Aging on Air: Sex, Age and Television News

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"In this 21st century, we should be long past the double-standard that allows men to age with gravitas while women are saddled with an expiration date."[1]

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[1] Greg Evans, *Five New York Anchorwomen Sue Charter Communication's NY1 News Channel Over Age and Gender Bias*, DEADLINE (June 19, 2019, 2:16 PM), https://deadline.com/2019/06/ny1-new-york-one-anchorwomen-age-gender-discrimination-lawsuit-roma-torre-charter-communications-1202635156/ (open letter from plaintiffs to the public at the time of filing suit).

I. INTRODUCTION

The best piece of advice I received when I began teaching law was to adopt Charlie Sullivan's and Mike Zimmer's casebook for my Employment Discrimination class. Before I became a law professor, I had no clue how important choosing the right textbook is, not only for the students but for the teacher. I also was unaware of how much I had to learn about a subject I thought I knew well. I had been litigating employment discrimination cases for several years, but when I began teaching, I quickly learned how much I did not know. Charlie's and Mike's casebook, through its organizational structure, its case selection and, importantly, its thoughtful and probing notes, gave me a deeper understanding of my field. As did their scholarship.[2]

I first met Charlie at the AALS annual meeting my first year in law teaching. I got up the nerve to introduce myself (I was, and still am, a bit star-struck by Charlie), and was gratefully surprised by how kind and approachable he was. He talked with me about my work in progress and made me feel like I belonged in this profession. Later at the conference, he introduced me to Mike, and the three of us ended up sharing a taxi to the airport. Best cab ride ever.

From the day I met him, Charlie has encouraged, supported, and inspired me. I have learned more about employment discrimination from Charlie Sullivan than from anyone else I have known, and he has influenced and shaped the way I (and my students) think about our area of the law.

Later in my career, one of my proudest moments as a law professor was when Charlie called to invite me to join him and Mike as their co-author on the casebook. I am honored to participate in this symposium celebrating Charlie; he has impacted my professional life in a way few others have. I am grateful to be his colleague and his friend.

II. THE TALE OF CHRISTINE CRAFT, OR "*TOO OLD, TOO UGLY AND NOT DEFERENTIAL TO MEN*"[3]

An example of Charlie's and Mike's careful case selection was featuring, in early editions of the casebook, *Craft v. Metromedia, Inc*,.[4] Set in the world of local television news, the *Craft* case involved a sex discrimination claim by Christine Craft, who had been demoted from her job as co-anchor to reporter based largely on her on-air appearance.

[2] That Charlie continues to produce some of the most insightful and path breaking scholarship in our field inspires awe.

[3] CHRISTINE CRAFT, TOO OLD, TOO UGLY AND NOT DEFERENTIAL TO MEN (1991).

[4] Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985).

Reaction by focus groups to Craft's appearance was "overwhelmingly negative,"[5] and in response, the station, KMBC, instituted a "clothing calendar" for Craft that dictated what clothes she would wear and provided her with make-up tutorials.[6] A follow-up telephone survey of randomly selected viewers, pursuing issues raised by the focus groups, asked participants to rank Craft against her female co-anchor competitors; almost thirty percent of the questions dealt with "'good looks' or the dress of and image of a 'professional anchor woman.'"[7] Craft did not fare well in comparison. Indeed, the results were described as "devastating," and when the survey results came in, Craft was demoted.[8] According to Craft, the news director told her she was being reassigned "because the audience perceived her as too old, too unattractive, and not deferential enough to men."[9]

Craft's sex discrimination claim did not contend that appearance was irrelevant to the job of being a television news anchor. Rather, her contention was that appearance standards were more strictly applied to female, as opposed to male, on-air talent. The district court rejected that contention, finding that KMBC was concerned with the appearance of all its on-air personnel, male and female, and had addressed individuals' deficiencies as needed, and the Eighth Circuit affirmed this finding.[10] Craft further argued, however, that "even if KMBC was evenhanded in applying its appearance standards, the district court erred in failing to recognize that the standards themselves were discriminatory,"[11] contending "she was forced to conform to a stereotypical image of how a woman anchor should appear."[12] And she claimed that KMBC had relied on customer preference to justify its discrimination against her. The Eighth Circuit rejected these arguments as well. An emphasis on feminine "'softness' and bows and

[5] *Id.* at 1209 (internal citation omitted).

[6] *Id.* at 1208–09.

[7] *Id.* at 1209.

[8] *Id.* The news director "characterized the results of the research, in the language of the district court, as 'devastating and unprecedented in the history of the consultants of Media Associates.'" *Id.* (internal citation omitted). Craft was reassigned to a position as a reporter at no loss of pay, a reassignment she refused. *Id.* Craft returned to her previous news station in California to work as a co-anchor. *Id.* Craft subsequently became a lawyer and also wrote a book about her experience. *See* CRAFT, *supra* note 3.

[9] *Craft*, 766 F.2d at 1209. The news director "specifically denie[d] making such a statement, and the district court believed his version of the conversation." *Id.* (internal citation omitted). Upholding this finding of fact, the Eighth Circuit stated, "The district court was in the best position to determine whether to believe Shannon [the news director] or Craft, and there are no circumstances suggesting any basis for finding clear error in the district court's choice in favor of Shannon." *Id.* at 1212.

[10] *Id.* at 1213–14.

[11] *Id.* at 1214.

[12] *Id.*

ruffles" were but incidental to the station's legitimate interests, particularly given that "reasonable appearance requirements were 'obviously critical' to KMBC's economic well-being."[13] Nor, said the appeals court, was the fact that Craft was meant to add "warmth and 'comfortability' to the newscast a reflection that the station was placing her in a stereotypical 'female' role secondary to her male co-anchor."[14] As for Craft's allegation that she was specifically told she was being demoted because she was viewed by the audience as "too old, too ugly and not deferential enough to men[,]" the news director denied making the statement, and the district court resolved the credibility conflict in his favor.[15]

The *Craft* case raised a number of interesting issues. What should we make, if anything, of the fact that Craft had been hired to "soften" the newscast? If femininity got her the job, should that preclude her objecting to being required to project a stereotypical feminine image? Moreover, if the station were simply responding to viewer preferences and ratings, should it matter to the outcome of the case whether those preferences or ratings themselves were grounded in gender bias?[16] Furthermore, could appearance be a BFOQ for a job such as television news anchor?[17] Why didn't the station mount a BFOQ defense, given that it certainly seemed to have relied on stereotypes of female appearance and demeanor? Had this case been brought after *Price Waterhouse v. Hopkins*,[18] with its recognition that sex stereotyping can support a claim of sex discrimination, would the outcome have been different? How far does or should the grooming code exception to Title VII's disparate treatment theory extend?[19] All of these, and more, were questions the *Craft* case allowed students to explore.

Eventually, *Craft* was dropped as a main case. Newer cases presented newer issues involving sex stereotyping, grooming codes, customer preference, and the BFOQ defense. Perhaps, too, there was a feeling (maybe we should call it wishful thinking) that *Craft* was a relic from the past, and that employers in television news were now more enlightened, as were their viewers, and that a case such as Craft's would not arise today. Would it were so.

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[13] *Id.* at 1215.

[14] *Id.* at 1216.

[15] *Craft*, 766 F.2d at 1212.

[16] *See infra* notes 122–39 and accompanying text.

[17] A BFOQ is a bona fide occupational qualification that serves as an affirmative defense to an intentional discrimination claim under Title VII and the ADEA. For a discussion of the BFOQ defense, see *infra* notes 109–21 and accompanying text.

[18] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[19] *See infra* notes 96–108 and accompanying text for a discussion of grooming codes and appearance standards.

