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Tenth Circuit Ruled in Favor of Sex-Plus-Age Claims of Discrimination Under Title VII in the Wake of *Bostock v. Clayton County*

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TENTH CIRCUIT RULED IN FAVOR OF SEX-PLUS-AGE CLAIMS OF DISCRIMINATION UNDER TITLE VII IN THE WAKE OF *BOSTOCK v. CLAYTON COUNTY*

Abstract: On July 21, 2020, the U.S. Court of Appeals for the Tenth Circuit in *Frappied v. Affinity Gaming Black Hawk, LLC* held that sex-plus-age discrimination claims are cognizable under Title VII of the Civil Rights Act of 1964. By taking a stance on the viability of sex-plus-age claims, the Tenth Circuit became the first circuit court to weigh in on the debate among the lower courts. Many federal district courts, relying on the availability of the Age Discrimination in Employment Act to address age discrimination claims, have rejected sex-plus-age claims under Title VII. This Comment argues that the Tenth Circuit’s decision is sound policy and logically follows the Supreme Court’s recent ruling in *Bostock v. Clayton County*.

INTRODUCTION

Women experienced workplace discrimination well before Congress enacted statutes to prevent it, and they continue to experience it today.¹ Workers over forty, whose employers often treat them less favorably than their younger counterparts, have similarly experienced discrimination.² As such, women over forty in the workforce may experience a unique form of employment discrimi-

¹ See Catherine Ross Dunham, *Third Generation Discrimination: The Ripple Effects of Gender Bias in the Workplace*, 51 AKRON L. REV. 55, 56 (2017) (noting that since Congress enacted Title VII, employment discrimination based on sex has changed and become less overt but still persists). Discrimination occurs when laws or accepted procedures bestow advantages on some people but not others “because of race, age, sex, nationality, religion, or disability.” *Discrimination*, BLACK’S LAW DICTIONARY (11th ed. 2019). The more subtle discrimination that women face in the workplace often happens when women enter into and compete in male-dominated industries, where people hold implicit bias against women. See Dunham, *supra*, at 56–57 (describing a female Wal-Mart employee who was not promoted because her male managers, who had discretion over promotion decisions, relied on gender stereotypes that favored promoting male employees to managerial positions).

² See Richard W. Johnson & Peter Gosselin, *How Secure Is Employment at Older Ages?*, URB. INST. 20 (Dec. 8, 2018), https://www.urban.org/research/publication/how-secure-employment-older-ages/view/full_report [<https://perma.cc/BJD2-EV7A>] (finding that a worker’s employment becomes less secure as they age). Over half of fifty-one to fifty-four-year old full-time employees reported an involuntarily separation from their job after the age of fifty, which can have dire financial consequences for those workers who were relying on additional years of work to support themselves and their families into retirement. See *id.* (indicating that older adults disproportionately experience unwanted periods of unemployment, and employers’ hesitance to hire older workers compounds this further).

nation that is distinct from a simple combination of sex discrimination and age discrimination.³

When the Golden Mardi Gras Casino in Black Hawk, Colorado laid off about sixty workers in 2013, its decisions disproportionately affected older workers, particularly older women.⁴ Plaintiffs sued Affinity Gaming Black Hawk, LLC, the new owners of the casino, for sex and age discrimination under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA).⁵ The U.S. District Court for the District of Colorado dismissed the claims, in part because it did not find that plaintiffs could bring sex-plus-age claims under Title VII.⁶ On appeal, the U.S. Court of Appeals for the Tenth Circuit in *Frappied v. Affinity Gaming Black Hawk, LLC*, in 2020, became the first circuit court to take a stance on this issue when it reversed the lower court's finding that Title VII sex-plus-age claims were not permissible.⁷

³ See Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 94–97 (2003) (explaining that the discrimination older women experience as a result of the intersection of age and sex is more than a mere combination of sex discrimination and age discrimination and that they are treated worse than older men and younger women). This is particularly visible in the television industry, where in 1985, only 3% of female news anchors were over forty, compared to the 48% of male news anchors over forty. See *id.* at 94. Attractive attorneys earn more than less-attractive attorneys, with the pay gap widening between five and fifteen years of practice. See *id.* at 95–96 (citing Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 195 (2000)) (noting that the correlation between attractiveness, age, and compensation will disproportionately affect women).

⁴ *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1055 (10th Cir. 2020). Of the approximately sixty laid off workers, about thirty-three were women and nineteen were women over forty years old. *Frappied v. Affinity Gaming Black Hawk, LLC*, No. 17-cv-01294, 2018 U.S. Dist. LEXIS 104796, at *2 (D. Colo. June 22, 2018), *aff'd in part, rev'd in part*, 966 F.3d 1038 (10th Cir. 2020). Shortly after the layoffs, the defendant casino hired about twenty-four new workers, none of whom were women over forty. *Frappied*, 966 F.3d at 1055.

⁵ *Frappied*, 966 F.3d at 1045. The plaintiffs consisted of eight older women and one older man. *Id.* Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in employment, and the Age Discrimination in Employment Act of 1967 (ADEA) prohibits employment discrimination against workers over forty years old. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (prohibiting employers from discriminating against current or potential employees based on sex); ADEA, 29 U.S.C. §§ 623(a), 631(a) (prohibiting employers from discriminating against current or potential employees based on age).

⁶ See *Frappied*, 2018 U.S. Dist. LEXIS 104796, at *7–8 (rejecting the Title VII sex-plus-age discrimination claim because the plaintiffs admitted they could not bring an independent sex discrimination claim under Title VII). The court primarily dismissed the sex-plus-age claim because it viewed it as a backup claim in the event that the plaintiffs' claim under the ADEA, which only alleged age discrimination, failed. See *id.* at *7 (preventing the plaintiffs from moving forward with their Title VII claim of sex-plus-age discrimination).

⁷ 966 F.3d at 1048. Other circuit courts had confronted sex-plus-age claims before, but none had specifically ruled on the viability of sex-plus-age claims under Title VII. See, e.g., *Gorzynski v. Jet-Blue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010) (refraining from deciding whether an age-plus-sex claim was cognizable after determining that the plaintiff had a viable claim based solely on age); *Bryant v. Int'l Sch. Servs., Inc.*, 675 F.2d 562, 573 & n.18 (3d Cir. 1982) (denying that a sex-plus claim was applicable based on the facts in the case). Sex-plus-age claims refer to claims of discrimina-

Part I of this Comment discusses the background of Title VII, the development of the “sex-plus” doctrine, and the facts and procedural history of *Frappied*.⁸ Part II details the legislative history and prior applications of Title VII and the ADEA, the varied district court stances regarding the viability of sex-plus-age claims, and relevant analysis from the Supreme Court in *Bostock*.⁹ Finally, Part III argues that the Tenth Circuit decision was correct in light of the Supreme Court’s 2020 decision in *Bostock v. Clayton County* and public policy considerations.¹⁰

I. TITLE VII, “SEX-PLUS” DISCRIMINATION, AND *FRAPPIED*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin.¹¹ Since Title VII’s enactment, courts have confronted claims that employers discriminated because of the intersection of a protected class and another factor.¹² Section A of this Part provides a history and description of Title VII.¹³ Section B outlines the interpretation of Title VII discrimination claims based upon sex and an additional factor.¹⁴ Section C provides the facts and holding of the Tenth Circuit’s 2020 case, *Frappied v. Affinity Gaming Black Hawk, LLC*.¹⁵

A. Title VII

Congress initially passed Title VII in 1964 to forbid employers from discriminating against their employees because of sex, and it later amended Title

tion based on the combination of sex and age under Title VII, whereas age-plus-sex claims refer to the same intersectional discrimination brought under the ADEA. See *Gorzynski*, 596 F.3d at 110 (distinguishing between age-plus-sex claims under the ADEA and sex-plus-age claims under Title VII).

⁸ See *infra* notes 11–55 and accompanying text.

⁹ See *infra* notes 56–92 and accompanying text.

