner and Brown, *supra* note 34, at 1239; Pais, *supra* note 34.

39. See generally Irena Dushi et al., *The Importance of Social Security Benefits to the Income of the Aged Population*, 77 SOC. SEC. BULL. 1, 4 (2017).

40. *Id.*

of black Americans aged sixty-five or older compared to 24.1% of whites.<sup>41</sup> Although white workers on average earn more total SSRI due to higher incomes throughout their lives, black workers have a higher wage replacement rate from SSRI due to its progressive nature.<sup>42</sup> This difference makes claiming SSRI more attractive for black workers and therefore helps incentivize their earlier exit from the labor force.<sup>43</sup> However, this difference in incentives does not explain the gap in labor force participation before age sixty-two, the youngest age at which Americans can begin drawing SSRI.<sup>44</sup> At older ages, the difference in participation narrows as more and more black and white adults exit the labor force.<sup>45</sup>

Older black and white workers also differ in the jobs they hold, which affects the desirability of working later in life and the capacity to perform such work.<sup>46</sup> Industry and occupational changes have negatively affected less-educated black women more than they have similar white women: the industries and occupations that historically employed disproportionately larger numbers of black women (such as personal service and manufacturing) have declined, while those that historically employed less-educated white women (such as bookkeeping and retail) have increased.<sup>47</sup> Such selection into different occupations has meant older minorities are more likely to work in strenuous job conditions compared to their white counterparts.<sup>48</sup> For those aged fifty-eight and older, 42.6% of white workers held jobs with difficult working conditions or physical demands,<sup>49</sup> compared to 53.2% of black

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41. *Id.*

42. *See id.*; Benjamin Bridges & Sharmila Choudhury, *Examining Social Security Benefits as a Retirement Resource for Near-Retirees, by Race and Ethnicity, Nativity, and Disability Status*, 69 SOC. SEC. BULL. 19, 28 (2009).

43. *See id.*

44. *See id.*; *Benefits Planner: Retirement*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/retire/applying2.html> (last visited Oct. 14, 2018).

45. IPUMS-CPS, *supra* note 10.

46. Joanna N. Lahey, *Understanding Why Black Women Are Not Working Longer*, in *WOMEN WORKING LONGER: INCREASED EMPLOYMENT AT OLDER AGES 1, 7–8* (Claudia Goldin & Lawrence F. Katz eds., 2018); IPUMS-CPS, *supra* note 10.

47. *Id.*; IPUMS-USA, *United States Census and American Community Survey: 1990-2011*, <https://doi.org/10.18128/D010.V8.0> (based on author calculations).

48. Hye Jin Rho, *Hard Work? Patterns in Physically Demanding Labor Among Older Workers*, 2010 CTR. FOR ECON. AND POL'Y RES., 9–10.

49. *See id.* at 3 (considering a job to be physically demanding or having difficult working conditions if any of the following characteristics receives a 4+ rating for each job attribute: “dynamic strength, explosive strength, static strength, trunk strength, bending or twisting, kneeling or crouching, quick reaction time, or gross body equilibrium. In addition to these measures, if jobs involve performing more general physical activities, handling and moving objects, or demand workers to spend significant time standing, walking and running, or making repetitive motions” (physically demanding); “cramped workspace, labor outdoors (exposed to the weather or covered) or indoors in not environment-controlled conditions, or exposure to abnormal temperatures, contaminants, hazardous conditions, hazardous equipment, or distracting or uncomfortable noise” (difficult working conditions)).



workers.<sup>50</sup> These differences in job characteristics affect the ability to work and are a major reason why more black men than white men report being unable to work at later ages.<sup>51</sup>

### *C. Multiple and Intersectional Discrimination as a Cause of Differential Outcomes*

Labor market discrimination is an important cause of different economic outcomes for individuals. Race-based discrimination has consistently limited the opportunities of black Americans in the workforce, as they are segregated into lower-income positions and have a harder time getting interviews for positions.<sup>52</sup> Age discrimination in the labor market also negatively affects older workers, particularly in hiring.<sup>53</sup> An older minority worker is likely to experience both age-based and race-based discrimination.

While an older black person may suffer from multiple types of discrimination, they may also suffer from intersectional discrimination—where the combination of their identities results in distinct patterns of discrimination. In Columbia University and the University of California-Los Angeles Professor of Law Kimberle Crenshaw’s ground-breaking 1989 work on discrimination against black women, Crenshaw posits that the current anti-discrimination framework, which focuses on single categories of discrimination, serves only to protect the least marginalized.<sup>54</sup> The idea that discrimination affects people with multiple disadvantages in a unique way is useful in understanding differential outcomes for older black and older white workers. As Minna Kotkin, professor of law at Brooklyn Law School, asserts, “although stereotypes for ‘women’ have somewhat dissipated, those for ‘older African American women’ still hold sway.”<sup>55</sup> In this way, the types of discrimination experienced by an older black woman or older black man may be distinct from those experienced by younger black workers or older white workers, as employers hold different beliefs about those specific groups.

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50. *Id.* at 10.

51. *See* Bound et al., *supra* note 35, at 317.

52. *See* Lang & Lehmann, *supra* note 33 (discussing the theory and evidence for racial discrimination in the labor market). *See* Marianne Bertrand & Esther Duflo, *Field Experiments on Discrimination*, 1 HANDBOOK OF ECON. FIELD EXPERIMENTS 309 (2017) (presenting a review of experimental studies on labor market discrimination).

53. *See generally* Geoffrey Wood et al., *Age Discrimination and Working Life: Perspectives and Contestations—A Review of the Contemporary Literature*, 10 INT’L J. OF MGMT. REVS. 425 (2008); Joanna N. Lahey, *Age, Women, and Hiring an Experimental Study*, 43 J. OF HUM. RESOURCES 30 (2008); David Neumark et al., *Is It Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment*, NAT’L BUREAU OF ECON. RES. (2015); Joanna Lahey, *State Age Protection Laws and the Age Discrimination in Employment Act*, 51 THE J. OF LAW AND ECON. 433 (2008); David Neumark & Patrick Button, *Did Age Discrimination Protections Help Older Workers Weather the Great Recession?* 33 J. OF POL’Y ANALYSIS AND MGMT. 566 (2014).

54. *See* Crenshaw, *supra* note 2.

55. *See* Kotkin, *supra* note 4.

Intersectional discrimination as a theory is different from the idea of multiple types of discrimination and shows up in the law distinctly. When someone with multiple disadvantaged identities experiences discrimination, they may experience discrimination against different parts of their identity separately.<sup>56</sup> For example, an older black man may face discrimination on the basis of being black and on the basis of his age separately. We refer to these accumulated forms of discrimination as multiple discrimination.<sup>57</sup> On the other hand, he may be discriminated against because he is both older and black; he would not be experiencing discrimination were he older and white or younger and black. We refer to this type of interacted discrimination as intersectional discrimination.<sup>58</sup> While it can be difficult to disentangle these experiences, the distinction is important in the way plaintiffs argue claims and how the law treats them.

