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## Extending the Sex-Plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives

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# EXTENDING THE SEX-PLUS DISCRIMINATION DOCTRINE TO AGE DISCRIMINATION CLAIMS INVOLVING MULTIPLE DISCRIMINATORY MOTIVES

MARC CHASE MCALLISTER

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# EXTENDING THE SEX-PLUS DISCRIMINATION DOCTRINE TO AGE DISCRIMINATION CLAIMS INVOLVING MULTIPLE DISCRIMINATORY MOTIVES

MARC CHASE MCALLISTER\*

**Abstract:** Federal employment discrimination statutes make it unlawful to discriminate against employees on the basis of certain protected characteristics, including race, color, religion, national origin, sex, disability, and age. Under Title VII of the Civil Rights Act of 1964, an employer may not discriminate against an employee based on a combination of two protected traits, such as race and sex. Nevertheless, these claims—which this Article refers to as multiple-motive claims—tend to fail when one of the protected traits is age. Whether brought under Title VII or under the Age Discrimination in Employment Act of 1967 (ADEA), this Article argues that courts should authorize discrimination claims combining age with some other immutable characteristic, like race or gender, and proposes an amendment to the ADEA that would authorize such claims.

## INTRODUCTION

Under federal employment discrimination statutes, employees may be protected against workplace discrimination due to their membership in certain protected classes, including race, color, religion, national origin, sex, disability, and age.<sup>1</sup> Discrimination claims typically allege that an employer

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<sup>1</sup> See Age Discrimination in Employment Act of 1967 (ADEA) § 4, 29 U.S.C. § 623(a) (2012) (making it unlawful to discriminate against employees on the basis of age); 42 U.S.C. § 2000e-2(a)(1) (2012) (making it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”); Americans With Disabilities Act of 1990 (ADA) § 102, 42 U.S.C. § 12112 (2012) (making it unlawful for an employer to discriminate on the basis of disability). Other significant federal statutes include the Genetic Information Nondiscrimination Act of 2008 (GINA) § 202(a), 42 U.S.C. § 2000ff-1(a) (2012), which prohibits discrimination on the basis of genetic information; the Pregnancy Discrimination Act § 102, 42 U.S.C. § 2000e(k),

has treated employees in a protected class differently than those outside the protected class, such as where an employer promotes male but not equally-qualified female employees,<sup>2</sup> or where an employer imposes different workplace requirements on employees of different races.<sup>3</sup> In some instances, however, an employee claims discrimination due to a combination of protected traits, such as race and gender, rather than either trait alone.<sup>4</sup> This Article refers to these types of claims as “multiple-motive” claims.<sup>5</sup>

When such multiple-motive claims involve Title VII protected classes, courts generally permit such claims.<sup>6</sup> Courts agree, for example, that a *black female* may claim discrimination based on her membership in a particular subclass of female employees, rather than against female employees as a whole, due to discrimination on the basis of both race and sex, each of which are protected under Title VII.<sup>7</sup> Courts are split, however, regarding whether to permit multiple-motive claims when age discrimination is alleged under the Age Discrimination in Employment Act of 1967 (ADEA),<sup>8</sup> such that an *older female* in the ADEA’s protected class of forty-and-older employees<sup>9</sup> often cannot claim she was treated differently than women under forty (as opposed to *all* younger employees of both sexes).<sup>10</sup> This is true even though the discriminatory variables—sex and race in the Title VII con-

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which states that Title VII’s prohibition against sex discrimination applies to discrimination on the basis of pregnancy; and, the Rehabilitation Act of 1973 (“Rehabilitation Act”), Pub. L. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2012)), which prohibits discrimination against federal government employees based on disabilities.

<sup>2</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235–36 (1989).

<sup>3</sup> See, e.g., *Vazquez v. Caesar’s Palace Stream Resort*, No. 3:CV-09-0625, 2013 WL 6244568, at \*2, \*6 (M.D. Pa. Dec. 3, 2013) (holding that the plaintiff, an African-American employee, brought a successful race discrimination claim where she was fired for wearing her hair in braids while a white employee was not).

<sup>4</sup> See, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416–17 (10th Cir. 1987) (deeming black women a protected subclass under Title VII); *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032–33 (5th Cir. 1980) (same).

<sup>5</sup> Cf. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 190–92 (2009) (Breyer, J., dissenting) (discussing the concepts of “mixed-motives” and “multiple-motives”).

<sup>6</sup> See *infra* notes 86–123 and accompanying text.

<sup>7</sup> See *infra* note 102 and accompanying text; see also 42 U.S.C. § 2000e-2(a)(1).

<sup>8</sup> See generally 29 U.S.C. §§ 623–634.

<sup>9</sup> See *id.* § 623(a) (making it unlawful to discriminate against employees on the basis of age); *id.* § 631(a) (limiting the ADEA’s protection to those employees who are at least forty years of age).

<sup>10</sup> See *infra* notes 180–225 and accompanying text; see also *Smith v. Bd. of Cty. Comm’rs of Johnson Cty.*, 96 F. Supp. 2d 1177, 1187–88 (D. Kan. 2000) (stating that because “[p]laintiff’s age-plus-gender claim is based on defendants’ alleged discrimination against . . . older women . . . plaintiff must show differential treatment between herself and younger women” to prevail).

text, and sex and age in the ADEA context—each involve protected classifications and immutable characteristics the employee cannot change.<sup>11</sup>

From this jurisprudential backdrop, this Article examines two age-related issues that have splintered courts. First, this Article considers whether Title VII discrimination claims combining sex and age should be recognized as valid under well-established “sex-plus” discrimination doctrine,<sup>12</sup> and argues that such claims should be permitted to combat discrimination against female employees aged forty and older.<sup>13</sup> Next, this Article considers the analogous issue of “age-plus” discrimination claims under the ADEA and argues that such claims should be permitted when the ADEA’s protected characteristic, age, is combined with another immutable characteristic, like race or gender.<sup>14</sup>

Although there are numerous arguments for extending the sex-plus discrimination doctrine in this manner, this Article primarily points to established sex-plus discrimination precedents as evidence that discrimination against subclasses of protected employees (such as black females) should not go unpunished, and argues that subgroups of employees in the ADEA’s protected class (such as females aged forty or older) deserve the same protections.<sup>15</sup> In addition, this Article addresses the primary obstacle to plus discrimination claims under the ADEA, namely, the requirement that an ADEA plaintiff prove that his or her age was the but-for cause of the employer’s adverse action,<sup>16</sup> which, according to some courts, precludes multiple-motive ADEA claims.<sup>17</sup> Despite the apparent textual basis for these

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<sup>11</sup> See *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1089–92 (5th Cir. 1975) (discussing the courts’ application of sex-plus discrimination doctrine to sex-plus immutable characteristics).

<sup>12</sup> See *infra* notes 52–179 and accompanying text.

<sup>13</sup> See *infra* notes 229–252 and accompanying text.

<sup>14</sup> See *infra* notes 253–341 and accompanying text; see also *Jefferies*, 615 F.2d at 1033 (explaining that sex-plus discrimination claims are permitted where the “plus” factor pertains to an immutable characteristic or the exercise of a fundamental right).

<sup>15</sup> See *infra* notes 226–341 and accompanying text. Even courts rejecting age-plus-sex claims have conceded this point. See, e.g., *Bauers-Toy v. Clarence Cent. Sch. Dist.*, No. 10-CV-845, 2015 WL 13574291, at \*6–7 (W.D.N.Y. Sept. 30, 2015) (rejecting sex-plus-age and age-plus-sex claims but stating that “the Court is cognizant of plaintiff’s valid argument that an individual could be treated unlawfully as a result of both age and gender”).

<sup>16</sup> See *infra* notes 184–208 and accompanying text; see also *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (interpreting the ADEA as requiring a plaintiff to prove that his or her “age was the ‘reason’ that the employer decided to act” (citations omitted)).

<sup>17</sup> See, e.g., *Bauers-Toy*, 2015 WL 13574291, at \*7–8 (requiring a plaintiff who sought to bring combination claims based on age and sex to argue exclusively sex discrimination under Title VII, and exclusively age discrimination under the ADEA).

rulings,<sup>18</sup> which this Article contends is overstated,<sup>19</sup> requiring an age-plus plaintiff to argue age discrimination exclusively distorts the true nature of the plaintiff's subgroup discrimination claim and changes the relevant comparator, making the resulting pure age discrimination claim more difficult to prove.<sup>20</sup> Moreover, precluding such combination claims under the ADEA effectively rewards employers for exercising not just one discriminatory motive against a particular employee, such as age, but multiple discriminatory motives, such as age and sex. Nevertheless, given important textual differences between Title VII and the ADEA,<sup>21</sup> courts may remain hesitant to recognize ADEA plus discrimination claims.<sup>22</sup> Accordingly, this Article proposes that Congress amend the ADEA to state that an ADEA plaintiff may prevail upon proof that his or her age was “a motivating factor for an adverse employment action, even though other discriminatory or illegitimate factors may have also motivated the employer.”<sup>23</sup>

Before examining these arguments, Part I of this Article summarizes the core differences between sex discrimination claims brought pursuant to Title VII and age discrimination claims brought under the ADEA.<sup>24</sup> Part II then analyzes various Title VII plus discrimination claims endorsed by courts, including cases involving discrimination on the basis of sex-plus-race, and race-plus-religion.<sup>25</sup> Moving to age-related claims, Part III sum-

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<sup>18</sup> Compare 42 U.S.C. § 2000e-2(m) (stating that an unlawful employment practice under Title VII is proven when “the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”), with *Gross*, 557 U.S. at 180 (holding that, unlike Title VII claims, to prevail on an ADEA claim, a plaintiff must prove “that age was the ‘but-for’ cause of the challenged adverse employment action”); see also *Franchina v. City of Providence*, 881 F.3d 32, 53 (1st Cir. 2018) (rejecting an employer’s argument in a sex-plus case that a plaintiff must prove that the discrimination would not have occurred but for her gender because “Title VII requires no such proof”; rather, Title VII “bars discrimination when sex is ‘a motivating factor,’ not ‘the motivating factor’” (citing 42 U.S.C. § 2000e-2(m))).

<sup>19</sup> See *infra* notes 254–320 and accompanying text.

<sup>20</sup> See *Jefferies*, 615 F.2d at 1032–33 (recognizing that “[i]f both black men and white women are considered to be within the same protected class as black females for purposes of the [McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) test] . . . no remedy will exist for discrimination which is directed only toward black females”); *Arnett v. Aspin*, 846 F. Supp. 1234, 1238 (E.D. Pa. 1994) (recognizing that if plaintiff’s “sex-plus-age” claim is not viable under Title VII, then she must instead present two separate claims—“one for sex discrimination and another for age discrimination”—neither of which would survive summary judgment).

<sup>21</sup> See *supra* note 18.

<sup>22</sup> See, e.g., *Luce v. Dalton*, 166 F.R.D. 457, 461 (S.D. Cal.), *aff’d*, 167 F.R.D. 88 (S.D. Cal. 1996) (rejecting the “age-plus” theory of discrimination in part because allowing a plaintiff “to aggregate claims under four completely different statutes, as an extension of ‘sex-plus’ theories of discrimination, would amount to judicial legislation”).

<sup>23</sup> Cf. 42 U.S.C. § 2000e-2(m).

<sup>24</sup> See *infra* notes 29–51 and accompanying text.

<sup>25</sup> See *infra* notes 52–123 and accompanying text.

marizes the split among courts regarding Title VII sex-plus-age claims<sup>26</sup> and Part IV examines a related judicial split on ADEA age-plus discrimination claims.<sup>27</sup> Finally, Part V argues that Title VII should be read to authorize sex-plus-age discrimination claims, that ADEA age-plus discrimination claims are valid as well, and finally, that an amendment to the ADEA would help clarify the law regarding multiple-motive claims.<sup>28</sup>

## I. SEX DISCRIMINATION AND AGE DISCRIMINATION CLAIMS

Federal employment discrimination statutes protect employees against workplace discrimination on the basis of a number of protected characteristics, such as race or religion.<sup>29</sup> Regardless of the protected category at issue, employees usually assert one of four types of claims: disparate treatment,<sup>30</sup> disparate impact,<sup>31</sup> harassment,<sup>32</sup> or retaliation.<sup>33</sup> Although all four claims are generally available across the federal anti-discrimination statutes, victims of employment discrimination usually pursue claims of disparate treatment, which require proof of intentional discrimination, or claims of disparate impact, which do not.<sup>34</sup>

The most comprehensive federal statute governing employment discrimination is Title VII of the Civil Rights Act of 1964, which makes it unlawful for employers to discriminate on the basis of race, color, religion, sex, and national origin.<sup>35</sup> Title VII became effective on July 2, 1965, and was amended in 1991 to clarify that a violation of the statute may be proven

<sup>26</sup> See *infra* notes 124–179 and accompanying text.

<sup>27</sup> See *infra* notes 180–225 and accompanying text.

<sup>28</sup> See *infra* notes 226–341 and accompanying text.

<sup>29</sup> See *supra* note 1.

<sup>30</sup> See, e.g., *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 985–86 (1988).

<sup>31</sup> See, e.g., *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (interpreting the ADEA as authorizing recovery on a disparate impact theory); *Griggs v. Duke Power*, 401 U.S. 424, 430–31 (1971) (authorizing disparate impact claims under Title VII).

<sup>32</sup> See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (authorizing sexual harassment claims under Title VII); *Rickard v. Swedish Match N. Am., Inc.*, 773 F.3d 181, 184–85 (8th Cir. 2014) (discussing workplace harassment claims based on either sex or age).

<sup>33</sup> See, e.g., 42 U.S.C. § 2000e-3 (2012) (making it unlawful under Title VII “for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter”); 29 U.S.C. § 623(d) (2012) (making it unlawful under the ADEA “for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by [the ADEA], or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter”).

<sup>34</sup> *Watson*, 487 U.S. at 986–87.

<sup>35</sup> See Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1) (2012).

when “the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other [non-discriminatory] factors also motivated the practice.”<sup>36</sup>

Before the 1991 amendments, if a Title VII plaintiff proved that his or her protected characteristic “played a motivating part in an employment decision,” the defendant could avoid liability by proving “that it would have made the same decision even if [it] had not taken [that factor] into account.”<sup>37</sup> In other words, a defendant that acted with a discriminatory motive could still completely avoid liability if it had some additional non-discriminatory motivation for its employment decision.<sup>38</sup> In changing the law on such “mixed-motive” claims, Congress’s addition of a “motivating factor” standard in Title VII effectively expanded the relief available to a plaintiff who could demonstrate that an unlawful criterion played a “motivating part” in an employment decision, even though the employer was able to show that it would have made the same decision regardless.<sup>39</sup>

Unlike Title VII, the ADEA protects employees from discrimination “because of such individual’s age,”<sup>40</sup> a protection that is limited to those aged forty and older.<sup>41</sup> Although the ADEA tracks much of the language of Title VII, including the statute’s “because of” language preceding its delineation of protected classifications,<sup>42</sup> the ADEA contains one key difference. Unlike Title VII, which was amended to authorize discrimination claims where an improper consideration was “a motivating factor” for an employer’s

<sup>36</sup> See Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m) (2012) (emphasis added).

<sup>37</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

<sup>38</sup> See *id.*; see also *id.* at 259–60 (White, J., concurring) (explaining that in “pretext” cases, “the issue is whether either illegal or legal motives, but not both, were the ‘true’ motives behind the decision,” whereas in “mixed-motives” cases, “there is no one ‘true’ motive behind the decision,” which is instead “a result of multiple factors, at least one of which is legitimate” (citations omitted)); L. Camille Hébert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive Wards Cove and the Civil Rights Act of 1990?*, 32 B.C. L. REV. 1, 55 (1990) (explaining the concept of pretext as one where the employer has “purpose or intent,” because “‘pretext’ is ‘a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs’” (citations omitted)).

<sup>39</sup> *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 552 (10th Cir. 1999) (citing 42 U.S.C. § 2000e-5(g)(2)(B)).

<sup>40</sup> 29 U.S.C. § 623(a).

<sup>41</sup> *Id.* § 631(a).