¹⁰ See *infra* notes 93–117 and accompanying text.

¹¹ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

¹² See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (permitting plaintiffs to bring Title VII claims alleging discrimination because of the combination of sex and another factor), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Comcast Corp. v. Nat’l Assoc. of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020) (noting that Congress, in enacting the 1991 Civil Rights Act, replaced *Price Waterhouse*’s motivating factor test with its own); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (explaining that refusing to hire women with pre-school-age children could still constitute discrimination in violation of Title VII even though the employer did not discriminate against all women); *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (allowing the plaintiff to bring a Title VII claim alleging that their employer discriminated against them because of a combination of sex and race).

¹³ See *infra* notes 16–24 and accompanying text.

¹⁴ See *infra* notes 25–38 and accompanying text.

¹⁵ See *infra* notes 39–55 and accompanying text.

VII when it passed the Civil Rights Act of 1991.¹⁶ The amendment clarified that an employer has violated Title VII if a plaintiff can show that race, color, religion, sex, or national origin was a “motivating factor” in an adverse employment action, even if it was not the sole basis for the decision.¹⁷

One type of Title VII claim, a disparate treatment claim, requires a plaintiff to prove that an employer intended to discriminate.¹⁸ The plaintiff will be successful if there is direct and unambiguous evidence of intent to discriminate.¹⁹ In the absence of such evidence, courts apply the three-step burden-shifting framework established in 1973 by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*.²⁰ First, the plaintiff must establish a prima facie case by showing that the four elements of a Title VII employment discrimination claim are met.²¹ The plaintiff must show that (1) they belong to one of the protected classes listed in Title VII; (2) they were qualified for their job; (3)

¹⁶ See 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m) (clarifying that as long as an employee’s position in a protected class was one of the reasons for an adverse employment practice, that practice is discrimination in violation of Title VII).

¹⁷ See *id.* (prohibiting employers from discriminating because of a combination of a protected characteristic and other factors); see also *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739–40 (2020) (finding that, even without considering the 1991 amendment to Title VII, the employer violated Title VII because the plaintiff’s sex was one of the reasons for the employment decision).

¹⁸ See, e.g., Marc Chase McAllister, *Extending the Sex-plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives*, 60 B.C. L. REV. 469, 474 (2019) (describing the difference between disparate impact and disparate treatment discrimination claims). Disparate impact occurs when a practice appears neutral on its face and is not necessary for the operation of business, but it ultimately discriminates on the basis of a protected trait. *Disparate Impact*, BLACK’S LAW DICTIONARY, *supra* note 1. Disparate treatment, in contrast, requires intent to discriminate on the basis of race, sex, national origin, age, or disability. *Disparate Treatment, id.*

¹⁹ See Porter, *supra* note 3, at 82 (noting that an employer is liable for discrimination if the plaintiff can prove direct evidence of discriminatory intent). If a plaintiff can present direct evidence of discrimination, courts apply the “mixed motives” test that the U.S. Supreme Court developed in *Price Waterhouse v. Hopkins*, in 1989. 490 U.S. 228, 252 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Comcast Corp. v. Nat’l Assoc. of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020) (noting that the 1991 Civil Rights Act removed the ability of the defendant to raise lack of but-for causation as an affirmative defense once discrimination has been established as a motivating factor); see *DeAngelo v. DentalEZ, Inc.*, 738 F. Supp. 2d 572, 584 (E.D. Pa. 2010) (denying the defendant employer’s motion for summary judgment for an ADEA age discrimination claim and sex-plus-age Title VII claim and noting that if there is direct evidence of discrimination, the “mixed motives” test from *Price Waterhouse* is appropriate). In mixed-motive cases, the employer acts for multiple reasons and lacks one decisive motive. See *Price Waterhouse*, 490 U.S. at 260 (White, J., concurring) (distinguishing mixed-motive cases from pretext cases). Direct evidence of an intent to discriminate is rare and can include an employer’s unambiguous statement that they fired the employee because she was a woman. Porter, *supra* note 3, at 81. Direct evidence does not have to be so explicit, however, and can instead also include words that demonstrate an employer’s bias against a group that Title VII protects, such as an employer sharing their belief that women belong in the home. See *id.* at 81–82 (providing examples of what constitutes direct evidence of discrimination).

²⁰ 411 U.S. 792, 802, 804 (1973) (delineating the three-step framework for establishing an employer’s discriminatory intent through indirect evidence).

²¹ *Id.* at 802.

their employer terminated them despite their qualifications; and (4) the employer did not eliminate their job after the employer terminated their employment.²² If the plaintiff is successful, the burden shifts to the employer to provide a legitimate, nondiscriminatory motive for terminating employment.²³ If the employer is able to do so, the plaintiff has a final opportunity to prove that the legitimate motive the employer cited is pretextual.²⁴

B. “Sex-Plus” Discrimination

Sex-plus discrimination is when an employer discriminates against an employee because of a combination of sex and another factor.²⁵ The Supreme Court of the United States first recognized the viability of a sex-plus discrimination claim under Title VII in the 1971 case, *Phillips v. Martin Marietta Corp.*, where it concluded that discriminating against women with pre-school-age children violated Title VII even though the employer did not discriminate against women in general.²⁶ Since then, lower courts have further developed sex-plus jurisprudence to permit other sex-plus claims, including sex-plus-

²² See *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1056 (10th Cir. 2020) (noting that the *McDonnell Douglas* factors for establishing a prima facie case are flexible); *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1229–30 (10th Cir. 2000) (applying the *McDonnell Douglas* burden-shifting paradigm); see also *McDonnell Douglas*, 411 U.S. at 802, 804 (establishing the three-step burden-shifting framework to establish an employer’s discriminatory intent). A plaintiff has established a prima facie case if they have met their burden of presenting a rebuttable presumption in their favor. *Prima Facie*, BLACK’S LAW DICTIONARY, *supra* note 1.

²³ See *McDonnell Douglas*, 411 U.S. at 802 (describing the burden-shifting framework that courts apply when there is no direct evidence of discrimination).

²⁴ See *id.* at 804 (describing the final part of the three-step burden-shifting framework for a Title VII disparate impact claim); see also *Frappied*, 966 F.3d at 1059 (summarizing the third step of the *McDonnell Douglas* burden-shifting framework and disagreeing with the district court’s conclusion that the plaintiffs did not show pretext); *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002) (applying the third step of the *McDonnell Douglas* framework and providing examples of the ways plaintiffs can show pretext).

²⁵ See *Arnett v. Aspin*, 846 F. Supp. 1234, 1238 (E.D. Pa. 1994) (allowing plaintiff’s argument that the employer discriminated against a subset of the protected class, even though the employer did not discriminate against the entire protected class). *Arnett v. Aspin*, a 1994 case in the Eastern District of Pennsylvania, involved an employer who filled two open positions with women under forty, passing over the forty-nine-year-old female plaintiff for both opportunities. *Id.* at 1236. The plaintiff claimed that all of the employees selected for the position had been either women under forty or men over forty. *Id.*

²⁶ See 400 U.S. 542, 544 (1971) (explaining that an employer’s discrimination against only the subset of women that had pre-school-age children could still violate Title VII); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004) (clarifying that the term “sex plus” was developed to indicate that Title VII claims will not necessarily fail if only a subclass of a protected group faced discrimination); see also *Sprogis v. United Air Lines*, 444 F.2d 1194, 1199 (7th Cir. 1971) (concluding that an employer requiring women, but not men, to be unmarried is sex discrimination under Title VII).

marital status, sex-plus-race, and sex-plus-age claims.²⁷ Notably, in sex-plus claims, the “plus” factor does not need to be another protected class.²⁸ Rather, it need only relate to either an immutable characteristic or to the exercise of a fundamental right.²⁹

Until 2020, no federal appellate court had determined whether a plaintiff could bring a sex-plus-age claim under Title VII.³⁰ Some district courts have found that plaintiffs may bring a sex-plus-age discrimination claim under Title VII.³¹ The main distinction between sex-plus-age claims and other sex-plus

²⁷ See *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (permitting the plaintiff to bring a sex-plus-race claim under Title VII); *Sprogis*, 444 F.2d at 1199 (permitting a plaintiff to bring a sex-plus-marital status claim under Title VII); *Arnett*, 846 F. Supp. at 1241 (E.D. Pa. 1994) (permitting a plaintiff to bring a sex-plus-age claim under Title VII).