One measure of the prevalence of multiple or intersectional discrimination is how people perceive discrimination in their own lives. Older black people perceive higher levels of discrimination and more types of discrimination than their white counterparts.<sup>59</sup> For example, in the Chicago Health and Aging Project, a survey on the South Side of Chicago of black and white residents aged sixty-eight and older, black residents across income levels consistently reported higher levels of discrimination in terms of unfair treatment and personal rejection compared to white residents.<sup>60</sup> In a separate survey of people aged sixty-five and older living in the District of Columbia and two Maryland counties, black men reported the highest level of work-related discrimination, followed by black women.<sup>61</sup> Both groups reported more discrimination than white men or women, and black men with white-collar jobs reported more discrimination than those in lower-status occupations.<sup>62</sup> While these differences in perceptions do not compare the views of older workers to younger workers, over half of older ethnic-minority respondents in the General Social Survey who perceived racial-ethnic discrimination also perceived age discrimination, and those who did perceive age discrimination were six times as likely to also perceive racial ethnic

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56. *Id.*; see also Timo Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore*, 2002 INST. FOR HUM. RIGHTS, 9–14.

57. *Id.*

58. See Crenshaw, *supra* note 2.

59. See generally Lisa L. Barnes et al., *Racial Differences in Perceived Discrimination in a Community Population of Older Blacks and Whites*, 16 J. OF AGING AND HEALTH 315 (2004); Scott Schieman et al., *Status Inequality and Occupational Regrets in Late Life*, 27 RES. ON AGING 692 (2005); Catherine E. Harnois, *Are Perceptions of Discrimination Unidimensional, Oppositional, or Intersectional? Examining the Relationship among Perceived Racial–Ethnic-, Gender-, and Age-based Discrimination*, 57 SOC. PERSP. 470 (2014); Todd A. Collins et al., *Intersecting Disadvantages: Race, Gender, and Age Discrimination Among Attorneys*, 98 SOC. SCI. Q. 1642 (2017).

60. See Barnes et al., *supra* note 59 at 324.

61. See Schieman et al., *supra* note 59 at 707.

62. *Id.* at 715.

discrimination.<sup>63</sup> These differential feelings of discrimination even show up among law professionals. In a survey of 2000 attorneys, minority women were more likely than minority men, white men, and white women to perceive unfair treatment based on age.<sup>64</sup> These perceptions of discrimination indicate that older people of color experience discrimination in a way distinct from other older adults.

Higher levels of perceived discrimination do not necessarily prove that older black Americans experience more discrimination. However, experimental studies of labor market discrimination, specifically correspondence and audit studies, have shown evidence of racial discrimination and age discrimination in the hiring process.<sup>65</sup> But few such studies have looked at how race and age may interact in the labor market.<sup>66</sup> One study that looked at age and race discrimination in the United Kingdom labor market found a significant interaction between race and age discrimination for British men, with black applicants aged fifty having a 13.8 percentage point lower chance of receiving an interview invitation than a fifty-year-old white applicant and a 24 percentage point lower chance than a twenty-eight-year-old black applicant.<sup>67</sup> Although the exact statistics from the study may not be equivalent in the United States, the findings do support the idea that older black applicants may have unique experiences of discrimination. Future experimental research on the intersection of age and race discrimination is needed to clarify the scope of the issue and how different groups are affected.

Given the evidence for the occurrence of intersectional discrimination in the workplace against older people of color, there is a need for a legal avenue to remedy this problem. However, current legislation at the federal level does little to protect older workers who may experience discrimination along combined multiple parts of their identity. In fact, the ADEA has unique structural and legal barriers that make it more difficult for non-white plaintiffs to succeed even though older non-whites are more likely to experience negative employment outcomes due to discrimination. These barriers represent a significant public policy shortcoming that leaves older people of color vulnerable.

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63. See Harnois, *supra* note 59 at 478.

64. See Collins et al., *supra* note 59 at 9–10.

65. For an overview of experimental studies on labor market discrimination, see Bertrand & Duflo, *supra* note 52.

66. *Id.*

67. Nick Drydakis et al., *Age Discrimination in the UK Labour Market. Does Race Moderate Ageism? An Experimental Investigation*, 25 APPLIED ECON. LETTERS 1, 2 (2017).

## II. THE ADEA AND MINORITIES

### A. *History of the ADEA and Minorities in the United States*

Age discrimination protections under federal law have a distinct history from other employment protections. Congress did not include age in the original 1964 Civil Rights Act (CRA) that outlawed employment discrimination on the basis of race, color, religion, sex, or national origin.<sup>68</sup> Although Congress considered an amendment to add age as a protected class prior to the passage of the 1964 CRA, the amendment did not pass because members of Congress did not feel they had enough information on age discrimination.<sup>69</sup> Instead, Congress ordered a report on age discrimination, which the Department of Labor presented in 1965.<sup>70</sup> This report detailed significant age discrimination in the American labor market, noting that older workers at the time of the report suffered primarily from discrimination when trying to find a job, resulting in longer unemployment periods.<sup>71</sup> This report does not discuss older workers of color and does not mention race except as a contrasting basis of discrimination.<sup>72</sup> Instead, the report argues that the increased focus on racial discrimination of the 1960s had drawn resources away from enforcing existing anti-age-discrimination state laws.<sup>73</sup>

Following that report, Congress passed the ADEA in 1967, mandating that for workers aged forty and older:

It shall be unlawful for an employer-

- (1) 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;
- (2) to limit, segregate, or classify his employees 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 age; or
- (3) to reduce the wage rate of any employee in order to comply with this chapter.<sup>74</sup>

While Congress based the ADEA largely on the employment discrimination prohibitions in Title VII of the CRA, Congress gave the

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68. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

69. Michael C. Falk, *Lost in the Language: The Conflict Between the Congressional Purpose and Statutory Language of Federal Employment Discrimination Legislation*, 35 RUTGERS L. J. 1179, 1198 (2004).

70. See generally WIRTZ, *supra* note 22.

71. *Id.* at 18.

72. *Id.*

73. *Id.*

74. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2018).

responsibility of enforcing the ADEA not to the Equal Employment Opportunity Commission (EEOC) but to the Department of Labor under the rules of the Fair Labor Standards Act.<sup>75</sup> In this way, age discrimination was purposely kept administratively separate from race and other types of discrimination to prevent age claims from competing for enforcement resources.<sup>76</sup> Only in 1978 was federal employment enforcement consolidated and administrative responsibility for the ADEA granted to the EEOC starting October 1, 1979.<sup>77</sup> In 1978, 1986, and 1990, Congress expanded the protections of the ADEA, although none of these changes addressed older minority populations.<sup>78</sup>

The Supreme Court has played an important role in shaping the ADEA with relation to intersectional discrimination. Although Supreme Court decisions related to the ADEA have both expanded and limited its protections, recent decisions have tended to limit the protections of older workers and have particularly affected older minorities.<sup>79</sup> Although these cases have not explicitly mentioned minorities or intersectional discrimination, a few cases have important implications for plaintiffs experiencing intersectional discrimination. In *Smith v. Jackson*, the Supreme Court held that the ADEA permitted disparate impact cases.<sup>80</sup> Americans seeking remedy for employment discrimination can seek relief under two theories: 1) disparate treatment,<sup>81</sup> which requires showing that they were discriminated against individually because of their membership in a protected class under discrimination law; or 2) disparate impact, which requires showing that even if a specific policy did not target a group, it had an unlawful discriminatory impact on that group.<sup>82</sup> Plaintiffs can bring disparate impact cases under Title VII,<sup>83</sup> so *Smith* kept ADEA claims in line with other discrimination claims. However, the requirements for proving disparate impact under the ADEA fall under a different framework.<sup>84</sup> For plaintiffs experiencing intersectional discrimination, proving disparate impact cases

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75. *Id.*

76. See Craig Robert Senn, *Ending Discriminatory Damages*, 64 ALA. L. REV. 187, 204 (2012).

77. Reorganization Plan No. 1 of 1978, 3 C.F.R. § 321 (1978); 124 Congressional Record H 1457 (H. Doc. No.95-295).

78. For a discussion of the expansions to the ADEA, see Lahey *supra* note 53, at 51.

79. For a thorough discussion of Supreme Court cases relevant to the ADEA, see L. STEVEN PLATT & CATHY VENTRELL-MONSEES, *AGE DISCRIMINATION LITIGATION* § 1 (James Pub. Revision 15th ed. 2016).