<sup>42</sup> Compare *id.* § 623(a)(1) (making it unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age”), with 42 U.S.C. § 2000e-2(a)(1) (making it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”).



adverse action,<sup>43</sup> the ADEA does not contain an analogous provision.<sup>44</sup> Rather, the ADEA's causation standard is limited to the phrase, "because of . . . age."<sup>45</sup>

Interpreting the ADEA's "because of . . . age" requirement, the Supreme Court ruled in *Gross v. FBL Financial Services, Inc.* that an ADEA plaintiff in any disparate treatment action "must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action."<sup>46</sup> Thus, in an ADEA case, unlike a Title VII case, a plaintiff may not prevail by showing that age was simply "a motivating factor" if another, non-discriminatory factor also motivated the employer.<sup>47</sup> Rather, an ADEA plaintiff must prove that he suffered an adverse employment action "because of" his age.<sup>48</sup> Accordingly, under the ADEA, there is no such thing as a so-called "mixed-motive" claim—i.e., one involving a combination of both legitimate and illegitimate motives.<sup>49</sup> In addition, no mixed-motive "'same decision' affirmative defense" exists under the ADEA: the employer either acted "'because of' the plaintiff's age or it did not."<sup>50</sup> The plaintiff's age must be the employer's "one 'true' motive."<sup>51</sup>

## II. PLUS DISCRIMINATION CLAIMS UNDER TITLE VII

As noted, Title VII prevents employers from taking adverse action against employees on the basis of sex, among other immutable characteristics.<sup>52</sup> Under the sex-plus doctrine, a plaintiff, often female, may bring a Title VII claim for sex discrimination if she can show that her employer

<sup>43</sup> See 42 U.S.C. § 2000e-2(m).

<sup>44</sup> See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173–75 (2009) (internal quotation marks and citation omitted).

<sup>45</sup> See 29 U.S.C. § 623(a).

<sup>46</sup> *Gross*, 557 U.S. at 180; see also *id.* at 177–78 (recognizing that "the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in *any other ADEA disparate-treatment action*," where "[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision" (emphasis added)).

<sup>47</sup> See *id.* at 173–75 (internal quotation marks and citation omitted).

<sup>48</sup> See *Mora v. Jackson Mem'l Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir. 2010) (internal quotation marks and citation omitted).

<sup>49</sup> See *Gross*, 557 U.S. at 178–80; see also *Price Waterhouse*, 490 U.S. at 259–60 (White, J., concurring).

<sup>50</sup> *Mora*, 597 F.3d at 1204; see also *Gross*, 557 U.S. at 180 ("The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.").

<sup>51</sup> *Price Waterhouse*, 490 U.S. at 260 (White, J., concurring).

<sup>52</sup> See 42 U.S.C. § 2000e-2(a)(1) (2012).

discriminated against her not because of her gender per se, but because of the combination of her gender plus some additional factor.<sup>53</sup>

As courts have developed the doctrine, the additional “plus” factor in a sex-plus case must pertain either to an immutable characteristic or a fundamental right.<sup>54</sup> In the immutable characteristic category, for example, if an employer discriminates against black females, an employee within that particular subclass may claim discrimination even though the employer does not discriminate against either blacks as a whole (including black men) or females as a whole (including white women).<sup>55</sup> In the fundamental right category, for example, if an employer refuses to hire women with children but has no such hiring policy for men with children, that employer’s differential treatment between genders based on the additional factor of having children (representing the exercise of a fundamental right) constitutes discrimination, particularly when that employer’s decision is based on a gender stereotype the law seeks to eradicate.<sup>56</sup>

At its core, then, “sex-plus claims are a flavor of gender discrimination claims where an employer classifies employees on the basis of sex *plus* another characteristic.”<sup>57</sup> In this sense, sex-plus claims represent a form of subgroup discrimination, in which an employer treats only a particular segment of male or female employees in a discriminatory manner.<sup>58</sup> As the United States Court of Appeals for the Second Circuit has noted, “[t]he term ‘sex plus’ . . . is simply a heuristic developed . . . to affirm that plaintiffs can [claim sex discrimination] even when not all members of a disfavored class

<sup>53</sup> See *Franchina v. City of Providence*, 881 F.3d 32, 54 (1st Cir. 2018) (recognizing that in sex-plus claims, “the simple question posed . . . is whether the employer took an adverse employment action *at least in part* because of an employee’s sex,” and applying the sex-plus theory to a plaintiff who was allegedly discriminated against at least in part because of the plaintiff’s gender where the “plus-factor” was sexual orientation (citation omitted)).

<sup>54</sup> *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1033 (5th Cir. 1980); *Arnett v. Aspin*, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994).

<sup>55</sup> See *Jefferies*, 615 F.2d at 1034.

<sup>56</sup> See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544–45 (1971) (Marshall, J., concurring); see also *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45 (1st Cir. 2009) (discussing sex-plus discrimination and concluding that, under Title VII, “an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities”; rather, “[t]he essence of Title VII in this context is that women have the right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities”); *Smith v. AVSC Int’l, Inc.*, 148 F. Supp. 2d 302, 308 (S.D.N.Y. 2001) (stating that the sex-plus theory “recognizes that it is impermissible to treat men with an additional characteristic more or less favorably than women with the same additional characteristic”).

<sup>57</sup> See *Franchina*, 881 F.3d at 52 (internal quotation marks and citation omitted).

<sup>58</sup> See *Myers v. Goodwill Indus. of Akron, Inc.*, 701 N.E.2d 738, 743 (Ohio Ct. App. 1997) (stating that “[t]he point behind the establishment of the sex-plus discrimination theory is to allow Title VII plaintiffs to survive summary judgment when the defendant employer does not discriminate against *all* members of the sex”).

are discriminated against.”<sup>59</sup> For this reason, an employer in a sex-plus case cannot justify its discriminatory actions towards a particular subgroup of women simply by pointing to its favorable treatment of other women outside that particular subgroup.<sup>60</sup>

Section A of this Part examines sex-plus claims involving a fundamental right.<sup>61</sup> Section B of this Part examines plus claims involving immutable characteristics, including claims involving sex-plus-race and race-plus-religion.<sup>62</sup>

### *A. Title VII Sex-Plus Discrimination Claims Involving a Fundamental Right*

The Supreme Court first held that Title VII could be violated by an employer’s discriminatory treatment of a subclass of women in 1971 in *Phillips v. Martin Marietta Corp.*<sup>63</sup> In *Phillips*, the Court unanimously found that an employer could be liable for sex discrimination for its policy of refusing to employ women with pre-school age children, without a similar rule for men with such children.<sup>64</sup> Overturning a grant of summary judgment for the defendant, the Court explained that Title VII “requires that persons of like qualifications be given employment opportunities irrespective of their sex,” a principle that was likely violated by the employer’s gender-based hiring policy.<sup>65</sup> Focusing on the rights of the particular affected individuals, *i.e.*, women with pre-school age children, the Court thus deemed it irrelevant that 75–80% of the persons hired for the position at issue were women (albeit those without young children) because gender discrimination occurred through the use of “one hiring policy for women and another for men.”<sup>66</sup>

In a more recent example where the plus factor in a sex-plus claim involved the exercise of a fundamental right, the United States Court of Ap-

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<sup>59</sup> *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004).

<sup>60</sup> *See Phillips*, 400 U.S. at 543–44 (finding that a policy of refusing to hire women with pre-school age children discriminates on the basis of sex even though at least 75% of those hired for the position were women).

<sup>61</sup> *See infra* notes 63–85 and accompanying text.

<sup>62</sup> *See infra* notes 86–123 and accompanying text.

<sup>63</sup> 400 U.S. 542 (1971).

<sup>64</sup> *Id.* at 544.

<sup>65</sup> *Id.* For purposes of remand, the majority clarified that the employer’s hiring policy might be upheld if the employer could show that the policy “is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” *Id.* (internal quotation marks and citation omitted). Writing separately, Justice Marshall argued that such a defense would not be appropriate in this particular case. *See id.* at 544–47 (Marshall, J., concurring).

<sup>66</sup> *Id.* at 543–44 (majority opinion).

peals for the Second Circuit in 2004 considered a discrimination claim brought by school psychologist, Elana Back, after she was denied tenure due to an allegedly stereotypical view that young mothers could not balance work and home obligations.<sup>67</sup> Treating the case as one of “sex stereotyping”<sup>68</sup> against the particular subgroup of women with children, the court noted that, as in *Phillips*, “discrimination against one employee cannot be cured . . . solely by favorable . . . treatment of other employees of the same . . . sex,”<sup>69</sup> as it is the rights of individual employees that truly matter.<sup>70</sup> Accordingly, the court rejected the employer’s argument that it was immune from Back’s allegations of gender discrimination simply because, “in the year that Back was hired, 85% of the teachers employed at [the school] were women, and 71% of these women had children.”<sup>71</sup> Rather, “what matters is how Back was treated.”<sup>72</sup> And on this point, the court found evidence that the decision-makers who denied Back tenure had stereotyped her “as a woman and mother of young children, and thus treated her differently than they would have treated a man and father of young children.”<sup>73</sup> Such evidence, according to the court, was enough for Back’s discrimination claim to survive summary judgment.<sup>74</sup>

In another example of a sex-plus discrimination claim with a plus characteristic involving the exercise of a fundamental right, the United States District Court for the Eastern District of Pennsylvania in 1997 ruled in *McGrenaghan v. St. Denis School* that a teacher could maintain a Title VII sex discrimination claim as a member of a subclass of women with disabled children.<sup>75</sup> Finding evidence of discriminatory animus against moth-

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<sup>67</sup> See *Back*, 365 F.3d at 113; see also *id.* at 115 (describing the alleged stereotyping behavior). Notably, Back brought her sex discrimination claim under the Equal Protection Clause, which the court found to encompass sex-plus claims. See *id.* at 117–19 (holding that “[a]n employment discrimination plaintiff alleging the violation of a constitutional right may bring suit under § 1983 alone, and is not required to plead concurrently a violation of Title VII” (citations omitted)).

<sup>68</sup> *Id.* at 113.

<sup>69</sup> *Id.* at 121–22 (quoting *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001)).

<sup>70</sup> See *id.* at 122 (noting that “what matters is how Back was treated”). The Supreme Court later emphasized this point in subsequent discrimination cases. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 453–55 (1982) (stating that the purpose of Title VII “is the protection of the individual employee, rather than the protection of the minority group as a whole,” and explaining that under Title VII, “Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees’ group”).

<sup>71</sup> *Back*, 365 F.3d at 122.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 130 (analyzing the evidence of discriminatory motives and comments of plaintiff’s supervisors).

<sup>74</sup> See *id.* Notably, summary judgment was denied only against the actual decision makers in Back’s case. *Id.*

<sup>75</sup> 979 F. Supp. 323, 327 (E.D. Pa. 1997).

ers with disabled children, including discriminatory statements made by the school's principal, the court rejected the defendant's argument that no gender discrimination had occurred because the person ultimately selected for the position was also a woman.<sup>76</sup> Here, the court found it significant that the woman selected for the position was "not a member of the subclass of women with disabled children" to which the plaintiff belonged.<sup>77</sup> Accordingly, the court denied summary judgment to the defendant on plaintiff's sex discrimination claim.<sup>78</sup>

*Phillips, Back*, and *McGrenaghan* are examples of sex-plus discrimination claims brought by female employees treated differently for having children.<sup>79</sup> Under the sex-plus doctrine, courts have invalidated discrimination against subclasses of women based on their exercise of other fundamental rights.<sup>80</sup> Courts have found, for example, that an employer's differential treatment of married women, as opposed to married men, violates Title VII.<sup>81</sup>

In the sex-plus-marital status cases, as in *Phillips, Back*, and *McGrenaghan*, courts have rejected employer arguments that there was no discrimination "on the basis of sex" because the employer did not discriminate against *women as a whole*.<sup>82</sup> In one such case, the United States Court of Appeals for the Seventh Circuit noted that an employer's "no-marriage rule"—which it applied only to female flight stewardesses—violated Title

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See *supra* notes 63–78 and accompanying text; see also *Chadwick*, 561 F.3d at 48 (1st Cir. 2009) (affirming denial of summary judgment to defendant-employer on a similar sex-plus discrimination claim); *Philipsen v. Univ. of Michigan Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at \*6–9 (E.D. Mich. Mar. 22, 2007) (recognizing a similar claim, but granting summary judgment to the defendant on the plaintiff's sex-plus claim due to a lack of evidence that the plaintiff was treated differently than males with young children).

<sup>80</sup> See *Jefferies*, 615 F.2d at 1033 (noting that "courts have [identified meritorious sex-plus cases] as involving regulations which concern sex plus an immutable characteristic or a constitutionally protected activity such as marriage or child rearing").

<sup>81</sup> See, e.g., *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1202–05 (10th Cir. 1997) (ruling in a sex-plus-marital status claim that a female plaintiff must show that her male co-workers with the same marital status were treated differently, and reversing jury verdict for plaintiff due to a lack of evidence on that point); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (holding that a "no-marriage rule" for stewardesses violates Title VII); *Gee-Thomas v. Cingular Wireless*, 324 F. Supp. 2d 875, 884, 888 (M.D. Tenn. 2004) (recognizing a sex-plus claim on the basis of sex plus marital and family status, but dismissing plaintiff's claim because she failed to "establish a triable question of fact as to pretext"); *Rauw v. Glickman*, No. CV-99-1482-ST, 2001 WL 34039494, at \*8–9 (D. Or. Aug. 6, 2001) (authorizing a sex-plus-marital status claim under Title VII); *Jurinko v. Wiegand Co.*, 331 F. Supp. 1184, 1187–88 (W.D. Pa. 1971) (holding that an employer's refusal to hire married women violated Title VII).

<sup>82</sup> See, e.g., *Jurinko*, 331 F. Supp. at 1187 (rejecting the argument).

VII even though the rule did not apply to all female employees, “for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.”<sup>83</sup> Thus, the Seventh Circuit declared, Title VII’s effect “is not to be diluted because discrimination adversely affects only a portion of the protected class.”<sup>84</sup> As another court declared, “[i]f [a] company discriminates against married women, but not against married men, the variable becomes women, and the discrimination, based on solely sexual distinctions, invidious and unlawful.”<sup>85</sup>

### *B. Title VII Plus Discrimination Claims Involving Immutable Characteristics*

As noted, the sex-plus theory of discrimination applies when discrimination has occurred against a subclass of male or female employees based on either (1) the exercise of a fundamental right, such as the right to marry or have children; or (2) an immutable characteristic, such as the plaintiff’s race.<sup>86</sup> In the past 50 years, courts have recognized various “plus claims” under Title VII involving a combination of immutable characteristics—some protected by Title VII and others protected by different anti-discrimination statutes.<sup>87</sup> Courts have recognized claims of sex-plus-race (for example, alleging discrimination against black females<sup>88</sup> or against Asian females),<sup>89</sup> race-plus-religion (for example, alleging discrimination against a white Jewish male),<sup>90</sup> and most importantly to the instant analysis, sex-plus-age (for example, alleging discrimination against older women).<sup>91</sup> This section summarizes exemplary claims involving multiple immutable characteristics.

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<sup>83</sup> *Sprogis*, 444 F.2d at 1197–98 (quoting 29 C.F.R. § 1604.3(a) (2012)) (adopting the reasoning of the Equal Employment Opportunity Commission (EEOC) as expressed in 29 C.F.R. § 1604.3(a)).

<sup>84</sup> *Id.*

<sup>85</sup> *Jurinko*, 331 F. Supp. at 1187.

<sup>86</sup> See Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 87 (2003) (quoting *Arnett v. Aspin*, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994)).

<sup>87</sup> See *infra* notes 92–123 and accompanying text.

<sup>88</sup> See, e.g., *Jefferies*, 615 F.2d at 1034 (recognizing a subclass of black women or a sex-plus-race claim).

<sup>89</sup> See, e.g., *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1561–62 (9th Cir. 1994) (recognizing a subclass of Asian women or a sex-plus-race claim).

<sup>90</sup> See, e.g., *Feingold v. New York*, 366 F.3d 138, 153 (2d Cir. 2004) (finding sufficient evidence “to support an inference that [Feingold] was terminated on the basis of his religion and/or race”).

<sup>91</sup> See, e.g., *Arnett*, 846 F. Supp. at 1240–41 (recognizing a sub-class of older women or a sex-plus-age claim under Title VII).

## 1. Sex-Plus-Race

In 1980, in a leading case involving sex-plus-race discrimination, *Jefferies v. Harris County Community Action Association*, the United States Court of Appeals for the Fifth Circuit acknowledged that Title VII prohibits discrimination against a subclass of *black women*.<sup>92</sup>

In *Jefferies*, plaintiff Dafro Jefferies, a black female, alleged that her employer discriminated against her due to her race and sex.<sup>93</sup> The district court, however, separated Jefferies's single discrimination claim into distinct claims of race discrimination and sex discrimination.<sup>94</sup> From there, the district court rejected Jefferies's race discrimination claim because the promotion she sought was instead filled by a black male.<sup>95</sup> The court further rejected Jefferies's sex discrimination claim based on evidence that 60-70% of the defendant's employees were female, who often held important positions within the organization.<sup>96</sup>

On appeal, the Fifth Circuit found it improper to separate Jefferies's plus discrimination claim into distinct race and sex discrimination claims,<sup>97</sup> and held that discrimination against black females can exist even in the absence of discrimination against black men or white women.<sup>98</sup> Describing "black females as a distinct protected subgroup," the court noted that no remedy would exist for discrimination directed specifically toward black females "[i]f both black men and white women are considered to be within the same protected class as black females."<sup>99</sup> Thus, the court concluded that "when a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant,"<sup>100</sup> as black men and white women must be treated as persons outside the particular subclass of black women.<sup>101</sup>

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<sup>92</sup> 615 F.2d at 1034.

