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The Claims of Women of Color Under Title VII: the Interaction of Race and Gender

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COMMENT

THE CLAIMS OF WOMEN OF COLOR UNDER TITLE VII: THE INTERACTION OF RACE AND GENDER

> African-American women by virtue of our race and gender are situated within at least two systems of subordination: racism and sexism. This dual vulnerability does not simply mean that our burdens are doubled but instead, that the dynamics of racism and sexism intersect our lives to create experiences unique to us.[1]

I. INTRODUCTION

Title VII of the 1964 Civil Rights Act[2] was created to protect individuals from discriminatory employment practices based on race, color, religion, sex, or national origin.[3] Federal courts have applied differing standards when a woman of color brings a claim which alleges an interaction of two or more of these characteristics.[4] Since the statute can be read to set out these characteristics as if each were mutually exclusive,[5] the

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1. Kimberle Crenshaw, *Race, Gender and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1468 (1992).

2. 42 U.S.C. § 2000e (1993) et. seq.; 110 CONG. REC. 7213 (1964).

3. Jefferies v. Harris Community Action Ass'n., 615 F.2d 1025, 1032 (5th Cir. 1980).

4. DeGraffenreid v. General Motors, 413 F. Supp. 142, 145 (E.D. Mo. 1976). *But cf, Jefferies*, 615 F.2d 1025, 1032; Judge v. Marsh, 649 F. Supp 770, 772 (D.D.C. 1986).

5. This was the original reading of the statute in *DeGraffenreid*. 413 F. Supp. at 143. In *Jefferies v. Harris Community Action Ass'n.*, the Fifth circuit rejected this reading stating that House of Representatives had declined to amend that statute to include the word "solely," showing the intent to prohibit discrimination based on any or all of the listed characteristics. *Jefferies*, 615 F.2d at 1032.

courts have initially denied any claim of discrimination based on a combination of protected characteristics.[6]

When a woman of color claims she has experienced discrimination solely because she is a woman of color, she may be faced with unique problems.[7] For example, an Asian woman may allege discrimination based on being an "Asian woman". Federal courts, viewing gender and race as individual characteristics,[8] would separate the claim into discrimination based on race (Asian) and a separate claim based on gender (woman), rather than viewing the claim as a single entity.[9] The woman would have Asian men included in her statistics demonstrating race discrimination, and White women included in her statistics showing gender discrimination.[10]

This would not occur if a White man claimed he was discriminated against as a "White man."[11] His claim would not be separated into White and male, with Black men included in the statistics for gender discrimination and White woman included in the claim of race discrimination.[12] The White man should not have his claims separated since he is suing as a "White man," just as the Asian woman should not have her claims separated. While her claims may be bifurcated by the courts,[13] the White male's would not.[14]

Separation of the claims of women of color along race and gender lines has occurred throughout history,[15] including

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6. In *DeGraffenreid*, for example, the court did not allow the plaintiff to claim discrimination based on both gender and race. 413 F. Supp. at 145. In contrast, *Jefferies v. Harris Community Ass'n*, 411 U.S. 792, allowed the plaintiff to bring an action based on race, gender and the interaction of the two claims.

7. *See,* Kimberle Crenshaw, *Demarginalzing the Intersection of Race and Sex: A Black Feminist Critique of AntiDiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. OF CHI. LEGAL FORUM 139 (1989).

8. *See, e.g., DeGraffenreid*, 413 F. Supp. at 145.

9. *Id.*

10. Lam v. University of Hawaii, 40 F.3d 1551, 1562 (1994). In *Lam*, the court discussed how the lower court incorrectly split a claim into "Asian" and "woman."

11. Wilson v. Bailey, 934 F.2d 301 (11th Cir. 1991)

12. *Id.*

13. *DeGraffenreid*, 413 F. Supp. at 145.

14. *Wilson*, 934 F.2d 301.

15. BELL HOOKS, AIN'T I A WOMAN?, 160-162 (1981), PAULA GIDDINGS,

within social movements such as women's suffrage and emancipation, where the focus was on the single characteristic of either sex or race.[16] For example, in 1851 when Sojourner Truth rose to give her famous speech "Ain't I a Woman?"[17] at the Women's Rights conference in Akron, Ohio, several White women tried to keep her silent.[18] The fear among the White women was that if a Black woman was permitted to speak she would change the focus from suffrage to emancipation.[19]

This single characteristic analysis is also used when analyzing employment discrimination claims for race discrimination and sex discrimination.[20] A dominant view is that sex discrimination focuses on White women and that race discrimination focuses on Black men, thus marginalizing the claims of women of color by forcing them into a category that fails to fully recognize the scope of their claims.[21]

Contrary to the holding of several courts, women of color may experience a unique form of discrimination. As Kimberle Crenshaw explains, Black women[22] experience an "intersec-

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WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA, 54 (1984).

16. Justice Brennan, speaking for the majority in Sharon v. Richardson, 411 U.S. 677 (1973), speaks of the historic discrimination of women and Blacks. In describing the historic oppression of both he never speaks of the Black woman. In explaining why gender should be a suspect classification under the Equal Protection analysis, Brennan states, "And although blacks were guaranteed the right to vote in 1870, women were denied even that right [. . .] until the adoption of the 19th Amendment half a century later." *Id.* at 685.

17. Soujouner Truth's speech criticized the reasons given by White men for disenfranchisement of women. Men stating the women should not be involved in the political process since they were too frail and delicate. Truth spoke about how she had worked hard in the fields as a slave woman, been lashed by a whip and seen her children sold into slavery. BELL HOOKS, *supra* note 15 at 160.