III. THE MORE THINGS CHANGE . . . *"ALL YOU NEED TO DO IS TURN ON THE LOCAL NEWS. IT OFTEN LOOKS LIKE TAKE YOUR DAUGHTER TO WORK DAY"*[20]

The past year or so has seen a spate of well-publicized claims by television news anchors from around the country. The claims have been brought by women who are claiming their age, combined with their sex, led to their dismissals or demotions from their jobs in television news.[21] There is the case of Nashville news anchor Demetria Kalodinos, fired from her job at age fifty-eight, after thirty-three years on the air.[22] Her replacement was a thirty-two-year-old female.[23] And news anchor Karen Fuller, fired at forty-seven, claimed her station, KCTV, had "an 'age ceiling' for its female anchors but not for its male anchors."[24] When discussing Fuller's younger replacement, the station manager was alleged to have remarked, "She can

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[20] Clair Suddath, *Beloved Nashville Anchor Sues Meredith for Age Discrimination*, BLOOMBERG (Dec. 10, 2018, 11:09 AM), https://www.bloomberg.com/news/articles/2018-12-10/beloved-nashville-anchor-sues-meredith-for-age-discrimination (quoting Karen Fuller's attorney, Pete Smith). *See also* Dan Margolies, *Former KCTV-5 Anchor's Age Discrimination Lawsuit Can Proceed, Judge Rules*, KCUR (Aug. 23, 2018), https://www.kcur.org/post/former-kctv-5-anchor-s-age-discrimination-lawsuit-can-proceed-judge-rules#stream/0 (quoting attorney for plaintiff Karen Fuller, who sued her employer, KCTV for age and sex discrimination). Fuller's suit settled on undisclosed terms one month before trial was slated to begin. *See* Dan Margolies, *Former KCTV Anchor Karen Fuller Settles Her Discrimination Lawsuit Against Meredith Corp.*, KCUR (Dec. 18, 2018), https://www.kcur.org/post/former-kctv-anchor-karen-fuller-settles-her-discrimination-lawsuit-against-meredith-corp#stream/0.

[21] The irony of my writing about this topic does not escape me. My first job out of college was as a television news reporter. After about one and a half years on the job, I was let go; the explanation given me by the news director was that I looked "too young" on camera to be taken seriously by viewers. I always believed, however, that my dismissal had more to do with my refusal to sleep with the news director. Sexual harassment in the television news industry is something else that does not seem to have gone away, as the allegations involving Roger Ailes, Matt Laurer, and Les Moonves, for example, make clear, but discussion of sexual harassment claims in the television news industry is beyond the scope of this article.

[22] As Ms. Kalodinos stated in an interview with the New York Times,

> My gender and my age stamped me with a bull's-eye I couldn't shed despite decades of dedication, journalism awards, public respect and popularity. . . . At Meredith [the station's owner], the message to women journalists is loud and clear: Don't make trouble, don't stick up for other women, and whatever you do, don't get old.

Steve Cavendish, *The Fight to Be a Middle-Aged Female News Anchor*, N.Y. TIMES (Mar. 11, 2019), https://www.nytimes.com/2019/03/11/opinion/meredith-kalodimos-age-discrimination.html.

[23] Suddath, *supra* note 20.

[24] Margolies, *Former KCTV-5 Anchor's Age Discrimination Lawsuit Can Proceed, Judge Rules*, *supra* note 20. "Ms. Fuller's suit alleged that removing older women from highly visible roles has been a problem at Meredith stations, with a set of seven female anchors in markets including Atlanta, Phoenix and St. Louis removed in a span of five years and replaced with younger women." Cavendish, *supra* note 22.

be cute and young but also able to dress up and be more serious and respectable . . . . How will she age, I wonder?"[25] Michele Gillen, former anchor and chief investigative reporter for CBS's Miami affiliate last year sued for age and gender discrimination after she was removed as host from her public affairs program.[26] Moreover, five female anchors recently sued NY1, claiming that after Charter Communications took over, it "blatantly marginalized them and cast them aside in favor of younger women and men."[27] "We are fighting for any woman who has reached a certain age and has been intentionally marginalized, passed-over and deemed less relevant because of her age."[28] The situation in television news and advertising is so pronounced that the Association of National Advertisers has launched a #SeeHer initiative aimed at ensuring that the women we see on air reflect women in our society at large.[29]

Discussions of these recent claims inevitably lead to a renewed discussion in the media of the *Craft* case, which still remains the most prominent case involving discrimination against a television news anchor. Almost forty years after Craft was demoted, and thirty-five years after the appellate court rejected her discrimination claim, it is striking how similar the newsroom environment appears.[30] Craft's former lawyer, when asked about the most recent claim involving a Kansas City television station, noted the lack of progress that has been made in the years since Craft's suit was brought, observing that "[i]t is interesting that things seem not to change much for females."[31] Prominent plaintiffs' attorney Ed Buckley,

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[25] Margolies, *Former KCTV-5 Anchor's Age Discrimination Lawsuit Can Proceed, Judge Rules*, *supra* note 20.

[26] *See* Johnny Diaz, *Former CBS Miami Anchor Michele Gillen Files Age and Gender Discrimination Suit*, SOUTH FLA. SUN SENTINEL (Sept. 20, 2018), https://www.sun-sentinel.com/news/florida/fl-ne-michelle-gillen-sues-wfor-age-discrimination-20180918-story.html.

[27] *See* Erik Larson, *N.Y. News Anchors Sue Charter for Age, Gender Discrimination*, BLOOMBERG L. (June 19, 2019, 4:37 PM), https://news.bloomberglaw.com/daily-labor-report/n-y-news-anchors-sue-charter-for-age-gender-discrimination.

[28] Evans, *supra* note 1 (quoting open letter from plaintiffs to the public).

[29] *See* Cavendish, *supra* note 22.

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> Aging in television newsrooms has always been a problem, particularly for women. For every Judy Woodruff or Andrea Mitchell who has remained on the air into her 70s, many more hit the ceiling that Ms. Fuller and Ms. Kalodimos have found, in spite of performance. . . . Local television presents a particularly tough challenge: Ratings pressure is ever-present, consultants are a constant and management turnover can be high—neither of the general managers who terminated Ms. Fuller or Ms. Kalodimos, for instance, is still at their station. And yet the cultural influence of these stations, for all that they're viewed as an outdated medium, remains real: Almost 40 percent of Americans watch local TV news, more than watch cable or broadcast.

Id.

[31] Margolies, *Former KCTV-5 Anchor's Age Discrimination Lawsuit Can Proceed,*

who has litigated numerous discrimination suits against television stations, had a similar view: "I've been doing this work more than [thirty] years, and I can't tell you much has changed," Buckley said, noting that TV stations regularly fire based on age.[32] He cited to what he termed as "coded comments," such as a need for "fresher talent" or a description of a young female as someone who "pops."[33] "That means, boy, she's young and sexy and hot."[34]

IV. SEX PLUS AGE OR AGE PLUS SEX? *"IN OCCUPATIONS WHERE APPEARANCE IS BELIEVED TO BE IMPORTANT, THE TREATMENT OF OLDER WOMEN IS MUCH WORSE THAN THAT OF OLDER MEN OR YOUNGER WOMEN."*[35]

That aging takes a harder toll on women in the workplace than on men is a truth almost universally acknowledged.[36] Moreover, women in television news are hardly the only women to see their careers, or career prospects, diminish with advancing years.[37] But the treatment of these women, who we welcome into our homes and watch each evening as they age on air, is a particularly powerful example of how our society treats older women.[38] If these women, in prominent and prestigious positions,

Judge Rules, *supra* note 20.

[32] Suddath, *supra* note 20.

[33] *Id.*

[34] *Id.*

[35] Nicole B. Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 95 (2003).

[36] Susan Bisom-Rapp & Malcom Sargeant, *Its Complicated: Age, Gender and Lifetime Discrimination Against Working Women—the United States and the U.K. as Examples*, 22 ELDER L.J. 1, 21 (2014) ("Older women, however, suffer from the disadvantage of the combination of stereotyping based on age and gender, both of which can negatively affect them in the workplace."); David Neumark, *How Can We Know if There Is Discrimination in Hiring?*, ECONOFACT (Oct. 27, 2018), https://econofact.org/how-can-we-know-if-there-is-discrimination-in-hiring (noting that experiential research shows that older women experience more age discrimination than older men); Porter, *supra* note 35 (discussing how appearance related norms affect women, particularly aging women, in the workplace and while noting that age "has not truly affected the power or status of older men"). According to Bisom-Rapp and Sargeant, research shows three predominant ways older women are stereotyped—women are seen as aging earlier, their appearance is viewed more harshly than older men's and "compared to older men, aging women are seen as 'less competent, intelligent and wise.'" They are, however, seen as more nurturing, sensitive and warmer than older men. *See* Bisom-Rapp & Sargeant, *supra* note 36, at 28.

[37] Porter, *supra* note 35, at 95, 100–01 (noting that appearance matters outside television news as "one survey found appearance to be the single most important factor in employee selection for a wide variety of jobs" and that this is particularly true for women, for whom "appearance and 'the beauty myth' really are a major cause of discrimination against older women," even in jobs where appearance could not be a primary function of the job).

[38] Cavendish, *supra* note 22 ("An unappreciated aspect of sexism in the workplace is

can be cast aside when they grow older, what does that portend for the rest of us?[39] Or is there something about television news, a visual medium after all, that gives employers in this field more room to take appearance into account, even if doing so adversely impacts women?