²⁸ See, e.g., *Phillips*, 400 U.S. at 544 (permitting a sex-plus claim for women who are parents of pre-school-age children); *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997) (holding that Title VII prohibits employers from discriminating against a specific group of women, even if it did not discriminate against all women), *abrogated by Frappied*, 966 F.3d at 1047.

²⁹ See *Jefferies*, 615 F.2d at 1035 (allowing plaintiffs to allege a Title VII violation based on the intersection of sex and race); *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091–92 (5th Cir. 1975) (holding that employer grooming policies limiting the length of hair allowed on males did not implicate an immutable characteristic or exercise of a fundamental right and, therefore, was not a protected sex characteristic); *Arnett*, 846 F. Supp. at 1241 (reasoning that a sex-plus-age claim should be permissible because age is an immutable characteristic). Immutable characteristics are physical traits that a person cannot change, such as race, sex, and national origin. See *Willingham*, 507 F.2d at 1091 (holding that employers may not discriminate on the basis of an immutable characteristic or fundamental right); *Arnett*, 846 F. Supp. at 1241 (considering age an immutable characteristic). Fundamental rights are “a significant component of liberty” and include some rights to privacy, such as marriage and parenthood. *Fundamental Right*, BLACK’S LAW DICTIONARY, *supra* note 1; see, e.g., *Phillips*, 400 U.S. at 544 (permitting a claim of discrimination on the basis of sex and being the parent of a pre-school-age child, which is the exercise of a fundamental right).

³⁰ See *Frappied*, 966 F.3d at 1047 & nn.5–6 (noting that, although no circuit courts had addressed the applicability of Title VII to sex-plus-age claims, the district courts that had ruled on the issue were divided); see, e.g., *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010) (declining to make a finding about the viability of an age-plus-sex claim under the ADEA after having found a viable claim based on age alone); *Bryant v. Int’l Sch. Servs., Inc.*, 675 F.2d 562, 573 & n.18 (3d Cir. 1982) (acknowledging the existence of sex-plus claims under Title VII, but denying that such a claim was applicable in this case).

³¹ See *Frappied*, 966 F.3d at 1047 n.6 (identifying several district court opinions that held that Title VII permitted sex-plus-age claims, while also acknowledging that district courts did not unanimously hold this view); see, e.g., *Cooper v. Corr. Corp. of Am.*, No. 15-CV-00755, 2015 U.S. Dist. LEXIS 134025, at *9 (D. Colo. Oct. 1, 2015) (acknowledging the possibility of sex-plus-age discrimination claims); *DeAngelo v. DentalEZ, Inc.*, 738 F. Supp. 2d 572, 584 (E.D. Pa. 2010) (permitting sex-plus-age claims of discrimination); *Gorski v. Myriad Genetics*, No. 06-11631, 2007 U.S. Dist. LEXIS 48110, at *3–4 (E.D. Mich. July 3, 2007) (refusing to find that sex-plus-age claims are not cognizable); *McGrane v. Proffitt’s Inc.*, No. C 97-221, 2000 WL 34030843, at *7 (N.D. Iowa Dec. 26, 2000) (recognizing sex-plus-age claims under Title VII); *James v. Teleflex, Inc.*, No. CIV.A. 97-1206, 1998 U.S. Dist. LEXIS 20400, at *26 (E.D. Pa. Dec. 23, 1998) (noting that other courts in the district had found sex-plus-age claims permissible); *Hall v. Mo. Highway & Transp. Comm’n*, 995 F. Supp. 1001, 1005 (E.D. Mo. 1998) (allowing the plaintiff to proceed on a sex-plus-age discrimination claim), *aff’d on other grounds*, 235 F.3d 1065 (8th Cir. 2000). *But see, e.g., Bauers-Toy v. Clarence Cent. Sch. Dist.*, No. 10-CV-845, 2015 U.S. Dist. LEXIS 193758, at *19 (W.D.N.Y. Sept. 30, 2015) (rejecting the viability of sex-plus-age claims under Title VII).

claims is that Congress has separately addressed age discrimination in the ADEA.³² For this reason, some courts hesitate to expand Title VII to include age as a “plus” factor, despite an established sex-plus doctrine.³³

Under the ADEA, employers may not discriminate against employees older than forty because of their age.³⁴ The Supreme Court has interpreted the ADEA to require that, for an employer to be liable, age must have a “determinative influence” on an adverse employment outcome.³⁵ This form of strict but-for causation differs from the standard traditionally used in Title VII cases, which has always required only that a protected class be one but-for cause of an adverse employment action.³⁶ The strict standard for causation has also prevented a majority of lower courts from recognizing age-plus claims under the ADEA.³⁷ As a result, some courts have prohibited plaintiffs from bringing sex-plus-age claims under Title VII, reasoning that Congress envisioned that plaintiffs would use the ADEA to address age discrimination, rather than leverage the lower causation requirement in Title VII as a backup age discrimination claim.³⁸

³² See 29 U.S.C. §§ 621–634 (explicitly prohibiting employers from discriminating against workers over the age of forty). *But see Frappied*, 966 F.3d at 1048 (dismissing defendant’s argument that a plaintiff cannot bring a sex-plus-age claim under Title VII because the ADEA provides relief for age discrimination).

³³ See, e.g., *Bauers-Toy*, 2015 U.S. Dist. LEXIS 193758, at *19 (dismissing the possibility of a sex-plus-age claim under Title VII).

³⁴ 29 U.S.C. §§ 623(a), 631(a). Congress did not intend for the ADEA to protect the relatively young from employment discrimination. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 590–91 (2004) (noting that Congress intended for the ADEA to protect older workers from employment discrimination that benefits their relatively younger counterparts). Congress also did not intend to force employers to provide special treatment to older workers. See *Berry v. Gen. Motors Corp.*, 838 F. Supp. 1479, 1500 (D. Kan. 1993) (noting that the ADEA does not require employers to continue to employ older workers), *aff’d*, 56 F.3d 1233 (10th Cir. 1995).

³⁵ See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (requiring that age be a “determinative factor” for a plaintiff to prevail on a disparate treatment claim); see, e.g., *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176 (2009) (requiring the plaintiff to prove that age was “the but-for” cause of the employer’s adverse action to prove an ADEA claim). Courts have interpreted the ADEA’s requirement that an employer acted “because of” age to require plaintiffs to demonstrate that age was the “reason” for the adverse employment action. *Gross*, 557 U.S. at 176 (citing *Hazen Paper Co.*, 507 U.S. at 610).

³⁶ See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (permitting a Title VII claim of discrimination against mothers of pre-school-age children, even though not all women were discriminated against). Sex was a but-for cause because fathers of pre-school-age children were not discriminated against. See *id.* at 543 (noting that the employer was not considering mothers of pre-school-age children for employment, despite employing men with preschool-age children).

³⁷ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739–40 (2020) (applying a looser but-for causation standard when applying the original, unamended Title VII language to the facts); *McAllister*, *supra* note 18, at 493 (reporting that at least eight federal district courts have rejected age-plus claims under the ADEA). A but-for cause is an element that is necessary to cause an event. *Cause*, BLACK’S LAW DICTIONARY, *supra* note 1.