18. BELL HOOKS, *supra* note 15 at 159-160.

19. BELL HOOKS, *supra* note 15 at 159.

20. Peggie Smith, *Separate Identities: Black Women, Work, and Title VII,* 14 HARV. WOMEN'S L.J. 21, 33 (1991).

21. Crenshaw, *supra* note 7 at 152; ELIZABETH V. SPELMAN, INESSENTIAL WOMAN 114-115 (1988). Spelman states that the racial identity of a women is presumed to be White when it is not stated and Black women are only included when there is an explicit reference to Black women. The term Blacks is also largely considered to mean Black men. Id. at 114.

22. While I focus on employment discrimination cases of Black women more than other women of color, it is because there are a limited number of cases discussing the claims of other women of color. Thus, the analysis which is used

tion" of discrimination.[23] First, they may experience racism or sexism exclusive of each other.[24] Second, they may experience a combination of these characteristics such as an employment policy which is discriminatory to both Blacks and women (double discrimination).[25] Third, they may experience discrimination as the single entity of a Black woman, based on stereotype different from those shared by White women or Black men[26] (interactive discrimination).[27]

This comment will focus on how a single characteristic construction of Title VII has distorted and marginalized the claims of women of color. Part One illustrates how the courts initially refused to recognize the claim of interactive discrimination. Part Two explains the limited way in which courts began to recognize the interactive claims brought by women of color. Instead of seeing the plaintiffs as alleging the single entity of interactive discrimination, courts have bisected the claim into "sex plus race."[28] Par Three focuses on the issue of women of color as adequately representing a class in a class action suit. Since a Black women may experience discrimination in several ways, the courts have grappled with both the scope of her claim and who she may represent. Part Four analyzes the recent Ninth Circuit case of *Lam v. University of Hawaii*[29] and sets forth a proposed framework for analyzing discrimination claims brought by women of color.

II. REFUSING THE CLAIM OF INTERACTIVE DISCRIMINATION

The leading case where a federal court considered and rejected a claim of interactive discrimination under Title VII is

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for Black women would apply to cases for all women of color.

23. Crenshaw, *supra* note 7 at 149.

24. See, e.g., Slack v. Havens, 522 F.2d 1091, 1092-1093 (9th Cir. 1975).

25. Donaldson v. Pillsbury, 554 F.2d 825, 830 (8th Cir. 1977).

26. *Lam*, 40 F.3d 1551 at 1562.

27. Smith, supra note 20 at 23. *See also*, Elizabeth W. Shoben, *Compound Discrimination: The interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U L. REV. 973, 796. Shoben uses the term compound discrimination rather than interactive discrimination.

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

29. 40 F.3d 1551 (9th Cir. 1994).

DeGraffenreid v. General Motors.[30] In *DeGraffenreid*, five Black women claimed General Motors' ("GM") seniority system of "last hired first fired" had a disparate impact upon Black women.[31] GM did not hire Black women prior to 1964, and all of the Black women who were hired lost their jobs during a recession due to GM's lay-off policy.[32] The District Court granted partial summary judgment for the defendant, holding that the plaintiffs could sue on the basis of race or on the basis of sex, but they were not allowed to combine the claims.[33] In rejecting the claim of interactive discrimination, the District Court stated that the plaintiffs were combining two causes of action, race and gender, which effectively created a special subclass.[34] The court viewed the claim as beyond the scope of Title VII and forced the plaintiffs to chose between claiming race discrimination or gender discrimination.[35]

> . . . they should not be allowed to combine statutory remedies to create a new 'super-remedy' which would give them relief beyond what the drafters of relevant statutes intended.[36]

The claims were then broken into two individual causes of action: race discrimination and sex discrimination.[37] The sex discrimination claim was dismissed since the women had been hired prior to the enactment of Title VII.[38] The plaintiff's claim of race discrimination was consolidated with another suit brought by Black men alleging GM engaged in race discrimination.[39] Although the plaintiffs asserted in oral argument that

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30. 413 F. Supp. 142 (E. D. Mo. 1976)

31. *Id.* at 143. A prima facie case of disparate impact is set out in Griggs v. Duke Power, 401 U.S. 424 (1971). The plaintiff must show that while the employer's policy is neutral on the face, it has a discriminatory impact on the protected class of persons. The employer can then rebut the presumption of discrimination by proving the existence of a business necessity. *Id.* at 431. Disparate impact is defined at 42 U.S.C. §2000e-2(a) (1993).

32. *Id.* at 144.

33. *Id.* at 145.

34. *DeGraffenreid*, 413 F. Supp. at 143.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 144.

39. *DeGraffenreid,* 413 F. Supp. at 145. See Moseley v. General Motors, 497 F. Supp. 583 (E. D. Mo. 1980). The plaintiffs in *Moseley* alleged a broad claim of race discrimination. The seniority system challenged in *DeGraffenreid* was not considered in the case. Yet, while the women were given a monetary award, back

the consolidation would not adequately represent their interactive discrimination claim, the court ordered the consolidation.[40] The court stated that if it recognized the plaintiff's claim of both race and sex discrimination, it would create a special subclass beyond the scope of Title VII.[41] To permit the plaintiffs' claim would open the door to allowing discrimination claims based on any combination of factors, which would lead to "the prospect of opening a hackneyed Pandora's box."[42]

In denying the plaintiffs claims, the court established a structure for analyzing interactive claims using a "but-for" theory.[43] The plaintiffs could only bring a cause of action if they alleged that but-for one factor they would have been treated the same as White men.[44] Thus, a claim alleging but-for race or but-for sex was recognized, while a claim alleging a combination of both was seen as beyond the scope of Title VII.[45]

The Black women in *DeGraffenreid*, were required to show that the discrimination they experienced was similar to that of Black men *or* White women.[46] A woman of color who is forced to separate her claims into race or sex discrimination will have Black men included in her statistics of race discrimination and White women included her claim of sex discrimination.[47] While these statistics will show the effect of either race and

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seniority was not awarded. *Id.*

40. *DeGraffenreid*, 413 F. Supp. at 145.