Federal law prohibits discrimination in employment, and television news anchors and reporters are unquestionably employees. Title VII prohibits discrimination on the basis of sex,[40] and the ADEA prohibits discrimination on the basis of age against workers age forty or above.[41] Accordingly, firing or demoting women because of their sex *or* because of their age (if forty or older) is unlawful, unless the employer can successfully assert a BFOQ.[42]

But what happens when the claim is that it is not sex alone, nor age alone, but the combination of *sex plus age* or *age plus sex* that has caused the adverse action to occur?[43] This contention was missing in the *Craft* case. Despite the alleged references to her being "too old," Craft did not bring an age discrimination claim. Why not? Because she was only thirty-seven at the time of her demotion, and the ADEA's protections apply only to those age forty or above.[44]

How should the law treat claims such as these? Can a sex plus age claim succeed under Title VII? Can an age plus sex claim succeed under the ADEA? Or must these women sue separately under each statute, creating the risk that each claim may fail based on the presence of the alternative motivation under the other statute?

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age discrimination, and it operates in many places. But one of the places where it's most visible—where we can all #SeeHer getting aged out—is in TV news.").

[39] Bisom-Rapp & Sargeant, *supra* note 36, at 28 ("Discussions of how aging affects women typically reference the problem of appearance. In societies that prize female youth and beauty, signs of aging in women lead to their devaluation and what has been termed 'gender ageism.'"); *see also* Porter, *supra* note 35, at 107 (pointing to literature supporting the fact "that it is far more common for older women to be the victims of appearance related discrimination that for older men or younger women to fall victim to this phenomenon.").

[40] 42 U.S.C. § 2000e-(2) (2018).

[41] 29 U.S.C. § 623 (2018).

[42] See discussion *infra* notes 109-21 and accompanying text for a discussion of the BFOQ affirmative defense.

[43] Patti Buchman, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age Related Appearance*, 85 COLUM. L. REV. 190, 191 (1985) (contending that emphasizing youthful appearance for women to a greater degree than men runs afoul of Title VII and asserting, "There is evidence that network executives and station managers regard women over the age of forty as 'too old' and 'too unattractive' to anchor the news. Whereas for male anchors 'gray hair and frown lines are wrinkles and [considered] marks of distinction, . . . [f]or women they're the kiss of death.'").

[44] Should we consider it progress that today's women anchors have been able to retain their jobs into their forties and fifties, something that would have been virtually unheard of at the time Craft brought her claim? Of course not.

A. *Title VII and Sex Plus Age Claims*

Christine Craft brought a Title VII disparate treatment claim against KMBC and its parent company, and disparate treatment claims are alleged in the more recent claims being brought by female anchors as well.[45] "Disparate treatment," the Supreme Court tells us:

> is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some cases be inferred from the mere fact of differences in treatment.[46]

The Court was discussing Title VII, but the disparate treatment theory applies under the ADEA as well.

Disparate treatment, despite the Supreme Court's description of it, has proved neither simple nor easily understood. In fact, it is quite complicated, as the cases discussed herein demonstrate. But the gist of the disparate treatment theory is this: if the plaintiff proves the protected characteristic actually motivated the decisionmaker, then she generally prevails.[47] Discriminatory intent or motive is not the equivalent of hatred, ill will or animus. Intent is present when the employer takes the action because of the plaintiff's sex, for example, even if the action were taken for ostensibly benign purposes.[48] If a woman is intentionally treated differently than she would have been treated were she a man, even if the employer claims he has good business reasons for treating her differently, a disparate treatment claim is present.[49]

Suppose, though, that it is not simply a woman's sex, but her sex plus some other characteristic, which has caused the employer to take action against her. Can she successfully bring a claim?

In *Phillips v. Martin Marietta*,[50] the employer refused to hire women

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[45] *See, e.g.*, Torre, et al v. Charter Communications, Inc. d/b/a/Spectrum, Case 1:19-cv-05708 (S.D.N.Y. 2019).

[46] Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[47] I say generally because there is an affirmative defense, known as the BFOQ, discussed *infra*. Moreover, there is a judicially created exception for dress and grooming codes, discussed *infra* at notes 96–108. Finally, there is the question of motivating factor versus but for causation, also discussed *infra* at notes 66–68.

[48] *See, e.g.*, Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (sex-specific policy constituted disparate treatment, whether or not employer's motive was beneficent).

[49] We will put aside for the moment the role customer preference may play in these claims. This issue is discussed *infra* notes 122–39 and accompanying text.

[50] Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

with pre-school age children, while imposing no such limitation on the hiring of men. The Court held that this "sex plus" discrimination ran afoul of the statute.[51] Even though not all women were subject to the hiring ban,[52] those with young children were being treated differently than men with young children. This "sex plus" discrimination constituted disparate treatment within the meaning of the statute.[53]

Courts have gone on to recognize other sex plus claims, almost always when the "plus" involves an immutable characteristic or fundamental right,[54] and the courts also have recognized sex plus race claims under Title VII.[55] As one commentator recently asserted, "As courts have developed the doctrine, the additional 'plus' factor in a sex-plus case *must* pertain to either to an immutable characteristic or a fundamental right."[56] But, importantly, the claims have been recognized under Title VII, whether the plus is school age children, marital status, race or religion. Recognizing "sex plus" claims means that women can allege sex discrimination "even when not all members of a disfavored class are discriminated against."[57] Or as Professor Marc McAllister correctly describes the sex plus theory, "an employer in a sex-plus case cannot justify its discriminatory actions towards a particular subgroup of women simply by pointing to its favorable treatment of other women outside that particular subgroup."[58]

But what if the sex plus claim under Title VII is sex plus age? Here, the question becomes more difficult. One commentator, Professor Nicole Porter, asserts that despite the protections of Title VII and the ADEA:

[A]n older woman cannot bring a claim based on the fact that she

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[51] *Id.*

[52] *Id.* at 543 (noting that the majority of the employer's workforce was female).

[53] *Id.*

[54] *See, e.g.*, Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004) (alleged discrimination against women with young children); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971) (no marriage rule for stewardesses violates statute).

[55] *See, e.g.*, Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025 (5th Cir. 1980); Lam v. Univ. of Hawaii, 40 F.3d 1551 (9th Cir. 1994); Marc Chase McAllister, *Extending the Sex-Plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives*, 60 B.C.L. REV. 469, 483 n.102 (collecting cases).

[56] McAllister, *supra* note 55, at 477 (emphasis added); *see also* Buchman, *supra* note 43, at 198, 201 (questioning whether age-related appearance is immutable, like race, or mutable, like weight, and contending that youthful appearance is either immutable or semi-immutable).

[57] *Back*, 365 F.3d at 118.

[58] McAllister, *supra* note 55, at 478; *see also* Arnett v. Aspin, 846 F. Supp. 1234, 1240 (E.D. Pa. 1994) ("The point behind the establishment of the sex-plus discrimination theory is to allow Title VII plaintiffs to survive summary judgment when the defendant employer does not discriminate against *all* members of the sex. Thus, the . . . cases have not created a new remedy, but instead have closed a loophole through which defendant employers could escape Title VII liability.").

> feels she was discriminated against because she is an older woman. In other words, her claim must be brought either on the basis of her sex *or* on the basis of her age, but not on the basis of both her sex and age combined.[59]

As she states, using an example especially pertinent here, "[d]espite our laws prohibiting age discrimination and sex discrimination, one only has to look as far as the television in one's home to see an example of how the merging point of sexism and ageism has really affected older women in a very unique, and unfortunately, very negative way."[60] As she observes, protection under Title VII or the ADEA for older women as such has proven elusive.

Professor McAllister also acknowledges the difficulties posed by such claims under either Title VII or the ADEA, noting:

> [S]ome courts have rejected attempts to claim subgroup discrimination under Title VII by older male or female employees, reasoning that because the ADEA does not permit a combined age-plus-sex discrimination claim, plaintiffs should not be allowed to recast such a claim as a sex plus age claim under Title VII.[61]

He goes on to state, however, that some courts *have* recognized these claims under Title VII,[62] a result for which both he and other commentators advocate.[63]

Given that other "sex plus" claims are widely recognized under Title VII, why are sex plus age claims so problematic? The reasons are varied. For one thing, unlike many of the sex plus cases brought under Title VII, the plus involves neither another protected category under Title VII (such

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[59] Porter, *supra* note 35, at 79; *see also* Katlyn J. Lynch, *Sex-Plus-Age Discrimination: State Law Saves the Day for Older Women*, 31 A.B.A. J. LAB. & EMP. L. 149, 151 (2015) (noting that no federal appellate court has adopted, and some have explicitly rejected, Title VII sex plus age claims); Bisom-Rapp & Sargeant, *supra* note 36, at 31 ("[L]egal doctrine is in general not hospitable to claims of intersectional discrimination . . . ."); Joanne Song McLaughlin, *Limited Legal Recourse for Older Women's Intersectional Discrimination Under the Age Discrimination in Employment Act*, 26 ELDER L.J. 287, 315 (2019) (noting that the ADEA and Title VII are ineffective in protecting older women from discrimination).

