

January 2003

Sex Plus Age Discrimination: Protecting Older Women Workers

Nicole Buonocore Porter

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Nicole Buonocore Porter, Sex Plus Age Discrimination: Protecting Older Women Workers, 81 Denv. U. L. Rev. 79 (2003).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Sex Plus Age Discrimination: Protecting Older Women Workers

SEX PLUS AGE DISCRIMINATION: PROTECTING OLDER WOMEN WORKERS

NICOLE BUONOCORE PORTER[†]

INTRODUCTION

There is little doubt that sexism and ageism still exist. To remedy these “isms,” there are laws to protect both women and older workers from discrimination in the workplace, namely Title VII of the Civil Rights Act of 1964 (“Title VII”),¹ which prohibits sex discrimination as well as discrimination based on many other protected categories,² and the Age Discrimination in Employment Act of 1967 (“ADEA”),³ which prohibits age discrimination.⁴ Despite these protections, an older woman cannot bring a claim based on the fact that she feels she was discriminated against because she is an older woman. In other words, her claim must be brought either on the basis of her sex *or* on the basis of her age, but not on the basis of both her sex and age combined.⁵ This Article proposes to remedy what this Author believes is a serious shortcoming in our employment discrimination laws.

In 1980, courts first recognized that Title VII should protect black women as a separate protected category, distinct from protections afforded sex or race alone.⁶ In other words, the courts realized that black women were discriminated against differently from other women, and differently from black men. Accordingly, in cases where a race discrimination claim or gender discrimination claim would fail (because statistics revealed that race or gender alone was not an indicia of discrimination), courts were willing to consider black women as a protected subclass.⁷ This is often referred to as “sex plus race” discrimination, and courts

[†] Assistant Professor of Law, Saint Louis University School of Law, Effective July 2004. B.A., 1992 Michigan State University; J.D. 1998, *magna cum laude*, Order of the Coif, University of Michigan Law School.

1. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

2. *Id.* § 2000e-2(a) (prohibiting discriminatory employment practices based on “race, color, religion, sex, or national origin”).

3. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2000).

4. *Id.* §§ 623(a)–(c).

5. This is not to suggest, however, that her complaint cannot allege both sex discrimination and age discrimination, only that each claim will be analyzed separately.

6. *See, e.g.*, *Jefferies v. Harris County Cmty. Action Ass’n*, 615 F.2d 1025, 1032-33 (5th Cir. 1980) (explaining that the purposes of the statute would not be served if a black woman was discriminated against but could not gain relief because she could not establish a claim based on sex or race alone).

7. *See id.*

have allowed plaintiffs to plead a prima facie case of discrimination based not on their race or sex⁸ alone, but on their sex plus their race.⁹

This Article proposes that sex plus *age* should be treated as a separate protected subclass much in the same way as sex plus *race* is considered. This proposal is based on this Article's thesis that older women are treated differently (and much more negatively) than older men and younger women, both in employment situations and by society as a whole.

Part I of this Article will discuss general employment discrimination theories and principles, and then will outline the emergence of the sex-plus theory of discrimination. Part I will also discuss the dearth of case law dealing with the sex plus age theory of discrimination.¹⁰ Part II will look at the experiences of older women from a social and economic perspective, and propose that those experiences are truly unique from the experiences of older men or younger women. Finally, Part III will conclude that because older women are discriminated against in a manner different from their older male or younger female counterparts, they should be protected as a separate category, just as black women are protected. Once courts recognize this theory of discrimination, perhaps the more subtle discrimination suffered by older women (not only in employment, but by society as a whole) will be brought to the forefront and addressed.¹¹

I. STATE OF THE CASE LAW

A. Introduction to Employment Discrimination Principles

For a reader unversed in discrimination law theory and principles, some background is necessary. It has already been stated that Title VII of the Civil Rights Act of 1964 prohibits sex discrimination, as well as discrimination based on race, color, religion, and national origin or ethnicity.¹² Specifically, Title VII makes it an unlawful employment practice for an employer, employment agency, or labor organization to refuse to hire, discharge, or otherwise discriminate, limit, segregate, or classify employees on the basis of their race, color, religion, sex, or national origin.¹³ While the legislative history regarding sex as a protected category under Title VII is scant, it does reveal that "sex" was added to Title VII

8. Gender and sex are used interchangeably throughout this Article.

9. Courts have also considered sex plus other characteristics. See *infra* Part I.B.

10. This shortage may be in part blamed on the fact that two different statutes cover sex and age discrimination. 42 U.S.C. § 2000e-2(a) (prohibiting sex discrimination); 29 U.S.C. §§ 623(a)-(c) (prohibiting age discrimination).

11. Of course, this Article does not address, much less propose to remedy, the societal discrimination against older women. It only seeks to remedy a deficiency in the employment discrimination laws.

12. See *supra* note 2 and accompanying text.

13. 42 U.S.C. §§ 2000e-2(a) to 2000e-2(c).

as an attempt to defeat the passage of the entire Act.¹⁴ Those who suggested the addition of sex to the Act were sure that even the proponents of the racial protections of the Act would cave when faced with the proposition of women becoming a protected class.¹⁵

Nevertheless, scholars have given Title VII a very broad reading:

In brief, Title VII demands a broad definition of discrimination—broad enough to protect every individual from the deprivation of any form of employment opportunity by any means, device, practice, or policy. Furthermore, if even one individual suffers, the statute is violated—regardless of whether that individual's race, gender, or ethnic group is represented in the applicable workforce; regardless of whether the plan or policy is voluntary or mandatory; and regardless of whether any nondiscriminatory options are available.¹⁶

Consistent with this broad reading, the Supreme Court, through several cases, has established two primary methods to evaluate all discrimination complaints, including sex discrimination complaints: disparate treatment and disparate impact.¹⁷

1. Disparate Treatment

In order to establish a disparate treatment case of discrimination (by far, the most popular theory used),¹⁸ the plaintiff must prove that the employer's action was taken with intent to discriminate.¹⁹ Sometimes, this intent can be gleaned from what is referred to as "direct evidence" of discrimination. One example of direct evidence would be credible proof that the employer stated, "We are firing Amy Smith because she is a woman." Of course, proof of this type is rarely available, and certainly never so bluntly stated. More often, direct evidence might manifest itself in "written or spoken words demonstrating bias against a protected group, such as 'women should not work outside of the home,' 'blacks

14. See *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971) (citing 110 CONG. REC. 2581 (1964) (statement of Rep. Green explaining that the inclusion of "sex" to Title VII would "clutter up the bill and . . . be used to help destroy . . . the bill")).

15. See *id.*

16. Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 794 (1987).

17. See e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (applying disparate treatment analysis to hold that a woman denied a partnership position in an accounting firm because she did not match a sex stereotype had an actionable claim under Title VII); *Dothard v. Rawlinson*, 433 U.S. 321, 329-31 (1977) (applying disparate impact analysis to find that Alabama's statutory height and weight requirements for prison guards disparately affected women in violation of Title VII). Generally, the principles and theories used for analyzing sex discrimination claims are also used to analyze claims brought pursuant to the ADEA. See *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir. 1998).

18. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

19. *Teamsters*, 431 U.S. at 335-36 n.15.

can't do this job,' or 'I would never hire a foreigner.'"²⁰ In order to establish discriminatory intent, "[t]he plaintiff's evidence must be able to connect the expressed bias to the challenged employer action"²¹ Only after the plaintiff presents direct evidence of discriminatory intent will a prima facie case of discrimination be established.²² If direct evidence can be proven, the employer is subject to liability for the discrimination.²³

Sometimes, cases involve not only proof of some direct evidence of an illegal or discriminatory motive, but also some evidence of a legitimate motive for the employment decision.²⁴ These cases are referred to as "mixed motive" cases.²⁵ In these cases, once the illegal motive is connected to the employer action, the burden of production shifts to the employer, whereby the employer must prove that it would have made the same decision even absent any illegal motive.²⁶

Employers are fairly savvy these days. Often, there is no direct evidence that the employer had a discriminatory motive. Because it is difficult, if not impossible, to read the minds of the employer's decision makers, the Supreme Court articulated a three-step analytical framework for establishing indirect evidence of a discriminatory motive.²⁷

In cases where there is no direct evidence of discrimination, the plaintiff must first establish a prima facie case of discrimination by showing: (1) membership in a protected group; (2) that she applied and was qualified for a job which the employer had available; (3) that she was rejected; and (4) that following the rejection, the employer continued to seek applicants or eventually filled the position with someone outside the plaintiff's protected classification.²⁸

Once the plaintiff has met this burden of establishing a prima facie case, the burden of production shifts to the defendant employer to establish a legitimate, non-discriminatory reason for its action.²⁹ At this point,

20. Sabina F. Crocette, *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, 127 (1998).

21. *Id.*

22. *See id.*; *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (citing *Teamsters*, 431 U.S. at 358 n.44).

23. *See Crocette, supra* note 20 at 127.

24. *Id.* at 128.

25. *Id.*

26. *See Hopkins*, 490 U.S. at 252; 42 U.S.C. §§ 2000e to 2005(g)(2)(b)(i) & (ii) (1994).

27. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-07 (1973).