80. *Smith v. City of Jackson*, 544 U.S. 228, 245 (2005).

81. See Kotkin, *supra* note 4.

82. *Id.*

83. 42 U.S.C. § 2000e-2(k).

84. See Senn, *supra* note 76, at 203–04

constitutes a significant burden.<sup>85</sup> For example, to show that a policy had a disparate impact on older black workers, even if such a policy did not affect younger black workers or older white workers, a plaintiff must be able to produce enough statistical evidence to convince a judge that there was a disparate impact based on both of his or her protected classes.<sup>86</sup> This is especially challenging if there are not enough older black workers and other employees affected by the policy to produce a large enough sample size to convince a court.<sup>87</sup>

Another consequential Supreme Court ruling on mixed-motive claims, in which an adverse employment action occurs due to illegal discrimination combined with a permissible reason, and the ADEA came in 2009 with *Gross v. FBL Financial Services, Inc.*<sup>88</sup> Jack Gross alleged age discrimination under the ADEA after his employer demoted him in 2004.<sup>89</sup> At trial, the district court instructed the jury to find in Gross's favor if "he proved, by a preponderance of the evidence, that he was demoted and his age was a motivating factor in the demotion decision, and told the jury that age was a motivating factor if it played a part in the demotion."<sup>90</sup> The jury found for Gross, but the Eighth Circuit overturned that finding based on improper jury instruction.<sup>91</sup> In the Supreme Court, the justices ruled that, in contrast to Title VII cases, a mixed-motives instruction for the jury is never appropriate in ADEA cases.<sup>92</sup> For age discrimination cases, a plaintiff can prevail only if the adverse employment action would not have happened "but-for" the age of the plaintiff; employers can therefore use age as a factor in employment decisions under federal law as long as it is not the main factor.<sup>93</sup>

While a mixed-motive claim typically refers to an adverse employment act motivated by discrimination based on a protected class plus a permissible reason, the *Gross* decision has far-reaching implications for intersectional discrimination under the ADEA.<sup>94</sup> According to the "but-for" standard, age

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85. See Kotkin, *supra* note 4 (discussing the difficulties of proving a disparate impact case for an African-American woman in *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980)).

86. See Kotkin, *supra* note 4, at 1492 (discussing statistical evidence in *Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998), an age, race, and gender discrimination case).

87. See PLATT & VENTRELL-MONSEES *supra* note 79, at § 5:260 (discussing the use of statistics to prove age discrimination cases).

88. 557 U.S. 167.

89. *Id.* at 167.

90. *Id.*

91. *Id.* at 168.

92. *Id.*

93. *Id.*

94. For general critiques of the *Gross* decision, see Michael Foreman, *Gross v. FBL Financial Services—Oh So Gross*, 40 U. MEM. L. REV. 681 (2010); Leigh A. Van Ostrand, *A Close Look at ADEA Mixed-Motives Claims and Gross v. FBL Financial Services, Inc.*, 78 FORDHAM L. REV. 399 (2009); Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69 (2010).

cannot be one of multiple reasons but must be the determinative reason for an adverse employment action in order to be considered discrimination.

*Multiple Discrimination under Title VII and the ADEA.*

*Smith v. CH2M Hill, Inc.* illustrates the difficulties plaintiffs face when they experience both racial and age discrimination simultaneously.<sup>95</sup> In this case, Troy Smith, a fifty-one-year-old African-American man, was terminated from his position as Assistant Director of Code Enforcement for CH2M Hill, Inc. (CH2M) and Operations Management International, Inc. (OMI), contractors for the city of Chattahoochee Hills, Georgia.<sup>96</sup> Smith alleged the city pressured him to enforce code in a racially discriminatory way against African Americans and demanded his termination from CH2M and OMI when he refused.<sup>97</sup> Following his termination, Smith filed suit under Title VII and the ADEA for discrimination based on race and age, alleging he was replaced by one or more non-African American employees and one or more substantially younger employees.<sup>98</sup> He brought his case against CH2M, OMI, and the city.<sup>99</sup>

The district court granted all three defendants' motions for dismissal—the plaintiff did not oppose the city's motion for dismissal.<sup>100</sup> On appeal, the court overturned the decision to dismiss Smith's racial discrimination claim under Title VII but upheld the dismissal of the age discrimination claim under the ADEA.<sup>101</sup> This decision came not because of a disparity in evidence between the age and race claims or a difference in how the plaintiff argued them but rather because of the different standard required to prove an age discrimination claim.<sup>102</sup> As the court explained:

Smith alleged that his termination was “substantially motivated” by age. An age discrimination claim under the ADEA, however, requires that age be the but-for cause of the termination. Here, Smith did not allege sufficient facts to allow us to reasonably infer that CH2M and OMI violated the but-for standard set forth in the ADEA.<sup>103</sup>

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95. *Smith v. CH2M Hill, Inc.*, 521 F. App'x 773 (11th Cir.2013).

96. *Smith v. CH2M Hill, Inc.*, No. 1:10-cv-02936-CC-RGV, 2012 WL 12883975, at \*1 (N.D. Ga. Feb. 8, 2012).

97. *Id.* at \*2.

98. *Id.* at \*3.

99. *Id.* at \*1.

100. *Id.* at \*5.

101. *Smith v. CH2M Hill, Inc.*, 521 F. App'x 773, 775 (11th Cir. 2013).

102. *See id.*

103. *Id.* at 774–75.

Smith also alleged that his termination was “substantially motivated by race,”<sup>104</sup> which was enough to survive dismissal under Title VII due to the more lenient standard applied to racial discrimination claims.<sup>105</sup>

This difference between the ADEA and Title VII standards highlights the difficulties facing plaintiffs discriminated against on the basis of multiple identities that fall under different statutes. Smith did not make an explicitly intersectional argument; he did not say that it was age and race combined that motivated his termination but rather that each played a substantial role in the decision.<sup>106</sup> However, following *Gross*, a plaintiff cannot use the same argument for age and racial discrimination. Even if Smith believed that both were factors in his termination, his employer is liable for age discrimination only if it was the central reason.<sup>107</sup> Even though laws prohibit both age and race discrimination, because Smith argued that both occurred as part of his termination, his age claim could not proceed while his race claim could.<sup>108</sup>

Thus, a plaintiff who argues that it was their age and race combined that motivated their termination will be impeded by the “but-for” standard in the age-based argument. However, a plaintiff may still argue a defendant discriminated against them on multiple bases, including age, even if the reasoning is contradictory.<sup>109</sup> The plaintiff may still allege both age and race discrimination, but must assert that age alone, not the combination of age and race, was the determining factor in the age discrimination claim. In Smith’s case, he was not able to successfully make this argument alongside his argument that race played a role in his termination.<sup>110</sup> Without evidence that age was the determining factor in a dismissal, a plaintiff will not succeed in making an age discrimination claim, even if the circumstances make it difficult to distinguish if discrimination is occurring because of the plaintiff’s race or age.