<sup>93</sup> *Id.* at 1028. In her complaint, Jefferies charged that HCCAA discriminated against her in promotion "because she is a woman, up in age and because she is Black." *Id.* at 1029. Jefferies's age-based discrimination claim, however, did not materialize as a live issue at trial, and was not before the court on appeal. *See id.* at 1030.

<sup>94</sup> *See id.* at 1032 (explaining that the district court did not analyze whether the plaintiff was discriminated against "based on a combination of race and sex," and instead "separately addressed Jefferies's claims of race discrimination and sex discrimination").

<sup>95</sup> *Id.* at 1028; *see also id.* at 1030 (affirming the district court's rejection of Jefferies's claim of pure race discrimination in promotion, given that the person promoted to the position at issue was also black).

<sup>96</sup> *Id.* at 1029-31.

<sup>97</sup> *Id.* at 1032.

<sup>98</sup> *Id.* at 1034.

<sup>99</sup> *Id.* at 1032-33.

<sup>100</sup> *Id.* at 1034.

<sup>101</sup> *See id.* at 1032, 1034; *see also Arnett*, 846 F. Supp. at 1239 (discussing *Jefferies*).

Since *Jefferies*, numerous courts have ratified sex-plus claims by subclasses of employees in similar circumstances.<sup>102</sup> In one such case, *Lam v. University of Hawaii*, the United States Court of Appeals for the Ninth Circuit recognized a Title VII plus discrimination claim brought by an Asian woman.<sup>103</sup>

In *Lam*, plaintiff Maivan Clech Lam, a woman of Vietnamese descent, sued the University of Hawaii, among other defendants, claiming the University's Law School violated Title VII by discriminating against her on the basis of her race, sex, and national origin when it twice rejected her application for a faculty position.<sup>104</sup> The district court granted summary judgment to the defendants as to the initial rejection, and ruled in favor of the defendants after a bench trial as to the second rejection. Lam appealed both decisions.<sup>105</sup>

Examining the initial rejection of Lam's application, and focusing specifically on Lam's allegations of race and sex discrimination, the Ninth Circuit declared that "[o]n summary judgment, the existence of a discriminatory motive for the employment decision will generally be the principal question."<sup>106</sup> Regarding that issue, Lam presented testimony that the Chair of the appointments committee, Professor A., had a biased attitude towards women and Asians.<sup>107</sup> Lam also presented evidence that another professor who participated in the hiring process had stated that the new hire should be male.<sup>108</sup>

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<sup>102</sup> See, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416–17 (10th Cir. 1987) (adopting the reasoning of *Jefferies* in recognizing a sex-plus-race hostile work environment claim); *Robertson v. Wells Fargo Bank, N.A.*, No. 3:14-CV-01861 (VLB), 2017 WL 326317, at \*8 (D. Conn. Jan. 23, 2017) (recognizing that “[a] plaintiff may bring a [discrimination] claim under a combination of two protected grounds of Title VII, such as race and gender”); *Walton v. Vilsack*, No. 09-7627, 2011 WL 3489967, at \*10 (E.D. La. Aug. 10, 2011) (rejecting defendant's argument that a “plaintiff cannot present evidence of discrimination against her as an African-American female”); *Johnson v. Dillard's Inc.*, No. 3:03-3445-MBS, 2007 WL 2792232, at \*3–5 (D.S.C. Sept. 24, 2007) (discussing the issue at length and recognizing a combination claim alleging race plus sex discrimination under Title VII); *Nieto v. Kapoor*, 182 F. Supp. 2d 1114, 1140 (D.N.M. 2000) (considering evidence of harassment based on both race and sex); *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 944 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987) (treating plaintiff's race and gender discrimination claims as involving “the class of black women”); *Graham v. Bendix Corp.*, 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) (“Under Title VII, the plaintiff as a black woman is protected against discrimination on the double grounds of race and sex, and an employer who singles out black females for less favorable treatment does not defeat plaintiff's case by showing that white females or black males are not so unfavorably treated.” (citations omitted)).

<sup>103</sup> 40 F.3d at 1561 n.16, 1561–62.

<sup>104</sup> *Id.* at 1554, 1558.

<sup>105</sup> *Id.* at 1558.

<sup>106</sup> *Id.* at 1559.

<sup>107</sup> *Id.* at 1560. On this point, the district court found that “the evidence suggests that Professor A. harbored prejudicial feelings towards Asians and women.” *Id.*

<sup>108</sup> *Id.*



According to the Ninth Circuit, this evidence alone was “sufficient to preclude summary judgment for the defendants.”<sup>109</sup>

Most significantly, the Ninth Circuit found it erroneous for the district court to have relied on the defendants’ favorable treatment of two other candidates for the faculty position at issue: the first an Asian man (tending to defeat a claim of racial discrimination), and the second a white woman (tending to defeat a claim of sex discrimination).<sup>110</sup> According to the Ninth Circuit, the district court apparently viewed racism and sexism as “distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman became a simple matter of performing two separate tasks: looking for racism ‘alone’ and looking for sexism ‘alone,’ with Asian men and white women as the corresponding model victims.”<sup>111</sup> This slicing and dicing of Lam’s plus discrimination claim, according to the Ninth Circuit, failed to account for the fact that “Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women.”<sup>112</sup> Consequently, they may be targeted for discrimination “even in the absence of discrimination against [Asian] men or white women.”<sup>113</sup> Accordingly, the court determined that “when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex.”<sup>114</sup>

## 2. Race-Plus-Religion

Another Title VII plus discrimination case, *Feingold v. New York*, decided by the United States Court of Appeals for the Second Circuit in 2004, is particularly significant in that it involved a combination of immutable characteristics, race and religion, extending beyond the sex-plus framework.<sup>115</sup>

In *Feingold*, a terminated white, Jewish, and gay administrative law judge (ALJ), Larry Feingold, sued his former employer for disparate treatment and a hostile work environment on the basis race, religion, and sexual orientation. Feingold later narrowed his claim to one based on race and reli-

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<sup>109</sup> *Id.* at 1560.

<sup>110</sup> *Id.* at 1561.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1562. The court noted in a footnote that Asian women are subject to particular stereotypes such as geisha, dragon lady, concubine, and lotus blossom. *Id.* at 1562 n.21.

<sup>113</sup> *Id.* at 1562 (quoting *Jefferies*, 615 F.2d at 1032).

<sup>114</sup> *Id.* (citations omitted).

<sup>115</sup> See 366 F.3d at 143.

gion.<sup>116</sup> To support his claim, Feingold presented evidence that most of his colleagues were African-American, non-Jewish, or both, and had expressed particular hostility to both whites and Jews.<sup>117</sup> Thereafter, the district court granted summary judgment to the defendants on all of Feingold's claims, a decision he appealed.<sup>118</sup>

On appeal, the Second Circuit reversed the district court's grant of summary judgment on Feingold's disparate treatment claim.<sup>119</sup> Although the court did not specifically address the viability of plus discrimination claims such as Feingold's, the court's analysis of Feingold's Title VII claim implicitly recognized his claim as one combining race and religion.<sup>120</sup> In analyzing his *prima facie* case, for example, the court found that Feingold belonged to a protected class by "having alleged discrimination on the basis of race and religion."<sup>121</sup> Thereafter, the court found sufficient evidence "to support an inference that [Feingold] was terminated on the basis of his religion and/or race,"<sup>122</sup> including evidence that "ALJs who were not white *and* Jewish would not have been fired for [making the same decisions that led to Feingold's firing], and indeed, were not penalized when they behaved similarly."<sup>123</sup> Thus, one can infer that the Second Circuit considered Feingold's Title VII claim as one alleging subgroup discrimination against a white Jewish employee, as opposed to separate claims of discrimination against whites or against Jews.

### III. THE OUTER EDGES OF TITLE VII PLUS DISCRIMINATION CLAIMS

The sex-plus theory of discrimination is not without limitation.<sup>124</sup> Specifically, courts have rejected attempts to claim sex-plus discrimination for sex-differentiated grooming or appearance requirements.<sup>125</sup> In addition,

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<sup>116</sup> *Id.* at 143, 147.

<sup>117</sup> *See id.* at 144–45.

<sup>118</sup> *Id.* at 143, 148.

<sup>119</sup> *See id.* at 152–56.

<sup>120</sup> *See id.*

<sup>121</sup> *Id.* at 152.

<sup>122</sup> *Id.* at 153.

<sup>123</sup> *Id.* (emphasis added).

<sup>124</sup> *See* *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1033–34 (5th Cir. 1980) (distinguishing cases where courts have accepted sex-plus discrimination from cases where courts have rejected sex-plus discrimination claims).

<sup>125</sup> *See, e.g.,* *Jespersion v. Harrah's Operating Co.*, 444 F.3d 1104, 1105–06 (9th Cir. 2006) (en banc) (rejecting a sex-plus discrimination claim where the employer implemented a sex-differentiated grooming and appearance code that required female employees to wear makeup while prohibiting male employees from wearing makeup); *see also* *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (per curiam) (following the majority of federal courts of appeals in holding that requiring short hair on men and not on women does not violate Title VII).

some courts have rejected attempts to claim subgroup discrimination under Title VII by older male or female employees, reasoning that because the ADEA does not permit a combined age-plus-sex discrimination claim, plaintiffs should not be allowed to recast such a claim as a sex-plus-age claim under Title VII.<sup>126</sup> Section A of this Part examines plus factors that do not involve a fundamental right or immutable characteristic.<sup>127</sup> Section B of this Part then shifts to sex-plus-age claims under Title VII.<sup>128</sup>

*A. Plus Factors Not Involving a Fundamental Right  
or Immutable Characteristic*

Generally speaking, courts have rejected attempts to claim sex-plus discrimination in the context of sex-differentiated grooming codes or other workplace appearance requirements, such as employer policies imposing different makeup or hair length requirements for men and women.<sup>129</sup> Courts have rejected such claims because, unlike valid sex-plus claims, the plus factor in these cases does not involve an immutable characteristic, such as race or national origin, or a constitutionally protected activity, such as marriage or child rearing.<sup>130</sup>

In limiting the scope of sex-plus discrimination in this manner, courts have sought to effectuate the intent of Congress in prohibiting discrimination on the basis of sex, which is to ensure equal job opportunity for males and females based on their qualifications, rather than their sex.<sup>131</sup> For this reason, Title VII should “reach any device or policy of an employer which serves to deny acquisition and retention of a job or promotion in a job to an individual *because* the individual is either male or female.”<sup>132</sup> Articulating this equal employment opportunity objective, while also noting the sex-plus doctrine’s two primary limitations, the United States Court of Appeals for the Fifth Circuit has explained:

Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. Similarly, an employer cannot have one hiring policy for

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<sup>126</sup> See, e.g., *Bauers-Toy v. Clarence Cent. Sch. Dist.*, No. 10-CV-845, 2015 WL 13574291, at \*8 (W.D.N.Y. Sept. 30, 2015).

<sup>127</sup> See *infra* notes 129–137 and accompanying text.

<sup>128</sup> See *infra* notes 138–179 and accompanying text.

<sup>129</sup> See *supra* note 125.

<sup>130</sup> See *Jefferies*, 615 F.2d at 1033.

<sup>131</sup> See *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (discussing Congress’s intent in enacting Title VII).

<sup>132</sup> *Id.*

men and another for women *if* the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity.<sup>133</sup>

Interpreting these principles, the Fifth Circuit found that the sex-plus discrimination doctrine does not apply to an employer's hair length restriction because hair length is not an immutable characteristic, such as the employee's race, nor is it like having pre-school age children, which is also "an existing condition not subject to change."<sup>134</sup> Accordingly, "[i]f [an] employee objects to [such a] grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job."<sup>135</sup>

Or, as the United States Court of Appeals for the D.C. Circuit has explained, different grooming and appearance standards for men and women, such as different hair length requirements, are merely "classifications by sex which do not limit employment opportunities by making distinctions based on immutable personal characteristics, which do not represent any attempt by the employer to prevent the employment of a particular sex, and which do not pose distinct employment disadvantages for one sex."<sup>136</sup> Accordingly, the sex-plus discrimination doctrine does not encompass such classifications.<sup>137</sup>

### *B. Sex-Plus-Age Discrimination Under Title VII*

Numerous courts have authorized sex-plus-age claims as part of the Title VII prohibition against sex discrimination, including the United States District Courts for the Eastern District of Pennsylvania,<sup>138</sup> Northern District of Iowa,<sup>139</sup> Eastern District of Missouri,<sup>140</sup> and Eastern District of Michi-

<sup>133</sup> *Id.* (emphases in original).

<sup>134</sup> *Id.* at 1091–92 (citation omitted).

<sup>135</sup> *Id.* at 1091.

<sup>136</sup> *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336–37 (D.C. Cir. 1973).

<sup>137</sup> *Id.*

<sup>138</sup> *See James v. Teleflex, Inc.*, No. Civ. A. 97-1206, 1998 WL 966009, at \*9–10 (E.D. Pa. Dec. 23, 1998) (denying summary judgment for employer on an older female employee's sex-plus-age discrimination claim under Title VII); *Arnett v. Aspin*, 846 F. Supp. 1234, 1240–41 (E.D. Pa. 1994) (recognizing a "sex-plus-age" claim under Title VII).

<sup>139</sup> *See McGrane v. Proffitt's Inc.*, No. C 97-221-MJM, 2000 WL 34030843, at \*7 (N.D. Iowa Dec. 26, 2000) (recognizing a "sex-plus age" claim under Title VII as a valid "sex" discrimination claim, and stating, "[a]lthough the theory of sex-plus age discrimination has yet to be put squarely before the Eighth Circuit, there is nothing in the Circuit's precedent that would lead this Court to believe such a claim is not viable under Title VII").

gan,<sup>141</sup> among others.<sup>142</sup> However, not all courts agree that Title VII sex-plus-age claims are valid.<sup>143</sup>

### 1. Courts Rejecting Title VII Sex-Plus-Age Discrimination Claims

In numerous cases where a female employee aged forty or older claimed discrimination on the basis of sex-plus-age in violation of Title VII, courts have rejected the claim as unsupported by evidence, thus either refusing to decide whether such claims are viable<sup>144</sup> or failing to discuss the issue in depth.<sup>145</sup> Some courts, however, have outright rejected the attempt to combine sex and age on the basis that authorizing such claims, even under Title VII, might permit plaintiffs to circumvent the ADEA's unique but-for causation principles.<sup>146</sup> Perhaps the best example is a 2015 opinion of the United States District Court for the Western District of New York, *Bauers-Toy v. Clarence Central School District*.<sup>147</sup>

<sup>140</sup> See *Hall v. Mo. Highway & Transp. Comm'n*, 995 F. Supp. 1001, 1005–06 (E.D. Mo. 1998) (recognizing a sex-plus-age claim under Title VII).

<sup>141</sup> See *Block-Victor v. CITG Promotions, LLC*, 665 F. Supp. 2d 797, 808, 808 n.2 (E.D. Mich. 2009) (recognizing as valid “sex plus age” discrimination claims under Title VII, but noting that “[c]ourts have rejected ‘age plus’ theories of discrimination under the ADEA” (citations omitted)).

<sup>142</sup> See, e.g., *Dominguez v. FSI L.A., LLC*, No. CV 15-09683-RSWL-AJWx, 2016 WL 2885861, at \*3 (C.D. Cal. May 17, 2016) (recognizing that “although courts have rejected ‘age-plus’ claims under the ADEA, the Ninth Circuit Court of Appeals had recognized a ‘sex-plus’ theory of discrimination, such that a plaintiff’s combination claim “is adequately pled as a ‘sex-plus-age’ claim under Title VII, even if the claim is not cognizable under the ADEA” (citations omitted)).

<sup>143</sup> See, e.g., *Bauers-Toy*, 2015 WL 13574291, at \*5–8 (rejecting a sex-plus-age claim under Title VII and an age-plus-sex claim under the ADEA).

<sup>144</sup> See, e.g., *Sherman v. Am. Cyanamid Co.*, No. 98-4035, 1999 WL 701911, at \*1, \*5 (6th Cir. Sept. 1, 1999) (declining to decide whether a cause of action for “sex plus age discrimination” exists); *Famighette v. Rose*, 2:17-cv-2553(DRH)(ARL), 2018 WL 2048371, at \*5 (E.D.N.Y. May 2, 2018) (dismissing plaintiff’s claims of gender discrimination and gender-plus-age discrimination under Title VII because plaintiff failed to sufficiently allege “facts suggesting an inference of [even gender] discrimination”).