41. *Id.* at 145

42. *Id.*

43. Crenshaw, *Intersectionality*, *supra* note 7 at 151. Crenshaw explains the theory by analogizing to a room filled with people who are disadvantaged stacked on top of each other, with those who are the most disadvantaged at the bottom. The people at the top are brushing up against what is the floor for people who are not disadvantaged. In order to be able to climb through the hatch in the floor to the other room with those who are not disadvantaged, a person must claim that "but for" one characteristic they would have been treated the same as the others.

44. *Id.* at 152.

45. *DeGraffenreid*, 413 F. Supp. at 145. Since the Black women were denied the claim of interactive discrimination, the court considered all women for gender discrimination claim. *Id.*

46. *Id.* at 143, Smith, *supra* note 20 at 33.

47. *DeGraffenreid*, 413 F. Supp. at 143.

sex discrimination, these statistics will not be evidence of interactive discrimination.[48]

While such a standard is inadequate,[49] the District Court in *DeGraffenreid* concluded that the existence of interactive discrimination granted too much protection to women of color under Title VII, and denied the plaintiffs the right to bring such a claim.[50] Although a minority of jurisdictions follow the analysis of *DeGraffenreid*,[51] the following cases demonstrate how the courts tend to return to this analysis.

III. RECOGNIZING THE CLAIM OF INTERACTIVE DISCRIMINATION

In *Jefferies v. Harris Community Action Ass'n*,[52] the Fifth Circuit first recognized the combined claims of both race and sex discrimination. A Black woman brought an individual disparate treatment[53] action against Harris Community Action Association, alleging sex discrimination, race discrimination and interactive discrimination.[54] Jefferies was employed

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48. *See, e.g.*, Crenshaw, *Intersectionality, supra* note 7 at 152. Crenshaw notes that forcing a Black woman into alleging sex and race separately marginalizes there experiences and fails to address the plaintiffs real cause of action. *Id.*

49. Lam v. University of Hawaii, 40 F.3d 1551, 1562, fn. 19 (1994).

50. *DeGraffenreid*, 413 F. Supp. at 145. The court feared plaintiffs would claim discrimination based on many or all of the characteristics stated in Title VII, and there would be no way to contain the scope of Title VII. Id.

51. Since *DeGraffenreid*, other cases such as Chambers v. Omaha Girls Club, 629 F. Supp. 925 (D Neb. 1986) and Graham v. Benedix Corp., 585 F. Supp. 1036 (N.D. Ind. 1984) have recognized the claim of interactive discrimination.

52. 615 F.2d 1025 (5th Cir. 1980).

53. The prima facie case for a disparate treatment case is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The plaintiff has the burden of showing that the job was open, she applied and was qualified for the job, despite her qualifications she was rejected and the position remained open and the employer continued to seek applicants. *Id.* at 802.

The burden of production then shifts to the defendant to articulate a non-discriminatory reason why the plaintiff was not hired. The plaintiff, retaining the ultimate burden of persuasion, can argue that the reason given by the employer is pretext. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-254 (1981).

54. The plaintiff's original claim included age discrimination but it is not discussed as part of her claim in this opinion. *Jefferies*, 615 F.2d at 1030. *See, also,* Jefferies v. Harris Community Action Ass'n, 425 F. Supp. 1208 (S.D. Tex. 1977).

as a secretary and had been denied several promotions within the company.[55] When two new promotions were posted, she applied for both but was denied the promotions. A Black man and a White woman were promoted instead of the plaintiff.[56] The District court found in favor of the defendant[57] and held that since a Black man and a White woman had been promoted the plaintiff had failed to prove her *prima facie* case.[58] The Fifth Circuit applied the "sex-plus" analysis established in *Phillips v. Martin Marietta Corp.*,[59] which split the plaintiff's claim into gender discrimination plus discrimination based on a neutral factor[60] and applied this theory to Jefferies claim of interactive discrimination.[61]

The *Jefferies* court recognized that employers are not allowed to discriminate against women with children or married women since that is a form of unlawful discrimination based on sex plus the neutral factor of having children or being married.[62] If employers are prohibited from discriminating on this basis, it would be illogical to allow discrimination against the subclass of Black women,[63] since race and gender are two protected classes under Title VII.[64] Thus, the court held that when a Black woman claimed interactive discrimination, "the fact that black males or white females are not subject to the discrimination is irrelevant."[65]

The plaintiffs were allowed to claim race discrimination,

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55. *Jefferies*, 615 F.2d at 1029.
56. *Id.*
57. *Id.* at 1030-1031.
58. *Id.* at 1031. See note 53, *supra*, discussing the *prima facie* case.
59. 411 F.2d. 1-4, *aff'd*, in Philips v. Martin Marietta Corp., 400 U.S. 542 (1971). Based on a company policy which forbade the hiring of women with preschool age children, the plaintiffs brought a systematic disparate treatment claim. The court held this was sex discrimination plus the neutral characteristic of having a preschool age child. *Id.*
60. *Id.*
61. *Jefferies*, 615 F. Supp. at 1034.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 1034. The court also refuted the finding in *DeGraffenreid* that the plaintiffs claim was beyond the type of protection which Congress had intended since Congress had denied amending the act to include the word "solely." *Id.* at 1032.

sex discrimination and interactive discrimination.[66] In analyzing these claims the Fifth Circuit found no evidence of race discrimination but remanded the claim of sex discrimination for further findings.[67] After recognizing the claim of interactive discrimination the court also remanded this claim.[68]

The court in *Jefferies* employed several analytical devices for interactive discrimination claims. First, it allowed women of color to seek remedy for interactive discrimination.[69] It also recognized the claim of interactive discrimination as a separate cause of action with its own evidence, distinct from a race or sex claim.[70] Even in the absence of race discrimination, a women of color may still have a claim for interactive discrimination.[71] Because of this a Black woman, in a disparate treatment case, may proffer evidence showing that both Black men and Black women were discriminated against to support her claim of race discrimination.[72] She can also proffer evidence of discrimination solely against Black women to prove interactive discrimination.[73]