### *B. Who Files Under the ADEA and What Claims Do They Pursue?*

Although Congress did not design the ADEA specifically with minorities in mind, several studies have looked at the demographics of ADEA complainants. One early study looked at 153 cases brought under the

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104. *Id.*

105. *Id.* at 775.

106. *Id.* at 773–75.

107. *Id.* at 774.

108. *Id.* at 775.

109. *See Ries v. Winona Cty.*, Civ. No. 10-1715 (JNE/JKK), 2010 WL 3515722, at \*10 (D. Minn. July 28, 2010) (“*Gross* does not foreclose an ADEA plaintiff from pleading alternative theories of relief.”); *see also Prisco v. Methodist Hosp.*, Civil Action No. 10-3141, 2011 WL 1288678, at \*3–4 (E.D. Pa. Apr. 4, 2011) (holding that *Gross* does not apply at the pleading stage).

110. *Smith*, 521 F. App’x at 775.



ADEA that courts decided on substantive matters between 1968 and 1981.<sup>111</sup> This study found that eighty-one percent of complainants were male, and the race of the plaintiff was mentioned in only one case.<sup>112</sup> The research concluded that white men in professional occupations and managerial roles were primarily using the ADEA, not those protected by Title VII as well.<sup>113</sup> The lower likelihood of claims by non-whites may explain why stronger age discrimination laws did not affect the hiring of non-whites negatively prior to the 1990s.<sup>114</sup>

More recent research into ADEA complainants shows a small shift in demographics. A study of all age discrimination cases filed with the Civil Rights Commission of Ohio from 1988 through 2003 found minorities filed suits in proportion to their representation in the population.<sup>115</sup> However, the authors indicated that the proportion of age discrimination suits should likely be higher because minorities who experience discrimination are more likely to claim only race discrimination due to the importance of race in their lives.<sup>116</sup> Furthermore, because older minorities are more likely to perceive age discrimination,<sup>117</sup> one might expect them to be overrepresented in age discrimination cases, but they are not.<sup>118</sup>

Multiple and intersectional claims have also grown significantly over time. In the 1970s and 1980s, less than ten percent of equal employment opportunity (EEO) opinions involved claims under multiple protected bases; by the second half of the 1990s, over a quarter of claims involved multiple protected classes.<sup>119</sup> Another metric that shows the increase in intersectional claims looks at the number of different types of claims filed with the EEOC compared to the total number of charges. For example, if one person claims age and race discrimination, that would count as a single charge but two claims. In 1993, for every 100 charges, there were 113 claims under race, sex, national origin, religion, age, or disability.<sup>120</sup> By 2006, there were 123

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111. Michael Schuster & Christopher S Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 INDUS. & LAB. REL. REV. 64, 66 (1984).

112. *Id.* at 68.

113. *Id.*

114. See Joanna Lahey, *State Age Protection Laws and the Age Discrimination in Employment Act*, 51 J. L. & ECON. 433, 457 (2008).

115. See Vincent J. Roscigno et al., *Age Discrimination, Social Closure and Employment*, 86 SOC. FORCES 313, 329 (2007) (“Secondly, age discrimination suits filed by minority workers are roughly proportionate to their representation in the population. Indeed, we suspect that there is significant slippage here owing to the fact that minorities who are discriminated are probably more likely to file charges based on race than age due to the more clearcut centrality of race in their lives (see also Roscigno 2007).”).

116. *Id.*

117. See *supra* text accompanying note 59.

118. See Roscigno, *supra* note 115.

119. Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC’Y REV. 991, 1008 (2011).

120. Kotkin, *supra* note 4, at 1451–52.

claims per 100 charges.<sup>121</sup> In 2017, the number had increased to 132 claims per 100 charges.<sup>122</sup> The growth in intersectional claims may help explain the larger proportion of minorities filing under the ADEA because they are more likely to file under Title VII as well. While the publicly available EEOC data do not provide information about how many charges are brought with both age and race discrimination claims, the overall number of age discrimination claims has also risen.<sup>123</sup> At the same time, claims filed solely under the ADEA have decreased proportionally from 63% of claims in 1993 to only 40% of claims in 2010.<sup>124</sup> Women and minorities were more likely than men and white claimants to file jointly under the ADEA and another statute during this time period.<sup>125</sup>

Most claims under the ADEA are brought by current and former employees of an organization,<sup>126</sup> and not by those seeking work—a main argument for the need of age discrimination legislation.<sup>127</sup> The most common adverse employment action that people cite in age discrimination claims is discharge, which was cited 10,091 times and represented 54.9% of age discrimination charges in 2017.<sup>128</sup> Meanwhile, hiring is the fifth most common type of claim and was cited 1,796 times, representing only 9.8% of charges.<sup>129</sup> This difference does not capture the true underlying distribution of discrimination types. It is easier for people to determine that they have been discriminated against at the firing stage than at the hiring stage, where they have little idea of why the employer chose another applicant. Additionally, damages are likely to be higher in a firing case than in a hiring case, increasing the potential benefits from bringing a lawsuit because

121. *Id.*

122. U.S. EQUAL EMP. OPPORTUNITY COMM'N, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2017, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 15, 2018) (author calculations from dividing sum of FY 2017 claims based on race, sex, national origin, religion, age, and disability by the total number of charges for that year).

123. In 1997, 15,785 age claims were reported, which meant 19.6% of total charges included a claim of age discrimination. In 2017, there were 18,376 age claims, which represented 21.8% of charges. *Id.*

124. Sarah von Schrader & Zafar E. Nazarov, *Trends and Patterns in Age Discrimination in Employment Act (ADEA) Charges*, 38 RES. ON AGING 580, 589–90 (2016).

125. This number includes plaintiffs who filed under the ADEA and Title VII, the ADEA and the Americans with Disabilities Act (ADA), and those that filed under all three statutes. *Id.*

126. U.S. EQUAL EMP. OPPORTUNITY COMM'N, STATUTES BY ISSUE (CHARGES FILED WITH EEOC) FY 1997–FY 2017 (Mar. 2, 2018), [https://www.eeoc.gov/eeoc/statistics/enforcement/statutes\\_by\\_issue.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm). (last visited Mar. 2, 2018).