[60] Porter, *supra* note 35, at 94.

[61] McAllister, *supra* note 55, at 486.

[62] It is fair to say, however, that very few cases have discussed the issue in any detail. *See* Porter, *supra* note 35, at 87 n.68; McAllister, *supra* note 55, at 488. At least two circuits did consider the question but did not decide whether such a claim was viable, finding it unnecessary, under the facts presented, to do so. *See* Best v. Johnson, 714 F. App'x 404 (5th Cir. 2018); Sherman v. Am. Cyanamid Co., 188 F.3d 509 (6th Cir. 1999).

[63] *See* Sabina F. Crocette, *Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis—A Pragmatic Model*, 28 GOLDEN GATE U. L. REV. 115 (1998); Porter, *supra* note 35, at 102–11; Lynch, *supra* note 59, at 151; Buchman, *supra* note 43, at 195.

as race) nor a characteristic that correlates with gender stereotypes (such as being a working mother with young children).[64] More importantly, Title VII and the ADEA are separate statutes and have different proof structures, and this difference has led some courts to find that sex plus age claims are not available under Title VII.[65]

Importantly, Title VII permits mixed motive claims.[66] The ADEA, according to the Supreme Court's decision in *Gross v. FBL Financial Services, Inc*.,[67] does not. Title VII allows plaintiffs to prevail by showing that sex was a motivating factor in the employer's decision-making, even if other factors also motivated the decision. The ADEA, however, requires that age be the "but for" cause of the at-issue decision. Although it need not be the sole factor, age must be the "but for" cause. Thus, allowing sex plus age claims under Title VII, in the view of these courts,

> would be tantamount to allowing plaintiff to argue age discrimination in the context of a mixed-motive theory of discrimination. Such a result stands in direct opposition to the language of the ADEA and the Supreme Court's holding in *Gross*. In addition, it would provide plaintiffs an end-run around the heightened standards set forth by Congress under the ADEA.[68]

Or as the district court stated in *Best v. Johnson*, "[b]ecause Congress chose to protect the two characteristics in completely separate statutory schemes, allowing Best to pursue her 'gender plus age' claim at trial would constitute improper judicial legislation. Courts have declined to recognize such 'plus' claims on this basis alone."[69] Older women, said the *Best* court,

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[64] *See* Bauers-Toy v. Clarence Cent. Sch. Dist., 10-CV-845, 2015 WL 13574291 (W.D.N.Y. Sept. 30, 2015); *see also* McAllister, *supra* note 55, at 488–90 (discussing *Bauers-Toy*).

[65] *See* Best v. Johnson, 1:15-CV-00086-NBB, 2018 U.S. Dist. LEXIS 147819 (N.D. Miss. Aug. 30, 2018). *See also* McAllister, *supra* note 55, at 485–86; Lynch, *supra* note 59, at 154. Similar issues may arise for sex plus claims involving other statutes, such as the Americans with Disabilities Act. For a discussion of sex plus claims involving sex and disability, *see* Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099 (2017).

[66] 42 U.S.C. § 2002e-2(m) (2018); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[67] 557 U.S. 167 (2009).

[68] *Bauers-Toy*, 2015 WL 13574291, at *6; *see also*, McAllister, *supra* note 55, at 488–90 (discussing *Bauers-Toy*).

[69] Best v. Johnson, No. 1:15-CV-00086-NBB, 2018 U.S. Dist. LEXIS 147819, at *4; *see also Bauers-Toy*, 2015 WL 13574291, at *6 ("While the Court is cognizant of plaintiff's valid argument that an individual could be treated unlawfully as a result of both age and gender, it is not within the Court's purview to create a cause of action under Title VII which does not apparently exist."); Frappied v. Affinity Gaming Black Hawk, LLC, No. 17-cv-01294-RM-NYW, 2018 U.S. Dist. LEXIS 104796, at *8 (D. Colo. June 22, 2018) (rejecting sex plus age claim: "[S]hould plaintiffs' standalone age discrimination fail under a narrower

are not a protected class for purposes of Title VII.[70]

A few district courts, however, have permitted such claims. One of, if not the first to do so, was *Arnett v. Aspin*,[71] a district court opinion. In allowing the claim to proceed, the *Arnett* court relied upon the sex plus theory recognized in *Phillips v. Martin Marietta* and its progeny.[72] Regardless of the subclass, the court said, Title VII, as understood by the sex plus theory, does not permit employers to discriminate against some women so long as they do not discrimination against all women.[73] In the court's view, that the sex plus claim involved protections provided by two different statutes was a distinction without a difference. *Arnett*, however, was decided before the Supreme Court's decision in *Gross*. Does or should that matter?

Should sex plus age claims be recognized today under Title VII? Both Professors Porter and McAllister argue that they should be. As Professor Porter explains, it is insufficiently protective of older women to relegate them to bringing separate claims under Title VII and the ADEA: when an older woman is replaced by a younger woman, while older men retain their jobs, she is unlikely to be successful under either the ADEA or Title VII in cases involving circumstantial evidence of discrimination.[74] As she explains, her Title VII sex discrimination claim would likely fail because she was replaced by a woman.[75] Her age discrimination claim

scope of liability, plaintiffs would be able to [fall back] on their gender plus age claim under a broader scope of liability. The Court will not allow such an attempt to work-around statutory dictates.").

[70] *Best*, 2018 U.S. Dist. LEXIS 147819, at *5.

[71] 846 F. Supp. 1234 (E.D. Pa. 1994). According to Professor Porter, *Arnett* was the only court, as of 2003, to have "actually discussed and decided the issue of whether the law should recognize a sex plus age theory of discrimination. Other courts have given it only cursory treatment." Porter, *supra* note 35, at n.68.

[72] *Arnett*, 846 F. Supp. at 1238–40.

[73] *Id.* at 1240.

[74] In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the Supreme Court established the elements of a prima facie case for plaintiffs, which, once established, shifted to defendant the burden of articulating a legitimate nondiscriminatory reason for the challenged action. While circuits have interpreted the elements of the test differently, the general requirements include: (1) the plaintiff was within the protected class; (2) the plaintiff had met objective qualifications or other benchmarks in job performance; (3) the plaintiff was subject to an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. Some circuits have required a particular showing of disparate treatment through comparators to meet the prima facie burden. *See, e.g.*, Johnson v. Ohio Dep't of Pub. Safety, 942 F.3d 329, 331 (6th Cir. 2019); Lewis v. City of Union City, 934 F.3d 1169 (11th Cir. 2019) (en banc). *McDonnell Douglas* was a Title VII case; the Supreme Court has never formally adopted this test in the ADEA context. *See* Gross v. FBL Fin. Servs, Inc., 557 U.S. 167, 175 n.2. (2009).

[75] Porter, *supra* note 35, at 105–06.

would likely fail because older men were retained.[76] "Even with the very strong evidence that the older woman was being discriminated against because she is an older woman, the plaintiff's Title VII and ADEA claims would both fail if analyzed separately," Professor Porter asserts, since in each claim there would be no comparator outside the protected class treated more favorably.[77]

Porter contends that a straightforward application of the sex plus theory, as occurred in *Arnett*, should be applicable to sex plus age claims;

> Using this rule . . . an older woman should be able to prove that, had she been an older man, she would have been treated differently, even if there were plenty of younger women who were treated better than she was. Simply following precedent leads us to the conclusion that the sex plus age theory should be recognized.[78]

But Professor Porter's article was written before the Supreme Court's decision in *Gross*. Professor McAllister's, on the other hand, was written in a post-*Gross* landscape, and he, too, concludes that sex plus age claims should be recognized under Title VII.[79] He does so after acknowledging the conflict between *Gross* on the one hand and *Phillips v. Martin Marietta* on the other.[80] But the "most logical" way to resolve the conflict, he says, is to focus simply on the Title VII claim, which permits sex plus claims, without regard to whether an "age plus" claim may or may not be available under the ADEA.[81] And he agrees with Professor Porter that "the biases,

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[76] Professor Porter notes that in disparate treatment cases involving circumstantial evidence, plaintiff must show, as part of her prima facie case, that comparable employees not in the protected group were treated more favorably. Porter, *supra* note 35, at 105.