Not all aspects of the *Jefferies* decision were an advance for women claiming interactive discrimination. The court phrased the claim within a sex-plus analysis.[74] In essence, the court stated that but-for sex and an added characteristic, the plaintiff would have been treated the same as a White man.[75] This continues to characterize Black women as a compound of two separate parts instead of as the single entity of "Black women." The court should not use the analysis of sex-plus for a

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66. *Id* at 1034-1035.
67. *Id.* at 1032.
68. *Id.* at 1035.
69. *Id.* at 1034.
70. *Id.*
71. Judith Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1991*, 79 CAL. L. REV. 775 at 800. Winston concludes the significance of the court not finding race discrimination but remanding the claim of interactive discrimination infers that the independent findings of race and gender discrimination may bolster each other so that the sum is greater than the parts. *Id.* at 801.
72. *Jefferies*, 615 F. Supp. at 1033.
73. *Id.*
74. *Id* at 1033. Shoben, *supra* note 27, at page 804 criticizes the use of the sex-plus analysis as only addressing the issue of sex discrimination.
75. *Id.*

Black woman's claim, but instead should limit it to claims in which the "plus" is an immutable characteristic.[76] By using the sex-plus analysis, the court infers that the race of Black women is a secondary characteristic, to be analyzed in addition to the sex discrimination claim.[77] Thus, the door is left open for lower courts to tally how many factors a person is removed from the "norm" (i.e. White male) and then decide if the claim is one which the court will recognize.[78]

Such an analysis dictated the court's decision in *Judge v. Marsh*.[79] The plaintiff was a Black woman employed by the United States Army.[80] The Army had a small panel which rated and referred all employees for promotion.[81] The plaintiff claimed that the panel inaccurately summarized her qualifications and failed to recommend her because she was a Black woman.[82] She alleged a claim of disparate treatment based on interactive discrimination due to the defendant's failure to select her for promotions and to assign her higher promotion ratings.[83]

Using the sex-plus analysis from *Jefferies*, the District Court held that plaintiff could only allege one "plus."[84] If the plaintiff was allowed allege more than one protected characteristic, there would be protected sub-groups for every combination of characteristics protected under Title VII.[85] The court illustrated this problem by using the analogy of a many headed Hydra.[86] Taken to the extreme, the *Jefferies* rationale would

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76. Cathy Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L. J. 1457, 1472 (1989).

77. Smith, *supra* note 20 at 44, Shoben, *supra* note 27 at 804.

78. Scarborough, *supra* note 76 at 1471.

79. 649 F. Supp. 770 (D.D.C. 1986).

80. *Id.* at 772.

81. *Id.* at 773

82. *Id.* at 775.

83. *Id.*

84. *Judge,* 649 F. Supp. at 780.

85. *Id.*

86. *Id. In* both *DeGraffenreid* and *Judge*, the courts analogize the Black women's claims to mythological female monsters. Hydra was a multi-headed water serpent who grew two heads for every one which was cut off. Hydra was killed by Hercules who burned off the heads. Pandora was created by Zeus to plague mankind. Zeus gave her a box containing diseases and trouble which she opened and let the evils escape leaving only hope left in the box. *Grolier Electronic Publishing*

allow for protected sub-groups which combine all of the characteristics protected under Title VII.[87] The court stated that the *Jefferies* analysis is limited to "one protected, immutable trait or fundamental right, which are directed against individuals sharing a second protected, immutable characteristic."[88] By narrowing the scope of Title VII the court stated that Title VII will "not be splintered beyond the use of recognition."[89]

The District Court in *Judge* made it clear that a woman of color can only deviate so far from the norm of a White male before the claim is viewed as too obscure,[90] because her claim consists of too many factors removed from the "norm" to be recognized.[91] For example, a Black woman alleging discrimination based on the interaction of race, sex and age[92] would have to choose only two factors, even though this would inadequately address her claim.[93] While she may experience discrimination based on each factor separately (because she is Black, a woman or older) this does not preclude the fact that she was discriminated against based on the stereo-type which derived from the claim being seen as one entity (an older Black woman).[94]

The conflict between splitting apart a plaintiff's claim into multiple factors and looking at it as a single entity does not always occur when a plaintiff brings a claim of interactive discrimination.[95] For example, the federal courts do not sepa-

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Co.(1983).

87. *Judge*, 649 F. Supp. 770, at 780.

88. *Id.*

89. *Id.*

90. Not all courts have followed this analysis. For example, in Chambers v. Omaha Girls Club, 629 F. Supp. 925 (D. Neb. 1986), the court allowed the plaintiff to allege that she was discriminated against on the basis of being an unmarried pregnant Black woman. *Id.* at 947.

91. *Judge*, 649 F. Supp. at 780. The court did allow the plaintiff to claim interactive discrimination, but it was dismissed for failure to meet the ultimate burden of persuasion. *Id.* at 781.

92. This was the original claim brought by the plaintiff in Jefferies v. Harris Community Action Ass'n , 411 U.S. 792 (1973) at 1029.

93. Smith, *supra* note 20 at 46.

94. In *Chambers*, 629 F. Supp. 925 at 944, the plaintiff claimed she was discriminated against based on the stereo-type of being an unmarried, pregnant, Black woman.