127. See WIRTZ, *supra* note 22, at 21–25.

128. EEOC, *supra* note 122. A single age discrimination charge may cite multiple issues, such as both termination and harassment, so the number of issues adds up to more than the total number of charges in a year. In 2017 there were 18,376 charges filed with the EEOC under the ADEA. *Id.*

129. The second most commonly cited issue was terms/conditions of employment, which was included in 24.7% of ADEA charges in 2017 with 4,539 citations. Harassment was the third most common issue under the ADEA, as it was included in 21.3% of ADEA charges with 3,909 claims of harassment. Discipline was fourth with 2,125 claims representing 11.6% of 2017 ADEA charges. Unlike hiring, these claims all show that the plaintiff is a current or former employee of an organization. *Id.*

damages under the ADEA are generally limited to “make whole,” meaning that a fired worker could regain lost pay and benefits, including those that require vesting or that increase with tenure.<sup>130</sup> While the previous statistics refer to all charges brought under the ADEA, not just those brought by minority plaintiffs, the large number of claims brought by employees and not applicants shows how the ADEA may not be adequately serving older minorities who are more likely to be unemployed and less likely to receive interviews than their white counterparts.<sup>131</sup>

### C. Intersectional Claims

Given the complex (and at times contradictory) nature of discrimination law, it is not surprising that courts have had difficulty in dealing with intersectional claims, and plaintiffs have had a hard time finding relief from employment discrimination.<sup>132</sup> Based on a sample of cases in the Southern and Eastern Districts of New York from June 2006 to June 2007, of twenty-six cases where the court addressed multiple claims of discrimination, summary judgment was granted in favor of the employer in twenty-two cases, the employer was granted partial summary judgment in three cases, and all the plaintiff’s claims survived summary judgment in only one case.<sup>133</sup> Employers, therefore, had partial or complete success in summary judgment in 96% of cases with multiple claims.<sup>134</sup> In a random sample of two percent of judicial opinions from cases alleging discrimination between 1965 and 1999 in all U.S. district and circuit courts, plaintiffs who made claims along multiple protected classes were half as likely to fully win their cases as those alleging only a single basis of discrimination (15% of claims with multiple bases compared to 30% of claims with one basis).<sup>135</sup> Of this sample, 18% of cases alleged discrimination on more than one protected base, and 2% of the total sample alleged discrimination on the basis of both age and race.<sup>136</sup> Plaintiffs alleging multiple claims are less likely to succeed in court than those who argue along a single protected basis.

Despite the low success rate, there is some precedence for the recognition of intersectional claims. In fact, multiple courts have recognized a theory of “sex plus” discrimination.<sup>137</sup> Despite the recognition that sex can

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130. For a more detailed discussion of how benefits work in the ADEA compared to Title VII, *see generally* RAYMOND F. GREGORY, *AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE* (2001).

131. *See* discussion, *supra* Part I.A. and I.C.

132. *See* discussion, *supra* note 4.

133. *See* Kotkin, *supra* note 4, at 1458–59.

134. *See id.*

135. *See* Best, et al., *supra* note 119, at 1002–09.

136. *Id.* at 1002.

137. *See* Kotkin, *supra* note 4, at 1463–80 (discussing the history of the “sex plus” theory).

interact with other characteristics of an employee's identity and lead to discrimination, courts have not extended that argument to age and there has been no recognition of an "age plus" theory of discrimination in general nor recognition of a specific theory of discrimination based on the combination of race and age.<sup>138</sup> Despite the lack of jurisprudence recognizing "race plus" age discrimination, the EEOC specifically asserts in its compliance manual that Title VII prohibits discrimination on the basis of race and age: "[Title VII] also prohibits individuals from being subjected to discrimination because of the intersection of their race and a trait covered by another EEO statute – e.g., race and disability, or race and age."<sup>139</sup> This interpretation has not been borne out by the courts.<sup>140</sup>

Older people and minorities already face challenges in proving employment discrimination, even when pursuing single claims. One study that looked at the success rates of wrongful discharge and employment discrimination cases in 1998 and 1999 in California found that discrimination cases are less likely to succeed when brought by non-whites.<sup>141</sup> In fact, this study found that while statutory employment discrimination cases succeed 50% of the time, only 27% of age discrimination cases and only 36% of race discrimination cases brought by non-whites succeed.<sup>142</sup> These numbers are particularly low for female plaintiffs, with black female plaintiffs winning only two of twelve cases of racial discrimination and female plaintiffs winning zero of eight age discrimination cases during that time.<sup>143</sup> These numbers show the difficulty in succeeding on discrimination cases for minorities and older people for cases along only a single protected trait. Cases brought along multiple bases face an even tougher path.<sup>144</sup>

Why are intersectional claims treated so suspiciously by the courts? One possibility is that judges believe that plaintiffs who pursue multiple claims are merely adding on to their cases without additional proof. This would indicate that cases with multiple bases are inherently weaker than other cases, in which case the lower success rate would be logical. However, empirical testing has not shown cases with multiple bases to be weaker than those without.<sup>145</sup> Instead, it appears that many judges appear to view employees

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138. See PLATT & VENTRELL-MONSEES, *supra* note 79, at § 5:270.

139. EEOC, *supra* note 3, at 15–19.

140. For discussion, see Platt and Ventrell-Monsees, *supra* note 79, at § 5:270; for an example, see *Bernofsky v. Tulane Univ. Med. Sch.*, 962 F. Supp. 895 (E.D. La. 1997) (refusing to recognize older Jewish people as a protected class).

141. David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 542–45 (2003).

142. *Id.* at 545.

143. *Id.* at 517.

144. See PLATT & VENTRELL-MONSEES, *supra* note 79, at §5:270.

145. Best et al. controlled for multiple challenged actions and tested whether it mattered if the challenged bases of discrimination were ascriptive characteristics or not. They found that these tests

alleging discrimination suspiciously whether or not they allege multiple claims despite little evidence that people are likely to lie about experiencing discrimination or pursue lawsuits based on such a lie.<sup>146</sup> Indeed, without direct and clear evidence of intentional discrimination, it can be extremely difficult to prove any employment based discrimination case.<sup>147</sup>

Given the low likelihood of success, it is somewhat surprising that over the past few decades more plaintiffs are bringing suits with multiple claims of discrimination.<sup>148</sup> One potential reason for the increased number of multiple claims is the structure of bringing a discrimination claim. To bring a lawsuit under the ADEA or Title VII, an employee must submit a claim with the EEOC.<sup>149</sup> This claim form does not make it clear what evidence an employee needs to prove a claim and allows employees to check boxes to indicate under which protected bases they were discriminated.<sup>150</sup> If an employee is a member of multiple protected classes, they may simply check all the classes they are a part of without knowing what it would take to prove individual claims.<sup>151</sup> After asserting multiple claims, an employee may then struggle to provide enough evidence to establish multiple forms of discrimination.<sup>152</sup>

The ease of asserting multiple protected classes without knowing the evidentiary hurdles for proving each claim is particularly troublesome for a claim under the ADEA, which does not allow mixed-motive arguments.<sup>153</sup> An employee would have no way of knowing this at the time of filing an initial claim of discrimination without significant research or the aid of a lawyer. Such an employee would also be unlikely to have knowledge of other distinctions between the ADEA and Title VII, such as the limited ability to bring class action suits under the ADEA and the lower amount of

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indicate that plaintiffs with weak cases are not just adding multiple bases of discrimination. For a full explanation, see Best et al., *supra* note 119, at 1011–12.

146. For a discussion of the possibility of fake discrimination claims, see SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* 138–50 (Oxford University Press 2017).

147. For a discussion of the difficulty of proving that an employer's action was discrimination in the context of *White v. Baxter Healthcare Corp.*, see Kotkin, *supra* note 4, at 1442.

148. See Best et al., *supra* note 119, at 1008–09 (discussing increase in claims from 1980s to 2000); Kotkin, *supra* note 4, at 1451–52 (discussing increase in claims from 1993 to 2006); U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 122 (discussing increase in claims from 1997 to 2017).

149. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *How to File a Charge of Employment Discrimination*.

150. See Kotkin, *supra* note 4, at 1460 (showing the EEOC intake form and discussing why it is problematic for intersectional claims).

151. *Id.*

152. See Kotkin, *supra* note 4, at 1487–89 (discussing the evidentiary barriers to proving multiple and intersectional claims of discrimination in the context of *Jeffers v. Thompson*).

153. See generally *Gross v. Fin. Servs. Inc.*, 557 U.S. 167 (2009).

compensatory damages the ADEA allows for.<sup>154</sup> This means workers who believe they faced both age and racial discrimination may file under Title VII and the ADEA without knowing the challenges to bringing such a claim.

#### *A Discrimination Claim under Title VII and the ADEA*

*Johnson v. Napolitano*<sup>155</sup> underscores the difficulties of bringing a discrimination claim under both Title VII and the ADEA. Michael Johnson, a fifty-seven-year-old African-American male, applied for and was not chosen to be an Entry Specialist for the Department of Homeland Security (DHS).<sup>156</sup> He alleged that he was not selected due to race, gender, color, and age discrimination, and also alleged retaliation.<sup>157</sup> In this case, Johnson made the intersectional claim that it was his race, gender, color, and age combined that led to the discrimination.<sup>158</sup> Some of the eight applicants whom the DHS chose for the position Johnson applied for shared some of his protected traits but not all of them.<sup>159</sup> In this context, only an intersectional claim makes sense. In fact, Johnson specifically argued the DHS gave him a poor reference because of his combined traits and in retaliation to a previous EEO claim he had made.<sup>160</sup>

The court granted summary judgment for the defendant in this case, reasoning:

Plaintiff [Johnson] would have the court create the protected category of “dark-skinned black male of a certain age who has previously spoken out against purportedly discriminatory policies.” But no court has cobbled together so many protected characteristics as a viable subgroup on which to establish a prima facie case. As in *Luce*,<sup>161</sup> to avoid judicial legislation, I decline to do so. Because Johnson does not set forth a cognizable protected class, he cannot make a prima facie discrimination claim and defendant’s motion for summary judgment is properly granted.<sup>162</sup>

The defendant’s motion for summary judgment succeeded not because Johnson did not have evidence but because he attempted to make an intersectional argument across two statutes.

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154. See generally Michael C. Harper, *Reforming the Age Discrimination in Employment Act: Proposals and Prospects*, 16 EMP. RIGHTS & EMP. POL’Y J. 13 (2012) (discussing the differences between the ADEA and Title VII).

155. *Johnson v. Napolitano*, No. 10 CIV 8545, 2013 WL 1285164, at \*8–9 (S.D.N.Y. Mar. 28, 2013).

156. *Id.* at \*1.

157. *Id.* at \*6.

158. *Id.*

159. *Id.* at \*1.

160. *Id.* at \*5.

161. *Luce v. Dalton*, 166 F.R.D. 457, 461 (S.D. Cal. 1996) (the Court refused to recognize age plus religion or age plus disability as recognized claims under the ADEA. The Court argued that doing so would amount “judicial legislation” as the plaintiff’s claims fell under four separate statutes.).

162. *Johnson*, 2013 WL 1285164, at \* 9.

In this case, the plaintiff could not pursue his discrimination case because his intersectional argument did not match with the structure of federal law.<sup>163</sup> Although the court has previously argued that it is possible to combine protected classes across statutes, such as sex plus age,<sup>164</sup> this case was not allowed to proceed under more complex circumstances.<sup>165</sup> The separation of Title VII and the ADEA along with the court's understanding of discrimination hindered the plaintiff's case.<sup>166</sup> Johnson's inability to disentangle which part of his identity was primarily responsible for the discrimination against him meant he had no remedy under the law. In particular, since several of the selectees shared some of Johnson's traits but not all of them, he could not show discrimination along any single protected trait.<sup>167</sup> In this case, an intersectional argument is the only one that makes logical sense, but the Court found no legal protection for intersectional identities.<sup>168</sup>

#### *D. Federal Employees and Intersectional Discrimination*

The ADEA does not treat all employers equivalently, and federal employees in particular have stronger protections. Federal employees were not included in the original ADEA in 1967, but Congress added them to the statute in 1974 in a separate section.<sup>169</sup> This section, Section 15, had distinct statutory language for federal employers compared to private sector and state government employers.<sup>170</sup> As opposed to just prohibiting an adverse action that happened "because of" an employee or applicant's age, employment decisions made by the federal government "shall be made free from any discrimination based on age."<sup>171</sup> This different language gives far more protection to federal employees than to their private sector counterparts.<sup>172</sup>

This greater protection for federal employees is particularly relevant for workers who fall into multiple protected classes. A federal employee does not need to prove that age was the "but-for" cause for an adverse employment action but rather that it was a motivating factor in the decision.<sup>173</sup> Although the issue has not reached the Supreme Court, the D.C. Circuit has upheld that federal employees can bring mixed-motives cases under the ADEA in *Ford*

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163. *See id.*

164. *See Best et al., supra* note 119.

165. *Johnson*, 2013 WL 1285164, at \*9.

166. *Id.*

167. *Id.* at \*10.

168. *Id.*

169. 29 U.S.C. § 633a (2018).

170. *Id.*

171. 29 U.S.C. § 633a (1974).

172. *See Keith R Fentonmiller, The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1083–84 (1998).

173. *Id.* at 1077 n.28.

*v. Mabus*.<sup>174</sup> This reasoning makes legal sense given that *Gross* relied on the specific statutory language of the ADEA, but the section of the ADEA that covers the federal government has distinct and more expansive statutory language.<sup>175</sup> Thus, an applicant for a federal job who was discriminated against on the basis of age and race should be able to argue that age was one of multiple factors in their rejection from the position and still be entitled to relief.

#### *Federal Laws Can Handle Multiple Discrimination*

It is possible to succeed in a discrimination case that relies on multiple bases, particularly for federal employees. In *Gilmore v. Social Security Administration*,<sup>176</sup> Elizabeth Gilmore, a fifty-eight-year-old black female federal employee, argued that she was not selected for a position in the Social Security Administration due to her race, sex, and age.<sup>177</sup> In this case, Gilmore was working at the agency when she applied for a position as a Supervisory Social Insurance Specialist (Operations Supervisor), but the agency instead selected a twenty-nine-year-old white male candidate.<sup>178</sup> Gilmore had twenty-seven years of experience at the agency compared to the five years of the other candidate.<sup>179</sup> An EEOC Administrative Judge found discrimination under Title VII and the ADEA, and the agency appealed the decision.<sup>180</sup> The EEOC affirmed the original decision and found in favor of Gilmore, requiring the agency promote Gilmore to the position of Supervisory Social Insurance Specialist, pay her \$2,000 in damages, train all responsible agency employees on sex, race, and age discrimination, and consider taking appropriate disciplinary actions against the responsible employees.<sup>181</sup>

One factor that helped the plaintiff succeed was that the candidate chosen for the position differed from the plaintiff in each of the three protected bases for which she alleged discrimination. Because this was a single position given to someone younger, white, and male, the plaintiff was able to clearly distinguish herself from the selectee. This is distinct from *Johnson v. Napolitano*, where those selected over Johnson shared only some of his characteristics.<sup>182</sup> This put Johnson in the difficult position of arguing

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174. 629 F.3d 198, 206 (D.C. Cir. 2010).