28. *McDonnell Douglas*, 411 U.S. at 802. Of course, this prima facie case framework is modified in cases of termination or other types of adverse employment action. *See, e.g., Ercegovich*, 154 F.3d at 350 (demonstrating the prima facie framework for a termination action). For instance, in a termination case, the second prong of the framework would simply be that the plaintiff was qualified for the position, the third prong would be modified to read that "she was terminated," and the fourth prong would be modified to state that the plaintiff was replaced by someone outside her protected classification. *Id.*

29. *McDonnell Douglas*, 411 U.S. at 802.

the inference of discrimination established by a plaintiff's prima facie case is destroyed.³⁰ The plaintiff still has one final opportunity to prove by a preponderance of the evidence that the employer's explanation for its action is not the true reason, and that it is more likely than not that discrimination was the real reason for the challenged action.³¹ The plaintiff's burden of persuasion may be met by establishing that the defendant's reason is not worthy of credence, that it was insufficient to cause the adverse action, or that it is more likely than not that discrimination was the real reason.³²

2. Disparate Impact

Disparate impact cases do not involve a claim of intentional discrimination. Instead, the plaintiff in such cases will allege that an employment practice or requirement, while neutral on its face, disproportionately affects one protected group over another.³³ The Supreme Court first recognized this theory of discrimination in *Connecticut v. Teal*,³⁴ where the Court held that requiring applicants to take a written examination in order to be eligible for consideration as a supervisor operated to exclude a disproportionate number of black employees over white employees, and therefore, had a disparate impact on the black plaintiffs.³⁵ Once a plaintiff has made a prima facie case of discrimination under the disparate impact theory, the burden shifts to the employer to prove that the challenged practice or policy is related to job performance.³⁶ In order to do this, an employer has to use "professionally accepted methods" to demonstrate that its hiring or employment practices are predictive or significantly correlated with important elements of work behavior that are relevant to the job.³⁷

There are three different techniques for an employer to demonstrate a significant correlation.³⁸ First, the employer can use "content validation," which demonstrates that a hiring test, for instance, actually measures performance of tasks that are relevant to the job.³⁹ The second, and

30. See *id.* at 802-03.

31. *Id.* at 804.

32. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994) (quoting *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir. 1993)).

33. See *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

34. 457 U.S. 440 (1982).

35. *Teal*, 457 U.S. at 455-56.

36. *Thompson v. Miss. State Pers. Bd.*, 674 F. Supp. 198, 209 (N.D. Miss. 1987); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").

37. Joanne Bal, *Proving Appearance-Related Sex Discrimination in Television News: A Disparate Impact Theory*, 1993 U. CHI. LEGAL F. 211, 224 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 n.29 (1975)).

38. *Id.*

39. *Id.* (citing Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 1016 (1982)).

most used technique, is "criterion-related validation," which "analyzes 'the relationship between performance on a test or other 'predictor' and performance on the relevant job,' to ensure that the predictor actually predicts job performance."⁴⁰ Finally, "construct validation" focuses on measuring "mental capacities presumed important for job performance, to ensure that these 'constructs' actually bear on job performance."⁴¹

The case of Christine Craft is an example of how this theory might work in a sex discrimination case. Ms. Craft was an anchorwoman who was demoted to a reporter because she did not meet the appearance standards that her television station employer set for her.⁴² She filed suit against her employer, based on a disparate treatment theory, alleging that the appearance-related requirements set by her employer were more strictly enforced on women than men.⁴³ The court held, however, that there was no evidence that the standards were more harsh for women than men because both parties were subject to some input on their clothing, hair, and make-up.⁴⁴ Accordingly, her claim failed.⁴⁵

One legal theorist opined that if Craft had brought her case under a disparate impact theory, rather than the disparate treatment theory, she may have been successful in her claim.⁴⁶ In the theorist's opinion, the focus groups used by the television station, which operated to cause Ms. Craft's demotion, had a disproportionately disparate effect on women over men because they took into account society's biases and prejudices about the way women are supposed to look.⁴⁷ It is unclear, of course, whether such a theory would have succeeded, but it does serve to illustrate the difference between the two theories.

B. Emergence of the Sex-Plus Discrimination Theory

Having discussed the various frameworks under which discrimination cases are brought, the reader is better prepared to discuss the sex-plus theory. The sex-plus discrimination theory is based on a disparate treatment model rather than a disparate impact model. In a sex plus discrimination case, the "plaintiff does not allege that an employer discriminated against a protected class as a whole [(e.g., women)], but rather that the employer disparately treated a subclass within the protected class."⁴⁸ This theory was first recognized by the U.S. Supreme Court in *Phillips v. Martin Marietta Corp.*⁴⁹ In that case, the defendant

40. *Id.* (quoting Bartheolet, *supra* note 39, at 1018).

41. *Id.* (citing Bartheolet, *supra* note 39, at 1019).

42. *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1207 (8th Cir. 1985).

43. *Craft*, 766 F.2d at 1210.

44. *Id.* at 1215.

45. *Id.*

46. *Bal*, *supra* note 37 at 226, 231-32.

47. *Id.*

48. *Arnett v. Aspin*, 846 F. Supp. 1234, 1238 (E.D. Pa. 1994).

49. 400 U.S. 542 (1971).

had a policy of refusing to hire women with pre-school age children.⁵⁰ The defendant was honest about the fact that it did not place a similar limitation on men with pre-school age children, but a “straight-up” sex discrimination claim failed in the court below because the vast majority of applicants hired for the position were women, albeit women without pre-school age children.⁵¹

The Supreme Court vacated the grant of summary judgment to the defendant and held that even though not all women were affected, Title VII did not permit one hiring policy for men and another for women.⁵² Accordingly, courts have interpreted this case as establishing a rule whereby if a plaintiff can prove that she would have been offered the position if she were a man, she can establish a prima facie case of discrimination even if other women were offered the same position.⁵³ In order to determine whether there was disparate treatment, “the plaintiff’s class is defined as a subclass of women, for example, women with pre-school children.”⁵⁴ This theory has been coined the “sex-plus” theory of discrimination.⁵⁵

This theory was used again in a case where the defendant, an airline, required that all of its female flight attendants be unmarried, but did not require the same of male flight attendants.⁵⁶ The Seventh Circuit,

50. *Phillips*, 400 U.S. at 543.

51. *Phillips v. Martin Marietta Corp.*, 441 F.2d 1, 4 (5th Cir. 1969).

52. *Phillips*, 400 U.S. at 544.

53. *See Arnett*, 846 F. Supp. at 1238-39.

54. *Id.* This reasoning makes sense when one considers the legislative history behind Title VII. The courts have made clear that it is irrelevant whether other employees in the protected class were unharmed. It matters only whether the plaintiff was harmed because of a protected characteristic. *See Bayer*, *supra* note 16, at 794.

55. *See Phillips*, 400 U.S. at 542. When discussing this proposed Article with a colleague, who was unfamiliar with the sex-plus theory of discrimination, he argued that the courts should have never expanded the law to allow sex-plus cases. Using the *Phillips* case as an example, he argued that instead of using the sex-plus theory, the court should have simply looked at whether men were treated differently than women, regardless of whether one looks at some women or all of the women. His argument, at first blush, made sense, until I belatedly remembered the framework for establishing a prima facie case using indirect evidence of discrimination. *See McDonnell Douglas*, 411 U.S. at 802-07. As stated above, *supra* Part I.A.1, courts must first look at whether a plaintiff can establish a prima facie case. *See McDonnell Douglas*, 411 U.S. at 802-07. In a hiring case, for example, in order to establish a prima facie case, the court would look at whether: (1) the plaintiff belongs to a protected class; (2) the plaintiff was qualified for, and applied for, the position; (3) the plaintiff was rejected for the position; and (4) the position was either held open or given to someone outside the protected classification. *Id.* at 802. Using this framework in the *Phillips* case, it becomes clear why the Court needed to adopt the sex-plus theory. Turning to the fourth prong of the prima facie test, whether the position was given to someone outside the protected classification, in *Phillips*, the positions were given to women, albeit women who did not have pre-school children. *See Phillips*, 400 U.S. at 543-44. Therefore, the plaintiff’s case would have failed, just as it did in the court below. *See Phillips*, 441 F.2d at 4. Accordingly, the argument that the sex-plus theory was an unnecessary judicial expansion of the law fails when one considers the framework under which discrimination cases are decided. This Article does not attempt to defend or even analyze in great detail the merits of the *McDonnell Douglas* framework.

56. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1196 (7th Cir. 1971).

following the precedent set down by *Phillips*, held that the airline's employment policy violated Title VII.⁵⁷ The court stated:

[Title VII] is not confined to explicit discriminations based "solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. [Title VII] subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class.⁵⁸

In keeping with the sex-plus terminology, this case can be referred to as "sex plus marital status" discrimination.⁵⁹

Finally, in 1980, the Fifth Circuit decided the first sex plus race discrimination case.⁶⁰ In this case, the plaintiff argued that the defendant discriminated against her on the basis of both her race and sex because she was a black woman.⁶¹ The district court separated her one claim into two separate claims—one for race discrimination, and one for sex discrimination—and, therefore, dismissed her complaint.⁶² The Plaintiff could not prove that either her sex alone or her race alone was used in hiring decisions.⁶³ On appeal, the Fifth Circuit held that the court had failed to address the plaintiff's claim based on both race and sex combined, reasoning that:

In the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, we cannot condone a result which leaves black women without a viable Title VII remedy. If both black men and white women are considered to be within the same protected class as black females for purposes of the McDonnell Douglas prima facie case and for purposes of proof of pretext after an employer has made the required showing of a legitimate, non-discriminatory reason for the adverse employment action, no remedy will exist for discrimination which is directed only toward black females.⁶⁴

57. *Sprogis*, 444 F.2d at 1198.

58. *Id.* (footnote omitted).

59. *See id.* at 1199.

60. *Jefferies v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).

61. *Jefferies*, 615 F.2d at 1029.

62. *Jefferies v. Harris County Cmty. Action Ass'n*, 425 F. Supp. 1208, 1213-15 (S.D. Tex. 1977). Please note that the district court spelled the plaintiff's name differently than the Fifth Circuit: "Jeffries" as opposed to "Jefferies." This Article will use each spelling depending upon which court is being cited.

63. *Jeffries*, 425 F. Supp. at 1215.

64. *Jefferies*, 615 F.2d at 1032-33.