95. Crenshaw, supra note 7 at 142.

rate the claims of a White woman into White and woman.[96] A White woman's claim is not seen as creating a "many-headed Hydra" as referred to in *Judge*, since courts only sees her as claiming that "but-for" her gender she would not have been discriminated against. She is not required to claim her race as a part of her discrimination claim, since Whiteness is seen as a race neutral characteristic.[97]

A similar analysis can be drawn with a discrimination claim brought by a White man. For example in *Wilson v. Bailey*,[98] two White men who were deputy sheriffs brought a disparate treatment action alleging "reverse discrimination" due to the City's voluntary affirmative action plan.[99] They alleged that, "minorities and women were promoted," rather than White men.[100] In analyzing this claim, the court did not separate the claim into race and gender with statistics of Black men included in the claim for gender discrimination and White women included in the statistics of race discrimination.[101] There was no debate at all about the plaintiff's ability to allege an interactive claim, and the court merely viewed the plaintiffs as claiming the single entity of "White men" as the basis of discrimination.[102]

The federal courts do not look to *Wilson* as a precedent for interactive discrimination in Title VII cases since these courts do not see the White men as alleging a claim of interactive discrimination.[103] Since courts often proceed as if White men are considered the norm,[104] their claim will not be viewed as

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96. Price Water House v. Hopkins, 490 U.S. 228 (1989). In *Price* the plaintiff claimed gender discrimination. The plaintiff did not have to specify her race since it is assumed with a White woman that race is not an issue but only gender. *Id.* at 236. Scarborough, *supra* note 76 at 1468.

97. Crenshaw, *supra* note 7 at 145.

98. 934 F.2d 301 (11th Cir. 1991).

99. *Id.* at 304.

100. *Id.*

101. *Id.*

102. *Id. See also,* Lilly v. City of Beckley, W. Va., 940 F.2d 1394 (4th Cir. 1991), Peightal v. Metropolitan Dade County, 940 F.2d 1394 (11th Cir. 1991).

103. *Id.*, Crenshaw, *supra* note 7 at 142 ft. note 12, states that no case has been discovered in which white men were not allowed to bring a reverse discrimination claim due because the claim alleged discrimination based on the interaction of race and gender.

104. Scarborough, *supra* note 76 at 1476.

obscure or alleging too many factors that remove them from the norm.[105] The problem of obscuring claim only occurs when a plaintiff alleges *different* characteristics other than just race or sex.[106] Despite the cases which have allowed reverse discrimination,[107] lower courts have only sporadically allowed woman of color to allege an interactive claim, while always allowing them to allege discrimination on the basis of race and gender as separate factors to be proved independently.[108]

IV. SPECIAL PROBLEMS OF ADEQUATE REPRESENTATION IN CLASS ACTIONS

Struggling with the complex manner in which women of color can experience discrimination, the courts have been unable to formulate a standard analysis to determine when a woman of color can adequately represent a class. As evidenced from *Jefferies* and *Judge*[109] women of color may claim discrimination based on race, sex, a combination of both, or interactive discrimination.[110] When a woman is alleging both[111] interactive discrimination and sex discrimination, she cannot represent a class of women who allege sex discrimination.[112] Often the federal courts will view her claims as placing her at odds with the White women.[113] Courts will only allow for a

105. Crenshaw, *supra* note 7 at 154-155; Scarborough, *supra* note 76 at 1476.

106. *Id.*

107. *Wilson*, 934 F.2d at 304. *See also,* Lilly v. City of Beckley, W. Va., 940 F.2d 1394 (4th Cir. 1991), Peightal v. Metropolitan Dade County, 940 F.2d 1394 (11th Cir. 1991).

108. *See*, Lam v. University of Hawaii, 40 F.3d 1551 (9th Cir. 1994), Parker v. Secretary, H.U.D, 891 F.2d 316 (D.C. Cir. 1989), Jefferies v. Harris Community Action Ass'n 615 F.2d 412, Judge v. Marsh, 649 F. Supp. 770 (D.D.C. 1986), Chambers v. Omaha Girls Club, 629 F. Supp 925 (D. Neb. 1986), Graham v. Benedix Corp., 585 F. Supp 1036 (N.D. Ind. 1984).

109. Jefferies v. Harris Community Action Ass'n., 615 F.2d 1025 (5th Cir. 1980); Judge v. Marsh, 649 F. Supp. 770 (D.D.C. 1986).

110. *See* notes 34 to 45 for a discussion on *Jefferies* and notes 79-84 for a discussion of *Judge*.

111. Donaldson v. Pillsbury, 554 F.2d 825 (8th Cir. 1977). In *Donaldson*, the plaintiffs alleged that the employer had a policy which had an adverse impact on Blacks and women. *Id.* at 829.

112. Moore v. Hughes Helicopter, Inc., 708 F.2d 475, 482-484 (9th Cir. 1983).

113. *Id.* at 479-480.

woman of color to represent a class if she stays within the strict limits of a but-for theory.[114]

In *Moore v. Hughes Helicopter, Inc.*,[115] Black women brought a class action alleging both sex discrimination and race discrimination in the employer's promotion practices.[116] The plaintiffs claimed the company's promotion policy had a disparate impact on both Blacks and women.[117] For the sex discrimination claim, Moore petitioned the court to represent a broader class which included all females.[118] The Ninth Circuit confirmed the lower court's holding and refused to certify Moore as the class representative, since the class included both Black women and White women.[119]

The Ninth Circuit reasoned that Moore had not claimed "she was discriminated against as a female but only as a Black female."[120] The court forced Moore into a narrower claim of interactive discrimination even though she alleged disparate impact on the basis of race and sex.[121] Moore was only allowed to use evidence that "Black women" were discriminated against[122] rather than being able to show that Black women would be affected by any policy which had a disparate impact against Blacks and/or women.[123] Without the use of both sets of statistics, Moore was unable to make out her prima facie case for discrimination.[124]

In order for Moore to represent the class of women, even in a disparate impact case, she was required to allege sex discrimination claims separately.[125] Once Moore claimed discrimination as a "Black women" she narrowed the scope of her