³⁸ See *McAllister*, *supra* note 18, at 494 (discussing the Western District of New York’s 2015 opinion, in *Bauers-Toy*, that rejected the possibility of a sex-plus-age claim under Title VII); see

C. Factual Background and Procedural History of Frappied

On July 21, 2020, shortly after the Supreme Court decided the landmark Title VII case *Bostock v. Clayton County*, the Tenth Circuit Court of Appeals became the first circuit court to decide that Title VII permits sex-plus-age claims.³⁹ Defendant Affinity Gaming Black Hawk purchased the Golden Mardi Gras Casino in Black Hawk, Colorado in March of 2012 and took over day-to-day operations that November.⁴⁰ At that point, the defendant required all existing employees to re-apply for their jobs, and the plaintiffs were re-hired.⁴¹ Prior to their termination, all nine plaintiffs successfully performed their job requirements.⁴² All nine plaintiffs were over forty years old, and eight of them were women.⁴³

In January of 2013, the defendant had laid off about sixty of the 106 employees at the casino and posted a Craigslist ad for fifty-nine open positions during the same time period.⁴⁴ The new management's explanations for the layoffs were varied and inconsistent.⁴⁵ The defendant provided some former employees with reasons for their terminations, such as the employee failing to pass the probationary period or that they were not what the defendant was looking for.⁴⁶ Some were given no reason at all.⁴⁷

Frappied v. Affinity Gaming Black Hawk, LLC, No. 17-cv-01294, 2018 U.S. Dist. LEXIS 104796, at *7–8 (D. Colo. June 22, 2018) (refusing to allow plaintiffs to “attempt to work-around statutory dictates” by bringing a second claim of age discrimination under Title VII in addition to under the ADEA), *aff'd in part, rev'd in part*, 966 F.3d 1038 (10th Cir. 2020).

³⁹ See 140 S. Ct. at 1741 (holding that the language of Title VII in 42 U.S.C. § 2000e-2(a)(1) prohibits employers from discriminating based in part on sex); Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1048 (10th Cir. 2020) (holding that plaintiffs can succeed on a sex-plus-age claim under Title VII).

⁴⁰ See *Frappied*, 2018 U.S. Dist. LEXIS 104796, at *2 (providing the timeline of the defendant's purchase of and control over the casino).

⁴¹ See *id.* (describing the defendant's re-application requirement).

⁴² See *id.* at *2–3 (noting that the plaintiffs each performed their job functions and followed the “Genuine Service” philosophy that the defendant put in place around January 2013, prior to the layoffs).

⁴³ *Frappied*, 966 F.3d at 1045.

⁴⁴ See *Frappied*, 2018 U.S. Dist. LEXIS 104796, at *4–5 (summarizing the timing and extent of the layoffs and new hiring, which included about twenty-four new workers to replace the approximately sixty workers who were laid off).

⁴⁵ See *id.* (offering a range of explanations that the defendants provided to some plaintiffs for the layoffs and noting that others received no explanation at all).

⁴⁶ See *id.* (providing the defendant's purported reasons for laying off the plaintiffs). An employee reported seeing a ranked list of employees based on age, seniority, and work ability on the desk of a director at the casino. *Id.* at *3. Employee actions that Affinity deemed problematic during the probationary period included using profanity in front of a customer and making mistakes filling out forms like tip sheets and counts. *Frappied*, 966 F.3d at 1059–60.

⁴⁷ *Frappied*, 2018 U.S. Dist. LEXIS 104796, at *4 (noting that the casino management did not know the reasons for each plaintiff's termination).

The plaintiffs' presentation of the number and demographics of employees that the layoffs affected was inconsistent but still provided some probative value for claims of discrimination.⁴⁸ The plaintiffs intended for the statistics to demonstrate two things: first, that older people in general were more likely to be laid off, and second, that the defendant discriminated against older women in particular.⁴⁹ The eight women plaintiffs brought disparate impact and disparate treatment sex-plus-age claims under Title VII.⁵⁰ The U.S. District Court for the District of Colorado dismissed the plaintiffs' sex-plus-age disparate impact and disparate treatment claims because it found that plaintiffs could not bring sex-plus-age claims under Title VII.⁵¹

The plaintiffs appealed to the Tenth Circuit, which reversed the district court's finding and instead held that plaintiffs can bring sex-plus-age claims under Title VII.⁵² Despite noting that the ADEA exists to address age-related employment discrimination, the Tenth Circuit reasoned that legislative intent is more important than drawing an artificial line between types of discrimination claims.⁵³ The court found that by passing the ADEA, Congress tried to broaden protections against employment discrimination to include older workers rather than to narrow the scope of Title VII.⁵⁴ The Tenth Circuit also relied on *Bos-*

⁴⁸ See *Frappied*, 966 F.3d at 1053, 1055 (finding that the statistics, even though not clearly presented, bolstered the plaintiffs' allegation of discrimination). The defendant originally employed about twenty-two women over the age of forty, and it laid off about eighteen of them. *Frappied*, 2018 U.S. Dist. LEXIS 104796, at *5. The defendant employed about eighteen men over the age of forty and laid off about ten of them. *Id.* at *4–5. Of the approximately thirty-three women laid off, about fourteen were over forty. See *id.* at *5 (summarizing the facts, which suggested that at least nineteen of the thirty-three laid-off women were younger than forty). In January and February of 2013, the defendant hired about twenty-four new workers to replace the employees it terminated in January. *Id.* Of those new hires, three men and no women were over forty years old, and fifteen of them, or seventy-one percent, were in their twenties at the time of hire. *Frappied*, 966 F.3d at 1055. The exact numbers are not clear because the plaintiffs presented inconsistent and contradictory statistics. *Id.* at 1053.

⁴⁹ See *Frappied*, 966 F.3d at 1051 (describing and analyzing the statistics that the plaintiffs used to support their discrimination claims). The Tenth Circuit found plaintiffs' allegations of discrimination against older women conclusory and concluded that the plaintiffs' statistics had only plausibly shown that the defendant's layoffs were possibly motivated by age or sex. *Id.* at 1051, 1053.

⁵⁰ *Id.* at 1051.

⁵¹ See *Frappied*, 2018 U.S. Dist. LEXIS 104796, at *7–8, *13 (holding that the plaintiffs were not allowed to bring a sex-plus-age claim). The district court judge perceived the plaintiffs' sex-plus-age claim under Title VII as “an attempt to have a spare bullet” in the event that their ADEA age discrimination claim failed. *Id.* at *7. The judge also pointed to the different scopes of liability for Title VII and the ADEA and refused to permit plaintiffs to leverage the different standards to get around the limits that Congress imposed. *Id.* at *8.

⁵² See *Frappied*, 966 F.3d at 1049 (recognizing sex-plus-age claims under Title VII).

⁵³ See *id.* at 1048 (reasoning that Congress intended to expand employee protections when it amended Title VII, so sex-plus-age claims are permissible even if some plaintiffs would be able to bring both an ADEA and Title VII claim for the same incident).

⁵⁴ See 29 U.S.C. § 621 (declaring the intent of Congress to broaden protections against age discrimination for older workers); *Frappied*, 966 F.3d at 1048 (discussing Congress's policy aims in passing the ADEA).

tock, in which the Supreme Court recently declared that an employer violated Title VII if the reason they intentionally fired an employee was at all related to sex.⁵⁵

II. TITLE VII VERSUS THE ADEA

On July 21, 2020, in *Frappied v. Affinity Gaming Black Hawk, LLC*, the U.S. Court of Appeals for the Tenth Circuit became the first circuit court to determine whether Title VII of the Civil Rights Act of 1964 allows sex-plus-age claims, an issue dividing the federal district courts below.⁵⁶ Section A of this Part provides a brief history of Title VII and the ADEA.⁵⁷ Section A will also show the textual analysis that courts have conducted when deciding whether sex-plus and age-plus claims, respectively, are cognizable claims.⁵⁸ Section B presents the different standards of causation that courts have applied to claims under Title VII and the ADEA.⁵⁹ Section C provides a summary of the *Frappied* court's analysis and ultimate conclusion that Title VII permits plaintiffs to bring sex-plus-age claims of discrimination.⁶⁰ Finally, Section D provides an overview of the Supreme Court of the United States' 2020 holding and analysis in *Bostock v. Clayton County* that affirmatively states the proper standard of causation for similar Title VII cases.⁶¹

A. History of Title VII and the ADEA

Congress passed Title VII as part of the Civil Rights Act of 1964 to prevent employers from discriminating against employees "because of" their membership in a protected class.⁶² Congress later passed the ADEA in 1967 and has since amended it several times, including in the Civil Rights Act of

⁵⁵ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (holding that an employer has violated Title VII if they intentionally fire an employee "based in part on sex"); *Frappied*, 966 F.3d at 1045 (noting that, under *Bostock*, an employer has still violated Title VII even if a factor that Title VII does not protect was more important to the employer's decision than sex).