<sup>145</sup> See, e.g., *Potat v. PSC Auto. Grp., Inc.*, No. 3:03CV129, 2006 WL 2828836, at \*2 (W.D.N.C. Sept. 29, 2006) (recognizing that plaintiff had asserted a Title VII claim “under the theory of either ‘sex’ or ‘sex plus’ discrimination,” but granting summary judgment to defendant in part because plaintiff failed to present sufficient evidence of discrimination); *Best v. GTE Directories Serv. Corp.*, No. Civ. A. 3:92-CV-0163, 1993 WL 13144123, at \*1, \*3 (N.D. Tex. Apr. 8, 1993) (assuming, after a bench trial on plaintiff’s Title VII claims, that the plaintiff had established prima facie cases of sex discrimination and sex-plus-age discrimination, but ultimately rejecting both claims).

<sup>146</sup> See, e.g., *Best v. Johnson*, No. 1:15-CV-00086-NBB, 2018 WL 4145921, at \*1–3 (N.D. Miss. Aug. 30, 2018); *Bauers-Toy*, 2015 WL 13574291, at \*6–7.

<sup>147</sup> See 2015 WL 13574291, at \*6–7.

In *Bauers-Toy*, plaintiff Katherine Bauers-Toy claimed she was discriminated against by her employer, the Clarence Central School District, due to her age and gender given her status as the oldest female teacher in the science department.<sup>148</sup> Only days before trial, the school district filed a motion in limine arguing that Bauers-Toy could not combine age and gender, but instead must present separate discrimination claims.<sup>149</sup> The school district argued that because Title VII, which governs gender discrimination, and the ADEA, which prohibits age discrimination, contain different proof requirements, proceeding on either an “age plus gender” or “gender plus age” claim of discrimination would be “improper.”<sup>150</sup> In response, Bauers-Toy argued that she should be allowed to present a combined claim of sex and age discrimination to highlight evidence that younger women within the broader class of female employees were treated more favorably.<sup>151</sup>

Agreeing with the school district, the court ruled that Bauers-Toy would be required to submit her age-based and sex-based claims separately, as alternative bases for recovery.<sup>152</sup> Given the timing of the court’s opinion—which it issued “on the eve of trial”—the court framed the issue as “how plaintiff’s evidence, which involves two different protected classifications governed by two distinct statutes with separate standards, may properly be presented to the jury.”<sup>153</sup> The court thus considered “whether a ‘gender plus age’ claim is permissible under Title VII and whether an ‘age plus gender’ claim is permissible under the ADEA.”<sup>154</sup>

With respect to the Title VII claim, the court acknowledged that many of the sex-plus cases summarized above—including *Back v. Hastings on Hudson Union Free School District*,<sup>155</sup> *McGrenaghan v. St. Denis School*,<sup>156</sup> and *Feingold v. New York*<sup>157</sup>—“appear[] to be consistent with plaintiff’s argument that she is permitted to present a ‘gender plus’ claim under Title VII.”<sup>158</sup> Nevertheless, the court distinguished those cases given that “the vast majority” of them involved a plus factor consisting of either another Title VII protected characteristic, such as race or religion, or some other “characteristic found to be directly related to gender stereotypes such as

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<sup>148</sup> *Id.* at \*1.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at \*5.

<sup>154</sup> *Id.*

<sup>155</sup> See *supra* notes 67–74 and accompanying text.

<sup>156</sup> See *supra* notes 75–78 and accompanying text.

<sup>157</sup> See *supra* notes 115–123 and accompanying text.

<sup>158</sup> *Bauers-Toy*, 2015 WL 13574291, at \*5.

those attributed to working mothers.”<sup>159</sup> Thus, the court explained, “the distinguishing factor between the *Back* line of cases and this case is that age is neither a protected characteristic under Title VII nor is it related to certain gender-based stereotypes such as . . . motherhood.”<sup>160</sup>

Next, the court examined the distinct proof requirements of Title VII, which permits claims based on a mixed-motive,<sup>161</sup> and the ADEA, which does not.<sup>162</sup> With this distinction in mind, the court reasoned that “allowing plaintiff to argue to the jury that the defendant violated Title VII by discriminating against her on the basis of sex and age would be contrary to the purpose and requirements of the ADEA.”<sup>163</sup> Citing *Gross v. FBL Financial Services, Inc.*, which declared that the ADEA does not allow “a plaintiff [to] establish [age] discrimination by showing that age was simply a motivating factor,”<sup>164</sup> the court explained:

Allowing plaintiff here to present evidence of age discrimination under the auspices of her Title VII gender discrimination claim, which is subject to a more lenient [motivating factor] standard, would be tantamount to allowing plaintiff to argue age discrimination in the context of a mixed-motive theory of discrimination. Such a result stands in direct opposition to the language of the ADEA and the Supreme Court’s holding in *Gross*. In addition, it would provide plaintiffs an end-run around the heightened standards set forth by Congress under the ADEA. Indeed, any employee who believes they are a victim of age discrimination and falls under a category protected by Title VII would be better served by filing a Title VII mixed-motive theory of discrimination, rather than a claim under the ADEA, and arguing that the Title VII factor plus age was the basis for the discriminatory conduct. Such a result could not have been the intent of Congress.<sup>165</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See *Franchina v. City of Providence*, 881 F.3d 32, 53 (1st Cir. 2018) (rejecting an employer’s argument in a sex-plus case that a plaintiff must prove the discrimination would not have occurred but for her gender because “Title VII requires no such proof”; rather, Title VII “bars discrimination when sex is ‘a motivating factor,’ not ‘the motivating factor’” (citing 42 U.S.C. § 2000e-2(m))).

<sup>162</sup> See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (“Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not.”).

<sup>163</sup> *Bauers-Toy*, 2015 WL 13574291, at \*6.

<sup>164</sup> *Id.* (quoting *Gross*, 557 U.S. at 167).

<sup>165</sup> *Id.* (citation omitted).

Accordingly, the court concluded that Bauers-Toy could not argue that her alleged Title VII injuries were motivated by both her gender and her age; rather, “[a]s to her Title VII claim, she must exclusively argue gender discrimination.”<sup>166</sup>

## 2. Courts Authorizing Title VII Sex-Plus-Age Discrimination Claims

Unlike *Bauers-Toy*, numerous courts have authorized sex-plus-age claims as part of the Title VII prohibition against sex discrimination.<sup>167</sup> Two decisions authored by Judge Lowell E. Reed, Jr., of the United States District Court for the Eastern District of Pennsylvania—decided just one year apart—are particularly significant because Judge Reed first permitted one plaintiff to combine sex with age under Title VII,<sup>168</sup> but later rejected the age-plus theory under the ADEA as to the second plaintiff.<sup>169</sup>

In the first case, *Arnett v. Aspin*, decided in 1994, Judge Reed recognized a subgroup of women over age forty under Title VII, along the way rejecting the defendant’s argument that it would be improper to combine a classification protected by Title VII with one protected by another statute.<sup>170</sup> In that case, plaintiff Mary Arnett alleged that she was discriminated against by her employer because she was a female over the age of forty.<sup>171</sup> To support her claim, Arnett presented evidence that two women under thirty were hired over her for the position of equal employment specialist, and that all of her employer’s equal employment specialists had been women under forty or men over forty.<sup>172</sup> The *Arnett* defendant then moved for summary judgment with respect to Arnett’s Title VII sex-plus-age claim, but Judge Reed rejected the motion.<sup>173</sup> Judge Reed explained:

The point behind the establishment of the sex-plus discrimination theory is to allow Title VII plaintiffs to survive summary judgment when the defendant employer does not discriminate against *all* members of the sex. . . . As the Court stated in *Jefferies*, an

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<sup>166</sup> *Id.* at \*7.

<sup>167</sup> See *supra* notes 138–143 and accompanying text.

<sup>168</sup> *Arnett*, 846 F. Supp. at 1240.

<sup>169</sup> *Kelly v. Drexel Univ.*, 907 F. Supp. 864, 875 n.8 (E.D. Pa. 1995) (holding that the plaintiff was not entitled to protection under the subclass of “age-plus-disability”).

<sup>170</sup> 846 F. Supp. at 1240–41. The defendant’s argument rejected by Judge Reed mirrored the defendant’s argument that was accepted in *Bauers-Toy*. See 2015 WL 13574291, at \*1.

<sup>171</sup> *Arnett*, 846 F. Supp. at 1236.

<sup>172</sup> *Id.*

<sup>173</sup> See *id.* at 1237 (explaining that the defendants only sought summary judgment in their favor with respect to the second count of Arnett’s complaint, which alleged sex-plus-age discrimination under Title VII); see also *id.* at 1240 (rejecting defendants’ motion for summary judgment).



employer could discriminate against a discrete group of women—large women, black women, women with children, married women, pregnant women, older women—and be granted summary judgment in their favor because they had indeed filled these positions with other women not in the group. Such a result cannot be condoned. This is true whether or not the “plus” classification is also one afforded protection on its own, such as age under the ADEA.<sup>174</sup>

In reaching this result, Judge Reed further noted that “the current line drawn between viable and nonviable sex-plus claims is adequate—that the ‘plus’ classification be based on either an immutable characteristic or the exercise of a fundamental right.”<sup>175</sup> And, because age is an immutable characteristic, the sex-plus theory of discrimination applies to the “discrete subclass of ‘women over forty.’”<sup>176</sup> On the merits, Judge Reed thus found that Arnett, a woman over forty, had shown a prima facie case of discrimination because: (1) she was a member of the protected “women over forty” subclass; (2) “she was qualified for and applied for the positions in question”; (3) though qualified, “she was denied the positions”; and (4) “other employees outside her protected class were selected, in this case two women under 40.”<sup>177</sup>

Despite recognizing a combined sex-plus-age claim in *Arnett*, Judge Reed was careful to clarify that Arnett’s claim arose under Title VII, rather than the ADEA.<sup>178</sup> Just one year later, in *Kelly v. Drexel University*, Judge Reed rejected an age-plus-disability theory of discrimination under the ADEA, ruling that the “plaintiff [was] not entitled to protection as a member of a subclass of older workers with disabilities.”<sup>179</sup> Since then, numerous courts have likewise considered age-plus claims under the ADEA.

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<sup>174</sup> *Id.* at 1240.

<sup>175</sup> *Id.* at 1241.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1240 (noting that “[i]t is important to remember that the second count of Arnett’s complaint contains a claim for *sex* discrimination, not *age* discrimination”); see also *id.* (stating that “Arnett claims the defendants discriminated against her on the basis of sex in violation of Title VII because they required more of her than they did of male applicants for the position for which she applied,” namely, that she be under the age of forty).

<sup>179</sup> 907 F. Supp. at 875 n.8.

#### IV. AGE-PLUS DISCRIMINATION CLAIMS UNDER THE ADEA

To date, the United States Supreme Court has not considered whether age-plus discrimination claims are valid under the ADEA,<sup>180</sup> and lower courts are split on the issue.<sup>181</sup> This Part examines these competing opinions, with a particular focus on the arguments for and against such claims. Section A of this Part examines how a majority of courts have found age-plus discrimination claims under the ADEA invalid.<sup>182</sup> Section B then examines how a minority of courts have authorized age-plus discrimination claims under the ADEA.<sup>183</sup>

##### *A. The Majority View: Age-Plus Discrimination Claims Are Invalid*

At least eight federal district courts have rejected attempts to claim age-plus discrimination under the ADEA.<sup>184</sup>

Perhaps the most common reason for rejecting ADEA age-plus discrimination claims pertains to the differing proof requirements between Ti-

<sup>180</sup> See *Cartee v. Wilbur Smith Assocs., Inc.*, No. 3:08-4132-JFA-PJG, 2010 WL 1052082, at \*4 (D.S.C. Mar. 22, 2010) (noting that “no Supreme Court opinion . . . appears to have explicitly addressed the propriety of an age plus suit brought under the ADEA”); see also *Fuller v. Meredith Corp.*, No. 17-2335-JWL, 2018 WL 3973147, at \*2 (D. Kan. Aug. 20, 2018) (noting that the Supreme Court has never permitted “age-plus-gender” claims under the ADEA, but also denying the employer’s motion for summary judgment on the issue because “[w]hether or not gender was also a motivating factor, to succeed on this claim plaintiff will be required at trial to show that age was the determining factor”).

<sup>181</sup> See *infra* notes 184–225 and accompanying text.

<sup>182</sup> See *infra* notes 184–208 and accompanying text.

<sup>183</sup> See *infra* notes 209–225 and accompanying text.

<sup>184</sup> See *Famighette v. Rose*, No. 2:17-cv-2553(DRH)(ARL), 2018 WL 2048371, at \*5 (E.D.N.Y. May 2, 2018) (dismissing plaintiff’s age-plus-gender discrimination claim under the ADEA); *Bauers-Toy v. Clarence Cent. Sch. Dist.*, No. 10-CV-845, 2015 WL 13574291, at \*7–8 (W.D.N.Y. Sept. 30, 2015) (rejecting plaintiff’s age-plus-gender theory of discrimination under the ADEA); *Thompson v. City of Columbus*, No. 2:12-cv-01054, 2014 WL 1814069, at \*10 (S.D. Ohio May 7, 2014) (finding that “age-plus-sex claims under the ADEA do not exist”); *Johnson v. Napolitano*, No. 10 Civ. 8545(ALC), 2013 WL 1285164, at \*8–10 (S.D.N.Y. Mar. 28, 2013) (declining to recognize a purported subclass of employees “based on the combined factors of race, gender, color and age”); *Cartee*, 2010 WL 1052082, at \*3–4 (rejecting the argument that the law allows age-plus-gender claims under the ADEA); *McKinney v. City of Hawthorne*, No. CV08-07-GW(Ex), 2008 WL 11338236, at \*1 n.2 (C.D. Cal. Nov. 17, 2008) (rejecting plaintiff’s attempt to argue age-plus-sex discrimination under the ADEA); *Luce v. Dalton*, 166 F.R.D. 457, 461 (S.D. Cal.), *aff’d*, 167 F.R.D. 88 (S.D. Cal. 1996) (finding that “there does not exist in the law theories of ‘age-plus-religion’ or ‘age-plus-disability’ discrimination under the ADEA”); *Kelly v. Drexel Univ.*, 907 F. Supp. 864, 875 n.8 (E.D. Pa. 1995) (rejecting an age-plus-disability theory of discrimination under the ADEA while granting summary judgment to the defendant); see also *Smith v. Bd. of Cty. Comm’rs of Johnson Cty.*, 96 F. Supp. 2d 1177, 1187 (D. Kan. 2000) (declaring that “[n]o district court has explicitly adopted an age-plus-gender theory of liability under the ADEA,” and rejecting plaintiff’s age-plus-gender claim—assuming one exists—due to insufficient evidence).

the VII and ADEA claims.<sup>185</sup> Here, courts have reasoned that a Title VII claim may be proven with evidence that the Title VII discriminatory factor, such as the plaintiff's sex, was *just one motivating factor* for the employer's actions.<sup>186</sup> An ADEA claim, by contrast, requires proof that age was *the sole motivating cause* of the employer's action.<sup>187</sup> This distinction between Title VII and the ADEA is seemingly intentional, given that Congress amended Title VII to permit so-called mixed-motive claims (i.e., one involving both lawful and unlawful motives),<sup>188</sup> but did not amend the ADEA to include similar language despite having amended the ADEA in other ways around the same time.<sup>189</sup>

As previously noted, in *Bauers-Toy v. Clarence Central School District*, the United States District Court for the Western District of New York precluded Title VII sex-plus-age claims because permitting such claims "would be tantamount to allowing plaintiff to argue age discrimination in the context of a mixed-motive theory of discrimination," contravening the ADEA's text, Congressional intent, and *Gross v. FBL Financial Services, Inc.*<sup>190</sup> Having reached this result with respect to the plaintiff's Title VII sex-plus-age claim, it is no surprise that the court reached the same result with respect to the plaintiff's age-plus-sex claim under the ADEA.<sup>191</sup> Again, the court emphasized that because an ADEA plaintiff must prove that her

<sup>185</sup> See, e.g., *Famighette*, 2018 WL 2048371, at \*5 (dismissing plaintiff's age-plus-gender discrimination claim upon finding that courts in the Second Circuit have not entertained mixed-motive cases for age discrimination in light of the Supreme Court's holding in *Gross v. FBL Financial Services, Inc.*, which held that "a plaintiff must prove . . . age was the 'but-for' cause of the challenged adverse employment action" (internal quotation marks and citation omitted)); *Bauers-Toy*, 2015 WL 13574291, at \*7–8; *Cartee*, 2010 WL 1052082, at \*3–4 (declaring that "the court . . . lacks the authority to recognize an age plus claim under the ADEA").