Thus, the court held that discrimination against black females can exist even in the absence of discrimination against black men or white women, and that for purposes of establishing a prima facie case, black men and white women must be treated as persons outside the plaintiff's protected class.⁶⁵ Other cases have similarly upheld the sex plus race theory of discrimination.⁶⁶ The rule of law that can be gleaned from the sex-plus line of cases is that plaintiffs can bring a Title VII discrimination claim based on a sex-plus theory "if they can demonstrate that the defendant discriminated against a subclass of women . . . based on either (1) an immutable characteristic [(e.g., race)] or (2) the exercise of a fundamental right [(e.g., the right to marry or have children)]."⁶⁷

C. *The Sex Plus Age Theory in the Court[s]*⁶⁸

Despite the many cases discussing the sex-plus theory, few courts have addressed the sex plus age theory of discrimination. One of the first courts to address this issue in any detail was the Eastern District of Pennsylvania in *Arnett v. Aspin*.⁶⁹ In that case, the court, after analyzing other sex-plus cases, held that the above-stated rule—that a sex discrimination claim should survive if the defendant discriminated against a subclass of women based on either an immutable characteristic or the exercise of a fundamental right—should also apply in the sex plus age analysis because age is an immutable characteristic.⁷⁰

In *Arnett*, the plaintiff alleged that she was discriminated against as an older woman since she was passed up for a transfer to a position that was given to younger women or men over the age of forty.⁷¹ The defendants sought summary judgment, arguing that because Title VII does not allow sex plus age discrimination claims, plaintiff's claim should be viewed as two separate counts—one for sex discrimination and one for age discrimination.⁷² According to the defendants, those claims fail because (1) the persons chosen for the position were women (hence, the sex discrimination claim must fail) and (2) the plaintiff only brought the

65. *See id.*

66. *See, e.g.,* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416-17 (10th Cir. 1987) (allowing, on remand, the consideration of racial and sexual harassment evidence "to determine whether there was a pervasive discriminatory atmosphere" in violation of Title VII).

67. *Arnett*, 846 F. Supp. at 1239. The court in *Arnett* announced the above rule when it was discussing sex plus age discrimination. *See id.* at 1240-41. This will be discussed more fully below. *See infra* Part I.C.

68. As will be seen below, only one court, the Federal District Court for the Eastern District of Pennsylvania, has actually discussed and decided the issue of whether the law should recognize a sex plus age theory of discrimination. Other courts have given it only cursory treatment. *See infra* notes 83-91 and accompanying text.

69. 846 F. Supp. 1234 (E.D. Pa. 1994).

70. *Arnett*, 846 F. Supp. at 1241.

71. *Id.* at 1236.

72. *Id.* at 1237-38.

claim under Title VII, which does not prohibit age discrimination.⁷³ The plaintiff, in turn, argued that she is a member of a protected subclass under Title VII: older women. In doing so, the plaintiff relied on a sex plus age theory.⁷⁴

The *Arnett* court first discussed the emergence of the sex-plus theory and then discussed the rule mentioned above—that a plaintiff can bring a sex discrimination claim under Title VII if she can demonstrate that the defendant discriminated against a subclass of women based on either (1) an immutable characteristic or (2) the exercise of a fundamental right.⁷⁵ The plaintiff claimed that because age is an immutable characteristic, she has a viable sex plus age discrimination claim under Title VII.⁷⁶ In response, the defendants argued that the plaintiff's case was different “because it combines a classification afforded protection by Title VII with a classification afforded protection by the ADEA, a completely separate statute.”⁷⁷ The defendants noted that other sex-plus cases combine sex with an unprotected classification, such as marital status, or with a classification also protected by Title VII, such as race.⁷⁸

The court found the distinction irrelevant, and looked towards the reasoning of the sex-plus line of cases to justify the result.⁷⁹ The court noted that the sex-plus line of cases did not create a new remedy, but rather, closed a loophole that allowed employers to discriminate against some women as long as they did not discriminate against all women.⁸⁰ As the court aptly stated, “Such a result cannot be condoned.”⁸¹ Accordingly, the court found that “the current line drawn between viable and nonviable sex-plus cases”—that is, whether the discrimination was against a subclass of women “based on either an immutable characteristic or the exercise of a fundamental right”—was adequate, and denied the defendants' motion for summary judgment.⁸²

Very few other courts have addressed the issue of whether a plaintiff can allege a sex plus age theory of discrimination. Of the courts that have had the opportunity to address the issue, they have either declined the invitation to decide the issue, or have recognized the cause of action

73. *Id.* at 1237. Age discrimination is prohibited by the ADEA, 29 U.S.C. §§ 623(a)–(c). It is unclear whether the plaintiff could have alleged an age discrimination claim pursuant to the ADEA. See *Arnett*, 846 F. Supp. at 1235-36. The defendants admitted that all of the persons selected for the positions were women under forty or men over forty. *Id.* at 1236. Because there were men over forty chosen for the positions, any age discrimination claim the plaintiff might have alleged would likely fail. See *id.* at 1236-37.

74. *Arnett*, 846 F. Supp. at 1238.

75. *Id.* at 1239.

76. *Id.* at 1240.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1241.

with little or no discussion.⁸³ As an example of the latter, the Eastern District of Missouri simply followed the precedent of *Arnett*, without any further discussion, and held that the “[p]laintiff can proceed under Title VII on a theory of sex-plus-age discrimination.”⁸⁴ In another case, *O’Regan v. Arbitration Forums, Inc.*,⁸⁵ the plaintiff alleged that the defendants favored young, attractive, inexperienced males over their older female counterparts.⁸⁶ The court never decided whether the plaintiff’s sex plus age claim was viable as a matter of law. In fact, it presumably assumed it was and turned immediately to the factual merits, finding that the plaintiff had established enough proof to withstand the defendants’ motion for summary judgment.⁸⁷

Finally, the Sixth Circuit in *Sherman v. Am. Cyanamid Co.*,⁸⁸ refused to accept the plaintiff’s invitation to recognize a sex plus age theory of discrimination.⁸⁹ In keeping with the court’s philosophy of judicial restraint, the court stated:

[T]he Plaintiff appealed, asking us to recognize a new cause of action for sex plus age discrimination, or discrimination against “older women.” We decline the invitation to decide the issue, partly because it is unnecessary for us to do so. Assuming [plaintiff] made out a *prima facie* case for such a claim, she nevertheless was not able to establish that the defendant’s reason for discharging her (a reduction in work force) was pretextual.⁹⁰

The court later stated that not only was it unnecessary to decide whether the plaintiff had established a *prima facie* case (because the plaintiff could not prove pretext), but also noted that no federal court of appeals had ever recognized such a cause of action.⁹¹

I was clerking for the Judge who wrote this opinion, the Honorable James L. Ryan, when this case was decided. While I completely respect and agree with Judge Ryan’s judicial restraint philosophy, it is unclear

83. See, e.g., *Hall v. Missouri Highway & Transp. Comm’n*, 995 F. Supp. 1001 (E.D. Mo. 1998).

84. *Hall*, 995 F. Supp. at 1005.

85. 121 F.3d 1060 (7th Cir. 1997).

86. *O’Regan*, 121 F.3d at 1065.

87. See *id.* Although this case describes the type of discrimination from which the plaintiff suffered as discrimination against “older women,” in all fairness, it appears that the plaintiff could have alleged both sex and age discrimination claims separately. *Id.* The court was not at all clear whether it was considering plaintiff’s sex and age claims together or separately. See *id.* The district court, on remand, sheds some light on the issue by revealing that the plaintiff did allege claims under both Title VII and the ADEA. *O’Regan v. Arbitration Forums, Inc.*, No. 95 C 6464, 1999 WL 731775, at *1 (N.D. Ill. Aug. 30, 1999). Nevertheless, even this court lumped the counts together when analyzing the plaintiff’s case. See *O’Regan*, 1999 WL 731775, at *3.

88. No. 98-4035, 1999 WL 701911, at *1 (6th Cir. Sept. 1, 1999).

89. *Sherman*, 1999 WL 701911, at *1.

90. *Id.*

91. *Id.* at *5. It is one of the author’s goals (as presumptuous and ambitious as it may be) to change this fact.

whether this court would have recognized the sex plus age theory even if it had been required to decide the issue. I suggested in my bench memorandum to the judge that, in my opinion, older women are discriminated against differently than older men and younger women in much the same way as black women are treated differently than black men and white women. It is this opinion that will be justified in the next Part of this Article.

II. OLDER WOMEN'S EXPERIENCES—AGEISM AND SEXISM MERGE

This Part will provide justification for the author's assertion that older women are treated differently than older men by society as a whole, which often leads to discrimination in employment. Part III will then argue that the discrimination laws should recognize older women as a protected subclass, using the sex plus age theory of discrimination.

It is doubtful that anyone would argue that we have completely eradicated sexism and ageism in our society. But the question is: is the combination of these two types of discrimination worse than each type of discrimination on its own? Otherwise put: is the sum greater than its parts? In order to answer that question, we must first look at the views and stereotypes that define each type of discrimination, and then determine whether the discrimination against older women is different than that against older men or younger women.

A. Ageism Defined

"Ageism . . . is a constriction that rearranges power relationships, just like any other kind of discrimination or prejudice. When one ages, one may gain or lose. With ageism, one is shaped into something that is *always* less than what one really is."⁹² Ageism has also been defined as a "socially constructed way of thinking about older persons based on negative stereotypes about aging as well as a tendency to structure society as though everyone is young."⁹³ Whereas age discrimination refers to actions taken by employers that disparately affect older persons, ageism refers primarily to attitudinal barriers.⁹⁴ "Preconceived notions, myths and stereotypes about the aging process and older persons persist and give rise to discriminatory treatment."⁹⁵ Simply put, ageism is a belief, largely unsupported by fact, that older people are "something" that they are not. How we define that "something" is not all that important. The "something" could be "frail," "sick," "unproductive," "resistant to

92. FRIDA KERNER FURMAN, *FACING THE MIRROR: OLDER WOMEN AND BEAUTY SHOP CULTURE* 117 (Routledge 1997).

93. ONTARIO HUMAN RIGHTS COMMISSION, *POLICY ON DISCRIMINATION AGAINST OLDER PERSONS BECAUSE OF AGE 4* (2002), available at <http://www.ohrc.on.ca/english/publications/age-policy.pdf> (last visited Oct. 29, 2003) [hereinafter ONTARIO HUMAN RIGHTS COMMISSION].