⁵⁶ See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)–(m) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin); 966 F.3d 1038, 1047–48 (10th Cir. 2020) (holding that plaintiffs may bring sex-plus age claims of discrimination under Title VII).

⁵⁷ See *infra* notes 62–67 and accompanying text.

⁵⁸ See *infra* notes 66–67 and accompanying text.

⁵⁹ See *infra* notes 68–74 and accompanying text.

⁶⁰ See *infra* notes 75–87 and accompanying text.

⁶¹ See *infra* notes 88–92 and accompanying text.

⁶² Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Title VII protects employees from employment discrimination based on race, color, religion, sex, or national origin. *Id.* Representative Howard Smith, reportedly intending to block the bill from passing, added sex to the list of traits afforded protection under Title VII. See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115–18 (1985) (describing Representative Howard Smith's failed attempt to sufficiently decrease support for Title VII to prevent Congress from passing it).

1991.⁶³ Congress also amended Title VII in the Civil Rights Act of 1991 and added that an employer may not establish an employment practice motivated by a protected trait, even if they also considered other factors.⁶⁴ When Congress amended Title VII, however, it did not add a similar motivating factor test to the ADEA.⁶⁵ Although courts recognized the sex-plus doctrine before the 1991 amendment to Title VII, they used the new “motivating factor” test in Title VII to deny age-plus claims under the ADEA.⁶⁶ Courts have used Congress’s failure to amend the ADEA to justify different burdens of persuasion on plaintiffs and to reach different conclusions about whether plaintiffs may bring mixed-motive cases under Title VII and the ADEA.⁶⁷

⁶³ See 29 U.S.C. §§ 621–634 (prohibiting employers from using employment practices that discriminate on the basis of age).

⁶⁴ See Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (amending Title VII to explicitly authorize mixed-motive claims of discrimination); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (holding that, to avoid liability, a defendant must prove by a preponderance of the evidence that even without considering the plaintiff’s gender, it would have made the same choice), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Comcast Corp. v. Nat’l Assoc. of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020) (noting that the 1991 Civil Rights Act removes this affirmative defense from employers).

⁶⁵ See 42 U.S.C. § 2000e-2(m) (authorizing mixed-motive Title VII claims); 29 U.S.C. § 623(a)(1) (prohibiting employment discrimination because of age); *see also* *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174 (2009) (comparing the legislative history of Title VII and the ADEA).

⁶⁶ See *Gross*, 557 U.S. at 174–75 (concluding that plaintiffs cannot bring age-plus claims under the ADEA because it, unlike Title VII, has no provision authorizing mixed-motive claims). *But see* *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (declining to rule out the possibility of a sex-plus claim under Title VII); *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (allowing a sex-plus-race claim under Title VII); *Sprogis v. United Air Lines*, 444 F.2d 1194, 1199 (7th Cir. 1971) (permitting a claim of sex-plus-marital status under Title VII).

⁶⁷ See *McAllister*, *supra* note 18, at 475–76 (comparing different courts’ approaches to Title VII and ADEA claims based on the combination of sex and age); *see, e.g., Gross*, 557 U.S. at 174–75 (requiring that age be the but-for cause of discrimination under the ADEA). The original language of the ADEA closely mapped the language of Title VII by preventing an employer from discriminating against an employee “because of . . . age.” *Compare* 42 U.S.C. § 2000e-2(a)(1) (declaring 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”), *with* 29 U.S.C. § 623(a) (prohibiting “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”). Courts have reasoned that because Congress did not similarly amend the ADEA, it did not intend to provide relief for age-plus claims of discrimination. *See, e.g., Gross*, 557 U.S. at 174 (holding that Title VII and the ADEA have different burdens of persuasion, which prevents Title VII decisions from applying to ADEA cases). *But see* *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1048 (10th Cir. 2020) (rejecting the defendant’s argument that because Title VII and the ADEA were designed differently and demand different burdens of proof, Title VII should not permit sex-plus-age claims). The U.S. Supreme Court’s ruling in 2009, in *Gross v. FBL Financial Services*, imposed a burden on a plaintiff bringing an age discrimination claim to prove that age was the only factor that the employer considered when it acted. *See* *McAllister*, *supra* note 18, at 476 (describing the implications of the Supreme Court’s ruling in *Gross*); *see also* *Gross*, 557 U.S. at 174 (restricting plaintiffs’ ability to bring age discrimination claims to instances of discrimination that age exclusively motivated).

B. Differing Standards of Causation

In 1989, the Supreme Court held in *Price Waterhouse v. Hopkins* that plaintiffs could bring sex-plus claims under Title VII.⁶⁸ Nonetheless, an employer could avoid liability if it could prove by a preponderance of the evidence that it would have taken the same action without considering a characteristic that Title VII protects.⁶⁹ Since the 1991 amendment to Title VII, however, it is possible for plaintiffs to prevail if sex is merely a motivating factor for an adverse employment decision.⁷⁰ Employers can be liable even if they relied more heavily on another factor when making the decision.⁷¹

Despite the nearly identical language of Title VII and the ADEA, courts have been hesitant to recognize age-plus discrimination under the ADEA.⁷² Rather than adopting a version of the sex-plus doctrine that was emerging prior to the 1991 amendment to Title VII, many courts interpreted the ADEA to require age to be “the reason” an employer acted.⁷³ Thus, courts often require claims under the ADEA to prove that age is *the* but-for cause of the adverse employment action—rather than *a* but-for cause—to be successful, despite courts never interpreting Title VII to require that a protected trait be the sole but-for cause of discrimination.⁷⁴

⁶⁸ See 490 U.S. at 258 (finding that gender played a motivating part in the decision not to promote the plaintiff).

⁶⁹ *Id.* (holding that employers may avoid liability if they are able to show, by a preponderance of the evidence, that they would have taken the same action even if they had not discriminated against the employee).

⁷⁰ See 42 U.S.C. § 2000e-2(m) (allowing plaintiffs to prevail on a Title VII discrimination claim if one of the traits Title VII protects motivated the employer).

⁷¹ See *id.* (holding an employer liable if a protected class motivated them when taking an employment action, even when the protected class was not the sole reason the employer acted); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (holding that if the employee’s protected class plays a part in an adverse employment decision, the employer has violated Title VII).

⁷² See *Famighette v. Rose*, No. 17-cv-2553, 2018 WL 2048371, at *14 (E.D.N.Y. May 2, 2018) (dismissing age-plus claim brought under the ADEA); *Bauers-Toy v. Clarence Cent. Sch. Dist.*, No. 10-CV-845, 2015 U.S. Dist. LEXIS 193758, at *19 (W.D.N.Y. Sept. 30, 2015) (same); *Thompson v. City of Columbus*, No. 12-cv-01054, 2014 WL 1814069, at *29–30 (S.D. Ohio May 7, 2014) (same); *Cartee v. Wilbur Smith Assocs.*, No. 08-4132, 2010 WL 1052082, at *12 (D.S.C. Mar. 22, 2010) (same); *McKinney v. City of Hawthorne*, No. CV08-07, 2008 U.S. Dist. LEXIS 128845, at *2 n.2 (C.D. Cal. Nov. 17, 2008) (same).