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114. *Id.*
115. 708 F.2d 475, 483 (9th Cir. 1983).
116. *Id.* at 478.
117. *Id.* at 483.
118. *Id.* at 479.
119. *Id.* at 480.
120. *Moore,* 708 F.2d at 480.
121. *Id.*
122. *Id.* at 482-484.
123. *Id.*
124. *Id.* at 485, Crenshaw, *supra* note 7 at 146.
125. *Moore*, 708 F.2d at 480.

claim and placed herself at odds with White women.[126] The Ninth Circuit viewed the interactive claim as alleging she was discriminated against in favor of both Black men and White women, and thus she is unable to adequately represent the class of women.[127]

It is inconsistent to argue, in a disparate impact case, that once Moore claimed interactive discrimination she would be precluded from claiming discrimination on the basis of her gender or race.[128] Since Moore is Black, she would be adversely affected by any policy which discriminates on the basis of race. In addition, since she is a woman, she will be adversely effected by any policy which discriminates on the basis of gender. The complex nature in which women of color experience discrimination has led the courts to view her as having "greater standing" in the law, seen in both *DeGraffenreid* and *Judge*.[129] Ironically, women of color, as evidenced from the prior cases, have a greater need to claim interactive discrimination, and yet the courts restrict the scope of their claims.[130] Women of color are forced to bring their claims within the but-for analysis, allowing them to allege only part of their claim.[131] Forcing the claim into such a narrow analysis only allows for small changes within the field of employment law.[132]

To avoid restricting the plaintiff's ability to represent a class, as seen in *Moore*, a plaintiff can bring class actions alleging race discrimination and sex discrimination separately, but cannot claim interactive discrimination if she hopes to be viewed as adequately representing the class.[133] For example, in *Donaldson v. Pillsbury*[134] the plaintiff, a Black woman,

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126. Crenshaw, *supra* at note 7, at 144-146.

127. *Moore,* 708 F.2d at 480.

128. *See*, Crenshaw *supra* note 7, at 144. Once Moore specified her race, the court narrowed her claim and saw her as placing herself at odds with White women. *Id.*

129. DeGraffenreid v. General Motors, 413 F. Supp. at 143 and *Judge*, 649 F. Supp. at 780.

130. Crenshaw, *supra* note 7 at 145.

131. *Id.*

132. *Id.*

133. 554 F.2d 825 (8th Cir. 1977).

134. *Id.*

brought a claim of disparate impact alleging discrimination against Black and women employees who had been denied employment or promotion on the basis of race or sex.[135] Reversing the District court's finding that the plaintiffs did not meet the "typicality" requirement for class actions, the Eighth Circuit stated, "the defendant's practices had the effect of limiting job opportunities of women and blacks."[136]

The plaintiff was able to certify her suit since she alleged discrimination based on a combination of two separate factors.[137] Thus, the court included statistics of Black men for her race discrimination claim and White women for her sex discrimination claim.[138] Having alleged race discrimination and sex discrimination separately, the federal courts will not force the women into an interactive claim and thus perceived them as being at odds with the other plaintiffs.[139] As long as the plaintiff remains within the but-for analysis she will be seen as adequately representing the claims of the class.[140] Alternatively, even when a plaintiff stays within a strict but-for analysis only alleging sex and/or race discrimination, the courts may still restrict the scope of a Black woman's claim when there is not only a disparity between the Black employees and the White employees or all male employees and female employees, but also where there is a disparity between the Black men and the Black women.[141]

In *Payne v. Travenol*,[142] two Black women brought a class action suit alleging race discrimination on behalf of all the Black employees and later amended the complaint to include sex discrimination.[143] No Blacks were employed by Travenol prior to 1965.[144] When Blacks were hired, the plain-

135. *Id.* at 829.

136. *Id.* at 832. The statistics proffered by the plaintiff was separated into Black solely and sex solely. There was no evidence proffered regarding the status of Black women. *Id.* at 830. *See* FED R. CIV. P. 23(a).

137. *Donaldson,* 554 F.2d at 832.

138. *Id.* at 830.

139. *Id.* at 831.

140. Crenshaw, *supra* note 7, at 145, *c.f., Moore,* 708 F.2d 480.

141. *Payne v. Travenol*, 673 F.2d 798 (5th Cir. 1982).

142. *Id.*

143. *Id.* at 805.

144. *Id.*

tiffs claimed Travenol's employment policy had a disparate impact on Blacks since Travenol required a 10th grade education for the assembly line jobs and twelfth grade or college education requirement to be employed as a clerk or technician.[145] At the request of the defendant, the court restricted the scope of the plaintiffs' claim to only include Black women.[146] Although the plaintiffs were claiming a disparity between Black and White employees,[147] the court narrowed the scope of the claim since there was a disparity between the Black men and the Black women.[148]

> The females, therefore sought to establish that the males were favored at their expense. This claim plainly draws at the interests of the males into contrast with the interests of the females.[149]

Yet, the plaintiffs were not claiming interactive discrimination but discrimination based on race and sex separately (double discrimination).[150] They were not placing themselves at odds with the Black men by stating that the Black men were treated more favorably than the Black women. The plaintiffs were alleging they had been adversely affected by both discriminatory practices.[151] While the plaintiffs were able to use the over-all statistics of race discrimination, after they prevailed the Black men were unable to share in the remedy.[152] This not only demonstrates how a but-for analysis restricts the scope of Black women's claims, but also shows how the Fifth Circuit viewed a conflict along both race and gender lines.[153] Since Payne alleged sex discrimination, the court viewed her as placing herself at odds with the Black men,[154] despite the

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145. *Id.*
146. *Payne,* 673 F.2d at 807.
147. *Id.* at 809.
148. *Id.*
149. *Id.* at 810.
150. *Id.* at 809.
151. *Payne*, 673 F.2d at 809.
152. *Id.* at 812.
153. The court forced the plaintiffs to chose between discrimination based on race to represent the Black men or chose to claim discrimination based on gender which disallows the plaintiffs to represent the Black men. *Id.* at 811, Crenshaw, *supra* note 7 at 148.
154. *Payne*, 673 F.2d at 810.