[77] *Id. See also* Crocette, *supra* note 63, at 143 (claims under the separate statutes allow employers to focus on younger women and older men to defeat claims at summary judgment stage); Kate Sablosky Elengold, *Clustered Bias*, 96 N.C.L. REV. 457, 466–69 (2018) (making a similar point for sex plus race claims). For a discussion of comparator proof in discrimination cases, *see* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191 (2009).

[78] Porter, *supra* note 35, at 108.

[79] McAllister, *supra* note 55, at 473.

[80] McAllister, *supra* note 55, at 501 ("On the one hand, if age-plus-sex claims under the ADEA are precluded by *Gross*'s conception of but-for causation—under which an ADEA plaintiff must prove that was 'the reason' for the adverse employment action as opposed to 'simply a *motivating* factor'—then sex-plus-age discrimination claims under Title VII also should be precluded because permitting such claims would allow a plaintiff to prevail upon a showing of two discriminatory motives, thereby circumventing the causation principles espoused in *Gross.* On the other hand, if the Title VII sex-plus doctrine is applied faithfully, then sex-plus-age claims should be permitted, given that the well-established sex-plus doctrine, flowing from *Phillips*, permits such claims when an employer discriminates against a subgroup of male or female employees on the basis of an immutable characteristic, which would naturally encompass a person's age.") (emphasis added) (citations omitted).

[81] McAllister, *supra* note 55, at 501.

prejudices and stereotypes associated with both 'ageism' and 'sexism' become worse when coupled together, becoming for some women a 'double hurdle' of sex discrimination and age bias.'"[82] That the plus factor involves an immutable characteristic protected by another statute is, in his mind, as in the mind of the *Arnett* court, a distinction without a difference as far as Title VII is concerned.[83]

This view appears correct. Discrimination against a subgroup of women, because they are women, runs afoul of Title VII, even if other (or even most) women are not victims of discrimination.[84] Whether the claim would succeed under the ADEA should have no bearing on its validity under Title VII.[85]

Importantly, though, the courts have not widely embraced this view. And their unwillingness to do so goes beyond whether a successful prima facie case can be brought. Courts are refusing to permit a sex plus age theory to proceed as outside the protections afforded by Title VII.[86]

B. *The ADEA and Age Plus Sex Claims*

If sex plus age claims are allowed under Title VII, does it follow that age plus sex claims should be allowed under the ADEA? Not necessarily. Even the district court judge who authored the *Arnett* opinion rejected an age plus theory under the ADEA.[87]

Unlike under Title VII, where sex plus claims have been expressly recognized by the Supreme Court, the Court has not squarely addressed an age plus claim. Most courts rejecting "age plus" claims have done so in reliance on *Gross*, finding that it would be inconsistent for a plaintiff to

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[82] McAllister, *supra* note 55, at 503 (citations omitted).

[83] McAllister, *supra* note 55, at 502.

[84] *See* Elengold, *supra* note 77, at 498–99 (advocating for a "cluster framework, rather than a "sex plus" framework for intersectional claims). "Sex plus," she claims, is confusing and fundamentally flawed because intersectionality is "not an additive experience." *Id.* at 498. Instead,

> the cluster framework specifically defines sex discrimination to include the categorization, stereotyping, and subjugation of particular subgroups of women . . . and treats discrimination against a subset of women as 'pure' sex discrimination—no plus needed . . . . If a subgroup of women is treated differently because they are women, that is sex discrimination.

Id. at 499.

[85] One commentator, who also agrees these claims should be recognized under Title VII, relying on *Phillips v. Martin Marietta* and its progeny, points out that even if courts reject such claims under Title VII, state law may provide protection, as a number of states outlaw sex and age discrimination in the same statute. *See* Lynch, *supra* note 59. *See also* McLaughlin, *supra* note 59, at 308–12.

[86] *See supra* notes 69–70.

[87] Kelly v. Drexel Univ., 907 F. Supp. 864, 875 (E.D. Pa. 1995) (refusing to recognize a claim based on age plus disability).

claim her age was the "but for"cause of the adverse action while also claiming the action was based on her gender.[88] However, a handful of courts have allowed "age plus" claims to proceed, reasoning that if sex plus claims are valid under Title VII, then "age plus" claims should be viable under the ADEA.[89] They also have recognized that the "but for" causation standard adopted in *Gross* for the ADEA is not a sole cause standard. The "but for" causation standard may be satisfied, even if other factors, such as sex, were also implicated in the decision.[90]

Recall that at the time *Phillips v. Martin Marietta* was decided, "but for" causation was the causal standard under Title VII, as well. That causation standard did not preclude the Court from recognizing that discrimination against only a subgroup of the protected class was nonetheless discrimination within the meaning of the statute.[91] Accordingly, *Gross* should not be seen as a barrier to an "age plus" claim, including an "age plus sex" claim.

Whether a plaintiff may successfully bring a sex plus age claim under Title VII or an age plus sex claim under the ADEA, however, is admittedly unclear. The handful of courts that have addressed the issue have divided on the viability of such claims. And bringing the claims separately, as a sex discrimination claim under Title VII and/or as an age discrimination claim under the ADEA, using a circumstantial evidence approach runs the very real risk that the claims will fail. A woman who loses her job to another woman or an older worker who is let go while other older workers are retained may often find it difficult to establish a prima facie case under either statute, regardless of the causation standard used.[92]

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[88] *See* Famighette v. Rose, 2:17-cv-2553 (DRH)(ARL), 2018 U.S. Dist. LEXIS 74484, at *14 (E.D.N.Y. May 2, 2018); *see also* McAlllister, *supra* note 55, at 493–97 (collecting cases).

[89] McAllister, *supra* note 55, at 497–99 (collecting cases). *But see* McLaughlin, *supra* note 59, at 290 ("The ADEA has never recognized this intersectionality of discrimination.").

[90] Even the dissenters in *Price Waterhouse* understood that but for causation allowed for other motivations to be present; it simply was plaintiffs' burden to show that sex was the but for cause of the challenged decision. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 282–84 (1989) (Kennedy, J., dissenting).

[91] *See* McAllister, *supra* note 55, at 505 (recognizing this point). He also points to the fact that the ADEA is not a sole cause statute and further argues that while *Gross* rejected mixed motives claims involving both lawful and unlawful motives, here both reasons are unlawful, and but for causation principles do not preclude claims involving multiple illegal motives. For these reasons, Professor McAllister contends age plus sex claims should be permitted, but he also calls for an amendment to the ADEA adding motivating factor language to clarify that age plus claims should be permitted when multiple illegal motivations are present. *Id.* at 503–08.

[92] *See supra* notes 74–77 and accompanying text.

V. APPEARANCE BASED EXCEPTIONS TO DISPARATE TREATMENT THEORY; OR, "*(S)HE'S GOT A GREAT FACE FOR RADIO'*[93]

Leaving aside the difficulties, discussed above, inherent in bringing an intersectional claim based on sex plus age, other potential obstacles loom for older female anchors. Television, after all, is a visual medium, and the question becomes whether the employer could justify its disparate treatment of older women under either a grooming code, a BFOQ or a customer preference exception.

Facially discriminatory policies, or direct evidence of discriminatory motive, are the relatively easy disparate treatment claims. Direct evidence consists of statements by the decision maker, made in reference to the employment decision at issue, that facially demonstrate the prohibited bias.[94] Were a station manager, for example, to say it was firing its news anchor because she was a woman, we would not be left to wonder about why she was fired. We know why. If the trier of fact determines that the statement was made and that it accurately reflected the decision maker's motivation, intentional discrimination is established. In the *Craft* case, for example, had the trial court believed, as Craft claimed, that the station manager had told Craft she was being demoted because she was "too old, too unattractive and not deferential enough to men," that would have been direct evidence of discrimination, and the result in the case would presumably have been different.[95]

When a facially discriminatory policy or other direct evidence of discrimination is present and credited, the question then turns to whether the employer has a valid defense. That is, unless the claim involves a dress or grooming code, as in *Craft*.

A. *Dress and Grooming Codes*

One significant exception to disparate treatment theory, and one front and center in the Christine Craft case, is the judicially-created exception for dress and grooming codes. Different grooming codes or appearance standards for men and women have routinely been upheld by the courts, despite being facially discriminatory.[96] An employer may permit women to

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[93] A remark my former news director was fond of making about other on-air talent in the market.

[94] For a discussion of what constitutes direct evidence, *see* CHARLES A. SULLIVAN AND MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION, 74, n.5 (Wolters Kluwer, 9th ed. 2017).