⁷³ See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (requiring age to be the but-for cause of the adverse employment action). *But see* *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 318–19 (6th Cir. 2012) (allowing discrimination claims if the protected trait was *a*, rather than *the*, but-for cause); *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1278 (10th Cir. 2010) (rejecting the idea that *Gross* raised evidentiary requirements for plaintiffs bringing ADEA claims by requiring them to prove that age was the only reason for the adverse employment action).

⁷⁴ See *Gross*, 557 U.S. at 175–76 (requiring age to be the but-for cause of discrimination in an ADEA claim); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (permitting a sex-plus claim under Title VII prior to the introduction of the motivating factor test), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Comcast Corp. v. Nat’l Assoc. of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020) (noting that the 1991 Civil Rights Act

C. The District Court Split and the Tenth Circuit's Ruling

Although the sex-plus doctrine for Title VII claims is well established, the reluctance of a majority of federal district courts to acknowledge age-plus discrimination claims under the ADEA has prevented some courts from recognizing sex-plus-age claims under Title VII.⁷⁵ Several district courts have expressed concern that permitting plaintiffs to bring a sex-plus-age claim under Title VII would allow them to prevail on a claim of age discrimination when they would not be able to succeed under the ADEA.⁷⁶ Congress intended for the ADEA to provide protection against age discrimination in employment, so these courts have understood sex-plus-age Title VII claims to effectively provide plaintiffs with two chances to prevail on what amounts to the same claim.⁷⁷

On the other hand, the district courts that have allowed sex-plus-age discrimination claims under Title VII have argued that Title VII and the ADEA address different harms.⁷⁸ Therefore, some district courts have said that a sex-plus-age claim under Title VII and an age discrimination claim under the ADEA can coexist without unfairly providing plaintiffs two chances to argue the same claim.⁷⁹ These courts have also reasoned that allowing plaintiffs the opportunity to pursue these claims fulfills the purpose of the sex-plus doctrine,

established a new motivating factor test). *But see* EEOC v. DynMcDermott Petroleum Operations Co., 537 F. App'x 437, 448 (5th Cir. 2013) (per curiam) (authorizing age-plus claims under the ADEA); *Leal v. McHugh*, 731 F.3d 405, 414–15 (5th Cir. 2013) (permitting mixed-motive claims of discrimination by finding that the district court had misinterpreted *Gross* as requiring age to be the sole cause, rather than one but-for cause); *Lewis*, 681 F.3d 312, 321 (allowing an age-plus-disability claim of discrimination).

⁷⁵ See *supra* note 72 and accompanying text (noting some of the district court cases that have prohibited plaintiffs from bringing age-plus discrimination claims under the ADEA).

⁷⁶ See *Frappied v. Affinity Gaming Black Hawk, LLC*, No. 17-cv-01294, 2018 U.S. Dist. LEXIS 104796, at *7–8 (D. Colo. June 22, 2018) (refusing to allow a sex-plus-age claim of discrimination under Title VII), *aff'd in part, rev'd in part*, 966 F.3d 1038 (10th Cir. 2020); *see, e.g., Kelly v. Drexel Univ.*, 907 F. Supp. 864, 875 n.8 (E.D. Pa. 1995) (rejecting the argument that the ADEA protects the subclass of older workers with disabilities).

⁷⁷ *See, e.g., Frappied*, 2018 U.S. Dist. LEXIS 104796, at *7–8 (rejecting the plaintiff's sex-plus-age discrimination claim because it would give plaintiffs the ability to prevail on an age discrimination claim under Title VII even if they would be unsuccessful under the ADEA); *Bauers-Toy*, 2015 U.S. Dist. LEXIS 193758, at *19 (rejecting the possibility of age-plus-sex claims by reasoning that the ADEA and Title VII cover age discrimination and sex discrimination separately, with two separate standards and remedies).

⁷⁸ *See Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 109–10 (2d Cir. 2010) (acknowledging that age discrimination is distinct from sex discrimination and that when both are present courts cannot neatly separate the two components).

⁷⁹ *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, SECTION 2 THRESHOLD ISSUES (2009) (noting that intersectional discrimination can be based on traits that separate Equal Employment Opportunity statutes protect); *see, e.g., Arnett v. Aspin*, 846 F. Supp. 1234, 1240 (E.D. Pa. 1994) (finding the distinction between sex-plus-age cases and other sex-plus cases in which the other factor is not separately protected irrelevant).

even when Congress separately protected the “plus” factor the way it protected age under the ADEA.⁸⁰

The Tenth Circuit was the first circuit court to directly address and choose a side of the district court split regarding the viability of sex-plus-age claims under Title VII.⁸¹ Noting that other courts have recognized sex-plus claims when the “plus” factor is not itself protected under Title VII, the *Frappied* court did not find any difference between those sex-plus claims and a sex-plus-age claim that would warrant denying the viability of a sex-plus-age claim.⁸² The court rejected the defendant’s argument that courts should bar sex-plus-age claims because the ADEA exists to separately address employment age discrimination.⁸³ It held that permitting a sex-plus-age claim would not allow plaintiffs to circumvent the requirements of the ADEA because Title VII and the ADEA exist to address two distinct harms.⁸⁴ Therefore, permitting a sex-plus-age claim under Title VII does not allow plaintiffs to bypass the requirements that the ADEA sets out.⁸⁵ The court recognized “intersectional” discrimination and noted that some people experience a form of discrimination based on multiple factors that is distinct from discrimination based on those factors individually.⁸⁶ Lastly, the court reasoned that sex-plus-age claims honored Congress’s intent because it designed the ADEA to broaden protections against employer discrimination rather than to limit the application of Title VII.⁸⁷

⁸⁰ See *Arnett*, 846 F. Supp. at 1240 (permitting a sex-plus-age claim when Congress has separately protected the plus factor). One purpose of Title VII is to protect employees from sex discrimination, so these courts opined that, even though the ADEA prohibits age discrimination, courts should permit plaintiffs to argue that the discrimination was based on the combination of traits as long as the statute under which a plaintiff is arguing protects one of the traits. See *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1047–48 (10th Cir. 2020) (finding no reason to separate sex-plus-age claims from other sex-plus claims courts had recognized).

⁸¹ See *Frappied*, 966 F.3d at 1048 (acknowledging that it would be the first circuit court to decide whether Title VII sex-plus-age claims are permissible and ultimately concluding that they are).

⁸² See *id.* at 1048 (reasoning that because courts have permitted other sex-plus claims under Title VII, sex-plus-age claims should also be cognizable).

⁸³ *Id.* (dismissing the defendant’s argument that because the ADEA addresses age-related employment discrimination claims, Title VII cannot address age-related claims).

⁸⁴ *Id.* (noting that the ADEA and Title VII address different types of discrimination, with the ADEA protecting workers from discrimination based on age and Title VII protecting older women from discrimination based on sex and possibly another factor).

⁸⁵ *Id.*

⁸⁶ See *id.* at 1049 (citing Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 150, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf> [<https://perma.cc/5QGF-CN7C>]) (noting that recognition of intersectional discrimination is necessary to understand and address all impermissible discrimination). When employers discriminate against older women but not older men, they are violating Title VII by relying on sex stereotypes. *Id.*

⁸⁷ *Id.* at 1048.