fact that she included a claim of race discrimination in which the Black men are similarly situated to Payne.[155]

In contrast to *Payne*, *Tennie v. City of New York Dep't of Soc. Serv.*[156] allowed Black women to represent the claims of all minority women although the plaintiffs were not all of the same race.[157] Six Black women and one Hispanic woman brought a class action based on a claim of interactive discrimination in which the class included both Black women and Hispanic women.[158] The plaintiffs were previously employed as children's counselor's in various Department of Social Services (DSS) institutions but were transferred to other DSS departments when the City closed several of the offices.[159] When the plaintiffs were transferred their salary declined, which they claimed was due to their race and gender.[160] Since all the females alleged discrimination based on the status of minority women, they were able to be certified as a class.[161] The District Court viewed the claims as alleging that all of the plaintiffs were discriminated against in favor of White males due to their race and gender.[162] "Thus, both blacks and Hispanics are alleging that they have been discriminated against in precisely the same manner."[163]

The District Court placed the claim into the analysis of but-for one characteristic, (being a women of color) the plaintiffs would not have been adversely affected by the employer's policy.[164] Unlike the court in *Payne*, the court in *Tennie* did not view the minority women as being in conflict with each other.[165] Even though a Hispanic woman may be discriminat-

155. *Id.* at 810-811.
156. 1987 WL 6156 (S.D. N.Y. 1987).
157. *Id.* at *2.
158. The class originated as all employees who worked as counselors in New York city prior to 1977 and now work in other divisions. The class therefore included persons of both sexes and including Whites, Blacks, and Hispanics. *Id.* at *3.
159. *Id.* at *2
160. *Id.*
161. *Tennie,* 1987 WL 6156 at *3.
162. *Id.*
163. *Id.*
164. Crenshaw, *supra* note 7 at 151, explains the but-for analysis used by the courts.
165. *Tennie*, 1987 WL 6156 at *3.

ed against based on a different stereotype than a Black woman, they were both claiming that all men and all White employees were treated more favorably, and because of this the Black women were able to represent the claims of Hispanic women.[166]

In comparing both *Payne* and *Tennie*, it is clear that the plaintiffs are not analyzed by their own experiences of discrimination but how they are treated in comparison to White men.[167] While this may be helpful in proving the discriminatory practice, the initial focus of the claim should be on what the plaintiffs are claiming as the basis of the discrimination and who else has been adversely affected by this discriminatory act or policy.[168] Not only do the courts prematurely view a conflict between the plaintiffs when defining the scope of the claim but the courts will also restrict what the plaintiffs may claim as the basis of the discrimination, as seen in *Moore* and *DeGraffenreid.*[169]

V. A FRAMEWORK OF ANALYSIS

After examining the various ways in which the federal courts have analyzed the claims of women of color, this comment proposes that for an individual disparate treatment case, the courts draw from parts of the analysis in *Lam v. University of Hawaii*[170] and expanded upon in *Good v. U.S. West Communications.*[171] For a claim of disparate impact, courts should draw from *Lam* to set up a framework for the analysis, but should also consider the problems that may arise in class actions as seen in *Moore*[172] and *Payne.*[173]

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166. *Id.*

167. *Id.* at *3.

168. *See*, Castro and Corral, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 La Raza L.J. 159. This articles focuses an the need to focus on the individual's claim rather than separating the plaintiff's claim into single factors.

169. *DeGraffenreid* 413 F. Supp at 143 and *Moore*, 708 F. Supp. at 480.

170. 40 F.3d 1551 (9th Cir. 1994).

171. 1995 WL 67672 *1 (D. Or. 1995).

172. *See* discussion of *Moore*, *supra* notes 114-131.

173. *See* discussion of *Payne*, *supra* notes 140-153.

In *Lam*, an Asian woman brought a claim of individual disparate treatment in the University's hiring practices.[174] A small committee was appointed to recommend a person for the position of Director of the Pacific Asian Legal Studies.[175] Persons less qualified than Lam were considered for the job and one of the committee members evaluating Lam stated there should not be another woman teaching commercial law.[176] The Dean recognized that this member had difficulty dealing with women.[177] The District Court granted summary judgment for the defendants since the committee had favorably considered an Asian man and a White woman.[178] Following the analysis in *DeGraffenreid*, the District Court separated her claim into race and gender separately, and did not allow her to state a claim for interactive discrimination.[179] In reversing the District Court, the Ninth Circuit relied on *Jefferies* and the works of both Kimberle Crenshaw and Judith Winston.[180]

> Rather than aiding the decisional process, the attempt to bisect identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences . . . Asian women are subject to a set of stereo-types and assumptions that are neither shared by Asian men nor white women . . . 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 the people of the same race or of the same sex.[181]

The *Lam* decision establishes several useful tools for analyzing interactive discrimination cases. First, the court focused more on the plaintiff's individual basis of discrimination as opposed to splitting apart her claim.[182] The Ninth Circuit not only recognized the claim of interactive discrimination but also

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174. *Lam*, 40 F.3d at 1558.
175. *Id.* at 1552.
176. *Id.* at 1557.
177. *Id.* at 1564.
178. *Id.*
179. *Lam*, 40 F.3d at 1561.
180. *Id.* at 1562.
181. *Id.*
182. *Id.*

stated that the District court was incorrect in separating Lam's claim.[183] The District Court had reduced the claim into Asian men plus White women, which had distorted Lam's claim.[184] Lam alleged discrimination based in being on Asian woman and not solely as an Asian or as a woman.[185] The Ninth Circuit identified the inherent fallacy of splitting the claim by analogizing to the bisection of a White man's claim using statistics of Asian men in his claim for gender discrimination and statistics of White women in his claim for race discrimination.[186]