<sup>186</sup> See, e.g., *Cartee*, 2010 WL 1052082, at \*3–4. The 1991 amendments to Title VII instruct that an unlawful employment practice under Title VII, such as the creation of a hostile work environment, is proven when "the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2012); see *Franchina v. City of Providence*, 881 F.3d 32, 53 (1st Cir. 2018) (rejecting an employer's argument in a sex-plus case that a plaintiff must prove the discrimination would not have occurred but for her gender because "Title VII requires no such proof"]) but rather that Title VII "bars discrimination when sex is 'a motivating factor,' not 'the motivating factor'" (citing 42 U.S.C. § 2000e-2(m)).

<sup>187</sup> See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) ("Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor."); see also *Cartee*, 2010 WL 1052082, at \*3–4.

<sup>188</sup> See 42 U.S.C. § 2000e-2(m).

<sup>189</sup> See *Gross*, 557 U.S. at 174 ("Moreover, Congress neglected to add such a [mixed-motive] provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways . . .").

<sup>190</sup> *Bauers-Toy*, 2015 WL 13574291, at \*6.

<sup>191</sup> *Id.* at \*8.

age was the but-for cause of the discriminatory conduct, it would be “logically inconsistent” for a plaintiff to argue that her age was the but-for cause of the harm she incurred at the hands of her employer, “and also that [her employer] took that action on the basis of her gender.”<sup>192</sup> As the court explained, “any evidence that the discriminatory conduct was motivated by plaintiff’s gender would tend to disprove an age claim under the ADEA and would certainly lead to confusion for the jury.”<sup>193</sup> Accordingly, as to her ADEA claim, the court ruled that Bauers-Toy “must exclusively argue age discrimination.”<sup>194</sup> In closing, the *Bauers-Toy* court declared:

[T]he Court finds that it cannot reconcile plaintiff’s claim that she was discriminated against on the basis of both her age and gender with the separate statutory schemes set forth under Title VII and the ADEA, as well as the findings that the jury must make to determine that defendant violated either statute. Simply put, while the Court understands plaintiff’s argument that she was discriminated against based upon the combined characteristics of gender and age, it does not appear that, absent a change in the law . . . she can appropriately combine those arguments in one claim [under] Title VII or the ADEA.<sup>195</sup>

Like *Bauers-Toy*, numerous federal courts have invoked *Gross* to preclude age-plus claims under the ADEA.<sup>196</sup> In *Cartee v. Wilbur Smith Associates, Inc.*, for example, the United States District Court for the District of South Carolina rejected age-plus-sex claims under the ADEA,<sup>197</sup> reasoning that “*Gross* appears to prohibit claims asserting ‘an intersection of motives’ brought pursuant to the ADEA, as only the age motive truly matters.”<sup>198</sup>

Aside from invoking the ADEA’s general prohibition of mixed-motive claims, courts have rejected ADEA age-plus discrimination claims on the basis that authorizing them would amount to “judicial legislation,” a view expressed in 2013 by the United States District Court for the Southern Dis-

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> See, e.g., *Famighette*, 2018 WL 2048371, at \*5 (dismissing plaintiff’s age-plus-gender discrimination claim in light of *Gross*); *Cartee*, 2010 WL 1052082, at \*3–5 (rejecting age-plus-gender claims under the ADEA in light of *Gross*).

<sup>197</sup> *Cartee*, 2010 WL 1052082, at \*3–5.

<sup>198</sup> *Id.* at \*3 (citation omitted). But see *id.* (noting that “*Gross* addressed the burden of persuasion at trial, and several courts to have considered *Gross* have questioned the appropriate breadth of its application beyond that context,” such as in the case of “a judgment on the pleadings”).

trict of New York in *Johnson v. Napolitano*,<sup>199</sup> and by the United States District Court for the Southern District of California in 1996 in *Luce v. Dalton*.<sup>200</sup>

In *Luce*, the plaintiff, a terminated employee, moved to amend his complaint against his former employer to claim “that he was wrongfully terminated because of his age, because of his age plus his religion, because of his age plus being a non-Mormon, and/or because of his age plus his hearing disability.”<sup>201</sup> Rejecting plaintiff’s motion, the court recognized that there is no super-statute to handle every federally protected classification—race, color, sex, religion, national origin, age, and disability—and Congress could have so amended Title VII if that was its intention.<sup>202</sup> Rather, the court observed, “Congress chose to pass entirely separate legislation, providing for an entirely different basis for relief to persons who believe they have been discriminated against in employment based upon their age or disability.”<sup>203</sup> Accordingly, the court felt that “allow[ing] [p]laintiff here to aggregate claims under four completely different statutes, as an extension of ‘sex-plus’ theories of discrimination, would amount to judicial legislation.”<sup>204</sup>

Along with a strict interpretation of *Gross*’s “but-for” causation requirement and judicial legislation concerns,<sup>205</sup> at least seven federal courts rejecting age-plus discrimination claims have cited the apparent lack of case law to support such claims (perhaps erroneously, as the next Part shows).<sup>206</sup>

<sup>199</sup> See 2013 WL 1285164, at \*9 (rejecting the age-plus theory of discrimination in a case involving the combined factors of race, gender, color and age, in part because “no court has cobbled together so many protected characteristics as a viable subgroup,” and recognizing such a subgroup would amount to “judicial legislation”).

<sup>200</sup> See 166 F.R.D. at 461 (rejecting the age-plus theory of discrimination in part because allowing a plaintiff “to aggregate claims under four completely different statutes, as an extension of ‘sex-plus’ theories of discrimination, would amount to judicial legislation”); cf. *Bauers-Toy*, 2015 WL 13574291, at \*6 (“Even if this Court were to connect plaintiff’s age with some type of gender-based stereotype . . . the fact remains that the two protected classes at issue here are governed by their own statutes with wholly separate standards and remedies. . . . The Court finds this indicative of a Congressional intent that age discrimination not be addressed within the context of a Title VII claim.”).

<sup>201</sup> *Luce*, 166 F.R.D. at 458.

<sup>202</sup> See *id.* at 461.

<sup>203</sup> *Id.* Age discrimination is prohibited by the ADEA. See Age Discrimination in Employment Act of 1967 § 4, 29 U.S.C. § 623(a) (2012). Disability discrimination is prohibited by the ADA, Americans With Disabilities Act of 1990 § 102, 42 U.S.C. § 12112 (2012), and, for certain employees, by the Rehabilitation Act § 504, Pub. L. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2012)).

<sup>204</sup> *Luce*, 166 F.R.D. at 461.

<sup>205</sup> See *Gross*, 557 U.S. at 176–77.

<sup>206</sup> See, e.g., *Famighette*, 2018 WL 2048371, at \*5 (rejecting age-plus discrimination claims in part because “[c]ourts in the Second Circuit have not entertained mixed-motive cases for age discrimination”); *Thompson*, 2014 WL 1814069, at \*10 (rejecting age-plus-sex claim under the ADEA based on cases “almost unanimously conclud[ing] that age-plus claims under the ADEA do not exist”); *Johnson*, 2013 WL 1285164, at \*8 (noting that “[e]ven where the courts have rec-

In *McKinney v. City of Hawthorne*, for example, the United States District Court for the Central District of California in 2008 recognized that although courts in the Ninth Circuit had authorized sex-plus claims under Title VII, one district court within the Ninth Circuit had “persuasively rejected any ‘age-plus’ claims under the ADEA.”<sup>207</sup> Accordingly, as to the plaintiff’s age-based discrimination claim, the court limited its analysis to whether the plaintiff could “demonstrate a triable issue of fact as to . . . age alone.”<sup>208</sup>

### *B. The Minority View: Age-Plus Discrimination Claims Are Valid*

At least five federal courts have authorized age-plus discrimination claims under the ADEA.<sup>209</sup> Other courts have recognized a combined sex and age discrimination claim without clearly specifying whether the claim

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ognized two factors, courts have not included age in a protected-factor-plus consideration”); *Cartee*, 2010 WL 1052082, at \*4 (rejecting age-plus-gender claims under the ADEA, and recognizing that although plus claims have been recognized under Title VII, “no United States Supreme Court opinion nor any published Fourth Circuit opinion appears to have explicitly addressed the propriety of an age plus suit brought under the ADEA,” and “courts that have addressed the question have expressly declined to extend plus claims to the ADEA”); *Block-Victor v. CITG Promotions, LLC*, 665 F. Supp. 2d 797, 808 n.2 (E.D. Mich. 2009) (noting that “[c]ourts have rejected ‘age plus’ theories of discrimination under the ADEA”); *McKinney*, 2008 WL 11338236, at \*1 n.2 (rejecting plaintiff’s attempt to argue age-plus-sex discrimination under the ADEA because “at least one court within th[e] Ninth] Circuit has persuasively rejected any ‘age-plus’ claims under the ADEA”); *Luce*, 166 F.R.D. at 461 (finding “no recognizable citation to any case authority [in the materials provided by the plaintiff] which would support the assertion that there exists a viable ‘age-plus’ theory of employment discrimination”).

<sup>207</sup> *McKinney*, 2008 WL 11338236, at \*1 n.2 (citing *Luce*, 166 F.R.D. at 459–61). Notably, the court reached this result despite recognizing that at least one court within the Ninth Circuit had indeed authorized age-plus claims. See *id.* (citing *Good v. U.S. W. Commc’ns, Inc.*, No. 93-302-FR, 1995 WL 67672, at \*1–2 (D. Or. Feb. 16, 1995), as an example of a case permitting a discrimination claim combining age and sex).

<sup>208</sup> *Id.* at \*1 n.2.

<sup>209</sup> See, e.g., *Glover v. Donahoe*, No. 3:12cv189 (JBA), 2013 WL 6183891, at \*3 (D. Conn. Nov. 25, 2013) (recognizing that at summary judgment “a plaintiff is permitted to advance an ‘age-plus’ argument”); *Fratturo v. Gartner, Inc.*, No. 3:11cv113 (JBA), 2013 WL 160375, at \*6–8 (D. Conn. Jan. 15, 2013) (rejecting summary judgment to the defendant on the plaintiff’s ADEA age-plus-disability claim); *Siegel v. Inverness Med. Innovations, Inc.*, No. 1:09-CV-1791, 2009 WL 3756709, at \*1–2 (N.D. Ohio Nov. 6, 2009) (denying summary judgment to the defendant on the plaintiff’s age-plus-gender or gender-plus-age claim of discrimination, and “grant[ing] [the plaintiff] leave to amend her complaint to bring her ‘age plus’ claim under the ADEA”); cf. *Leal v. McHugh*, 731 F.3d 405, 414–15 (5th Cir. 2013) (rejecting an employer’s motion to dismiss the plaintiff’s age discrimination claim and agreeing with the Tenth Circuit’s interpretation of *Gross* in which it rejected the employer’s argument that “age must have been the only factor in the employer’s decision-making process” (internal quotation marks omitted)); *EEOC v. DynMcDermott Petroleum Operations Co.*, 537 F. App’x 437, 448 (5th Cir. 2013) (per curiam) (reversing a district court’s grant of summary judgment in favor of an employer in suit alleging both age and disability as bases for the employer’s adverse employment action).

is cognizable under Title VII or the ADEA,<sup>210</sup> and still other courts have refused to decide the issue where such a decision was unnecessary.<sup>211</sup>

Courts authorizing ADEA age-plus discrimination claims have highlighted the obvious analogy to sex-plus discrimination claims, including sex-plus-age claims under Title VII.<sup>212</sup> In one such case, a female plaintiff alleged that her employer terminated her employment while “retain[ing] male and younger female employees with poorer performance evaluations and less experience.”<sup>213</sup> Denying summary judgment to the defendant on the plaintiff’s age-plus-gender and gender-plus-age discrimination claims, the court reasoned that because the well-established sex-plus doctrine would naturally encompass a sex-plus-age claim, there is no reason age-plus-gender claims should not be actionable as well<sup>214</sup> (even though the court determined that such claims should be brought under the ADEA, rather than under Title VII).<sup>215</sup>

Courts validating age-plus discrimination claims under the ADEA have also read the Supreme Court’s opinion in *Gross* less restrictively than those rejecting such claims, such that age need *not* be the *only* motivating fac-

<sup>210</sup> See, e.g., *Good*, 1995 WL 67672, at \*1–2 (recognizing combined claim of age and sex discrimination without specifying whether claim is cognizable under Title VII or the ADEA); see also *EEOC v. BOK Fin. Corp.*, No. CIV 11-1132 RB/LFG, 2013 WL 12042699, at \*3–5 (D.N.M. Sept. 18, 2013) (rejecting summary judgment to a defendant-employer on the plaintiffs’ age-plus-gender claims alleging discrimination against women over age 40); Plaintiff EEOC’s First Amended Complaint & Jury Trial Demand ¶ 19, *BOK Fin. Corp.*, 2013 WL 12042699 (D.N.M. Sept. 18, 2013) (No. CIV 11-1132 RB/LFG), 2013 WL 8563207 (alleging age-plus-sex discrimination against the plaintiffs “in violation of both the ADEA and Title VII . . . because they are women over 40 years of age”).

<sup>211</sup> See, e.g., *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010) (finding “no need . . . to create an age-plus-sex claim independent from [the plaintiff’s] viable ADEA claim” because “[e]ven if some subset of employees protected by the ADEA were not subject to age-based discrimination, [the plaintiff] may still have encountered such discrimination”); *Smith v. AVSC Int’l, Inc.*, 148 F. Supp. 2d 302, 308 n.3 (S.D.N.Y. 2001) (noting that “[t]he status of the ‘sex plus age’ and ‘age plus sex’ claims is unclear,” but stating that “defendants have not challenged the ‘sex plus’ or ‘age plus’ formulations in this motion, so the issue need not be addressed at this time”); *Smith*, 96 F. Supp. 2d at 1187 (rejecting plaintiff’s age-plus-gender discrimination claim because “[e]ven if [an age-plus-gender] claim is cognizable under the ADEA, plaintiff has failed to present evidence sufficient for a reasonable jury to find in her favor”); see also *Aiello v. Stamford Hosp.*, 487 F. App’x 677, 678 (2d Cir. 2012) (finding that plaintiff “failed to develop [his age-plus-gender argument] in any meaningful way in the District Court . . . and therefore he has waived any reliance on that theory on appeal” (internal quotation marks and citation omitted)).

<sup>212</sup> See, e.g., *Siegel*, 2009 WL 3756709, at \*1–2 (discussing age-plus and sex-plus claims under Title VII and the ADEA, and ultimately granting leave for the plaintiff “to amend her complaint to bring her ‘age plus’ claim under the ADEA”).

<sup>213</sup> *Id.* at \*1.

<sup>214</sup> See *id.* at \*2 (“Inverness offers no reason why ‘age plus’ claims should not be cognizable even if ‘gender plus’ claims are.”).

<sup>215</sup> *Id.* (granting plaintiff “leave to amend her complaint to bring her ‘age plus’ claim under the ADEA,” rather than Title VII).

tor.<sup>216</sup> For example, in 2010, the United States Court of Appeals for the Tenth Circuit rejected the argument that *Gross*'s requirement of "but-for causation" demands proof that an "employer was motivated solely by age when making an adverse employment decision."<sup>217</sup> According to the Tenth Circuit, *Gross* "does not . . . plac[e] a heightened evidentiary requirement on ADEA plaintiffs to prove that age was the sole cause of the adverse employment action."<sup>218</sup> Rather, the ADEA may be violated "if other factors contributed" to the employer's adverse action, as long as "age was the factor that made a difference."<sup>219</sup>

Adopting a similar standard, the United States Court of Appeals for the Fifth Circuit in 2013 explained that *Gross*'s "but-for cause" requirement can be satisfied even where age was not the "sole cause" of the plaintiffs' injury, such that plaintiffs "need not plead that age was the *sole* cause of their injury to survive a motion to dismiss."<sup>220</sup> The Fourth Circuit Court of Appeals has adopted a similar interpretation, holding that age does not need be the "sole cause" of the plaintiff's injury, as long as evidence shows that age was "the determinative factor in th[e] [employer's] decision."<sup>221</sup>

Finally, in a case alleging discrimination on the basis of age-plus-disability, *Fratturo v. Gartner, Inc.*, the United States District Court for the District of Connecticut in 2013 recognized an age-plus claim despite acknowledging *Gross*'s requirement of proving "that age was the 'but-for' cause of the challenged adverse employment action and not just a contributing or motivating factor."<sup>222</sup> Despite this articulation of *Gross*, the *Fratturo* court declared that "a plaintiff is permitted to advance an 'age-plus' argument, to claim that she was discriminated against based on her membership in two protected classes,"<sup>223</sup> thereby authorizing plaintiff's claim of

<sup>216</sup> See, e.g., *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1277–78 (10th Cir. 2010).

<sup>217</sup> *Id.* at 1277.

<sup>218</sup> *Id.* at 1278.

<sup>219</sup> *Id.* (internal quotation marks and citation omitted).

