

Age Bias Ruling May Lower Bar For Other 'Sex-Plus' Claims

By **Matt Cooper and Darin Smith** (August 20, 2020)

The U.S. Court of Appeals for the Tenth Circuit — which hears appeals from federal district courts in Colorado, Kansas, Oklahoma, New Mexico, Utah and Wyoming — just became the first federal appellate court to explicitly rule that employees can bring so-called sex-plus-age claims against employers under Title VII of the Civil Rights Act.

Relying heavily on this year's landmark U.S. Supreme Court decision in *Bostock v. Clayton County*, which clarified that Title VII prohibits sexual orientation-based discrimination in employment, in *Frappied v. Affinity Gaming Black Hawk LLC*, the Tenth Circuit last month concluded that older female employees may bring claims under Title VII alleging sex-plus-age discrimination, even though older age is not a characteristic protected by Title VII.

In *Affinity Gaming*, female employees, each of whom was age 40 or older when they were terminated and replaced by their employer, brought sex-plus-age disparate impact and disparate treatment claims under Title VII, as well as separate age-based discrimination claims under the Age Discrimination in Employment Act, or ADEA.

The Title VII claims were distinctive in the sense that the older female plaintiffs alleged a combination of discriminatory motives, one of which — sex — is covered by Title VII, which prohibits discrimination on the basis of race, color, religion, sex and national origin, and the other was age, a characteristic that is not protected under Title VII but is covered under the ADEA.

Although the Tenth Circuit acknowledged that the plaintiffs' sex-plus-age claims were not based on a combination of characteristics all of which were protected under Title VII, the court was persuaded by precedent holding that Title VII prohibits sex-plus claims in cases even where the "plus" characteristic is not protected under Title VII, such as claims alleging discrimination on the basis of sex, plus married status or sex, plus child-rearing obligations.

Citing *Bostock*, the Tenth Circuit first clarified that employers violate Title VII whenever the alleged discrimination is "based in part on sex." In *Bostock*, the Supreme Court ruled that an employer violates Title VII when it discriminates against employees based on sexual orientation or gender identity.

In so ruling, the Supreme Court held that when an employer terminates or otherwise discriminates against an individual employee on the basis of sexual orientation or gender identity, the employer does so necessarily "because of ... sex." Following and applying the reasoning in *Bostock*, the Tenth Circuit held that if sex plays any impermissible role in the employer's decision, it is prohibited sex-based discrimination even if another contributing factor to the employer's decision is not protected under Title VII standing alone — such as, in this case, age.

The court then explained that *Bostock* permits plaintiffs to prove their plus claims individually and not only as part of a group or subclass of men or women: "[I]f a female



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plaintiff shows that she would not have been terminated if she had been a man — in other words, if she would not have been terminated but for her sex — this showing is sufficient to establish liability under Title VII."

In other words, female plaintiffs do not need to show that all older women were discriminated against to have a cognizable claim. They must only show individual discrimination.

Finally, the Tenth Circuit rejected the employer's argument that the plaintiffs should not be allowed to bring sex-plus-age claims under Title VII because of the availability of relief under the ADEA, explaining in depth the unique role of intersectionality in discrimination.

The practical outcome of *Affinity Gaming* is that sex-plus-age plaintiffs have a viable Title VII claim in the Tenth Circuit, even where age — a characteristic not protected under Title VII — plays a role in an adverse employment action. To state a viable Title VII sex discrimination claim, plaintiffs need only show that they were discriminated against in part based on sex; that is, that they were subjected to unfavorable treatment compared to an employee of the opposite sex who also shares the same plus characteristic.

Furthermore, although the Tenth Circuit opened the door to sex-plus-age claims specifically, it is conceivable and likely that sex-plus claims based on any number of plus characteristics not enumerated under Title VII may also be viable — so long as a plaintiff can demonstrate that sex played some part in an employer's action, conduct or decision.

The Tenth Circuit's ruling thus demonstrates the importance of *Bostock* beyond its obvious explicit recognition of protections for the LGBTQ community. As evidenced by the decision in *Affinity Gaming*, *Bostock* is likely to have a significant impact on courts' increasingly expansive interpretation of federal employment discrimination laws.

Although this ruling currently applies only within the Tenth Circuit, several federal district courts have accepted the viability of sex-plus-age claims under Title VII — including in Iowa, Michigan, Missouri, Pennsylvania and New York — and other circuit courts have acknowledged but not yet resolved the issue. The Tenth Circuit's holding may thus pave the way for other federal appellate courts to allow sex-plus claims under Title VII.

For example, and as the Tenth Circuit noted, in 2010 the U.S. Court of Appeals for the Second Circuit in *Gorzynski v. JetBlue Airways Corp.* declined to recognize age-plus-sex claims in an ADEA context where the plaintiff had a viable ADEA claim standing alone.

Likewise, in 2000 the U.S. Court of Appeals for the Sixth Circuit in *Schatzman v. County of Clermont, Ohio*, declined to rule on the viability of a sex-plus-age claim where it was unnecessary to do so under the facts before the court. Following *Bostock* as extended by *Affinity Gaming*, sister appellate courts may accept future invitations to rule on the viability of sex-plus claims under Title VII.

After the explicit recognition of sexual orientation and gender identity as protected characteristics under Title VII's prohibition on sex discrimination in *Bostock*, employers were already advised to clarify this recognition in their equal employment, nondiscrimination, and anti-harassment policies and training materials.

But astute employers — particularly those with locations in the Tenth Circuit where *Affinity Gaming* is binding precedent — are also advised to review their policies, procedures, and training materials to ensure that they make clear the employer's prohibition on

discrimination against individual employees for mixed reasons, including age, where the employee's sex, sexual orientation, gender identity, race, color, national origin or religion is also implicated.

Employers are advised to familiarize themselves with the unique challenges that intersectional discrimination presents to workers, and be vigilant for — and systemically address and remedy — adverse employment actions that are directed at workers who belong to multiple protected classes or possess more than one protected characteristic. This is not only essential for remaining compliant with the shifting legal landscape Bostock has ushered in, but for promoting inclusivity and diversity in the workplace.

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