[95] *But see* Best v. Johnson, 2018 U.S. Dist. LEXIS 147819, at *4 (N.D. Miss. Aug. 30, 2018) (stating that older women are not a protected class under Title VII). Under that reasoning, even direct evidence of discrimination would not suffice.

[96] *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc).

wear their hair long while requiring men to wear theirs short,[97] and it may insist that women wear makeup,[98] or that men wear ties.[99] So long as the requirements are not deemed more onerous for one gender than for the other, courts have viewed sex-differentiated grooming and appearances standards as essentially too de minimis to violate the statute.[100] As the Ninth Circuit put it, "Grooming standards that appropriately differentiate between the genders are not facially discriminatory."[101] That, of course, is incorrect. These policies are facially discriminatory. But they nonetheless, despite enormous critical commentary to the contrary,[102] have been deemed outside the reach of Title VII. Separate but equal is the currently accepted touchstone vis a vis grooming and appearance codes.

Do dress and grooming codes play into and reinforce gender stereotypes? Indeed they do. But to date that has not stopped courts from permitting employers to enforce them. In *Jespersen v. Harrah's Operating Company, Inc.*, the court distinguished gender-specific grooming codes from the sex stereotyping at work in *Price Waterhouse.*[103] In *Price Waterhouse*, the sex stereotyping created a catch-22 for Ann Hopkins—out of a job if she conformed to sex stereotypes and out of a job if she did not. No such catch-22 was present at the casino, said the *Jespersen* court.[104] And it rejected the argument that Harrah's requirement that female bartenders wear makeup impermissibly perpetuated the stereotype that women, but not men, must be sexually attractive.[105] Adopting Jespersen's argument, the court essentially conceded, would wipe out most gender-specific dress and grooming codes, something the court was not prepared to do.[106]

Recall that in the *Craft* case, the question was not whether the station could insist that men and women dress differently. The question was

97 Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1087–88 (5th Cir. 1975).

98 *Jespersen*, 444 F.3d at 1113.

99 Fountain v. Safeway Stores, Inc., 555 F.2d 753, 756 (9th Cir. 1977).

100 Courts have rejected the argument that these grooming codes constitute impermissible sex plus discrimination. *See* McAllister, *supra* note 55, at 485.

101 *Jespersen*, 444 F.3d at 1109–10.

102 *See, e.g.*, Angela Onwuachi-Wilig, *Another Hair Piece, Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010); Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL'Y 467 (2007).

103 *Jespersen*, 444 F.3d at 1111–13.

104 *Id.*

105 *Id.* at 1109-11.

106 Currently pending before the Supreme Court is Bostock v. Clayton County, No. 17-1618, 2019 U.S. LEXIS 2927 (U.S., Apr. 22, 2019) and its companion cases, in which the Court is considering whether discrimination on the basis of sexual orientation and/or transgender status is prohibited by Title VII. How the Court rules in those cases could well impact the question of sex stereotyping and gender specific dress and grooming codes.

whether the grooming standards for women were more onerous or were being applied more rigorously to women than to men. Craft lost on this question of fact, just as Darlene Jespersen did decades later.[107] The more recent cases being brought by older female anchors also do not take aim at the existence of separate dress and grooming codes for women and men per se. Rather, as in *Craft*, the claim is that stations hold women to higher and more demanding appearance standards, standards that celebrate youth and beauty in women, while permitting men to age with dignity on the air.[108]

An interesting twist in these recent cases is the insertion of age into the equation. Well-groomed, professionally attired and, yes, attractive women are being pushed aside, so the allegations go, in favor of younger, more attractive women, while male counterparts suffer no such fate. Could a station defend these claims by openly claiming that youth and beauty is essential for its female, but not male, anchors?

B. *BFOQs and Television News*

The factual finding that appearance standards were not more demanding or applied more harshly to Craft than to her male counterparts is questionable at best.[109] And when one watches television news today, it is hard not to conclude that for women, being relatively young and attractive remains the coin of the realm at the anchor desk (or even in the field). If so, why do stations not simply assert a BFOQ? Why do they not just admit that appearance matters and that, as the rankings show, it matters more for women than for men? There are two reasons, one legal and one practical. Legally, an appearance based BFOQ is essentially dead in the water.[110] Practically, no news director worth his salt would let his station assert a BFOQ defense.[111]

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[107] *See* Emily Gold Waldman, *The Preferred Preferences in Employment Discrimination Law*, 97 N.C. L. REV. 91, 105–06 (2018) ("[C]ourts have applied the equal burdens test very loosely, allowing employers to defer to customer preferences that are in reality more burdensome on females than males," calling the *Craft* case "a blatant example of this.").

[108] Joanne Bal, *Proving Appearance-Related Sex Discrimination in Television News: A Disparate Impact Theory*, 1993 U. CHI. LEGAL F. 211, 211 ("Although both male and female anchorpersons must meet substantial image requirements, anchorwomen are generally forced to conform to a much narrower and more demanding ideal of youth and beauty."). *See also* Buchman, *supra* note 43, at 191. In other words, assuming it is permissible for stations to insist on a youthful on-air appearance, they may not apply that standard disparately to men and women. *Id.* at 199.

[109] *See* Waldman, *supra* note 107, at 127–28 ("Both the *Craft* and *Jespersen* courts explicitly minimized the differential burdens that the hair and makeup expectations had on female employees, insisting that they were roughly equal to those imposed on male employees, despite significant evidence to the contrary.").

[110] See *infra* notes 112–20 and accompanying text.

[111] See *infra* note 121 and accompanying text.

Both Title VII and the ADEA permit employers to facially discriminate on the basis of sex or age when sex or age "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[112] The BFOQ is an affirmative defense to disparate treatment claims, and it has been construed very narrowly by the courts. Two prongs must be met. First, the aspect of the job for which sex or age is claimed to be necessary must go to the *essence* of the employer's business.[113] To put it another way, what is the central mission of the business, and does the employer need to discriminate in employing people for the job in question in order to further that central mission? It is not enough to show that an employer will make more money if it discriminates or that its intentional discrimination is a product of its customers' preferences.

For example, a BFOQ claim asserted by Southwest Airlines that it needed to hire only women as flight attendants because it had marketed itself as a flying cocktail lounge, and that its customers, primarily men, wanted attractive women serving them drinks in the air, was firmly rejected.[114] The essence of an airline's business is the safe transportation of passengers, not selling sexiness in the air.[115] Thus, requiring that flight attendants be women would not go to the essence of the airline's business.[116] Nor could a battery-making plant insist that only infertile women work in its manufacturing jobs.[117] The essence of Johnson Controls' business was making batteries, and fertile women can make batteries as well as fertile men, even if the battery-making process posed a risk to a developing fetus. Thus, no BFOQ was present.

Second, even if the essence of the business test is satisfied, the employer must show that either all or substantially all members of the excluded group cannot perform the job or that it is impossible or impractical to deal with the excluded group on an individual basis.[118] For example, the safe transportation of passengers is the essence of an airline's business, and thus it may insist that its pilots be healthy and not at risk of a

112 42 U.S. C. § 2000e-2(e); 29 U.S.C.§ 623(f)(1).

113 See Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1999).

114 Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 304 (N.D. Tex. 1981). *See also* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).

115 "[S]ex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool . . . ." *Wilson*, 517 F. Supp. at 303.

116 The *Southwest Airlines* court distinguished airlines from strip clubs, where selling sex is the essence of the business. *Id.* at 301–02. A strip club hiring topless waitresses would be different from an airline and could insist on hiring women. But what about a restaurant such as Hooters? Can it insist that those serving its chicken wings and beer be sexy women?

117 Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).

118 Western Airlines v. Criswell, 472 U.S. 400, 414–16 (1985).

heart attack or stroke. But it may not use age as a proxy for health; rather, it can administer physicals to its pilots to determine who does or does not present a risk to the airline's passengers.

Understood in this way, it is easy to see how a BFOQ defense would fail if asserted in the context of television news.[119] Yes, television is a visual medium, but the essence of the business is informing the public by delivering the news. Men and women, young and old, can do that. Insisting that female anchors be attractive younger women goes no more to the essence of the news business than it did to Southwest Airlines' safe transportation of its passengers.[120] Moreover, even if the essence of the business test were somehow met, it would be neither impracticable nor impossible to make individual determinations about which women could meet the demands, rather than using age as a proxy.

Perhaps a recognition that a BFOQ defense was unwinnable is what kept KMBC and other stations from raising it. But at the time the *Craft* case was brought, the stringency of the BFOQ defense was not so firmly established. So why was the defense not asserted? Most likely, it was because the credibility of television as a news-gathering and reporting organization undoubtedly was and is on the minds of news departments and their stations.[121] For a news department to insist that the essence of its business is not delivering the news but instead is delivering the news in a sexually appealing way would be a step too far for even the most entertainment-minded news directors. Stations and networks pride themselves on the integrity of their news organizations; asserting that they are all about appearance as opposed to substance would be at odds with the credibility they seek with their viewers. So stations and networks are unlikely to assert BFOQ defenses, and even were they to be asserted, courts are unlikely to accept them. .