94. *Id.* at 4-5.

95. *Id.* at 2.

change,” “slow,” or “unable to learn new things.” Regardless of what label one uses to describe older people, that label will most likely be inaccurate. Using labels about older persons based on beliefs not grounded in fact is ageism.⁹⁶ Ageism attitudes often lead to age discrimination, which are actions that treat older persons unequally due to their age.⁹⁷

With respect to our workplace, assumptions and stereotypes are all too prevalent. “Older workers are often unfairly perceived as less productive, less committed to their jobs, not dynamic or innovative, unresponsive to change, unable to be trained or costly to the organization due to health problems and higher salaries.”⁹⁸ In fact, however, there is substantial evidence that older workers:

- are highly-productive, offering considerable on-the-job experience;
- do as well or better than younger workers on creativity, flexibility, information processing, accident rates, absenteeism and turnover;
- can learn as well as younger workers with appropriate training methods and environments; and
- do not fear change but rather fear discrimination.⁹⁹

When discussing the lack of proof to support employers’ beliefs regarding older workers’ skills and attributes, one author concluded, after looking at many studies of older employees at work (which included more than 60,000 subjects), that there is “an exceedingly weak relationship between age and performance.”¹⁰⁰ For instance, the studies revealed that older workers are absent less often and have a lower frequency of accidents in the workplace than their younger counterparts.¹⁰¹ Furthermore, the studies revealed that age-related declines in intellectual ability are minimal and are more often related to disease than age.¹⁰² Finally, the studies found little proof that older workers cannot learn new tasks.¹⁰³ Because “[a]ging is a highly individual experience . . . it is not possible to generalize about the skills and abilities of a person based on his . . . age”¹⁰⁴

96. See *id.* at 10 (“In the past, many standards, factors, requirements and qualifications that discriminate on the basis of age have been justified on the basis of presumed characteristics associated with aging.”).

97. See *id.* at 4-5.

98. *Id.* at 10-11.

99. *Id.* at 11 (footnotes omitted).

100. Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It’s Been, Where It Is Today, Where It’s Going*, 31 U. RICH. L. REV. 579, 679 (1997).

101. *Id.* at 680-81.

102. *Id.* at 682 (quoting Dorothy Fleisher & Barbara H. Kaplan, *Characteristics of Older Workers: Implications for Restructuring Work*, in WORK AND RETIREMENT: POLICY ISSUES 140, 151, 152 (Pauline K. Ragan ed., 1980) (citations omitted)).

103. See *id.* at 683 (quoting Fleisher & Kaplan, *supra* note 102, at 152-55).

104. ONTARIO HUMAN RIGHTS COMMISSION, *supra* note 93, at 11.

However, because employers are unlikely to know of the above referenced studies, it is likely that they will continue to make negative assumptions.¹⁰⁵ Accordingly, despite the reality that older people can be and are very good employees, age discrimination will likely remain very prevalent.¹⁰⁶

B. Sexism Defined

Turning our attention from ageism to sexism, despite the difficulty in defining it, most people know it when they see it. Just as ageism reflects negative and mostly inaccurate perceptions and stereotypes about older people, sexism reflects negative, demeaning, and inaccurate stereotypes about women. Some of these stereotypes include: (1) that a woman's place is in the home;¹⁰⁷ (2) that a woman's worth is based in part on her appearance and sexuality;¹⁰⁸ and (3) that a woman's worth is based on her reproductive ability.¹⁰⁹

The most common theory employed by courts in combating sexism has been called gender differentiation.¹¹⁰ The theory is based on the assumption "that there are real differences between the sexes, usually biological or natural," and that only those differences can be the basis of a gender-based decision.¹¹¹ The renowned feminist theorist, Catharine A. MacKinnon, in *Feminism Unmodified: Discourses on Life and Law*, explains this theory of feminism:

Upon these differences [between the sexes], society has created some distorted, inaccurate, irrational, and arbitrary distinctions: sex stereo-

105. Eglit, *supra* note 100, at 683.

106. *Id.* at 668. Eglit's article explored the ADEA in some depth, including an in-depth analysis of all cases filed under the ADEA in 1996. *Id.* at 590-663. As one of his conclusions, the author speculated about the future of age discrimination and lawsuits brought on that basis. *Id.* at 664-706. He stated that the most likely scenario is that the same misperceptions and negative attitudes that exist today will persist. *Id.* at 668. He concluded this discussion with the following somewhat pessimistic, albeit probably true, prediction:

That speculation . . . leads to the unfortunate conclusion that the perceived age bias that (1) prompted enactment in 1967 of the Age Discrimination in Employment Act, and that (2) has allegedly motivated employer decisions and actions which in turn have prompted the filing with the EEOC of thousands of charges of discrimination over the years, and that (3) has generated hundreds of cases over the years . . . in which ADEA plaintiffs have prevailed, is likely to persist into the foreseeable future.

Id.

107. See *UN Says: Gender Discrimination Must End*, INVESTING FOR WOMEN, at <http://womeninvest.about.com/library/weekly/aa92100a.htm> (last visited January 19, 2003) [hereinafter *UN Says*] (stating that ideas about "'real men' and 'a woman's place' are instilled at an early age and are difficult to change. These restrictions take a heavy toll").

108. See NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 3-8 (Perennial 2002).

109. REVISIONING AGING: EMPOWERMENT OF OLDER WOMEN 18 (Jenny Onyx, et al., eds., Peter Lang Publishing, Inc., 1999) [hereinafter REVISIONING AGING] (noting that in a society that emphasizes sexuality and reproductive powers, an older man, unlike an older woman, is still considered a sexually potent person).

110. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 117 (Harvard University Press 1987).

111. *Id.*

types or sex roles. To eliminate sex inequality, in this view, is to eliminate these wrong and irrational distinctions. The evil and dynamic of sexism here is the twisting of biological males and females into masculine and feminine sex roles. These roles are thought to shape men in one way and women in another way, but each sex equally. Implicit here is the view that initiatives toward sex equality are limited to or constrained by real underlying differences. "Arbitrariness" of treatment in social life is measured by implicit reference to these differences. This is liberal feminism's diagnosis of the condition of women. The solution that responds to this diagnosis is that we need to ignore or eliminate these distortions so that people can realize their potential as individuals. . . . The way you know the wrong of stereotyping is distortion is that there is something preexisting to distort. Liberal feminist strategies for change correspond to its critique: ignore or eliminate irrational differences.¹¹²

The desire and attempt to eliminate irrational and stereotypical assumptions about women is the basic goal behind most of our discrimination laws.¹¹³ It is evidenced most prominently in the bona fide occupational qualification ("BFOQ") defense to a discrimination claim.¹¹⁴

The BFOQ is a statutory defense to a prima facie claim of disparate treatment.¹¹⁵ It allows an employer to intentionally choose employees based on the employees' sex if the sex or the sexual traits are reasonably necessary to the normal operation of that particular business.¹¹⁶ The BFOQ defense assumes that there are real biological differences between the sexes and that occasionally those differences will result in only one sex being qualified for a particular job. The most obvious example of a legitimate use of the BFOQ defense is for the position of a wet nurse,¹¹⁷ where only women would be qualified to perform such a position.¹¹⁸ An employer cannot prohibit women from working a particular job if such a prohibition is based simply on sexual stereotypes, rather than biological fact.¹¹⁹

Laws prohibiting discrimination based on sex have as their goal ridding sexism from the workplace, but the research makes clear that we still have much to accomplish to truly combat sexism, and an even

112. *Id.* at 117-18.

113. *See, e.g.*, *Pond v. Braniff Airways, Inc.*, 500 F.2d 161, 166 (5th Cir. 1974) ("[I]f the employer in any way permits stereotypical culturally-based concepts of the abilities of people to perform certain tasks because of their sex to creep into its thinking, then Title VII will come to the employee's aid.")

114. 42 U.S.C.A. § 2000e-2(e)(1) (1982).

115. *Id.*

116. *Id.*

117. A wet nurse is a woman "that cares for and suckles young not her own." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2598 (Merriam-Webster Inc. 1986).

118. Another classic example of a legitimate BFOQ is gender restrictions on applications for casting acting roles in the entertainment industry. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 118 (West Publishing Co. 1994).

119. *See* 42 U.S.C. § 2000e-2(e)(1) (2000).

greater hurdle to leap in ridding the gender hierarchy that is still so prevalent in our society today.¹²⁰ For instance, consider this statistic: Women encompass one-half of the population, and when housework is accounted for, women “perform nearly two-thirds of all working hours, receive only one-tenth of world income and own less than one percent of world property.”¹²¹ It is difficult to argue that sexism does not exist when faced with these statistics.

C. Ageism and Sexism—The Effect on Older Women

This subpart will demonstrate how the biases, prejudices, and stereotypes associated with ageism and sexism become more unbearable when combined. In other words, it will reveal how the sum really is greater than its parts.

1. Appearance Matters

Despite our laws prohibiting age discrimination and sex discrimination, one only has to look as far as the television in one's home to see an example of how the merging point of sexism and ageism has really affected older women in a very unique, and unfortunately, very negative way. In 1970, the Federal Communications Commission (F.C.C.) established regulations prohibiting discrimination against women in the employment practices of broadcast licensees.¹²² Despite these regulations, anchorwomen over age forty remained the subject of discrimination.¹²³ Statistics revealed that in 1985, forty-eight percent of the men and only three percent of the women who were local news anchors were over forty.¹²⁴

The reason for such disparate statistics is apparently based on the appearance of older women. Women over age forty are regarded as “‘too old’ and ‘too unattractive’ to anchor the news.”¹²⁵ While for “male anchors, ‘gray hair and . . . wrinkles are considered marks of distinction, . . . for women they’re the kiss of death.’”¹²⁶ Based on these stereotypes, and the discriminatory treatment resulting from the stereotypes, one author argued that older anchorwomen should be able to pursue a cause of action based on sex plus “age related appearance” as the basis for the

120. See, e.g., *UN Says*, *supra* note 107 (noting that discrepancies in pay are significant, and even more entrenched in developed countries).