<sup>220</sup> See *Leal*, 731 F.3d at 415 (internal quotation marks omitted).

<sup>221</sup> See *Arthur v. Pet Dairy*, 593 F. App'x 211, 220–21 (4th Cir. 2015) ("[P]ursuant to *Gross*, for an event to be the 'but-for cause,' it need not be the sole cause of the adverse employment action. . . . [Rather], [w]hen evaluating cases like this on summary judgment, our focus is on whether the plaintiff has provided sufficient evidence to cast doubt upon the employer's stated reasons for the employment action, such that a reasonable juror may find age was the determinative factor in that decision.").

<sup>222</sup> *Fratturo*, 2013 WL 160375, at \*6 (quoting *Gorzynski*, 596 F.3d at 106) (internal quotation marks omitted).

<sup>223</sup> *Id.* (citing *Gorzynski*, 596 F.3d at 109).



discrimination “based on her age plus her disability.”<sup>224</sup> In the summary judgment context, other courts have reached similar results.<sup>225</sup>

## V. PROPOSALS

Broadly speaking, this Article seeks to determine whether subgroup discrimination claims combining age with some other characteristic should be recognized as valid, both under Title VII and under the ADEA. Because discrimination against older females is the most likely type of subgroup discrimination claim to arise where age discrimination is at play,<sup>226</sup> section A of this Part first addresses the viability of such a claim under Title VII.<sup>227</sup> After concluding that such claims are indeed valid, section B then considers whether courts should recognize plus discrimination claims under the ADEA.<sup>228</sup>

### A. Title VII Sex-Plus Discrimination Against Older Females or Older Males

Before considering the broader question of whether the sex-plus discrimination doctrine should be extended to the ADEA, it is helpful to first examine the particular age-plus claim most likely to arise: discrimination against a subgroup of older females or older males. This issue is unique because it pits well-established United States Supreme Court sex-plus discrimination precedents, including *Phillips v. Martin Marietta Corp.*,<sup>229</sup> against the Court’s ADEA precedents, including *Gross v. FBL Financial Services, Inc.*<sup>230</sup> As this section shows, the sex-plus discrimination case law and the ADEA case law become difficult to reconcile when applied to discrimination claims combining age with another protected characteristic.

As a starting point, it is important to recognize that sex-plus-age discrimination claims under Title VII are, from a factual standpoint, no different than age-plus-sex claims under the ADEA. As *Bauers-Toy v. Clarence*

<sup>224</sup> *Id.* at \*8.

<sup>225</sup> *See, e.g., Glover*, 2013 WL 6183891, at \*3 (stating, at summary judgment, that “a plaintiff is permitted to advance an ‘age-plus’ argument, to claim that he was discriminated against based on his membership in two protected classes”); *BOK Fin. Corp.*, 2013 WL 12040730, at \*4–5 (denying summary judgment to the defendant-employer in a case where the plaintiff alleged age-plus-gender discrimination due in part to sufficient evidence that the employer “discriminated against [the plaintiff] based on her age, sex, and age plus sex,” and noting that the plaintiff had demonstrated “a triable issue as to whether her age was a ‘but for’ cause of her termination for purposes of the ADEA” (emphasis added)).

<sup>226</sup> *See generally* Porter, *supra* note 86.

<sup>227</sup> *See infra* notes 229–252 and accompanying text.

<sup>228</sup> *See infra* notes 253–341 and accompanying text.

<sup>229</sup> 400 U.S. 542 (1971).

<sup>230</sup> 557 U.S. 167 (2009).

*Central School District* reveals, the two claims are functionally identical in that they involve alleged discrimination against ADEA-protected male or female employees.<sup>231</sup> And, as Part IV demonstrates, there are two ways to view such claims.<sup>232</sup> On the one hand, if age-plus-sex claims under the ADEA are precluded by *Gross*'s conception of but-for causation—under which an ADEA plaintiff must prove that age was “the reason”<sup>233</sup> for the adverse employment action as opposed to “simply a motivating factor”<sup>234</sup>—then sex-plus-age discrimination claims under Title VII also should be precluded because permitting such claims would allow a plaintiff to prevail upon a showing of two discriminatory motives, thereby circumventing the causation principles espoused in *Gross*.<sup>235</sup> On the other hand, if the Title VII sex-plus doctrine is applied faithfully, then sex-plus-age claims should be permitted, given that the well-established sex-plus doctrine, flowing from *Phillips*, permits such claims when an employer discriminates against a subgroup of male or female employees on the basis of an immutable characteristic, which would naturally encompass a person's age.<sup>236</sup>

The most logical way to resolve the conflict between *Gross*, on the one hand, and *Phillips*, on the other, is to focus narrowly on the precise issue addressed in this section, i.e., whether Title VII permits sex-plus-age discrimination claims, rather than whether an analogous claim could pass muster under the ADEA. In employment discrimination cases, plaintiffs often bring overlapping claims under different statutes; yet, absent some specific rule of law directing them to do so, courts ordinarily do not interpret one statute (here, Title VII) by pretending they are interpreting another (the ADEA).<sup>237</sup> Accordingly, with respect to sex-plus-age claims, the question is

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<sup>231</sup> See *supra* notes 147–154 and accompanying text; see also 29 U.S.C. § 631(a) (2012) (limiting the ADEA's protection to employees at least forty years of age).

<sup>232</sup> See *supra* notes 180–225 and accompanying text.

<sup>233</sup> See *Gross*, 557 U.S. at 176 (declaring that “the ordinary meaning of the ADEA's requirement that an employer took adverse action “because of” age is that age was the ‘reason’ that the employer decided to act”).

<sup>234</sup> See *id.* at 174 (“Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.”).

<sup>235</sup> See *Bauers-Toy v. Clarence Cent. Sch. Dist.*, No. 10-CV-845, 2015 WL 13574291, at \*6 (W.D.N.Y. Sept. 30, 2015).

<sup>236</sup> See *Arnett v. Aspin*, 846 F. Supp. 1234, 1240 (E.D. Pa. 1994).

<sup>237</sup> See *Gross*, 557 U.S. at 173 (“Petitioner relies on this Court's decisions construing Title VII for his interpretation of the ADEA. Because Title VII is materially different with respect to the relevant burden of persuasion, however, these decisions do not control our construction of the ADEA.”); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008) (cautioning in an ADEA claim that “employees and their counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination”); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 319 (6th Cir. 2012) (en banc) (“Just as we erred by reading the ‘solely’ language from the Rehabilitation Act into the ADA based on the shared purposes and histories of

not whether the ADEA would allow such claims, and consequently whether Title VII should likewise permit them, but rather whether Title VII, in and of itself, allows such claims. When the question is framed this way, the answer must be yes.

The sex-plus discrimination doctrine has a nearly fifty year history, dating back at least as far as the Court's decision in *Phillips*.<sup>238</sup> Under today's sex-plus doctrine, a plaintiff, often female, may prevail on a Title VII sex discrimination claim if she can prove her employer discriminated against her because of the combination of her gender plus some additional factor pertaining either to an immutable characteristic or the exercise of a fundamental right.<sup>239</sup> Because age is an immutable characteristic, *Phillips* and its progeny compel the conclusion that sex-plus-age claims are valid under Title VII.<sup>240</sup>

There is good reason for this protection. After all, without the sex-plus doctrine, an employer could discriminate against a particular subgroup of women, such as "large women, black women, women with children, married women, pregnant women, or older women," and avoid liability for sex discrimination based on how it treated other women outside of that particular subgroup.<sup>241</sup> As the Court's decision in *Phillips* reflects, such a result is untenable because Title VII "requires that persons of like qualifications be given employment opportunities irrespective of sex."<sup>242</sup> Moreover, this result should not change simply because the "plus" factor involves an immutable characteristic protected by another statute, "such as age under the ADEA."<sup>243</sup>

Although numerous scholars have addressed the unique discriminatory treatment of older female employees,<sup>244</sup> the argument that Title VII should extend to sex-plus-age discrimination claims is perhaps best articulated by

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the two laws . . . so we would err by reading the 'motivating factor' language from Title VII into the ADA. Shared statutory purposes do not invariably lead to shared statutory texts, and in the end it is the text that matters.").

<sup>238</sup> 400 U.S. at 543–44; see also *id.* at 544–47 (Marshall, J., concurring).

<sup>239</sup> See, e.g., *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1033 (5th Cir. 1980).

<sup>240</sup> See *Arnett*, 846 F. Supp. at 1240.

<sup>241</sup> *Id.*; see also *Jefferies*, 615 F.2d at 1032–33.

<sup>242</sup> See *Phillips*, 400 U.S. at 544; see also *supra* notes 63–66 and accompanying text.

<sup>243</sup> See *Arnett*, 846 F. Supp. at 1240.

<sup>244</sup> See, e.g., Patti Buchman, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COLUM. L. REV. 190, 197 (1985) (arguing, based on the rule that sex plus an immutable characteristic should result in a legally permissible basis for a prima facie case of sex discrimination, that age-related appearance is an immutable characteristic akin to "race and physical stature"); Leslie S. Gielow, Note, *Sex Discrimination in Newscasting*, 84 MICH. L. REV. 443, 443–45 (1985) (arguing that sex-plus discrimination is prevalent against older women in newscasting).

Professor Nicole Buonocore Porter in her article, *Sex Plus Age Discrimination: Protecting Older Women Workers*.<sup>245</sup> Professor Porter argues that sex-plus-age discrimination claims should be recognized to the same extent as sex-plus-race cases, given that “older women are treated differently . . . than older men and younger women,” including in employment.<sup>246</sup> In her article, Professor Porter demonstrates that the biases, prejudices, and stereotypes associated with both “ageism” and “sexism” become worse when coupled together,<sup>247</sup> becoming for some women a “double hurdle of sex discrimination and age bias.”<sup>248</sup> Professor Porter shows, for example, that older women do not fare as well in the workforce as compared to both older men and younger women in matters such as pay and promotion,<sup>249</sup> given that older men are generally treated more favorably as they age, whereas employers often value women for their youthfulness and physical appearance.<sup>250</sup>

Professor Porter is not alone in these observations. In one recent study, for example, economics professors David Neumark and Patrick Button, along with researcher Ian Burn, examined evidence from over 40,000 job applications and found “robust evidence of age discrimination in hiring against older women, especially those near retirement age,” with “less robust” results for aging men.<sup>251</sup> And, as another commentator has noted based on her review of the relevant literature, “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 from that of older men and

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<sup>245</sup> See generally Porter, *supra* note 86.

<sup>246</sup> *Id.* at 80.

<sup>247</sup> *Id.* at 94–101.

<sup>248</sup> *Id.* at 98 (quoting ROBERT S. MENCHIN, NEW WORK OPPORTUNITIES FOR OLDER AMERICANS 240 (1993)).

<sup>249</sup> *Id.* at 97–98, 101 (citing Darlene Stevens, *Age Old Problem: Job Gains Made by Young Don't Translate to Later Years*, CHI. TRIB., May 12, 1991, at F12) (reporting that in the early 1990s, “women over 45 earn[ed] an average of less than sixty percent of salaries paid to men the same age”); see also Carol Moseley-Braun, *Women's Retirement Security*, 4 ELDER L.J. 493, 494 (1996) (noting that, “[o]ver a lifetime, women earn roughly fifty-eight percent of a man's income” (citing Bonnie Thornton Dill, *Race & Gender in Occupational Segregation, in PAY EQUITY: AN ISSUE OF RACE, ETHNICITY & SEX* 11, 63 (Nat'l Comm. on Pay Equity ed., 1987)).

<sup>250</sup> Porter, *supra* note 86, at 94; see also Bonnie Marcus, *Age Discrimination and Women in the Workplace: How to Avoid Getting Pushed Out*, FORBES (May 12, 2018), <https://www.forbes.com/sites/bonniemarcus/2018/05/12/age-discrimination-and-women-in-the-workplace-heres-how-to-avoid-getting-pushed-out/#19ccd812c4a4> [<https://perma.cc/4XKZ-YEQP>] (reporting that older women employees are often “marginalized, and pushed out to make way for younger employees,” and noting that “[a]ge related assumptions create the [false] perception that older workers, especially women, lack the stamina, aren't technically savvy, and want to slow down; they aren't invested in their careers”).

<sup>251</sup> David Neumark et al., *Is It Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment 2* (Nat'l Bureau of Econ. Research, Working Paper No. 21669, 2017), <https://www.nber.org/papers/w21669.pdf> [<https://perma.cc/H3W6-LZSC>].

younger women.”<sup>252</sup> Accordingly, given the obvious application of sex-plus discrimination doctrine to the sex-plus-age context, as well as the potential for discrimination against older women in particular, Title VII should be read to authorize sex-plus-age discrimination claims.

### *B. Extending the Title VII Sex-Plus Discrimination Doctrine to the ADEA*

Once it is determined that the sex-plus discrimination doctrine should apply to Title VII sex-plus-age claims, one might infer that age-plus-sex claims should likewise be valid under the ADEA, as both types of claims are premised upon an employer’s treatment of the same subclass of employees: older women or older men. From there, the question becomes whether other types of age-plus claims should be permitted as well. This section examines these issues, and argues that ADEA age-plus claims should be recognized, as under Title VII, when the statutorily protected characteristic (age) is combined with a plus factor involving another immutable characteristic, like race or gender.<sup>253</sup>

#### 1. Textual Arguments for Recognizing Age-Plus Discrimination Claims

The analysis of ADEA age-plus discrimination claims begins with the statute’s text.<sup>254</sup> Briefly stated, the ADEA prohibits employment discrimination “because of [an] individual’s age,”<sup>255</sup> a phrase the *Gross* Court equated with a “but-for” standard of causation.<sup>256</sup> As a result of *Gross*—including the Court’s statement that “age [must be] the ‘reason’ that the employer decided to act”<sup>257</sup>—claims alleging discrimination based on more than just age become textually problematic, such that when a discrimination claim is based on age plus an immutable characteristic, most courts require the plaintiff to argue age discrimination exclusively.<sup>258</sup>

Although plausible, interpreting *Gross* to preclude age-plus discrimination claims is problematic for at least four reasons. First, the ADEA

<sup>252</sup> Sabina F. Crocette, Comment, *Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis—A Pragmatic Model*, 28 GOLDEN GATE U. L. REV. 115, 116 & n.5 (1998).

<sup>253</sup> See *infra* notes 254–341 and accompanying text; see also *Jefferies*, 615 F.2d at 1033 (explaining that sex-plus discrimination claims are permitted where the plus factor pertains to an immutable characteristic or the exercise of a fundamental right).

<sup>254</sup> See *Gross*, 557 U.S. at 175–76.

<sup>255</sup> 29 U.S.C. § 623(a)(1), (2) (2012); see also *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 74 (adopting this interpretation of the ADEA).

<sup>256</sup> See *Gross*, 557 U.S. at 176 (internal quotation marks and citation omitted).

<sup>257</sup> *Id.* (citation omitted).

<sup>258</sup> See *supra* notes 184–208 and accompanying text.

makes it unlawful to discriminate “because of . . . age,”<sup>259</sup> and the Supreme Court authorized sex-plus discrimination claims at a time when Title VII used identical statutory language.<sup>260</sup> Second, unlike the Rehabilitation Act, the ADEA’s “because of . . . age”<sup>261</sup> language is not preceded by the word “solely,” leaving room for other unlawful motives.<sup>262</sup> Third, *Gross*’s statement that “age [must be] the ‘reason’ that the employer decided to act”<sup>263</sup> must be read in context, specifically, by recognizing that this statement was made in rejecting ADEA “mixed-motive” claims, which involve both *lawful and unlawful* motives.<sup>264</sup> Such mixed-motive claims are different than those addressed in this Article, which instead involve a combination of *unlawful* motives, warranting a more exacting analysis. Finally, when examined in the specific context of plus discrimination, ordinary principles of but-for causation do not preclude discrimination claims involving multiple illegal motives.<sup>265</sup> Each of these points are explained more fully below.

When considering how *Gross*’s conception of but-for causation might apply in the context of age-plus discrimination, it is important to first recognize that but-for causation is a principle more often applied in tort law, one that is not typically considered when examining questions of motive.<sup>266</sup> Thus, analyzing but-for causation in the context of age-plus discrimination is at times awkward and complex.<sup>267</sup> And yet, three potential interpretations

<sup>259</sup> 29 U.S.C. § 623(a)(1), (2).

<sup>260</sup> See *Phillips*, 500 U.S. at 543–44 (authorizing a sex-plus discrimination claim under Title VII in 1971). The statute at the time the *Phillips* case originated (and at the time the case was decided by the Supreme Court) did not include 42 U.S.C. § 2000e-2(m), which was added in 1991 to allow parties to bring a discrimination suit where a Title VII protected class “was a *motivating factor* for any employment practice, even though other factors also motivated the practice.” Compare Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012), with 42 U.S.C. § 2000e-2 (1972) (amended 1991), and 42 U.S.C. § 2000-e-2 (1964) (amended 1972). For more information on that development in the statute, see Catherine T. Struve, *Shifting Burdens: Discrimination Laws Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 280–81 (2010) (explaining how Congress amended Title VII in 1991 by adding the “motivating factor” provision at 42 U.S.C. § 2000e-2(m)).