175. See Christine R. Lewis, *A Gross Injustice: Proving Age Discrimination by Federal Employers Under the ADEA in the Wake of Gross v. FBL Financial Services, Inc.*, 87 JOHN'S L. REV. 271, 289 (2013).

176. *Gilmore v. Soc. Sec. Admin.*, EEOC DOC 0720100003, 2011 WL 840788 (Mar. 2, 2011).

177. *Id.* at \*1.

178. *Id.*

179. *Id.*

180. *Id.* at \* 1–2.

181. *Id.* at \*5.

182. *Johnson v. Napolitano*, No. 10 Civ. 8545 (ALC), 2013 WL 128516, \*1 (S.D.N.Y. Mar. 28, 2013).



that all his traits combined to cause discrimination.<sup>183</sup> In *Gilmore*, there is no attempt to combine all facets of the plaintiff's identity and bring a truly intersectional case, but there is also no attempt to disentangle which of the three protected bases was the primary reason for discrimination.<sup>184</sup> Since the person selected over Gilmore shared none of her protected traits, each claim could theoretically stand alone and therefore did not need to be combined into an intersectional claim.<sup>185</sup>

The fact that Gilmore was a federal employee also helped her case succeed.<sup>186</sup> Notably, *Gross* is not mentioned in this case, and the judge did not apply stricter scrutiny to the age discrimination claim under the ADEA compared to the race and sex claims.<sup>187</sup> Since federal employees are covered by a different section of the ADEA with distinct wording, the judge did not attempt to limit Gilmore's ability to bring a mixed-motive case.<sup>188</sup> This allowed her to argue that age, race, and sex discrimination were all factors in her not being selected.<sup>189</sup> In *Johnson*, the plaintiff was also a federal employee, but the court argued that the plaintiff wanted the judge to create a new, narrow protected class.<sup>190</sup> Meanwhile in *Gilmore*, the judge found not that older black women constituted a specific protected class but rather that the discrimination occurred for each protected class.<sup>191</sup> As a result, Gilmore received recompense for discrimination along multiple bases while Johnson did not. That neither decision cited *Gross*<sup>192</sup> indicates that federal employees may not face the same hurdles in proving multiple claims, even if they will still be unlikely to succeed on intersectional claims.

#### E. State Laws

Given the difficulty facing intersectional claims under the ADEA, state laws may provide more protection for older minorities facing discrimination. State age discrimination law has a distinct history from the ADEA and often has different statutory language than the federal statute. Colorado passed the first anti-age discrimination state legislation in 1903,<sup>193</sup> and today the majority of states have their own statutes protecting against age

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183. *Id.*

184. *Gilmore*, 2011 WL 840788 at \*1.

185. *Id.* at \*1.

186. *See id.*

187. *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009); *see Gilmore*, 2011 WL 840788.

188. *See Gilmore*, 2011 WL 840788, at \*5.

189. *Id.*

190. *Johnson*, 2013 WL 1285164, at \*8.

191. *See Gilmore*, 2011 WL 840788, at \*5.

192. *Gross*, 557 U.S. at 180; *see Gilmore*, 2011 WL 840788; *Johnson*, 2013 WL 1285164.

193. *Lahey*, *supra* note 53, at 435.

discrimination.<sup>194</sup> Many state laws differ significantly from the ADEA by prohibiting age discrimination under the same statute as other forms of discrimination, such as sex and race. As of 2013, 39 states prohibited discrimination under such an omnibus law.<sup>195</sup>

Omnibus laws are important for intersectional discrimination claims because federal courts have ruled that age cannot be combined with other protected traits, holding that different statutes prohibit the distinct types of discrimination with differing requirements for proving discrimination.<sup>196</sup> State laws that protect workers from age and race discrimination in the same statute can offer more options for older minorities facing discrimination at the intersection of their identities.<sup>197</sup> A plaintiff bringing an intersectional case in a state where the same statute prohibits age and race discrimination would have a stronger opportunity to argue that the statute prohibits discrimination not just based on age or race alone but also at the intersection of those two traits. Of course, this is only true if state courts interpret their laws separately from federal interpretations of the ADEA.<sup>198</sup>

*Scamman v. Shaw's Supermarkets* illustrates the potential for state laws to be more protective of intersectional age discrimination.<sup>199</sup> In this case, five former full-time employees of Shaw's Supermarkets argued that their termination as part of a reduction in force was illegal age discrimination under the Maine Human Rights Act.<sup>200</sup> The issue in this case was the standard needed for the employer to negate the age discrimination claim.<sup>201</sup> The ADEA allows an employer to mount a defense based on the use of a "reasonable factor other than age" to make their employment decision.<sup>202</sup> However, in *Scamman*, the Supreme Court of Maine ruled that the reasonable factor was not a high enough standard under the Maine Human Rights Act.<sup>203</sup> Instead, a Maine employer must argue that it based the decision on business

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194. For a list of states with age discrimination laws, the size of firm covered under such laws, compensatory damages allowed, and the statute of limitations, see David Neumark & Joanne Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?*, 108 J. OF PUB. ECON. 1, 7 (2013).

195. For a full list of states that use omnibus discrimination laws, see Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 GEO. MASON L. REV. 545, 560 n.114 (2013).

196. See PLATT & VENTRELL-MONSEES, *supra* note 79, at § 5:270.

197. See Katlyn J. Lynch, *Sex-Plus-Age Discrimination: State Law Saves the Day for Older Women*, 31 ABA J. OF LAB. & EMPL. L. 149 (2015) (discussing how state laws also protect older women from intersectional discrimination).

198. See Sperino, *supra* note 191 (discussing how courts should interpret state laws separately from the ADEA).

199. See *Scamman v. Shaw's Supermarkets, Inc.*, 157 A.3d 223 (Me. 2017).

200. *Id.* at 225–26.

201. *Id.* at 229.

202. 29 U.S.C. § 623(f)(1).

203. *Scamman*, 157 A.3d at 233.

necessity.<sup>204</sup> This distinction puts Maine’s protection against age discrimination in line with the state’s protections against other types of discrimination.<sup>205</sup> It also means that Maine’s protections against age discrimination use the same framework as federal protections under Title VII, including protections against racial discrimination, which allow organizations to rebut a claim of discrimination if their decisions was based on “business necessity.”<sup>206</sup> Thus, Maine treats age as just another protected class, whereas at the federal level, age is a protected class with its own unique legal frameworks.

Similarly, the Alaska Supreme Court has acknowledged the ability to bring a mixed-motive age discrimination claim under Alaska state law. In *Smith v. Anchorage School District*, the court noted that it was not bound by *Gross* because Alaska’s legislature intended its anti-discrimination law to be broader than federal law and the state law does not contain the same statutory language as the ADEA.<sup>207</sup> Although the court found against the plaintiff in this case, their explicit recognition of the right to bring a mixed-motive age discrimination claim illustrates how state law can be more protective than federal law for older minority workers. Since the state law is broader than the ADEA, plaintiffs aren’t bound by the narrow federal framework required to prove age discrimination that limits multiple or intersectional claims.