121. See WOLF, *supra* note 108, at 23 (quoting the Humphrey Institute of Public Affairs (citations unavailable)).

122. In the Matter of Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 23 F.C.C.2d 430 (1970) (codified at 47 C.F.R. § 73.2080 (1982)).

123. Patti Buchman, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COLUM. L. REV. 190, 190 (1985).

124. *Id.* (citing Sally Bedell Smith, *Television Newswoman's Suit Stirs a Debate on Values in Hiring*, N.Y. TIMES, Aug. 6, 1983, at 44, col.1).

125. *Id.* at 191.

126. *Id.* (citations omitted).

discriminatory treatment.¹²⁷ Using the rule that sex plus an immutable characteristic should result in a legally permissible basis for a prima facie case of sex discrimination,¹²⁸ the argument is made that age-related appearance is as immutable as simply age.¹²⁹

A similar argument was made in another Note, which emphasized that the discrimination against older women in news casting is often related to the preferences of the viewing public, which demonstrates that society as a whole treats older women negatively.¹³⁰ In arguing for a sex plus age (or age related appearance) theory by the courts, Gielow states:

Comments by various news industry personnel indicate that sex-plus discrimination against female anchors does, in fact, occur frequently. According to one news consultant, "Women in this business face pressures that men do not, but those pressures often stem from the public." Others admit, "Appearance is a heck of a lot more of a factor in hiring a woman than a man," and "[i]t is a fact of life that men have an easier time of it in this business in terms of aging than women do." Finally, a female newscaster complains, "If I'm as aggressive as I think I should be in a particular situation, a lot of people get annoyed or write in and ask me, 'Don't I know how ladies behave?'" These comments suggest that women news personnel are subject to different criteria than are their male counterparts. Specifically, women not meeting certain age, appearance, and demeanor requirements may lose their jobs (or not get hired at all), while men with the same characteristics do not suffer any adverse consequences.¹³¹

These Notes suggest that, especially when in occupations where appearance is believed to be important, the treatment of older women is much worse than that of older men or younger women.¹³²

Even outside the TV news business, older women are treated differently than older men, presumably because of their age-related appearance. For instance, one survey found appearance to be the single most important factor in employee selection for a wide variety of jobs.¹³³ The

127. *Id.* at 196-98.

128. *See supra* Part I.C.

129. Buchman, *supra* note 123, at 197.

130. *See* Leslie S. Gielow, *Sex Discrimination in Newscasting*, 84 MICH. L. REV. 443, 444 (1985) (stating that television broadcasters believe that "the public prefers women with certain traits—for example, youth, beauty, and nonaggressive behavior—but that the public does not demand these qualities of male newscasters, or at least not to the same degree as of women" (citations omitted)).

131. *Id.* at 453-54 (citations omitted); *see also* Bal, *supra* note 37, at 211 (arguing that a double standard exists in television news because anchorwomen are forced to conform to a "narrower and more demanding ideal of youth and beauty" than are men).

132. *See also* Bal, *supra* note 37, at 214 (noting that appearance related standards are far more prevalent for anchorwomen than men, and noting that male anchors are generally twenty years older than females).

133. *See* Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 195 (2000) (citing *Facial Discrimination:*

“study found that attractive attorneys earned more than their less attractive classmates after five years of practice,” and the “gap increased after fifteen years of practice,” which suggests that there is a correlation between age and attractiveness, and that correlation will affect women more negatively than men.¹³⁴

Other literature also looks to age-related appearance as a significant reason why older women are devalued more than older men. For example, in *Facing the Mirror: Older Women and Beauty Shop Culture*, author Frida Kerner Furman discusses her ethnographic study of older women in the setting of a beauty salon.¹³⁵ She undertook this study to open up a discussion of older women’s experiences and how they differ from the experiences of younger women, noting that stereotypes and experiences of older women are often absent in feminist scholarship.¹³⁶

Furman suggests that women’s self image is based on perceptions and standards set by men and youthful women and notes that “physical appearance is a chief measure of women’s worth throughout the life cycle.”¹³⁷ She summarizes her study by stating:

In this book we have seen that in our socio-cultural order, older women must cope, not only with ageism, but with its conjunction with sexism, as well. We have witnessed repeatedly in these pages that the systemic devaluation of old age and of women’s intrinsic worth have serious consequences for the well-being of older women.¹³⁸

Furman notes that while many of the subjects of her study personalize their negative experiences, it is very likely that those experiences are brought on by an ageist society—one that worships youth and beauty.¹³⁹ Of course, as noted above, if age was the main impetus in the negative treatment of older women, then older men would suffer similarly.¹⁴⁰ One only has to look as far as our politicians and the CEOs of the world to note that age has not truly affected the power or status of older men.

Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance, 100 HARV. L. REV. 2035, 2040 (1987).

134. *Id.* (arguing that appearance attributes are associated with sex and age based on the fact that the largest number of appearance related claims appear to involve sex or gender in some respect, and stating “further, for women in particular, age and beauty often may be intertwined in an appearance-related discrimination claim”); see also ONTARIO HUMAN RIGHTS COMMISSION, *supra* note 93, at 2 (noting that often age works in “combination with other grounds of discrimination to produce unique forms of disadvantage;” specifically, women experiencing aging differently than men face compounded disadvantage). The ONTARIO HUMAN RIGHTS COMMISSION, *supra* note 93, at 5, gives the example of a fifty-five year-old woman who is refused a waitress job because she does not fit the image of the restaurant, which hires older men for maître d’s and younger women as waitresses.

135. See generally FURMAN, *supra* note 92.

136. See *id.* at 2-3.

137. *Id.* at 117.

138. *Id.* at 1.

139. See *id.* at 117.

140. See *supra* text accompanying notes 122-26.

Interestingly, when we discuss the treatment by society of older women, we are not just discussing treatment by men. Many believe that younger women are also guilty of a form of discrimination against their older sisters. One author stated that there is a competition between older women and younger women.¹⁴¹ Some believe this competition is because of the inherent conflict between mothers and daughters.¹⁴² Naomi Wolf, in *The Beauty Myth*, states that women are taught to dismiss their mothers' teachings about beauty since they believe that their mothers have failed through their own aging.¹⁴³

Other evidence of discrimination against older women by younger women is evidenced in women's magazines, which are run predominantly by women.¹⁴⁴ These magazines perpetuate the stereotype that "young equals beautiful" because advertisers, who are trying to sell women their beauty-enhancing products, dictate the content of the magazines.¹⁴⁵ Even women's magazines ignore older women.¹⁴⁶ One of the ways they do this is by airbrushing age off the faces of the older women portrayed in the magazines, even when the content of the article or the advertisement calls for an older woman.¹⁴⁷ Wolf believes this practice takes away one of the fundamental freedoms—"the freedom to imagine one's own future and to be proud of one's own life."¹⁴⁸

2. Financial Woes of Older Women

It is not just beauty, or the perceived lack of beauty, that causes older women to be in a more precarious situation than older men. The marginalization of older women also appears to be based on, or is the consequence of, their lack of status within the community, which is based in large part on factors over which older women have no control.

One factor that leads to their inferior status is their poverty. This is caused in large part because women live longer than men. Women in the sixty-five and over age group are the fastest-growing segment of the population.¹⁴⁹ Furthermore, because women live longer than men, one-half of all women who live to be over sixty-five can expect to be wid-

141. See WOLF, *supra* note 108, at 14.

142. See, e.g., *id.* at 74; see also Judy Klemesrud, 'If Your Face Isn't Young': Women Confront Problems of Aging, N.Y. TIMES, Oct. 10, 1980, at A24 (describing a counselor's story of how "she had encountered much discrimination against older women by younger women, 'because of the mother bond,' referring to common mother-daughter conflicts").

143. WOLF, *supra* note 108, at 74.

144. See *id.* at 81.

145. See *id.* 81-82.

146. *Id.* at 82.

147. *Id.*

148. *Id.* at 83 ("Airbrushing age off women's faces has the same political echo that would resound if all positive images of blacks were routinely lightened. That would be making the same value judgment about blackness that this tampering makes about the value of female life: that less is more.").

149. Klemesrud, *supra* note 142, at A24.

ows.¹⁵⁰ As aptly stated: "America continues to look the other way rather than look at the true face of poverty It belongs to an older woman."¹⁵¹

There are several frightening statistics about older women's financial status, as compared to that of men or of younger women. For example, women over forty-five "earn an average of less than 60 percent of salaries paid to men the same age."¹⁵² Women's median earnings peak at age forty-four, rather than fifty-five for men.¹⁵³ "Men ages 45 to 54 earn 8 percent more than younger men; however, women ages 45 to 54 earn 2 percent less than women ten years their junior."¹⁵⁴ "Older women are clustered in low-paying, traditional 'women's' jobs, such as sales and clerical positions," and even in those positions, men earn thirty-three percent more than their female co-workers.¹⁵⁵ Perhaps one of the most surprising statistics is that "[c]ollege educated women ages 45 to 64 earned 8 percent less than male high school graduates of the same age."¹⁵⁶ Simply put, "[d]espite their burgeoning ranks in the workforce, [older women] grow poorer—and glamorless—as they grow older."¹⁵⁷

Women's lack of financial status is also affected by their lack of opportunities when they were young. "[A] history of little education, alcoholic or violent husbands, and heavy childcare responsibilities has left [women] with few opportunities for obtaining self-sufficiency before old age."¹⁵⁸ Another author stated: "Although women seeking work face the double hurdle of sex discrimination and age bias, the real problem—the major barrier to finding work—is the lack of marketable skills."¹⁵⁹ Also presenting a disadvantage to older women is the fact that employers, when making hiring decisions, often consider gaps in employment history as a negative mark against the candidate.¹⁶⁰ "This can be a particular problem for older women who have re-entered the workforce after childbearing"¹⁶¹

150. *Id.*

151. Darlene G. Stevens & Barbara Sullivan, *Age Old Problem: Job Gains Made by Young Don't Translate to Later Years*, CHI. TRIB., May 12, 1991, at 12.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* Perhaps this statistic is not so surprising if many of the women in this study had taken considerable time off work to raise children. However, the fact that this role (raising children) is consistently left to women perpetuates the inferior status of older women in the workforce.