D. The Supreme Court's But-For Standard of Causation Analysis in Bostock

On June 15, 2020, the Supreme Court ruled in *Bostock v. Clayton County* that employers who discriminate against employees because of gender identity or sexual orientation are necessarily engaging in sex discrimination in violation of Title VII.⁸⁸ In that opinion, the Supreme Court analyzed only the original language of Title VII that prevents discrimination “because of . . . sex.”⁸⁹ The Court did not rely on the motivating factor test introduced in the 1991 amendment to Title VII.⁹⁰ Instead, when describing the but-for test of causation that the “because of” language of Title VII incorporates, the Court concluded that something is a but-for cause if changing that factor would change the outcome.⁹¹ Even if there are multiple but-for causes for a particular event, liability attaches if at least one of those but-for causes is a protected class under Title VII.⁹²

III. *FRAPPED* CORRECTLY REMAINED CONSISTENT WITH *BOSTOCK* AS WELL AS GENERAL POLICY GOALS

In 2020, the U.S. Court of Appeals for the Tenth Circuit, in *Frappied v. Affinity Gaming Black Hawk, LLC*, correctly ruled that Title VII permits sex-plus-age complaints.⁹³ Following the U.S. Supreme Court’s 2020 decision in *Bostock v. Clayton County*, other courts should similarly find sex-plus-age claims permissible under Title VII.⁹⁴ Not only was *Frappied* a correct interpretation of *Bostock*, but it was also correct as a policy matter because it allows plaintiffs to bring intersectional discrimination claims that separate

⁸⁸ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020). If an employer fires a male for being attracted to men, but would not fire a female for being attracted to men, the employer has discriminated on the basis of sex. *See id.* (explaining why discrimination based on sexual orientation necessitates impermissible sex discrimination). If an employer fires a female-identifying employee who was a male at birth but would not fire a female-identifying employee who was identified as a female at birth, they have discriminated because of sex. *See id.* (clarifying why discrimination on the basis of gender identity involves sex discrimination).

⁸⁹ *Id.* at 1739–40.

⁹⁰ *Id.*

⁹¹ *Id.* at 1739 (concluding that the legislative intent necessitates a but-for cause analysis that tests to see whether the presence or absence of a particular element changes the outcome). To illustrate this, the Court provided the example of a company policy of discrimination against women who are Yankees fans. *Id.* at 1742. If an employer fires women who are Yankees fans but not men who are Yankees fans, the employer is taking an adverse employment action “because of sex.” *Id.*

⁹² *Id.* at 1739 (clarifying that employers cannot simply point to another contributing factor to avoid liability for the discriminatory action). In *Bostock*, the Court noted that Congress has taken steps to make the standard lower by introducing a “motivating factor” test. *Id.* at 1739–40 (citing Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m)).

⁹³ *See* 966 F.3d 1038, 1048 (10th Cir. 2020) (holding that sex-plus-age Title VII claims are cognizable).

⁹⁴ *See* 140 S. Ct. 1731, 1741 (2020) (holding that an employer violated Title VII if they discriminated on the basis of gender identity or sexual orientation).

claims of age and sex discrimination would not otherwise adequately address.⁹⁵

The *Bostock* Court interpreted and applied the language in Title VII that prohibits employment discrimination “because of . . . sex.”⁹⁶ The Court did not look to the motivating factor test when assessing the claims of discrimination on the basis of sexual orientation and gender identity.⁹⁷ Courts have historically used the analogous language in the ADEA that makes it illegal for employers to discriminate “because of . . . age” to justify requiring a higher standard of causation for ADEA claims than for claims brought under Title VII.⁹⁸ Courts previously reasoned that the inconsistent standard of causation was permissible, if not required, because Congress amended Title VII in 1991 to specifically authorize mixed-motive claims, whereas it did not add similar language to the ADEA.⁹⁹ Because the Supreme Court clarified that an employer has violated Title VII if a protected class was *a* but-for cause—as opposed to *the* but-for cause—of the adverse employment action, courts should apply the same standard to claims brought under the ADEA.¹⁰⁰

Plaintiffs have been able to bring sex-plus claims for decades, with courts requiring only that one factor in the employment discrimination be a trait that Title VII protects.¹⁰¹ Sex-plus-age claims pre-dated the 1991

⁹⁵ See *id.* at 1739 (permitting plaintiffs to bring sex discrimination claims under Title VII even if sex is not the only factor the employer used to discriminate); *Frappied*, 966 F.3d at 1048 (holding that plaintiffs can bring sex-plus-age claims under Title VII).

⁹⁶ See *Bostock*, 140 S. Ct. at 1739 (analyzing the original language of Title VII found in the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)).

⁹⁷ See *id.* at 1739–40 (noting that the facts did not require analysis under the “motivating factor” test that Congress added to Title VII in 1991).

⁹⁸ See 29 U.S.C. § 623(a) (prohibiting age-related employment discrimination); see, e.g., *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174–76 (2009) (requiring age to be the but-for cause of discrimination under the ADEA).

⁹⁹ See Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (protecting against employment discrimination due to a combination of a protected trait and other factors); 29 U.S.C. § 623(a) (disallowing employers from engaging in age-related discriminatory employment practices); see, e.g., *Gross*, 557 U.S. at 174 (comparing the language of Title VII and the ADEA with a focus on the motivating factor test that Congress added to Title VII to explicitly authorize mixed-motive claims).

¹⁰⁰ See *Bostock*, 140 S. Ct. at 1739 (allowing for the possibility of multiple but-for causes for an adverse employment action). The Supreme Court concluded that an employer has violated Title VII if they discriminated on the basis of sex and another factor, and to reach this conclusion the Court only relied on the original language of Title VII. See *id.* at 1739–40 (noting that an employer has violated Title VII if sex was one of the reasons for an adverse employment action). This language mirrors the language in the ADEA, which should permit courts to allow claims that an employer discriminated on the basis of age and another factor. See 29 U.S.C. § 623(a) (protecting workers over forty from age-related employment discrimination); 42 U.S.C. § 2000e-2(a)(1) (prohibiting employment discrimination because of sex); *Bostock*, 140 S. Ct. at 1739–40 (relying on the original language of Title VII to allow claims in which sex is just one of multiple but-for causes of the discrimination).

¹⁰¹ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (describing and permitting mixed-motive claims under Title VII), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Comcast Corp. v. Nat’l Assoc. of Afr. Am.-Owned Media*,

amendment to Title VII, which clarified that an employer was in violation of Title VII if an employer considered a protected trait in an adverse employment action, even if it was not the deciding factor.¹⁰² The *Bostock* Court, having applied the “because of . . . sex” language from Title VII to discrimination claims, found that an employer violated Title VII if sex was *one* but-for cause of the discrimination.¹⁰³ Courts should lower the current “sole cause” standard of causation some courts apply in ADEA cases to permit age discrimination claims if age is one but-for cause of the discrimination.¹⁰⁴ The statutory language, mirroring that of Title VII, makes it illegal for employers to discriminate “because of . . . age.”¹⁰⁵ With a lowered standard of causation, age-plus-sex claims of discrimination would be permissible for the same reasons courts have permitted sex-plus-age claims Title VII.¹⁰⁶

The Supreme Court’s analysis in *Bostock* logically should also lower the standard courts apply in ADEA claims and allow plaintiffs to prevail on a claim when age is one but-for cause of discrimination.¹⁰⁷ This extension of *Bostock* would effectively erase the policy concerns some courts have expressed about considering sex-plus-age claims under Title VII.¹⁰⁸ Plaintiffs will no longer be forced to argue claims of employment discrimination, in which age at least partially motivated an employer, under two laws with dif-

140 S. Ct. 1009 (2020) (noting that the 1991 Civil Rights Act imposes a motivating factor test on discrimination claims); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971) (permitting a sex-plus claim under Title VII before Congress amended Title VII to include the motivating factor test). Between the enactment of Title VII and the 1991 amendment that introduced the motivating factor test, the Supreme Court ruled that plaintiffs could prevail even when a class Congress protected under Title VII was not the sole reason an employer discriminated against them in an employment decision. *See Price Waterhouse*, 490 U.S. at 258 (finding that the employer could have violated Title VII if the plaintiff’s gender affected their assessment of her as a manager).

¹⁰² *See* 42 U.S.C. § 2000e-2(m) (prohibiting mixed motive employment discrimination); *Price Waterhouse*, 490 U.S. at 258 (recognizing that an employer violated Title VII if a protected characteristic motivated an employment decision).

¹⁰³ *Bostock*, 140 S. Ct. at 1739–40. To reach this conclusion, the Court only analyzed the original language of Title VII, not including the 1991 amendment. *Id.*

¹⁰⁴ *See id.* at 1739 (relying on the original language of Title VII when determining that a protected characteristic need only be one but-for cause for an employer to have violated the statute).

