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The Future of Intersectionality in Employment Law

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Recent social justice movements—such as #MeToo and Black Lives Matter—have pushed mainstream American society to reckon with the ubiquity and persistence of systemic sex-based and racial inequities. At the heart of the firestorm are Black women, whose identity at the intersection of sex and race often exposes them to pervasive, but also unique employment discrimination and sexual harassment. Jamillah Bowman Williams's *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy* stands out as an exceptional examination of the how courts deal with such "intersectional" claims.

"Intersectionality," famously coined by Professor Kimberlé Crenshaw over three decades ago, recognizes that Black women may experience discrimination distinct from how white women or Black men experience discrimination. This concept is not new—the Fifth Circuit recognized it as early as 1980. The Equal Employment Opportunity Commission (EEOC)—the agency tasked with enforcement of the Title VII of the Civil Rights Act of 1964—explicitly recognizes Title VII's coverage of intersectional claims. Black women are overrepresented among low-income, vulnerable workers, and subjected to pernicious stereotypes rooted in chattel slavery.

This "double jeopardy" requires courts to move beyond forcing Black women to parse out their identities and pigeonhole their discriminatory experiences into conduct based solely on "race" or "sex." Williams urges judges and lawmakers to go deeper, to entertain a more complex and nuanced understanding of the law, and to align Black women's lived experiences with Title VII's broad remedial purpose by recognizing intersectional claims. Not only would Black women fare better at summary judgment and in case outcome (whose failure rate is significantly higher), but the law would be inclusive of their reality. For example, in the context of work harassment, a plaintiff may experience a hostile work environment based on the combination of their sex and their race but fail to prove either one independently. Title VII requires that workplace incidents be sufficiently severe or pervasive to constitute harassment, but if courts artificially disaggregate such incidents into "race" or "sex," they dilute, potentially fatally, the force of the discriminatory conduct. Appreciating the totality of the misconduct and the overlapping nature of the harassment would more faithfully protect everyone in the workplace.

Williams's article breaks new ground by identifying and critiquing the primary approaches used by the federal appellate courts when analyzing intersectional claims.

Some circuits (Fourth and Eighth) insist that Black women dissect their experiences and identities, ascribing either "sex" *or* "race" as the basis for discrimination. These appellate courts read the text and purpose of Title VII in a cramped way that disallows claims combining "sex" *and* "race." They worry that intersectional claims will afford Black women a "super-remedy" and "special" treatment unavailable to fellow workers. This narrow interpretation ironically deprives those multiply-marginalized of Title VII's protection, contrary to the statute's broad remedial purpose and spirit.

Other circuits (Second, Third, and Tenth) analyze intersectional claims under a "sex-plus" framework. A plaintiff who suffers discrimination on the basis of sex plus another trait (not protected under Title VII) would be shielded by the statute. The classic example is Phillips v. Martin Marietta Corp., allowing women with preschool-aged children to bring a sex-discrimination hiring case against the employer even though the company hired other women; this constituted sex discrimination because, unlike women, men with preschool-aged children were hired. The statute covered the combination of two traits (sex plus having a preschool-aged child). Although only a subset of women bore the brunt of the employer's exclusion, they could challenge discrimination at the intersection of sex and another factor. Courts have expanded the "sex-plus" rationale to protect older women from sex-plus-age discrimination, combining Title VII and a plus trait from another statute, the Age Discrimination in Employment Act (ADEA). Given this flexibility, Williams persuasively argues that a court should easily be able to recognize an intersectional sex-plus-race claim—the combination of two traits already protected under Title VII.

Williams's endorsement of the sex-plus approach, however, is tempered by its limitations. She faults the approach for its overdependence on comparators; elevation over a race-plus framework; and preferencing sex over other traits as the basis for statutory protection. Most notably, the sex-plus framework requires Black women to dissect their identities and lead with sex as the primary trait, with race secondary in the analysis. Centralizing sex artificially fractures the plaintiff's experience and unnecessarily subordinates the racial dimension.

A third and more preferable method from the circuit courts (Fifth and Eleventh) recognizes the unique experience of race and sex discrimination combined by identifying Black women as a protected class. Williams praises this as a step forward but worries that these courts still subordinate the plaintiff's race claim.

Two circuits (Sixth and Ninth) adopt the best approach—a totality or aggregate one. The court does not force the plaintiff to sort her experiences into boxes labeled "race," "sex," "age," "religion," "disability," or any other protected trait. Instead, the court analyzes her experience as a whole to discern illegal discrimination.

Finally, two circuits (First and D.C.) have been inconsistent and undecided when addressing intersectional claims. The U.S. District Court for the District of Columbia expressed concern over plaintiffs turning employment discrimination claims into a "many-headed hydra" comprised of countless permutations based on the various groups to which they belong.

After exploring the current state of the union on the interpretation of intersectional claims, Williams makes another ground-breakin contribution. Looking ahead, she examines a number of significant trends that foreshadow the future of intersectionality in employment law. Most notably, Williams contends that Bostock v. Clayton County supports intersectional claims. Authored by Justice Neil Gorsuch and joined by Chief Justice Roberts, *Bostock* joins conservative and liberal justices in a promising majority opinion. Williams argues that *Bostock* helps Black women in three ways: 1) inextricably linking discrimination on the basis of sexual orientation and transgender status to sex; 2) reinforcing that discrimination "because of sex" includes mixed motivations; and 3) noting that individuals may be subject to discrimination even if their whole group is not. *Bostock* gives space for intersectional claims, discrimination based on multiple factors, and discrimination against a subset of a protected class. Indeed, the Tenth Circuit relied on *Bostock* in recognizing intersectional claims by Black women through the sex-plus framework.

Williams also notes how state legislators, while leading the way in enacting protections against sexual harassment, must do the same for harassment based on race and other central identities. Indeed, the

law should not stop there, but should take a more unified approach that does not silo experiences into claims of discrimination, harassment, or retaliation.

Finally, Williams promotes the development of a “reasonable Black woman” standard for sexual harassment claims brought by Black women. This standard more closely mirrors plaintiffs’ unique experiences and perspectives, providing important context, nuance, and understanding. Such an approach would more fully advance the EEOC’s victim-centric guidance.

Williams ends her article with prescriptions based on various federal and state legislative reforms, pushing Congress, the EEOC, and the courts to more fully embrace the experience of Black women’s lives through the recognition of intersectional claims. She challenges judges, lawyers, and law students to see Black women not as the sum of our fractured identities, but to see us as whole persons. And in doing so to see our humanity.

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