157. *Id.*

158. REVISIONING AGING, *supra* note 109, at 89.

159. ROBERT S. MENCHIN, *NEW WORK OPPORTUNITIES FOR OLDER AMERICANS* 240 (Prentice Hall 1993).

160. ONTARIO HUMAN RIGHTS COMMISSION, *supra* note 93, at 14.

161. *Id.*

3. Gender vs. Age

One question that comes to mind when discussing the disparate treatment suffered by older women is whether the biases and discrimination endured by them can be blamed more on their sex, their age, or both equally. Some believe it is the sex that matters. One author makes clear that while “the marginalization of older women can be attributed to both sexism and ageism, the primary factor in their inferior status is that of gender”¹⁶² The reasoning for this theory is based largely on the favorable treatment received by older men over older women:

[A]n older man is regarded more favorably by our culture, reflecting the privileging of the male throughout the lifespan. He is usually healthier though shorter lived, more mobile, financially more secure, and more likely to have a partner. In a society that emphasizes sexuality and reproductive powers, he is, unlike the older woman, considered a sexually potent being. He is also considered to have carried out a socially useful role in that he has “worked,” whereas the women whose lives have centered around childbearing and house-keeping are considered never to have “worked” or to have been “kept.” Women who have been in the workforce have had their contribution to the finances considered adjunctive to their family duties. Again the old adage, “a woman’s place is in the home,” has contributed to the belief that for a woman there is no problem with the transition to the retirement years. Until recently, most research on the aged was centered on men’s adjustment to retirement and loss of work role.¹⁶³

These authors also noted that the second wave of feminism, with the maturing of the feminists of the seventies, finds older women at the forefront of the challenge of dealing with the combination of age and sex bias.¹⁶⁴ These feminists are beginning to direct their attention “to the fact that the discrimination and devaluation of older women is the culmination of a lifetime of attempted subordination of women.”¹⁶⁵

Another theory for the conclusion that gender is more of a factor in discrimination against older women than age is the fact that age discrimination is not always seen as having the same type of animus that other types of discrimination, namely race or sex discrimination, have.¹⁶⁶ While it may be “true that hiring officials are not immune to the brightness, vigor, and attraction of youth, nor always above exploiting these attributes for commercial advantage, . . . [these] choices involve prefer-

162. REVISIONING AGING, *supra* note 109, at 18.

163. *Id.* (citation omitted).

164. *Id.* at 18-19.

165. *Id.*

166. See Eglit, *supra* note 100, at 676 (stating that deep-seated animus has been rejected as the reason for age bias).

ences for one group, rather than antagonism against another.”¹⁶⁷ This theory supports the conclusion that it is more the sex than the age that matters.

However, if one takes into consideration the fact that older women are often subjected to discrimination from other, younger women, one would arguably be left with the conclusion that it must be age that matters because younger women would not (presumably) discriminate against their own gender. Younger women are probably aware (at least at a subconscious level) that their own aging will likely lead them to be in the same position that they view (often with disdain) other older women they know and meet. But, just as in many other areas of our society,¹⁶⁸ younger women like to believe that they will never become the “older woman” because they will be more successful at combating age than the older women they know. Of course, this theory recognizes that these women do not actually think they can find some eternal fountain of youth. They know they will age, but they believe they can combat the physical signs of aging, which in their mind, will lead to an avoidance of the negative stereotypes associated with being an older woman. Perhaps, then this theory leads us full circle back to the argument that appearance and the “beauty myth” really are a major cause of discrimination against older women. Thus, because appearance-related discrimination is more often directed at women,¹⁶⁹ one would assume that the sex matters more than the age. Certainly, attempting to figure out whether it is the sex or the age that leads to the significantly greater marginalization of older women is an interesting debate. However, it is unnecessary for us to undergo these mental gymnastics. What matters is the cumulative effect of the marginalization of older women.

4. Cumulative Effect of Sex and Age Discrimination

This subpart has focused on the reasons why older women are marginalized in our society—namely, because “appearance matters” and because generational differences have caused older women to be financially inferior to older men. It is important, however, to emphasize just how serious this marginalization is in society.

As stated by one author: “a steadily increasing body of discourse has considered and found support for the proposition that older women face employment and societal discrimination that is separate and distinct

167. *Id.* at 677 (quoting SECRETARY OF LABOR, THE OLDER AMERICAN WORKER-AGE DISCRIMINATION IN EMPLOYMENT, REPORT TO CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, at 5-6 (1965)).

168. One example of society’s ignorance of its own fate is a constant belief that the random violence or disease that we all see and hear will never happen to us.

169. See generally Adamitis, *supra* note 133, at 206 (stating that “consideration of appearance . . . may impact women disproportionately”).

from that of older men and younger women.”¹⁷⁰ Certainly, women in any occupation where appearance matters find significant discrimination in the workplace.¹⁷¹ As stated earlier, in 1985, forty-eight percent of men and only three percent of women who were local news anchors were over the age of forty.¹⁷²

But even in areas where appearance should not be considered a primary job function, older women still do not fare well. This is evidenced primarily by the difference in incomes between older women and older men.¹⁷³ Recall from above the troubling statistic that women over forty-five earn an average of less than sixty percent of salaries paid to men the same age.¹⁷⁴ Older women also earn less than younger women.¹⁷⁵ In our society where income and net worth determine one’s status, these statistics speak loud and clear.

Finally, we only have to look as far as the images conjured up in our heads when picturing our grandparents to realize just how much we all marginalize older women. While most of us love our grandmothers and have very fond memories of her, how many of us can say that the image conjured up in our heads was one of a powerful, independent, intelligent, and capable woman? Compare that image to one of our grandfathers, or other older men we know, who are much more likely to be running our businesses and our government, and it is easy to see how society marginalizes older women.

Having established the reasons for, and the magnitude of, the marginalization of older women, the question remains: What do we do about it? Is the sex plus age theory the best way to combat this type of discrimination?

III. RECOGNIZING THE SEX PLUS AGE THEORY

Having established a difference in treatment by society and by employers of older women as compared to older men and younger women,¹⁷⁶ this Part will argue that the sex plus age theory is not only necessary (as it is the only way to protect this subclass of women), but is also justified by current legal precedent.

When advocating for either a new law or an expansion of current case law, several questions must be answered. First and foremost, one must look at whether there is a compelling need for recognized judicial expansion of the law. Above, we saw that discrimination against older

170. Crocette, *supra* note 20, at 116.

171. *See* Buchman, *supra* note 123, at 190.

172. *Id.*

173. *See* Stevens & Sullivan, *supra* note 151, at 12.

174. *Id.*

175. *Id.*

176. *See supra* Part II.C.

women is fundamentally different and worse than that against older men or younger women.¹⁷⁷ But does that necessarily lead us to the conclusion that we need to recognize the sex plus age theory? Is there not adequate protection under our current laws, namely Title VII against sex discrimination,¹⁷⁸ and the ADEA against age discrimination?¹⁷⁹ This Part will seek to answer these questions, concluding that our current discrimination theories are inadequate to protect older women and courts need to recognize the sex plus age theory.

An equally important question is whether such an expansion of the existing law is legally justifiable. This Part will also address this issue, concluding that legal precedent not only supports the finding of a sex plus age theory, but also demands it.

A. *The Necessity of the Sex Plus Age Theory*

Having concluded in Part II that the discrimination against older women really is different and distinct from that against older men or younger women, the question remains: so what? The reader might wonder why the sex plus age theory is necessary to protect older women. After all, it is true that under current law an older woman could sue under Title VII and the ADEA to cover both her sex and age discrimination claims.¹⁸⁰ Accordingly, we should first look to whether a lawsuit brought under both of those statutes would be successful without the use of the sex plus age theory.

Some evidence indicates that older women might be quite successful in their lawsuits brought under the ADEA. For instance, in Eglit's article, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going*,¹⁸¹ Eglit found that more women were successful in their age discrimination lawsuits than men.¹⁸² In fact, as one of the conclusions for his study, Eglit stated that there was a "feminization . . . of the ADEA," and that that the number of female plaintiffs had increased dramatically.¹⁸³ This study would seem to indicate that older women have plenty of success bringing age discrimination lawsuits and that there is no need for the sex plus age theory.¹⁸⁴ How-

177. *Id.*

178. 42 U.S.C. §§ 2000e-2(a) to 2000e-2(c).

179. 29 U.S.C. §§ 623(a)-(c).

180. *See supra* Introduction and Part I.A.; 42 U.S.C. §§ 2000e-2(a) to 2000e-2(c); 29 U.S.C. §§ 623(a)-(c).

181. *See* Eglit, *supra* note 100.

182. *Id.* at 659-60 (quoting Michael Schuster, Joan A. Kaspin, & Christopher S. Miller, *The Age Discrimination in Employment Act: An Evaluation of Federal and State Enforcement, Employer Compliance, and Employee Characteristics*, A Final Report to the NRTA-AARP Andrus Foundation 47-48 (unpublished June 30, 1987)). Eglit's study looked at every published ADEA decision in all federal and state courts during 1996. *Id.* at 590-91.

183. *Id.* at 663.

184. *See generally id.* at 590-91, 599-612, 657-63 (recognizing female plaintiffs had greater success in ADEA suits than male plaintiffs).

ever, it is not clear that this one study is indicative of older women's success in age discrimination lawsuits.