¹⁰⁵ *See* 42 U.S.C. § 2000e-2(a)(1) (prohibiting employment discrimination on the basis of sex); 29 U.S.C. § 623(a) (prohibiting employment discrimination on the basis of age); *Bostock*, 140 S. Ct. at 1739 (holding that Title VII prohibits employment discrimination that is based in part on sex).

¹⁰⁶ *See Bostock*, 140 S. Ct. at 1739–40 (holding that Congress prohibited employers from taking adverse action if sex is one but-for cause prior to 1991 when it amended Title VII).

¹⁰⁷ *See id.* (holding that the original language of Title VII prohibits sex discrimination, even when sex is not the only reason for the adverse employment action).

¹⁰⁸ *See id.* (allowing Title VII sex discrimination claims when sex is one but-for cause of discrimination); *see, e.g., Frappied v. Affinity Gaming Black Hawk, LLC*, No. 17-cv-01294, 2018 U.S. Dist. LEXIS 104796, at *7–8 (D. Colo. June 22, 2018), *aff’d in part, rev’d in part*, 966 F.3d 1038 (10th Cir. 2020) (asserting that the ADEA and Title VII have different scopes of liability).

ferent standards of causation.¹⁰⁹ Courts would no longer have to grapple with discrimination based on the *intersection* of sex and age that they could previously only analyze as distinct sex and age discrimination claims under Title VII and the ADEA, respectively.¹¹⁰ Consistent interpretations of Title VII and the ADEA in mixed-motive claims of discrimination would permit courts to recognize sex-plus-age claims under Title VII without reservations.¹¹¹

Moreover, the *Frappied* court's interpretation of *Bostock* rightfully expands the viability of employment discrimination claims to cover scenarios in which an employer discriminates on the basis of more than one trait.¹¹² Discrimination based on sex *plus* age is not the same as discrimination based on sex or age alone.¹¹³ The intersection of these two protected traits results in

¹⁰⁹ See *Bostock*, 140 S. Ct. at 1739–40 (finding that sex does not need to be the only but-for cause of discrimination for a viable Title VII claim); *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1048 (10th Cir. 2020) (rejecting the defendant's argument that Congress imposed a limit on a plaintiff's ability to bring Title VII claims by enacting the ADEA). Congress structured Title VII and the ADEA almost identically before the 1991 amendment to Title VII, and, before that time, courts permitted sex-plus claims under Title VII. See 42 U.S.C. § 2000e-2(a)(1) (prohibiting sex discrimination in employment); 29 U.S.C. § 623(a)(1) (prohibiting age discrimination in employment); see, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (permitting sex-plus claims prior to Congress's adoption of the motivating factor test for Title VII claims), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, as recognized in *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020) (noting that Congress, in enacting the 1991 Civil Rights Act, adopted a motivating factor test to judge discrimination claims). There is no reason for courts to exclude age-plus claims under the ADEA while allowing them under Title VII, given the nearly identical statutory language even before the 1991 amendment. See 42 U.S.C. § 2000e-2(a)(1) (making employment discrimination in which race, color, religion, sex, or national origin are a but-for cause unlawful); 29 U.S.C. § 623(a)(1) (making it unlawful for employers to engage in age-related discrimination); see, e.g., *Price Waterhouse*, 490 U.S. at 258 (permitting mixed-motive claims under Title VII when the language was nearly identical to the current language of the ADEA). The *Bostock* Court's clarification of the standard of causation that Title VII requires should effectively reset the incorrect case law that has developed and permit age-plus claims under the ADEA and sex-plus-age claims under Title VII. See *Bostock*, 140 S. Ct. at 1739–40 (requiring only that a Title VII-protected trait be one but-for cause, rather than the sole but-for cause, of an adverse employment action).

¹¹⁰ See *Frappied*, 966 F.3d at 1049 (noting the need for courts to recognize intersectional discrimination).

¹¹¹ See *Bostock*, 140 S. Ct. at 1739 (clarifying the requirements for a Title VII claim). *But see Frappied*, 2018 U.S. Dist. LEXIS 104796, at *7–8 (refusing to allow plaintiffs to bring a sex-plus-age claim of discrimination because of the different standards Congress supposedly created for Title VII and the ADEA).

¹¹² See *Bostock*, 140 S. Ct. at 1739 (noting that employers violated Title VII if sex was one but-for cause of discrimination); *Frappied*, 966 F.3d at 1048 (holding that plaintiffs can bring sex-plus-age discrimination claims under Title VII).

¹¹³ See *Frappied*, 966 F.3d at 1049 (citing Jourdan Day, *Closing the Loophole: Why Intersectional Claims Are Needed to Address Discrimination Against Older Women*, 75 OHIO ST. L.J. 447, 474 (2014)) (discussing discrimination based on the intersection of two separate characteristics). Discrimination against older women does not necessarily look like discrimination against younger women or older men, but rather, it may be motivated precisely because of a combination of age and sex. See Day, *supra*, at 474 (discussing the dilemma older women face when deciding whether to bring a discrimination claim under Title VII or the ADEA when younger women and older men did not experience the discrimination).

a particular experience of discrimination that deserves appropriate legal treatment.¹¹⁴ Courts should not require plaintiffs who have experienced employment discrimination because of their age and sex to separately argue sex discrimination under Title VII and age discrimination under the ADEA.¹¹⁵ It can be difficult, if not impossible, for plaintiffs to neatly separate the types of discrimination they have experienced.¹¹⁶ Plaintiffs would also rarely be successful in arguing an ADEA age discrimination claim if anything other than age motivated the employer because the inconsistent, and often improperly high, standard of causation courts have imposed requires age to be “*the reason*” the employer acted.¹¹⁷

CONCLUSION

The U.S. Court of Appeals for the Tenth Circuit’s 2020 ruling, in *Frappied v. Affinity Gaming Black Hawk, LLC*, correctly held that plaintiffs could bring sex-plus-age claims under Title VII. This ruling was one of the first circuit court decisions interpreting the Supreme Court’s 2020 decision in *Bostock v. Clayton County*, which held that sex only needed to be one but-for cause of an adverse employment action for a plaintiff to bring a Title VII sex discrimination claim. Federal district courts had not reached a consensus regarding whether to allow sex-plus-age discrimination claims under Title VII, despite an established sex-plus doctrine. In *Bostock*, the Supreme Court clarified that, even under the original language of Title VII, sex did not need to be the only but-for cause of discrimination for a plaintiff to prevail. The nearly

¹¹⁴ See *Frappied*, 966 F.3d at 1049 (noting that discrimination based on the combination of two different traits is different from discrimination based on either of those two traits). Men tend to receive favorable treatment as they age, but women experience the opposite effect because employers tend to value women the most when they are young and attractive. See Porter, *supra* note 3, at 94 (discussing the difference in treatment that men and women receive as they age).

¹¹⁵ See *Frappied*, 966 F.3d at 1049 (noting that Congress intended for Title VII to protect against intersectional discrimination).

¹¹⁶ See *id.* (distinguishing discrimination based on a combination of age and sex from discrimination based solely on age). When employers discriminate against older women in particular, it is difficult, if not impossible, to successfully argue that the employer is either discriminating because of sex (because younger women will not be affected) or discriminating because of age (because older men will not be affected). See Porter, *supra* note 3, at 94–96 (noting that discrimination against older women is often based on the premium society has placed on youth and beauty, particularly for women).

¹¹⁷ See *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176–77 (2009) (requiring plaintiffs to prove that age was the but-for cause of age discrimination under the ADEA). Requiring plaintiffs who have truly been discriminated against by their employers for the combination of age and sex to separate their claim into an age discrimination claim and sex discrimination claim would be making it even more difficult for plaintiffs to prevail because there is no single but-for cause. See, e.g., *Frappied*, 966 F.3d at 1048 (recognizing that older women experience a type of discrimination that is distinct from a simple combination of sex and age discrimination).

identical language of the ADEA should also invoke this lighter standard for age discrimination's but-for cause requirement.

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