C. *Customer Preference and Television News*

Which brings us to the customer preference defense. Assuming that viewers *do* judge women's appearance more stringently than men's and *do* take that into account in choosing which channel to watch, are employers forbidden from factoring those preferences into their employment

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[119] *See* Buchman, *supra* note 43**Error! Bookmark not defined.**, at 205–06 (discussing the BFOQ defense in the context of television news).

[120] Buchman, *supra* note 43, at 206. *See also* Leslie S. Gielow, *Sex Discrimination in Newscasting*, 84 MICH. L. REV. 443, 466 (1985).

[121] I suspect television reporters and anchors, even today, still harbor a bit of an inferiority complex as compared to their print brethren. Newspaper reporters have a credibility in the hard journalism field that television reporters are often perceived as lacking. Notice, for example, how often reporters from the New York Times and Washington Post appear as guests on CNN and MSNBC.

decisions?[122] Could, or should, customer preference somehow form a defense to claims such as these?

As mentioned above, customer preference has not been found sufficient for satisfaction of a BFOQ. That an employer may make money by catering to its customers' discriminatory preferences is no defense to a disparate treatment claim is a well-established tenet of disparate treatment theory.[123] Moreover, the Civil Rights Act of 1991 codified this approach by amending Title VII to assert that business necessity is not a defense to a disparate treatment claim.[124]

And yet.[125] While employers may not defend against disparate treatment claims by acknowledging they intentionally discriminated but did so only at the behest of their customers, what happens when an employer acts on the basis of customer feedback that is itself the product of bias? More concretely, could a station fire a news anchor based on poor ratings, even if those ratings are themselves influenced by customer bias?[126] The answer to this last question is far from certain.

What does seem well-established is that customer preference is no defense to an employer's own intentional discrimination.[127] For example, an employer's refusal to hire a woman for a job because of a concern that customers would not accept her in that role is still discrimination because of sex. Had KMBC refused to hire a woman for an anchor role because she was a woman, it would be liable for sex discrimination, even if it did so

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[122] And according to the consultant in the *Craft* case, they do. "[V]iewers—particularly other women—criticize women more severely than men for their appearance on camera and that women's dress is more complex and demanding because 'society has made it that way.'" Craft v. Metromedia, Inc., 766 F.2d 1205, 1214 (8th Cir. 1985).

[123] *See* Waldman, *supra* note 107, at 93 ("A basic tenet of employment discrimination law is that customer preferences generally cannot justify discriminatory treatment by employers."). *See* Buchman, *supra* note 43, at 203–04 (showing a station's argument that it would lose revenue if forced to keep older women anchors on the air is not a defense to a disparate treatment claim).

[124] 42 U.S.C. §2000e-2(k)(2) (2018).

[125] Professor Waldman's article, *supra* note 107, described the various ways that customer preferences, despite the received wisdom to the contrary, in fact are taken into account by the courts. She points to privacy based BFOQs, gender specific appearance requirements, business necessity defenses, and reasonable accommodations as collective examples of situations where customer preferences are used to defend against discrimination claims. Waldman, *supra* note 107, at 97–123.

[126] In the *Craft* case, the district court concluded that KMBC had "reasonably relied on the survey results as the basis for the personnel change." 766 F.2d at 1210. The appellate court affirmed that finding as not clearly erroneous. *Id.*

[127] *See* Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2196 (2018), (discussing judicial rejection of the customer preference defense); Gielow, *supra* note 120, at 443 ("Under Title VII . . ., customer preference is generally not a justification for sexually discriminatory employment decisions.").

based on a concern that its viewers prefer male anchors.[128]

But what if a news station (or other employer) makes an employment decision based on customer feedback? If that feedback is openly biased, as it was in the *Craft* case, *and* if the employer is aware it is biased, holding the employer liable for acting upon it is not too much of a reach.[129] There seems appreciably little difference between an employer who refuses to hire a female because he believes his customer will react adversely to a woman and an employer who knowingly fires the woman because his customers do.[130] An employer's conscious reliance on openly discriminatory feedback seems well within the reach of the statute.

But, as Professor Dallan Flake asserts, "employers' use of biased customer feedback to make employment decisions has gone largely unchecked,"[131] noting "the courts have not directly addressed employers' use of discriminatory customer feedback."[132] And the problem is particularly difficult when the feedback, while rooted in bias, implicit or otherwise,[133] is not openly so. As Professor Deborah Brake observes,

[128] There were strong suggestions in the *Craft* litigation that Craft had been hired because she was a woman. The station perceived a need to "soften" its male anchor with a female presence, and other stations in the market had gone with male/female anchor teams. *Craft*, 766 F.2d at 1208. Assuming Craft got the job because she was a woman, would that stop her from claiming discrimination when she was later removed from the job? No. That she has benefitted from discrimination in the past does not preclude her from claiming discrimination in the present.

[129] Flake, *supra* note 127, at 2196 (asserting that when feedback is intentionally biased and employer knows and uses it anyway, it "seems clear that in such cases the employer could—and should—be liable."); Gielow, *supra* note 120, at 457 (stating that the *Craft* court "failed to consider whether the survey itself was sex biased, or whether the viewers brought sexual stereotypes to the viewings and thereby tainted the outcome of an otherwise sex-neutral survey."). *See also* Staub v. Proctor Hosp., 562 U.S. 411, 419–22 (2011) (endorsing the "cat's paw" theory of liability for discrimination claims).

[130] There may be a narrow exception in cases involving privacy or safety, where customer preference arguments are essentially accepted as BFOQs. The Court in *Johnson Controls*, however, did not reach the question of privacy-based BFOQs. Int'l Union v. Johnson Controls, 499 U.S. 187, 206, n.4 (1991).

[131] Flake, *supra* note 127, at 2170–71. *See* Buchman, *supra* note 43, at 210 ("Apparently, ratings and audience research indicate that television audiences prefer to have their news delivered by attractive young anchorwomen, and thus their use by the television news industry in personnel decisionmaking has had an adverse impact on older women seeking to secure or retain anchor positions."); Gielow, *supra* note 120, at 444 ("The public, according to many media personnel, evaluates female newscasters by different criteria from those used to judge their male counterparts. In response to perceived public expectations, networks treat them differently as well.").

[132] Flake, *supra* note 127, at 2190. *See also* Gielow, *supra* note 120, at 447 (contending that "viewer surveys almost always reflect sexual stereotypes that are impermissible under title VII . . . and . . . such surveys should be presumptively inadmissible as evidence to rebut a claim of sex discrimination.").

[133] There has long been a debate over whether disparate treatment theory reaches what is often termed as "implicit" or "cognitive" bias. For a discussion of cognitive bias and its role

courts seem to be "increasingly wedded to a conception of the disparate treatment claim as predicated on the decision maker's conscious reliance on a discriminatory reason."[134] If the employer is unaware that the customer feedback, or ratings in the case of television news, are the product of bias, then holding the employer liable for intentional discrimination is, quite frankly, unlikely. As Professor Flake observes, "Can it really be said that an employer intentionally discriminates when it factors into an employment decision facially neutral feedback that is tainted by hidden bias that only a skilled social scientist could detect?"[135]

That women are frequently rated lower than their male counterparts is no secret; female professors, female judges, even female orchestra performers often come up short in ratings as compared to men.[136] Nonetheless, when an employer relies on those rankings, particularly when they are facially neutral, a finding of intentional discrimination will be hard to come by.

Of course, this gives employers little incentive to look behind the face of the ratings or customer feedback to see if they may be the product of bias; indeed, it encourages employers to do the opposite.[137] Even if it suspects its viewers may be reacting adversely to an older woman vis-á-vis an older man or a younger woman because she is an older woman, so long as its decision is based on the ratings themselves, a liability finding is unlikely. As Professor Flake observes, neither the disparate treatment nor

in disparate treatment theory, including citation to the numerous articles on the topic, *see* CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 8–10 (9th ed. 2017).

[134] Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 572 (2017). *See* Flake, *supra* note 127(quoting Brake).