First of all, even though female plaintiffs won in more age discrimination lawsuits than did men, the win rate is still not very impressive. Older women bringing age discrimination lawsuits in 1996 won only twenty-three percent of the total cases filed.¹⁸⁵ Some might argue that a win rate of twenty-three percent is a successful statistic. This might be true when compared to some areas of employment law, where plaintiffs win much less frequently, such as in cases brought under the Americans with Disabilities Act (ADA).¹⁸⁶ However, when one considers that seventy-seven percent of female plaintiffs over age forty are not successful with their claims, one must question why.¹⁸⁷ While employers have an array of legitimate business defenses to discrimination claims, one is still left wondering how it is possible that seventy-seven percent of all female plaintiffs over age forty¹⁸⁸ were either less qualified than another employee, or (even less likely) engaged in some type of misconduct sufficient to warrant their discharge. Furthermore, and more importantly, an older woman's lawsuit brought pursuant to the ADEA will only be successful if the individual that replaced her (assuming a termination case) was younger.¹⁸⁹ Obviously, her suit under the ADEA would fail if an older man replaced the older woman.¹⁹⁰

Similarly, a woman claiming sex discrimination pursuant to Title VII will only prevail if she is replaced by a man.¹⁹¹ These types of cases are fairly straightforward and would likely not require a sex plus age analysis, because either a straightforward sex discrimination claim or age discrimination claim would allow the older woman to prevail (assuming

185. *Id.* at 660.

186. The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (stating that defendants prevail in more than 93% of cases brought against them). There are more significant hurdles to bringing an ADA claim than an age discrimination claim. Under the ADA, a plaintiff has to prove that she is a qualified individual with a disability, *see* 42 U.S.C. § 12112, which is much more difficult than meeting a *prima facie* age discrimination claim where the plaintiff only has to be over forty years old. 42 U.S.C. § 631(a). In both claims, of course, there are other requirements, such as proving that the plaintiff suffered an adverse employment action and was treated differently than an employee not in the protected category. *See supra* Part I.A.

187. *See* Eglit, *supra* note 100, at 660.

188. *Id.*

189. ROTHSTEIN ET AL., *supra* note 118, at 176.

190. I realize that the term "older" is a relative term. The ADEA protects individuals who are forty years of age or older. 29 U.S.C. § 631(a). However, if a woman who was sixty years old was fired and replaced by a man who was forty years old, she would still meet her *prima facie* case of discrimination under the ADEA because, although he is also in the protected class (those over forty), he is substantially younger than the female employee. *See, e.g.,* Balderston v. Fairbanks Morse Engine Div. of Coltec Indus., 328 F.3d 309, 321 (7th Cir. 2003) (recognizing that a plaintiff who is replaced by someone "substantially younger" is a reliable indicator of age discrimination but ultimately holding that a six year age difference was not "substantially younger").

191. *See* ROTHSTEIN ET AL., *supra* note 118, at 109.

she could prove that it was her sex or her age that motivated the adverse employment action.)¹⁹²

The fact that there are laws to prevent both age and sex discrimination claims is probably the most likely argument against the expansion of the law to allow sex plus age claims. While there is no current literature or case law specifically arguing that the sex plus age theory is unwarranted (unless it was unnecessary to decide a particular case), one would assume that one of the primary counter-arguments against the theory is that the sex and age discrimination laws (Title VII and the ADEA, respectively) adequately protect older women who feel they have been discriminated against. As stated earlier, these laws might be adequate in some circumstances, such as if an older woman was replaced by a younger man.¹⁹³ In that scenario, her complaint could allege both age discrimination and sex discrimination separately and (assuming the employer did not have a legitimate reason for her termination or she was able to prove pretext), both claims would succeed. However, a simple factual scenario such as this is only one possible type of circumstance under which an older woman might experience discrimination.

Analyzing a much more troubling scenario of the all-too-common reduction in force, where an older woman falls victim to corporate downsizing, reveals a very different result. Let us assume that an older woman was the only employee let go in her sales department, and the department is now left with ten employees. Assume further, for simplicity's sake, that of the ten employees left in the department after the reduction in force, five of them are younger women (under age forty) and five of them are older men (over age forty). We will also assume (in an attempt to draft the perfect scenario to illustrate the point) that our older woman finds proof that managers made comments while discussing the terminations, such as: "The best sales people are either established, powerful men who can persuade and pressure the sale, or the pretty young things who can mesmerize the customer long enough to trick him into the sale."¹⁹⁴ Before the fresh-out-of-law-school plaintiff's attorney runs into court with this factual scenario, a few words of caution—"not so fast!"

Despite the fact that it seems as though the perfect case of discrimination against an older woman has been created, this case will neverthe-

192. It is not enough for a plaintiff to prove that she was terminated, or passed up for a promotion, or not hired, and that someone in her protected classification was treated better than she was. See *supra* Part I.A. Assuming the employer can articulate a legitimate, non-discriminatory reason for its adverse employment decision, the burden will still be on the plaintiff (in our case, the older woman) to prove that it was her sex or her age that motivated the employer. *Id.*

193. See *supra* note 28 and accompanying text.

194. A much easier example would be if the manager had simply stated: "Let's get rid of the old bag—she's a woman not capable of the high-pressure sales tactics and she's way too old—so much past her prime." I did not choose such a stark comment because it could be seen as direct evidence of discrimination, and no *prima facie* case analysis would be necessary. See *supra* notes 18-23 and accompanying text.

less not make it past a motion for summary judgment.¹⁹⁵ Under our current law, with rare exception,¹⁹⁶ a court would consider this case under two separate theories: (1) an age discrimination theory and (2) a sex discrimination theory. Let us take each one in turn.

In order to make out a *prima facie* case of age discrimination in a reduction in force case,¹⁹⁷ the plaintiff must establish that: (1) she was at least forty years of age at the time of her dismissal; (2) she was qualified for the position; (3) she was discharged; and (4) additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.¹⁹⁸ This fourth element is met when the employee can demonstrate that comparable employees not in the protected group were treated more favorably.¹⁹⁹

To prove this fourth prong, the older woman in our scenario would have to show evidence that younger employees were favored over older employees.²⁰⁰ However, in our scenario, half of the employees left in the department after the reduction in force are over age forty. Accordingly, the plaintiff could not establish a *prima facie* case of age discrimination.

Likewise, the older woman's sex discrimination claim would fail because the same number of women were retained (and therefore, received favorable treatment) as were men.²⁰¹ Accordingly, as the reader can see, even with the very strong evidence that the older woman was being discriminated against because she is an older woman, the plaintiff's Title VII and ADEA claims would both fail if analyzed separately.²⁰²

Contrast that result with the result that would arise if the older woman in our scenario could use a sex plus age theory of discrimination. In this instance, the group of comparables for establishing a *prima facie* case would be both the older men and the younger women.²⁰³ Because the plaintiff in our hypothetical was the only older woman terminated out

195. Unless, of course, the court in which it is brought is the United States District for the Eastern District of Pennsylvania, which has already recognized a sex plus age theory, *see* Arnett v. Aspin, 846 F. Supp. 1234, 1241 (E.D. Pa. 1994); *supra* Part I.C., or the court in which this case is brought is foresighted enough to recognize that this is the perfect test case for a sex plus age theory. Thus, despite my conclusion that this hypothetical case would not make it past a motion for summary judgment, if any plaintiff's attorney gets a case with facts this good, the attorney, in my opinion, should definitely run with it.

196. *See* Arnett, 846 F. Supp. at 1241; *supra* Part I.C.

197. The framework is different in a reduction in force case because no one replaces the employee who was terminated as part of the downsizing. For example, compare the framework in notes 27-30 and their accompanying text with *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir. 1998).

198. *Ercegovich*, 154 F.3d at 350.

199. *Id.*

200. *See id.*

201. *See supra* note 28 and accompanying text.

202. *Id.*

203. *See* Arnett, 846 F. Supp. at 1240 n.7.

of the department, she has proof that both younger women and older men were treated more favorably. Accordingly, she could definitely establish a prima facie case, and even if the employer alleged that it had a good reason for terminating her (e.g., lack of performance, etc.), she would have fairly strong evidence—management's offensive and discriminatory comments—that the employer's reason was pretextual.²⁰⁴

Hence, the reader can see how it is possible to go from not being able to survive summary judgment, if the sex and age discrimination claims are brought separately, to not only establishing a prima facie case, but very possibly winning a jury trial if the case is brought under a sex plus age theory.²⁰⁵

Having said that, is it enough to show that one factual scenario would come out differently if the sex plus age theory is used? Perhaps the more important question is: how common is this type of discrimination?

Some commentators believe that this type of discrimination is not only common but bound to get worse. For example, in one study by the Women's Legal Defense Fund, involving 335 cases alleging both sex and age discrimination, only ten of those cases involved a combination of the two theories.²⁰⁶ Furthermore, as mentioned above, no federal appellate court has extended protection under Title VII to older women under the sex plus age theory, evidencing a failure in the law to adequately protect this subclass of women.²⁰⁷ Crocette argues for hybrid sex plus age claims because, as she states: "[U]nless the current analytical structures under Title VII and the ADEA evolve to more adequately consider the hybrid nature of cases brought by many older women, the lack of adequate redress will become worse."²⁰⁸ She also notes what was noted above in our hypothetical scenario—that considering sex and age claims separately allows employers to defeat older women's claims by showing

204. See *supra* note 28 and accompanying text.

205. Of course, there are no guarantees that this hypothetical plaintiff would win her sex plus age discrimination lawsuit. Suffice it to say, however, that having spent the vast majority of my legal career representing employers in legal discrimination lawsuits, this would definitely be considered a "bad" case from the employer's perspective—one which would likely lead to an early and substantial settlement.

206. See Crocette, *supra* note 20, at 115-16. Of course, this argument could also cut the other way. Arguably, the fact that so few women have brought this type of claim indicates that there are few women who feel as if they have been discriminated against as older women. However, it is just as likely a theory that women who could possibly have a "sex plus age" claim (but who do not have a good case if the sex and age claims are brought separately) are told by their attorneys that there is no such cause of action.

207. *Id.* at 140; see also *supra* Part I.C. Similarly, although courts have addressed the issue of age-plus discrimination, those courts rejected the proposition that age-plus claims are valid under the ADEA. Crocette, *supra* note 20, at 149; see also *Luce v. Dalton*, 166 F.R.D. 457, 461 (S.D. Cal. 1996) (rejecting an age-plus theory).