<sup>261</sup> 29 U.S.C. § 623(a)(1), (2).

<sup>262</sup> See Rehabilitation Act § 504, Pub. L. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2012)). The Rehabilitation Act provides: “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.” 29 U.S.C. § 794(a).

<sup>263</sup> See *Gross*, 557 U.S. at 176 (citation omitted).

<sup>264</sup> See *id.* at 175 (describing the issue before the Court as whether the text of the ADEA “authorizes a mixed-motives age discrimination claim”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–47 (1989) (describing the nature of a “mixed-motive” claim).

<sup>265</sup> See *infra* notes 306–320 and accompanying text.

<sup>266</sup> See *Gross*, 557 U.S. at 190–91 (Breyer, J., dissenting).

<sup>267</sup> See *id.*

emerge. The most employer-friendly interpretation of the ADEA's causation requirement for age-plus discrimination claims is the "sole cause" standard, one that certain courts, like *Bauers-Toy* and *Cartee v. Wilbur Smith Associates, Inc.*, have utilized to reject such claims.<sup>268</sup> The most employee-friendly interpretation is the "motivating factor" standard, which applies under Title VII but which *Gross* refused to apply to the ADEA<sup>269</sup> (despite a four-Justice dissenting argument to the contrary).<sup>270</sup> A final interpretation—one that traces the roots of but-for causation—falls between these extremes, is the most defensible, and leaves room for age-plus discrimination claims.<sup>271</sup>

### a. *The ADEA Does Not Include a "Sole Cause" Standard*

Because the *Gross* majority rejected the "motivating factor" standard under the ADEA,<sup>272</sup> this Article will begin by analyzing whether the ADEA's causation requirement should be equated with a "sole cause" standard, including whether such a standard should preclude age-plus discrimination claims.<sup>273</sup> There are strong arguments against this interpretation. First, like age-plus discrimination claims, sex-plus discrimination claims are based on a combination of two or more characteristics, such as race and gender.<sup>274</sup> And yet, sex-plus discrimination claims were declared valid as early as the Supreme Court's 1971 decision in *Phillips*,<sup>275</sup> a full twenty years before the amendments that added the "motivating factor" language to Title VII (in response to the Court's 1989 "mixed-motives" decision in *Price Waterhouse v. Hopkins*).<sup>276</sup> Thus, when *Phillips* was decided, Title VII

<sup>268</sup> See *supra* notes 185–198 and accompanying text; see also *Sole Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "sole cause" as "[t]he only cause that, from a legal viewpoint, produces an event or injury").

<sup>269</sup> See *Gross*, 557 U.S. at 176.

<sup>270</sup> See *id.* at 180–87 (Stevens, J., dissenting) (arguing that the phrase "because of" an individual's age means that age was "a motivating factor," and stating that "[t]he most natural reading of [the ADEA's 'because of' language] prohibits adverse employment actions motivated in whole or in part by the age of the employee").

<sup>271</sup> See *infra* notes 272–320 and accompanying text.

<sup>272</sup> See *Gross*, 577 U.S. at 176.

<sup>273</sup> See *infra* notes 272–320 and accompanying text.

<sup>274</sup> See *Franchina v. City of Providence*, 881 F.3d 32, 54 (1st Cir. 2018) (recognizing that in sex-plus claims, "the simple question posed . . . is whether the employer took an adverse employment action at least in part because of an employee's sex," and applying the sex-plus theory to a plaintiff who was allegedly discriminated against at least in part because of her gender where the "plus-factor" was sexual orientation (internal quotation marks and citation omitted)).

<sup>275</sup> 400 U.S. at 542.

<sup>276</sup> See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348–49 (2013) (explaining how the 1991 amendments to Title VII "codified the . . . lessened-causation framework of *Price Waterhouse* in part" by adding 42 U.S.C. § 2000e-2(m)).

simply prohibited discrimination “because of” sex (without including the “motivating factor” language that exists today).<sup>277</sup> And yet, that particular statutory language did not preclude plus discrimination claims, which often involve a combination of discriminatory motives, such that “‘because of’ . . . gender” cannot be read as “‘solely because of’ . . . gender.”<sup>278</sup> There is no reason the ADEA’s identical statutory language should be interpreted differently.

This argument is bolstered by recent opinions interpreting the Americans with Disabilities Act (ADA), which uses the same “because of” language employed by the ADEA.<sup>279</sup> Interpreting the ADA’s “because of” language, nearly every federal court of appeals has rejected the “sole cause” standard, often adopting a “motivating factor” standard instead.<sup>280</sup> In one ADEA case, *Lewis v. Humboldt Acquisition Corp.*, the United States Court of Appeals for the Sixth Circuit sitting en banc in 2012 interpreted the

<sup>277</sup> See *Phillips*, 400 U.S. at 543 n.\* (quoting the language of Title VII in effect at that time).

<sup>278</sup> *Price Waterhouse*, 490 U.S. at 241 (noting that “the words ‘because of’ do not mean ‘solely because of’”); see *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1076 (11th Cir. 1996) (recognizing that every justice in *Price Waterhouse* agreed on this point); *Price Waterhouse*, 490 U.S. at 241 n.7 (citing 110 Cong. Rec. 2728, 13837 (1964)) (“Congress specifically rejected an amendment that would have placed the word ‘solely’ in front of the words ‘because of.’”).

<sup>279</sup> See 42 U.S.C. § 12112(a)–(b)(1) (2012) (prohibiting “discriminat[ion] . . . because of” a person’s disability).

<sup>280</sup> See *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008) (rejecting the “sole causation” standard under the ADA and adopting the “motivating factor” standard); *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005) (holding that “the motivating factor standard is the appropriate standard for causation in the ADA context”); *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 187 (3d Cir. 2003) (stating that “to prevail under a ‘mixed-motives’ theory a plaintiff need only show that the unlawful motive was a ‘substantial motivating factor’ in the adverse employment action,” and finding “sufficient [evidence] to establish a *prima facie* case under . . . a ‘mixed-motive’ theory” in a plaintiff’s ADA claim (internal quotation marks and alterations omitted)); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 337 (2d Cir. 2000) (stating that Congress’s “elimination of the word ‘solely’ from the causation provision of the ADA suggests forcefully that Congress intended the statute to . . . cover situations in which discrimination on the basis of disability is one factor, but not the only factor, motivating an adverse employment action”); *Baird v. Rose*, 192 F.3d 462, 469–70 (4th Cir. 1999) (finding that the ADA does not impose a “solely by reason of” causation standard, and instead applying Title VII’s “motivating factor” standard (internal quotation marks and citation omitted)); *McNely*, 99 F.3d at 1076 (finding that Congress’s use of the term “because of” in the ADA does not equate to “solely because of,” and holding instead “that the ADA imposes liability whenever the prohibited motivation makes the difference in the employer’s decision, i.e., when it is a ‘but-for’ cause”); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (equating the ADA’s “because of” language to the “motivating factor” standard); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995) (adopting the “motivating factor” standard for an ADA claim). *But see* *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (ruling, in light of *Gross*, that “a plaintiff complaining of discriminatory discharge under the ADA must show that his or her employer would not have fired him but for his actual or perceived disability; proof of mixed-motives will not suffice”).



ADA's "because of" language in light of both the Rehabilitation Act, which includes a "sole cause" standard, and the ADEA, which employs the same "because of" language found in the ADA.<sup>281</sup> At the close of trial, the defendant requested an instruction requiring the jury to find that the company fired the plaintiff "solely" because of her disability—a term in the Rehabilitation Act but not in the ADA.<sup>282</sup> The plaintiff, on the other hand, asked for a jury instruction stating that the jury should rule in her favor if her disability was "a motivating factor" in the company's employment decision—a phrase that appears in Title VII but not in the ADA.<sup>283</sup> The en banc Sixth Circuit ultimately rejected *both* formulations, however, given that neither standard appears in the ADA.<sup>284</sup>

In rejecting the proposed "sole cause" formulation, the *Lewis* court reasoned that "[a] law establishing liability against employers who discriminate 'because of' an employee's disability does not require the employee to show that the disability was the 'sole' cause of the adverse employment action."<sup>285</sup> The court also noted that no other federal circuit court had adopted the sole motivation standard for the ADA.<sup>286</sup> Finally, although there were vigorous dissenting opinions in *Lewis*, no dissenting judge disagreed with the majority's rejection of the "sole cause" standard.<sup>287</sup>

Having rejected both the "sole cause" standard as well as the "motivating factor" standard, the *Lewis* court ultimately determined that the proper interpretation of *both* the ADA's and the ADEA's "because of" language is that each statute "prohibit[s] discrimination that is a 'but for' cause of the

<sup>281</sup> See 681 F.3d at 319; see also 29 U.S.C. § 623(a)(1) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"); *id.* § 794(a) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.").

<sup>282</sup> *Lewis*, 681 F.3d at 313–14.

<sup>283</sup> *Id.* at 314.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 315–16.

<sup>286</sup> See *id.* at 315 (citing cases from numerous federal appeals courts).

<sup>287</sup> See *id.* at 322 (Clay, J., concurring in part and dissenting in part) (declaring that the court was unanimous in agreeing that the "sole cause" standard is inappropriate for ADA cases); *id.* at 325 (Stranch, J., concurring in part and dissenting in part) (agreeing with the majority that ADA protection "does not hinge upon establishing that disability was the 'sole' cause of an adverse employment action"); *id.* at 331 (Donald, J., concurring in part and dissenting in part) ("I concur with this Court's welcome abandonment of its past interpretation of the [ADA], which read the word 'solely' into the ADA's express 'because of' causation standard.").

employer's adverse decision."<sup>288</sup> Accordingly, *Lewis* suggests that age discrimination may be proven with evidence that the plaintiff's age was *a* but-for cause of the employer's action, as opposed to *the* but-for cause,<sup>289</sup> an interpretation fully consistent with age-plus discrimination claims, which often involve a combination of unlawful motives.<sup>290</sup> With an age-plus claim alleging discrimination on the basis of age and sex, for example, both age and sex are but-for causes of the alleged employment action. Change either of those variables, such as the employee's gender, and the employer's unique discriminatory animus disappears.<sup>291</sup> In legitimate plus discrimination claims, there is more than one actual or but-for cause, but this should not preclude a finding of liability even under a but-for standard.<sup>292</sup>

*b. Title VII's "Motivating Factor" Provision Does Not Preclude Age-Plus Discrimination Claims*

Having determined that the ADEA's "because of" language does not equate to a "sole cause" standard of causation, and thus arguably permits

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<sup>288</sup> *Id.*, 681 F.3d at 321 (majority opinion) (emphasis added) (internal quotation marks omitted) (stating that "[t]he ADEA and the ADA bar discrimination 'because of' an employee's age or disability, meaning that they prohibit discrimination that is a 'but-for' cause of the employer's adverse decision" (internal quotation marks and citation omitted)).

<sup>289</sup> *See id.*

<sup>290</sup> *See supra* notes 180–225 and accompanying text.

<sup>291</sup> *See Price Waterhouse*, 490 U.S. at 240 ("In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.").

<sup>292</sup> *See* Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 65 (1956). The but-for causation test is described as follows:

One fact or event, it is said, is a cause of another when the first fact or event is indispensable to the existence of the second. In the trial of controversies this means that a defendant should not be charged with responsibility for a plaintiff's harm unless we can conclude with some degree of assurance that the harm could not have occurred in the absence of the defendant's misconduct.

*Id.*; *cf.* MODEL PENAL CODE § 2.03(1) cmt. 2 (AM. LAW INST. 1985) (describing a homicide-by-independent-assailants hypothetical, and explaining that in such "infrequent[]" cases, the criminal "result should be characterized as 'death from two mortal blows,'" such that "the victim's demise has as but-for causes each assailant's blow"); *see also* *Cox v. State*, 808 S.W.2d 306, 309 (Ark. 1991) ("[W]here there are concurrent causes of death, conduct which hastens or contributes to a person's death is a cause of death."); *People v. Bailey*, 549 N.W.2d 325, 334 (Mich. 1996) ("In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause that was a substantial factor in producing the harm."); RESTATEMENT (SECOND) OF TORTS § 431, cmt. b (AM. LAW INST. 1965) (noting the existence of cases where an injured party can prove the existence of multiple, independently sufficient factual causes).

discrimination claims based on multiple unlawful motives,<sup>293</sup> the next question is whether Title VII's "motivating factor" provision, coupled with the absence of a similar provision in the ADEA, precludes ADEA plus discrimination claims. Although a cursory comparison of the ADEA and Title VII might suggest that Congress intended to treat plus discrimination differently under each statute, Congress's specific objective when enacting Title VII's "motivating factor" provision belies such a conclusion.

Simply stated, when Title VII was amended in 1991 to incorporate a "motivating factor" standard, that amendment was not meant to change the law with respect to plus discrimination claims, which often involve a combination of *discriminatory* motives.<sup>294</sup> Rather, the 1991 amendments simply clarified the standards of proof for the type of mixed-motive claim present in Title VII cases involving both a discriminatory motive and a legitimate one.<sup>295</sup>

Prior to those amendments, the Supreme Court had ruled in *Price Waterhouse* that an employer could fully escape liability under Title VII, even where evidence of discrimination exists, by showing that "it would have made the same [employment] decision even if it had not taken the [discriminatory factor] into account."<sup>296</sup> In other words, an employer could escape Title VII liability altogether by "show[ing] that a discriminatory motive was not the but-for cause of the adverse employment action."<sup>297</sup> Congress disagreed, however, and through its 1991 amendments clarified that Title VII liability attaches when an employer is motivated at least in part by a discriminatory factor, even if other permissible factors contributed to the em-

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<sup>293</sup> See *supra* notes 272–292 and accompanying text.

<sup>294</sup> See *Nassar*, 570 U.S. at 348–49 (explaining how the 1991 amendment adding the "motivating factor" provision to Title VII "codified the . . . lessened-causation framework of *Price Waterhouse* in part"); see also, e.g., *Jefferies*, 615 F.2d at 1034 (recognizing a sex-plus-race claim where the plaintiff's sex and race were two discriminatory motives that formed the basis of the plaintiff's claims).

<sup>295</sup> See 42 U.S.C. § 2000e-2(m); see also *Price Waterhouse*, 490 U.S. at 239–42.

<sup>296</sup> *Price Waterhouse*, 490 U.S. at 258; see *id.* at 242 ("[A]n employer [in a Title VII sex discrimination suit] shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person."); *id.* at 244–45 (declaring that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role"); *id.* at 252 ("An employer may not meet its burden in [a mixed-motive] case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. . . . The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.").

<sup>297</sup> *Nassar*, 570 U.S. at 348.

ployer's decision.<sup>298</sup> Accordingly, for a Title VII discrimination claim to prevail under the statute's current iteration, a plaintiff need only present sufficient evidence to conclude that race, color, religion, sex, or national origin was a "motivating factor"—as opposed to the *sole* "motivating factor"—for the adverse employment action at issue.<sup>299</sup> From there, the employer may present the affirmative defense that it "would have taken the same action in the absence of the impermissible motivating factor,"<sup>300</sup> which, if successful, would no longer absolve the employer of liability, but instead impact the plaintiff's available remedies.<sup>301</sup>

In summary, the 1991 amendments to Title VII simply "substituted a new burden-shifting framework for the one endorsed by *Price Waterhouse*" in the type of mixed-motive case at issue there.<sup>302</sup> Thus, although it may be tempting to identify the *lack* of any corresponding "motivating factor" language in the ADEA as precluding age-plus discrimination claims (as some courts have done), this is a flawed approach given that ADEA age-plus discrimination claims involve multiple unlawful motives, rather than a competing lawful and unlawful one, and otherwise bear little resemblance to Title VII mixed-motive claims. Moreover, when Congress amended Title VII in 1991, its clear intention was to change the legal framework regarding Title VII mixed-motive claims; with that specific objective in mind, it would be illogical to conclude that Congress also intended to clarify the law regarding ADEA plus discrimination claims.<sup>303</sup> Title VII's "motivating factor" provision simply ensures that a Title VII claim may still succeed even where the defendant shows that it "would have taken the same action in the absence of the impermissible motivating factor."<sup>304</sup> Under an ADEA age-plus discrimination claim, the analysis is entirely different.<sup>305</sup> Accordingly, the mere existence of a "motivating factor" provision in one statute, Title

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<sup>298</sup> See Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m) (2012); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250–51 (1994) (explaining that, just two years after *Price Waterhouse*, Congress passed the 1991 Act "in large part [as] a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964").