[135] Flake, *supra* note 127, at 2195–96. Well, yes, it could, if one endorses a causal approach to disparate treatment. If the employee loses her job because she is a woman, even if the bias prompting it is implicit, then she has been treated differently because of her sex. *See generally* Rebeca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decisionmaking?*, 61 LA. L. REV. 495 (2001) (advocating a causation-based approach to intentional discrimination). As noted above, however, courts have generally insisted on a conscious decision to take sex or age into account. Even the *Price Waterhouse* plurality described the motive inquiry in the following terms:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

[136] Flake, *supra* note 127, at 2188. This often is ascribed to implicit or cognitive bias. *See* SULLIVAN & ZIMMER, *supra* note 133.

[137] Flake, *supra* note 127, at 2195–96.

the disparate impact[138] analytical framework "is fully equipped to handle customer feedback discrimination claims and, in fact, have made such claims virtually unwinnable."[139]

VI. A WORD ABOUT DISPARATE IMPACT

Up to this point, we have not discussed the disparate impact theory of discrimination. Both Title VII[140] and the ADEA[141] embrace disparate impact claims. Unlike disparate treatment, which, as we have seen, requires a finding of intentional discrimination, disparate impact does not. Rather, when a facially neutral policy or criterion adversely impacts a protected class, then liability may exist under either Title VII or the ADEA.

For example, if an employer requires its workers to pass a test in order to be hired, that requirement is facially neutral. Moreover, the employer may have adopted the requirement with no intent to discriminate but rather in an effort to achieve a well-trained workforce. Nonetheless, if the requirement screens out more black than white, or more female than male, or more older than younger, employees, the policy would have a disparate impact on black people, women or older workers.

In the context of the present discussion, could a station's use of ratings or customer feedback, a facially neutral practice, form the basis for a disparate impact claim? Would today's older female anchors have a greater likelihood of success if they pursue relief under a disparate impact theory?

It is doubtful.[142] While identifying the particular practice or practices causing the impact (ratings and/or viewer surveys) may not be difficult,[143] impact must still be shown. This is usually understood to require a statistical showing of the challenged practice's impact on the protected group. When employment decisions affect only one or a handful of people,

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138 Disparate impact claims are discussed *infra* at notes 140–53 and accompanying text.

139 Flake, *supra* note 127, at 2173. Flake advocates a negligence-based approach that would hold employers liable if they knew or should have known the feedback was biased and that considers whether the employer acted reasonably in response by taking appropriate preventive or corrective measures.

140 The Supreme Court recognized disparate impact theory under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Congress codified disparate impact theory in Title VII in the Civil Rights Act of 1991, amending Title VII to expressly authorize disparate impact claims. 42 U.S.C. § 2000e-2(k) (2018).

141 Smith v. City of Jackson, 544 U.S. 228 (2005).

142 *But see* Bal, *supra* note 108, at 212 (contending that disparate impact theory "may provide a more successful means by which anchorwomen can prove unlawful, appearance-related discrimination than disparate treatment claims," when stations rely on viewer surveys and other forms of market research).

143 Disparate impact theory, under both Title VII and the ADEA, requires the plaintiff to identify the particular practice or practices causing the impact.

establishing impact on the protected group can be difficult, if not impossible, when the number of people subject to the particular practices is quite small.[144] While an individual likely may bring an impact claim, it is still a statistically-based, group-based claim.[145] And building such a statistical case becomes even more difficult when the allegation is that the practice impacts not all women or all persons over forty but only women of a certain age.[146] Must impact be shown on women as a whole as opposed to on a subset of women?[147] Must impact be shown on all workers age forty or above, as opposed to a subset of older workers?[148] And, of course, there is the complication of intersectionality when the disparate impact structure varies between Title VII and the ADEA. Could a disparate impact claim be brought under Title VII when the impact falls on a group defined by sex plus age, rather than on sex or age alone?[149]

Moreover, once impact is shown, employers have a defense under either Title VII or the ADEA. Under Title VII, if the employer can show the challenged practice is job-related for the position in question and consistent with business necessity, the impact claim is defeated, unless the

[144] Flake, *supra* note 127, at 2210 ("A final problem with the disparate impact framework [in customer feedback cases] is that establishing a statistically significant adverse impact almost always requires that a sufficiently large and diverse population be affected by the challenged practice. Indeed, courts have routinely held that an adverse effect on a single or a few employees does not create a prima facie case of disparate impact as a matter of law." (footnotes omitted)). *See also* Bal, *supra* note 108, at 230 (acknowledging the difficulty of showing impact because of the small number of employment decisions involved). *But see* Buchman, *supra* note 43, at 210 (contending that research shows ratings have an adverse impact on older women anchors generally).

[145] *But see* Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 LOY. U. CHI. L.J. 473, 473 (1999) (arguing the plain language of the statute would allow an impact claim upon a plaintiff's showing that (1) the employer took adverse action based on an employment practice; (2) an alternative practice exists that would serve the employer's needs without adversely impacting the plaintiff; and (3) the employer refused to adopt the practice).

[146] *See* Martha Chamallas, *Exploring the Entire Spectrum of Disparate Treatment Under Title VII: Rules Governing Primarily Female Jobs*, 1984 U. ILL. L. REV. 1, 50, n.263 ("In a disparate impact challenge, however, marshalling convincing evidence that the standard has an adverse impact on women as a group may be very difficult, especially when the challenged standard is as difficult to measure as physical attractiveness. Essentially, the plaintiff would attempt to show that more women than men would likely be excluded from the qualified applicant pool, given the defendant's measure of attractiveness.").

[147] *See* Thompson v. Miss. State Pers. Bd., 674 F. Supp. 198 (N.D. Miss. 1987) (rejecting impact claim for women over forty).

[148] Marc Chase McAllister, *Subgroup Analysis in Disparate Impact Age Discrimination Cases: Striking the Appropriate Balance Through Age Cutoffs*, 70 ALA. L. REV. 1073, 1090 (2019) (noting that "courts are split regarding whether subgroups of employees in the ADEA's 40-and-over protected class may claim disparate impact discrimination.").

[149] *See* Frappied v. Affinity Gaming Black Hawk, LLC, No. 17-cv-01294-RM-NYW, 2018 U.S. Dist. LEXIS 104796 (D. Colo. June 22, 2018) (rejecting disparate impact claim based on sex plus age).

plaintiff can demonstrate there is a less discriminatory alternative.[150] Under the ADEA, the employer's burden is even lighter. It need only show the impact causing practice is a reasonable factor other than age.[151] Basing an employment decision on ratings or customer feedback, assuming such feedback is facially neutral, would most likely satisfy the employer's burden under either statute.[152] Rankings are the coin of the realm in the television industry, and thus reliance on them would more likely than not be viewed as a business necessity and/or a reasonable factor other than age.[153]

VII. CONCLUSION

Decades after Christine Craft lost her job as a television news anchor, a similar fate has befallen a number of other women, who, despite (or perhaps because of) their years of experience on the air are being pushed aside for younger, more attractive women. Meanwhile, their middle aged and older male counterparts continue to deliver the news.

The plight of these high-profile women shows how inadequate our anti-discrimination laws and proof frameworks are in protecting older women against discrimination. It is not just beauty and youth that fade as women age; their jobs do, too. If courts are unwilling to view older women as a protected subgroup under a "sex plus" or "age plus" theory, then it will be difficult for women of a certain age to prevail in their employment discrimination suits.

These cases also show the hollowness of the accepted maxim that employers cannot intentionally discriminate because it is good for business. Whether it is courts' unwillingness to acknowledge the unequal appearance standards men and women are held to on the air, and/or their willingness to permit employers to rely on viewer preferences when making employment decisions about on air talent, courts are permitting employers to treat older

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150 42 U.S.C. § 2000e-2(k).

151 Smith v.City of Jackson, 544 U.S. 228 (2005).

152 *See* Flake, *supra* note 127, at 2210 (asserting that customer satisfaction is likely be viewed as a business necessity). *See also* Waldman, *supra* note 107, at 96 (acknowledging that it is unclear whether a customer preference could satisfy either the business necessity defense under Title VII or the Reasonable Factor Other Than Age defense under the ADEA. But appearance-based preferences, she says, "intuitively strike courts as reasonable and natural, both because they do not seem invidiously discriminatory and because they align with ingrained social conventions and norms.").

153 *But see* Buchman, *supra* note 43, at 212–14 (contending that ratings would not constitute business necessity since they do not measure the anchor's ability to report "intelligently and articulately," and thus would not be job-related for the position); Bal, *supra* note 108, at 224–26 (contending that employers would need to prove the business necessity of the viewer surveys, including professional validation under the Uniform Guidelines of Employee Selection Procedures).

women differently, and less favorably, than their younger female or older male counterparts. Women anchors, it seems, do come with an expiration date. And our federal anti-discrimination statutes, as they are being interpreted and applied, are letting it happen.