Thus, state discrimination laws may be a better avenue for workers who have faced discrimination on the basis of both age and race. Since state laws are not necessarily bound by the same frameworks and limitations as federal discrimination law—in particular, the ADEA—state courts have an opportunity to better protect against multiple or intersectional age discrimination. Below, two cases from Tennessee illustrate this dichotomy. The Tennessee Human Rights Act prohibits discrimination “because of race, creed, color, religion, sex, age or national origin in connection with employment and public accommodations” under a single statute.<sup>208</sup> Thus, Tennessee state law may offer a better opportunity for plaintiffs who allege discrimination on multiple bases.

*Finding for Race Discrimination Prevents Finding for Age Discrimination Under “But-For”*

In *Love v. TVA Board of Directors*, Willie Love, Jr., a fifty-four-year-old African-American man, applied for a new position with his current employer, the Tennessee Valley Authority (TVA), a federally-owned

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204. *Id.* at 232.

205. *Id.*

206. 42 U.S.C. § 2000e-2(k).

207. 240 P.3d 834, 842 (Alaska 2010).

208. TENN. CODE ANN. § 4-21-101 (2015).

corporation.<sup>209</sup> But TVA gave the position to a thirty-eight-year-old white man instead.<sup>210</sup> Following his rejection for the position of lineman foreman at a plant in Columbia, South Carolina, Love alleged discrimination on the basis of his race and his age under Title VII and the ADEA respectively.<sup>211</sup>

For this position, TVA had used a points-based system to judge applicants' experience and interviews, and this rating system led to the selected employee being rated the highest.<sup>212</sup> However, the Court found that this rating system was not objective, as Love had more years of experience than the selected candidate (twenty-eight years at TVA compared to seventeen), and TVA failed to follow their weighting and policy guidelines.<sup>213</sup> Additionally, statistical evidence showed racial disparities in the Trades and Labor category at TVA.<sup>214</sup> For these reasons, the court found that there had been racial discrimination and ordered backpay to Love in the amount of \$14,820.10 and an enhanced retirement benefit of \$145.90 monthly.<sup>215</sup>

Although Love had pushed forward claims of both age and race discrimination, he only succeeded in his racial discrimination claim.<sup>216</sup> Love based both claims on an argument of disparate treatment with circumstantial evidence, meaning there was no direct evidence showing that the employer's actions had been explicitly motivated by either race or age but only his race claim succeeded with this argument.<sup>217</sup> Of the five candidates who interviewed for this position, Love was ranked fourth following an assessment of the candidates' experience and interview.<sup>218</sup> The three highest ranked candidates were all white and younger than Love (aged thirty-eight, forty, and fifty-four) while the only candidate ranked lower than Love was a fifty-eight-year-old black man who had worked at TVA the longest out of any of the candidates.<sup>219</sup> Without direct evidence of discrimination, such as disparaging comments about the applicant's age or race, it seems difficult to determine that either race or age was the primary motivating factor. However, to prove an age discrimination case, Love would have had to do exactly that. As the court noted, "For his ADEA claim, Plaintiff must prove that his age

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209. Love v. Tenn. Valley Auth. Bd. of Dirs., No. 3:06-00754, 2009 WL 2254922, at \*1 (M.D. Tenn. July 28, 2009).

210. *Id.* at \*3.

211. *Id.* at \*1.

212. *Id.* at \*3-4.

213. *Id.* at \*4, \*10.

214. *Id.* at \*8, \*10, \*12.

215. *Id.* at \*12.

216. *Id.* at \*1, \*10.

217. *Id.* at \*10, \*12.

218. *Id.* at \*4.

219. *Id.*

was *the* reason for his nonselection.<sup>220</sup> Love could not show this as he argued racial discrimination also played a role.<sup>221</sup> This represents a bizarre legal situation where an employer is not liable for age discrimination if it occurs alongside racial discrimination because in that case age discrimination is not the single motivating factor.<sup>222</sup>

*State Laws Can Provide Protection from “But-For”*

*Stewart v. Cadna Rubber Company*<sup>223</sup> demonstrates how state law may be more protective of older minorities facing discrimination. In this case, plaintiff Helen Stewart, a fifty-two-year-old African-American woman argued the defendant terminated her due to discrimination based on her age and/or race.<sup>224</sup> She filed this claim under the Tennessee Human Rights Act.<sup>225</sup> Although the trial court granted the employer’s motion for summary judgment, on appeal the court reversed the summary judgment in Stewart’s favor.<sup>226</sup>

In this case, the plaintiff alleged her employer terminated her but retained a younger, Hispanic employee who was less qualified.<sup>227</sup> The plaintiff argued that the decision to eliminate her position was a pretext for age and/or race discrimination.<sup>228</sup> When reviewing the plaintiff’s appeal of summary judgment, the Court of Appeals of Tennessee noted that the proper framework to follow was not the federal framework the trial court had used but one developed by Tennessee courts.<sup>229</sup> Under this framework, the court found that Stewart had met the requirements to survive summary judgment in both her age and race claims.<sup>230</sup> Thus, the state court provided the plaintiff a better opportunity to bring an age and race discrimination claim than federal law would have.<sup>231</sup> In contrast to *Love*,<sup>232</sup> the plaintiff could move forward with both age and race discrimination claims.<sup>233</sup> Stewart was not required to show that age was the central cause of her termination, and instead moved

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220. *Id.* at \*10.

221. *Id.*

222. See discussion *supra* Part II.A.

223. *Stewart v. Cadna Rubber Company*, No. W2013-00670-COA-R3-CV, 2014 WL 1235993 (Tenn. Ct. App. Mar. 26, 2014).

224. *Id.* at \*1.

225. *Id.*

226. *Id.* at \*10.

227. *Id.* at \*1.

228. *Id.* at \*2.

229. *Id.* at \*8.

230. *Id.*

231. See *id.*

232. *Love v. Tenn. Valley Auth. Bd. of Dirs.*, No. 3:06-00754, 2009 WL 2254922, \*9-\*10 (M.D. Tenn. July 28, 2009).

233. *Stewart*, 2014 WL 1235993 at \*10.

forward with an argument of both age and race discrimination. This type of argument does not appear possible under the ADEA, where age must be the “but-for” cause of discrimination.<sup>234</sup>

#### CONCLUSION

Labor market discrimination negatively affects the employment outcomes of older black Americans in comparison to their white counterparts. The federal government has recognized the need to protect against age discrimination in the labor market, as evidenced by the ADEA and its subsequent expansions. However, the ADEA is not equipped to address the challenges for older minority workers. Since the number of workers filing discrimination claims under more than one protected class, particularly both age and race, has increased, the lack of possible remedy for such claims represents a flaw in current discrimination law. The ADEA is poorly suited for such claims because as a stand-alone statute, its language and implementation are distinct from other federal anti-discrimination laws. Specifically, the ADEA is less protective than Title VII because, following *Gross*,<sup>235</sup> it requires a worker to prove that age was the main factor in their negative employment outcome. This means that a worker who believes that both age and race discrimination played a role in their termination would be unlikely to succeed in court based on their age claim while arguing other unlawful discrimination also happened. Despite this obstacle for private sector workers facing age and race discrimination, the ADEA provides stronger protections against age discrimination for federal workers. Meanwhile, state laws offer a better option for workers experiencing discrimination on more than one basis. The failure of the ADEA to adequately protect against discrimination at the intersection of age and race represents a need for revision of current federal anti-discrimination law.

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234. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177 (2009).

235. *See id.*