<sup>299</sup> See *Gross*, 557 U.S. at 174; *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

<sup>300</sup> 42 U.S.C. § 2000e-5(g)(2)(B).

<sup>301</sup> See *id.* § 2000e-5(g)(2)(B)(i)–(ii) (clarifying that a successful affirmative defense precludes money damages for the plaintiff and limits the available remedies to declaratory relief, injunctive relief, and attorney's fees and costs); see also *Nassar*, 570 U.S. at 348–49 (discussing the distinction between the employer's original defense pertaining to liability, and its current defense pertaining to the plaintiff's remedies).

<sup>302</sup> *Nassar*, 570 U.S. at 349.

<sup>303</sup> See Civil Rights Act of 1991 § 107(a) ("Section 703 of the Civil Rights Act of 1964 . . . is further amended by adding the following new subsection: [42 U.S.C. § 2000e-2(m)]").

<sup>304</sup> See 42 U.S.C. § 2000e-5(g)(2)(B).

<sup>305</sup> See, e.g., *Mora v. Jackson Mem'l Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir. 2010).

VII, should not be read to somehow preclude age-plus discrimination claims under another, the ADEA.

*c. Ordinary Principles of But-For Causation Do Not Preclude Plus Discrimination Claims*

The final question in this analysis is whether age-plus discrimination claims may co-exist with the ADEA's standard of but-for causation as articulated in *Gross*, which requires proof, in an ADEA disparate treatment claim, "that age was the 'but-for' cause of the challenged adverse employment action."<sup>306</sup> The answer to this question lies in *Gross* itself, including the authorities undergirding that opinion.

In *Gross*, the Court interpreted "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age" as requiring proof "that age was the 'reason' that the employer decided to act," a statement that appears to preclude age-plus claims.<sup>307</sup> Nevertheless, immediately after this statement, the Court cited its previous decision, *Hazen Paper Co. v. Biggins*, for the proposition that such a "claim 'cannot succeed unless the employee's protected trait [e.g., age] actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome.'"<sup>308</sup> The quoted passage from *Biggins* is not inconsistent with age-plus discrimination claims.

In *Biggins*, the Court explained that "[i]n a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision."<sup>309</sup> This is because when an employer's decision is motivated by age, the employer is likely acting not on the basis of individual ability, but rather as the result of "inaccurate and stigmatizing stereotypes" associated with aging workers—the very concern that led to the ADEA's enactment.<sup>310</sup> On the other hand, the Court explained, "[w]hen the employer's decision is *wholly motivated by factors other than age*, the problem of inaccurate and stigmatizing stereotypes disappears."<sup>311</sup> For these reasons, the Court declared that "a disparate treatment claim cannot succeed unless the employee's protected trait actually

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<sup>306</sup> *Gross*, 557 U.S. at 180 ("We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action.").

<sup>307</sup> *Id.* at 176.

<sup>308</sup> *Id.* (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

<sup>309</sup> *Biggins*, 507 U.S. at 610.

<sup>310</sup> *See id.* at 610–11 (citation omitted).

<sup>311</sup> *See id.* at 611 (emphasis added).

played a role in th[e] [employer’s decision-making] process and had a determinative influence on the outcome.”<sup>312</sup>

These pronouncements, which led the *Gross* Court to declare that the ADEA incorporates a standard of “but-for” causation,<sup>313</sup> are fully consistent with age-plus discrimination claims. In an age-plus-sex claim, for example, the employee alleges that her employer discriminated against her due to both her age and sex. In that context, the employee may succeed on her claim by proving that age “actually motivated the employer’s decision”<sup>314</sup> and “had a determinative influence on the outcome,”<sup>315</sup> because but-for the plaintiff’s age, the alleged adverse employment action would not have occurred.<sup>316</sup> This is unlike the Title VII mixed-motive context, where the presence of a legitimate motive serving as an *independent basis* for the employer’s decision rules out a finding of but-for causation as to the illegitimate and unlawful motive.<sup>317</sup> In the age-plus discrimination or multiple-motive context, the presence of a second discriminatory motive does not have the same effect.<sup>318</sup> Accordingly, *Gross*’s but-for causation requirement, when read in context, does not preclude multiple-motive discrimination claims.<sup>319</sup>

Returning to the *Biggins* statements, in a typical age-plus discrimination scenario, the employer’s decision would not be “wholly motivated by factors other than age,”<sup>320</sup> but would instead embody the very type of age-related stereotyping to which the ADEA is directed. The fact that the plaintiff’s gender may have also played a role does not diminish such unlawful

<sup>312</sup> *Id.* at 610.

<sup>313</sup> *See Gross*, 557 U.S. at 176.

<sup>314</sup> *Biggins*, 507 U.S. at 610.

<sup>315</sup> *Id.*; *cf. Pinkerton*, 529 F.3d at 519 (rejecting the “sole causation” standard under the ADA and adopting the “motivating factor” standard, which in turn requires that “discrimination . . . must actually play a role in the employer’s decision making process and have a determinative influence on the outcome” (internal quotation marks and citation omitted)).

<sup>316</sup> *See But-for Cause*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “but-for cause” as “[t]he cause without which the event could not have occurred”); *see also Nassar*, 570 U.S. at 360 (describing “traditional principles of but-for causation” as “requir[ing] proof that the unlawful [action] would not have occurred in the absence of the alleged wrongful action or actions of the employer”); *id.* at 364 (Ginsburg, J., dissenting) (describing the majority’s but-for causation standard as one in which the plaintiff’s “claim will fail unless the complainant shows . . . that the employer would not have taken the adverse employment action but for a design to retaliate”).

<sup>317</sup> *See Nassar*, 570 U.S. at 348.

<sup>318</sup> In an age-plus-sex claim, for example, when a plaintiff proves she was terminated because of both her age and gender—in other words, because she belonged to a subgroup of older female employees—but for the plaintiff’s age, she would not have been terminated. Likewise, but for the plaintiff’s gender, she would not have been terminated. In this example, if it were not for the plaintiff’s age *and* her gender, she would not have been terminated. *See, e.g., Leal v. McHugh*, 731 F.3d 405, 414–15 (5th Cir. 2013).

<sup>319</sup> *See supra* note 278.

<sup>320</sup> *Biggins*, 507 U.S. at 611.

stereotyping; rather, it adds to it. In this respect, two wrongs do not make a right. Rather, two wrongs add up to discrimination—in this instance, against a particular subgroup of ADEA-protected employees who are just as deserving of ADEA protection as all other ADEA-protected employees.

## 2. Proposed ADEA Amendment

Despite the arguments set forth above for recognizing age-plus discrimination claims under the ADEA's existing text, the fact remains that Congress has amended Title VII to provide recovery under a "motivating factor" theory, but did not include similar language in the ADEA. As such, it is reasonable to conclude that Congress has made the "motivating factor" standard available to Title VII plaintiffs, but not to claimants under other civil rights statutes.<sup>321</sup> From there, one might also conclude that without the benefit of a "motivating factor" standard, age-plus discrimination claims under the ADEA are unwarranted (as cases like *Bauers-Toy* and *Cartee* have determined).<sup>322</sup>

Although the previous subsection demonstrates that Congress need not amend the ADEA to validate age-plus discrimination claims, a clarifying amendment to the ADEA may be appropriate in light of the judicial decisions reading *Gross* to preclude age-plus claims. Accordingly, this Article proposes that Congress amend the ADEA to state that an ADEA plaintiff may prevail upon proof that his or her age was "a motivating factor for an adverse employment action, even though other discriminatory or illegitimate factors may have also motivated the employer."<sup>323</sup>

Notably, this proposed ADEA amendment does not track the mixed-motive provision of Title VII, given that its purpose is different. In the Title VII context, the point of the 1991 amendments was to clarify how Title VII applies in a mixed-motive case where an employer shows that it would have made the same employment decision even if it had not taken the proven discriminatory factor into account.<sup>324</sup> By contrast, the point of amending the

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<sup>321</sup> See *Lewis*, 681 F.3d at 317–21 (explaining two ways to view Congress's 1991 amendments to Title VII, including the interpretation that the "motivating factor" standard applies only to Title VII plaintiffs, and refusing to apply the "motivating factor" standard to the ADA).

<sup>322</sup> See *supra* notes 184–208 and accompanying text.

<sup>323</sup> Compare 42 U.S.C. § 2000e-2(m) (stating that an unlawful employment practice under Title VII is proven "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"), with *Gross*, 557 U.S. at 180 (holding that, unlike Title VII claims, to prevail on an ADEA claim a plaintiff "must prove . . . that age was the 'but for' cause of the challenged adverse employment action").

<sup>324</sup> See *Price Waterhouse*, 490 U.S. at 258; see also 42 U.S.C. § 2000e-2(m).

ADEA would be to clarify that *Gross*'s but-for causation requirement<sup>325</sup> does not rule out age-plus discrimination claims brought by a particular subgroup of ADEA-protected employees, i.e., claims that often involve a combination of illicit motives.

There are strong policy reasons to support this proposal. First, the Title VII sex-plus discrimination cases outlined in Part II demonstrate that discrimination against subclasses of protected employees (such as black females) should not go unpunished.<sup>326</sup> And although they are protected by a different statute, subgroups of employees in the ADEA's protected class (such as older females) deserve the same protection, given that the discriminatory variables—sex and race in the Title VII context, and sex and age in the ADEA context—each involve protected classifications and immutable characteristics the employee cannot change.<sup>327</sup> Indeed, even the *Bauers-Toy* court, which rejected combined sex and age claims under Title VII and the ADEA, recognized plaintiff's "valid argument that an individual could be treated unlawfully as a result of both age and gender."<sup>328</sup>

Second, because an employer in a Title VII plus discrimination case may not defend its discriminatory actions against a subgroup of protected employees, such as women with children, by showing that it does not discriminate against other members of the protected group, such as women without children,<sup>329</sup> a defendant in an ADEA case likewise should be precluded from asserting this type of "bottom line" defense regarding its treatment of the entire protected class (individuals over the age of forty).<sup>330</sup> And, the best way to preclude this defense is to allow a plaintiff to claim discrimination at the subgroup level—in other words, to recognize age-plus discrimination claims. Two illustrations might prove helpful.

The first illustration is adapted from a 2018 case from the United States District Court for the Eastern District of New York.<sup>331</sup> There, the plaintiff, named Deborah, was a fifty-six-year-old female employee terminated from her job despite having received excellent performance reviews

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<sup>325</sup> See *Gross*, 557 U.S. at 180.

<sup>326</sup> See *supra* notes 52–123 and accompanying text.

<sup>327</sup> See generally *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1089–92 (5th Cir. 1975).

<sup>328</sup> *Bauers-Toy*, 2015 WL 13574291, at \*6.

<sup>329</sup> See *supra* note 60.

<sup>330</sup> See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 451, 455 (1982) (stating that "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group").

<sup>331</sup> See generally *Famighette v. Rose*, 2:17-cv-2553(DRH)(ARL), 2018 WL 2048371 (E.D.N.Y. May 2, 2018).



during her fourteen years of employment.<sup>332</sup> For purposes of this illustration, assume that, after her termination, Deborah's duties are taken over by two individuals: a fifty-eight-year-old man, and an unqualified and attractive twenty-three-year-old woman.<sup>333</sup> On these facts, the court would likely dismiss Deborah's Title VII claim of pure gender discrimination (because one of Deborah's replacements is also a woman),<sup>334</sup> and would likewise dismiss Deborah's pure age discrimination claim (because one of Deborah's replacements is an older man).<sup>335</sup> In addition, because most courts do not recognize age-plus discrimination claims whatsoever, this court would likely reject Deborah's attempt to claim age-plus-sex discrimination.<sup>336</sup> Nevertheless, if Deborah had evidence that she was discriminated against because she was an *older woman*, her discrimination claim should prevail.<sup>337</sup>

For the second illustration, assume the owner of a small company harbors a particular animus against older female employees due to an archaic and stereotypical belief that older women should not be in the workforce. Also assume that this owner bears no such ill will towards older men or younger women, and that the owner states in a string of e-mails that he will refuse to hire older women given his discriminatory views towards those particular individuals. Finally, assume the owner then refuses to hire a fifty-year-old female employee, regardless of her strong qualifications, for no reason other than that she falls within the category of persons whom he does not value, and that the employer instead hires a fifty-year-old male of similar qualifications. On these facts, without the benefit of the age-plus doctrine, the rejected applicant would likely be unable to prove pure age discrimination under the ADEA, given that the employer's decision to hire a similarly qualified male of the same age as the rejected applicant tends to refute a

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<sup>332</sup> See *id.* at \*4 (summarizing allegations in the plaintiff's complaint).

<sup>333</sup> This particular allegation diverges somewhat from the actual allegation in *Famighette*, in which plaintiff claimed only that she was replaced by an unqualified twenty-three-year-old female. See *id.* at \*1, \*4. Nevertheless, there are cases similar to this where an employee is fired and her duties are distributed between more than one individual. See, e.g., *McFadden-Pell v. Staten Island Cable*, 873 F. Supp. 757, 763 (E.D.N.Y. 1994) (explaining how a fifty-three-year-old woman was discharged and her duties were distributed between two men who were ten to fifteen years younger).

<sup>334</sup> See *Famighette*, 2018 WL 2048371, at \*3 (dismissing plaintiff's Title VII sex discrimination claim because plaintiff's sole replacement was also a woman).

<sup>335</sup> Cf. *id.* at \*4 (refusing to dismiss plaintiff's ADEA claim because plaintiff alleged she was replaced without cause for someone who was significantly younger and inexperienced, which is sufficient to infer age discrimination).

<sup>336</sup> See *id.* at \*5 (dismissing plaintiff's age-plus-gender discrimination claim under the ADEA because "[c]ourts in the Second Circuit have not entertained mixed-motive cases for age discrimination").

<sup>337</sup> Cf. *Lam*, 40 F.3d at 1560–62 (permitting a plaintiff's sex-plus-race discrimination claim); *Jefferies*, 615 F.2d at 1032–34 (same).

claim of age-based animus.<sup>338</sup> As such, without the ability to argue age-plus discrimination, any ADEA claim the rejected applicant might assert would likely fail.<sup>339</sup> Such a result, however, should not be condoned, particularly where, as here, there is clear evidence of discrimination against *older females* such as the rejected applicant (via the owner's e-mails).<sup>340</sup>

As with the sex-plus doctrine, a more wholesale judicial recognition of the age-plus doctrine would permit plaintiffs such as these to prevail on a discrimination claim even though other members of the ADEA's protected class have not experienced the same discriminatory treatment.<sup>341</sup> Accordingly, precluding such plus claims altogether, based largely on misconceptions regarding the lack of a mixed-motive provision in the ADEA, only closes the courthouse doors to individuals, like those described above, who have endured discrimination.

## CONCLUSION

This Article has examined a double judicial split in age discrimination cases, one pertaining to Title VII and the other to the ADEA. As to Title VII sex-plus-age claims, this Article contends that such claims are clearly authorized by the well-established sex-plus discrimination doctrine and should be more routinely enforced to combat discrimination against older female employees. Further, this Article argues that ADEA age-plus discrimination claims should be deemed valid as well, particularly those combining age with another immutable characteristic, like race or gender. Here, this Article argues that the ADEA's but-for standard of causation does in fact permit discrimination claims based on the combination of both age and another immutable characteristic, even though most courts to address age-plus discrimination claims have ruled otherwise. Nevertheless, because *Gross* plausibly could be read to preclude multiple-motive claims, and because Con-

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<sup>338</sup> See, e.g., *Bauers-Toy*, 2015 WL 13574291, at \*4 (noting that "a plaintiff in an ADEA case must show that the discriminatory factor (age) was the only reason for the conduct").

<sup>339</sup> See *id.*

<sup>340</sup> Although the variables are different, this hypothetical is similar to a recent case from the United States Court of Appeals for the Fifth Circuit involving a claim of age and disability discrimination. See *EEOC v. DynMcDermott Petrol. Operations, Co.*, 537 F. App'x 437, 448 (5th Cir. 2013) (per curiam) (reversing a district court's grant of summary judgment for an employer and against a plaintiff who alleged both age and disability discrimination in part because e-mails indicated the employer did not want to hire the plaintiff "because of his age and his wife's health problems").

<sup>341</sup> See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004) (noting that "[t]he term 'sex plus' . . . is simply a heuristic . . . developed in the context of Title VII to affirm that plaintiffs can [claim sex discrimination] even when not all members of a disfavored class are discriminated against").

gress has not clarified how the ADEA applies in cases involving multiple employer motives, some courts may remain hesitant to recognize ADEA age-plus discrimination claims. Accordingly, this Article proposes that Congress amend the ADEA to state that an ADEA plaintiff may prevail upon proof that his or her age was “a motivating factor for an adverse employment action, even though other discriminatory or illegitimate factors may have also motivated the employer.”