208. See Crocette, *supra* note 20, at 118.

older men and younger women who are treated favorably, even though unfavorable treatment of older women exists simultaneously.²⁰⁹

Another argument demonstrating the need for the sex plus age theory is the plethora of literature describing appearance-related discrimination.²¹⁰ While it is certainly true that an employer could discriminate against the appearance of men and younger women, the literature above supports the fact that it is far more common for older women to be the victims of appearance-related discrimination than for older men or younger women to fall victim to this phenomenon.²¹¹

For example, one author argues that “for women in particular, age and beauty often may be intertwined in an appearance-related discrimination claim.”²¹² The same author also points out that given the common correlation of beauty to youth, appearance-related claims also disproportionately affect older women.²¹³ This literature suggests that if the “beauty myth” and appearance-related discrimination exist, then it only follows that older women will suffer the majority of the harm.

B. Legal Justification for the Sex Plus Age Theory

Even if the reader accepts the theory that discrimination against older women is prevalent and unremedied by the current legal principles, it is nevertheless necessary to offer legal justification for the proposition, rather than simply revealing that this is a social wrong that should be remedied.

In order to provide this legal justification, we shall first look at what the current law states. As stated earlier, only one case thoroughly discussed the sex plus age theory and conclusively recognized the theory as a legitimate method of establishing a prima facie case of discrimination.²¹⁴ This court found that there is no rational reason to not apply the sex plus age to the sex-plus line of cases.²¹⁵ The court followed the rule that the sex-plus theory is available when the plaintiff is able to prove she was discriminated against because of her sex plus an immutable characteristic.²¹⁶ The court was simply following the rule established in the sex plus race line of cases.²¹⁷ However, this holding was found by only one federal district court, and it cannot, therefore, be conclusively

209. *Id.* at 118-19.

210. *See, e.g.*, Adamitis, *supra* note 133 (arguing that states should include protection for appearance-related discrimination in their employment discrimination laws); *see also supra* Part II.C.1. (discussing the role appearance plays in society and the working world).

211. *See supra* Part II.C.1.

212. Adamitis, *supra* note 133, at 207.

213. *Id.* at 209.

214. *See Arnett*, 846 F. Supp. at 1241; *see also supra* Part I.C.

215. *Arnett*, 846 F. Supp. at 1241.

216. *Id.*

217. *See id.* at 1238-41.

relied upon as precedent. Therefore, it is necessary for us to undergo the same analysis the *Arnett* court did.

The court in *Arnett*, and all the sex-plus cases before it, turned to the first Supreme Court pronouncement on the subject, which was *Phillips v. Martin Marietta Corp.*²¹⁸ As discussed earlier, in *Phillips*, the Court stated that an employer cannot have one standard for females and a different standard for males.²¹⁹ Accordingly, if a plaintiff can prove that she would have been offered the position (or not fired, promoted, etc.) if she were a man, she can establish a prima facie case of discrimination even if other women were treated better than she was.²²⁰ Using this rule in the sex plus age theory, an older women should be able to prove that, had she been an older man, she would have been treated differently, even if there were plenty of younger women who were treated better than she was. Simply following precedent leads us to the conclusion that the sex plus age theory should be recognized.

Turning to the sex plus race line of cases, in *Jefferies v. Harris County Community Action Ass'n*,²²¹ the court found that Congress, when it refused to modify the word sex with "solely" in the statute, did not intend to leave black women without a remedy.²²² Accordingly, the court found that, without a finding of a sex plus race discrimination theory, black women would be left without a remedy.²²³ The court concluded by announcing the rule that a sex-plus theory should be used when the discrimination is against a subclass of women based on either (1) an immutable characteristic (e.g., race) or (2) the exercise of a fundamental right (e.g., the right to marry or have children).²²⁴

It is not only this rule but also the reasoning behind the rule that leads to the conclusion (just as it led the court in *Arnett v. Aspin*) that sex plus age should be a recognized theory of establishing a prima facie case of discrimination. One of the arguments that has been made against extending the sex-plus theory to protect the subclass of older women is that older women are not discriminated against as a subclass as are black women.²²⁵ Of course, after examining the plethora of literature on the subject, it is plain to see that this is not simply an accurate statement or a convincing argument against recognizing a sex plus age theory.

218. 400 U.S. 542 (1971).

219. *Phillips*, 400 U.S. at 544.

220. *See id.*; *see also Arnett*, 846 F. Supp. at 1238-39.

221. 615 F.2d 1025 (5th Cir. 1980).

222. *Jefferies*, 615 F.2d at 1032.

223. *Id.* at 1032-33.

224. *Id.* at 1033. The court felt these limitations were necessary to avoid claims such as "sex plus hair length." *Id.*

225. To the contrary, one older woman states that, because she often experiences marginalization by the public, she seeks help from African-American women, whom she believes will empathize with her feeling of marginality. FURMAN, *supra* note 92, at 118.

One other argument that has been made against finding a sex plus age theory is that age is protected in a separate statute from sex and race (as well as the other categories protected by Title VII).²²⁶ However, as the court stated in *Arnett*, the defendants in that case failed to identify why that argument reveals a distinction with a difference.²²⁷ In fact, as the court stated in *Jefferies*:

It is beyond belief that, while an employer may not discriminate against . . . subclasses of women, he could be allowed to discriminate against black females as a class. This would be a particularly illogical result, since the "plus" factors in the former categories are ostensibly "neutral" factors, while race itself is prohibited as a criterion for employment.²²⁸

Under this reasoning, the word "race" can easily be replaced by "age." Age is a protected classification, regardless of the fact that age is protected by a different statute than race.²²⁹

Other sex-plus cases also support the finding of a sex plus age theory. For instance, in *Lam v. University of Hawai'i*,²³⁰ the Ninth Circuit recognized a sex plus race claim, not on behalf of an African-American woman, but on behalf of an Asian woman.²³¹ In so finding, the court recognized what the *Jefferies* court implied—that there are peculiar stereotypes associated with subclasses of women.²³² "Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women."²³³ These unique discriminatory biases justify subclass treatment under Title VII to ensure that an employer is not permitted to avoid liability for discrimina-

226. See *Arnett*, 846 F. Supp. at 1240. This reasoning has also been used to find that the law does not recognize an age-plus claim. See, e.g., *Luce*, 166 F.R.D. at 457 (refusing to recognize an age plus disability cause of action). The court stated that:

Congress has not drafted one statute to govern all claims of employment discrimination, regardless of whether those claims are based upon any of the protected classifications of race, sex, religion, national origin, age, and disability. . . . If Congress had intended to allow plaintiffs to mix and match theories of liability for employment discrimination, regardless of whether such claim was based upon race, sex, religion, national origin, age, or disability, it could have amended Title VII to provide protections to older Americans and Americans with disabilities within the confines of that statute. . . . Therefore, the arguments of the courts based upon the interpretation of Title VII's explicit language as barring discrimination based upon race, sex, national origin, or religion cannot be extended to support "age-plus" theories of discrimination.

Id. at 461.

227. *Arnett*, 846 F. Supp. at 1240.

228. *Jefferies*, 615 F.2d at 1034.

229. See 29 U.S.C. §§ 623(a)–(c).

230. 40 F.3d 1551 (9th Cir. 1994).

231. *Lam*, F.3d at 1562.

232. See *id.*

233. *Id.*

tion by merely showing that it has not discriminated against all women.²³⁴

This line of reasoning is just as appropriate with respect to sex plus age discrimination. Because there are unique discriminatory biases associated with older women,²³⁵ and because legal precedent calls for a finding of a sex-plus discrimination theory when the “plus” factor is an immutable characteristic (which, of course, age is),²³⁶ it only follows that recognizing the sex plus age theory is legally justifiable.

CONCLUSION

As argued above, the courts’ recognition of a sex plus age theory for discrimination lawsuits brought under Title VII is legally justifiable, warranted, and it is the right thing to do. In Part II, we saw various literature²³⁷ that all supported the fact that there is not only a problem of discrimination against older women, but also that older women are victims of more severe and more frequent disparate treatment than older men or younger women.²³⁸

This legal and factual truth serves two purposes for this Article’s main proposition. First, it supports the argument that protecting older women from the unique type of discrimination suffered only by them is the right thing to do. Second, and perhaps more importantly from a legal theorist point of view, the fact that older women are discriminated against as older women (and distinct from the discrimination against older men and younger women) supports following the reasoning in the precedent set by the sex plus race cases. Just as black (or Asian) women suffer from unique forms of discrimination as a subclass, so do older women.

From the moment I worked on the *Sherman* case,²³⁹ this theory—that the law should recognize sex plus age discrimination—seemed so obvious to me that I was shocked to find several years later that very little had been written about the subject and very few courts had considered it. The lack of discussion of this area could mean one of two things: either the problem is not big enough for anyone to worry about, or, the more likely reason, in my opinion, older women really are a silent minority.

234. *See id.*

235. *See supra* Part II.C.

236. *Jefferies*, 615 F.2d at 1033.

237. Interestingly, in all my research, I never found a source that disputed the unique discrimination suffered by older women.

238. *See supra* Part II.C.

239. *See Sherman v. Am. Cyanamid Co.*, No. 98-4035, 1999 WL 701911, at *1 (6th Cir. Sept. 1, 1999); *see also supra* pp. 89-90.

The older women of the past decade were often taught to not seek careers or challenge male authority. Thus, it is no surprise that if and when they are discriminated against in favor of older men (who are thought to age gracefully and gain power and wisdom with age), or in favor of younger women (who have their beauty and none of the negative stereotypes associated with older women), they either do not recognize the discrimination, or do not believe that there is anything they can do about it.

In fact, as we saw above, without the recognition of the sex plus age theory, there often is very little that can be done to remedy the discrimination against older women.²⁴⁰ Only when the law and society begin to recognize this very real, underprivileged subclass of women, will older women really be given the benefit of equal opportunity in employment. This, in turn, will hopefully serve to rid the negative stereotypes attributed to older women.

240. See *supra* Part III.A.