Second, the court recognized that the Asian women are subject to stereo-types that are not shared by either Asian men or White women, showing a clear need for courts to recognize the claims of intersectionality.[187] Third, the court recognized the complexity of a woman of color's claim stating that a court cannot " . . . bisect a person's identity at the intersection of race and gender . . . "[188] Still, the court also acknowledged that a woman of color may be subjected to single factor discrimination such as solely race or solely sex.[189]

While the Ninth Circuit's analysis advances the ability of women of color to bring an interactive claim, the court falls into several of the same problem areas as earlier decisions. First, the decision speaks of Lam's claim of interactive discrimination as a combination of two factors instead of as the single unity of an Asian woman.[190] While the Ninth Circuit did not analyze the claim as a combination of factors, the language used by the Ninth Circuit may cause other federal courts to fall back into the sex-plus analysis that was used in *Judge*, which considered the number of factors a person is removed from the norm as the basis of discrimination.[191] Further, the

183. *Id.*
184. *Lam,* 40 F.3d at 1562.
185. *Id.*
186. *Id.*
187. The court refers to J. Hagedorn, *Asian Women in Film: No joy, No Luck,* MS. Jan./Feb., 1994 at 74, which illustrates some of the stereotypes which Asian women are subjected to such as geisha, dragon lady and concubine. *Id.*
188. *Lam,* 40 F.3d 1582.
189. *Id.* at 1561-62.
190. *Id.*
191. *Judge v. Marsh,* 649 F. Supp. 770, 780 (D.D.C. 1986).

court speaks of Asian women as a separate subgroup protected under Title VII.[192] This may result in revisiting the class action problems of *Payne*,[193] where the Black women were seen as a subgroup and thus unable to represent all Black employees for the claim of race discrimination.[194]

Utilizing the theory set forth in *Lam*, the District Court in *Good v. U.S. West Communications*,[195] expanded the theory of interactive discrimination beyond Title VII to include age discrimination protected by the Age Discrimination in Employment Act ("ADEA").[196] The plaintiff claimed she was discriminated against based on the interactive claim of age and sex discrimination since she was replaced by a younger male.[197] The District court initially granted summary judgment for the defendant on the age discrimination claim.[198] Good then moved the District Court to reinstate her claim of age discrimination since she claimed discrimination based on being an older woman, rather than alleging age and sex separately.[199] Focusing on the Good's original claim of discrimination, the court cited *Lam*[200] and stated that the theory of interactive discrimination applies to the ADEA and not just Title VII claims.[201]

VI. CONCLUSION

Good focused on the need to allow the plaintiff to individually state what she believes is the basis for the discrimination.[202] Both Lam and Good should be allowed to state what

192. *Lam,* 40 F.3d at 1562.
193. *Payne*, 673 F.2d at 810.
194. *Id.*
195. 1995 WL 67672 *1 (D. Or. 1995).
196. *Id.*
197. *Id.* at *1. Sex discrimination is protected under Title VII and age discrimination is protected under the Age Discrimination in Employment Act (ADEA). See 29 U.S.C.A. 623.
198. *Id.*
199. *Id.*
200. *Good,* 1995 WL 67672 at *1.
201. *Id.*
202. *Id.* at 1561, fn. 16, the court noted that Lam also alleged National Origin discrimination since the Asian man who was considered for her position was Chinese and Lam is Vietnamese-French. *Id.*

type of discrimination they have been subjected to and not have a court determine what the basis of the claim should be.[203] For example, if a Chicana woman brings a claim for interactive discrimination in a disparate treatment case, the law should not perceive the claim as a combination of race, color, sex and national origin but as the single entity in which she has experienced the discrimination, a Chicana woman.[204] Just as plaintiffs in most other fields of law can determine which claims they are to bring forth in a lawsuit, so should a woman of color in a Title VII action.[205]

This same focus on the individual's experience of discrimination in a disparate treatment case should be applicable to disparate impact cases. If a woman of color is alleging discrimination based on race, she should be able to represent the class of persons who also allege race discrimination.[206] The fact that she may also bring a claim of sex discrimination or interactive discrimination should not bar her from representing the class for a claim of race discrimination.[207] Just because she may have been subjected to other forms of discrimination, does not mean that she has not been subjected to race discrimination, and is not typical of the class.[208] She should still be able to both represent the class for a race discrimination suit and be a member of the other classes.[209]

Instead of trying to compare separate claims of race or sex discrimination by looking at how these claims separate the plaintiff from the norm, each claim needs to be looked on its individual merits.[210] The preliminary focus should be on how the plaintiff has experienced the discrimination and not what the courts believe the plaintiff should allege as the basis for

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203. *Lam*, 40 F.3d at 1562, *Good* 1995 WL 67672 at *1.

204. Scarborough, *supra* note 76 at 1476, explains protected groups of people have distinct histories and their claims should be understood based on their own experiences.

205. *Id.*

206. *See supra* notes 114 to 131 for a discussion of Moore v. Hughes Helicopter, Inc., 708 F.2d 475 (9th Cir. 1983).

207. *Id.*

208. *See supra* notes 140 to 153 for a discussion of Payne v. Travenol, 673 F.2d 798 (5th Cir. 1982).

209. Crenshaw, *supra* note 7 at 144-148.

210. Scarborough, *supra* note 76 at 1476.

discrimination. Courts need to allow a woman of color to claim interactive discrimination, but not force her into a class of interactive discrimination if she is only alleging race or gender discrimination.[211]

While focusing on the individual may not solve all problems with intersectionality claims, it will create an awareness in the judicial system of how a person may be subjected to discrimination in a wide variety of forms. Allowing the plaintiff to individually determine the basis for a claim of discrimination and represent all people who have been subjected to the same type of discrimination, the court will allow for a broader reform in current structure of both employment law and employment practices.

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211. *See supra* notes 114 to 131 for a discussion of *Moore*.

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