

Multiple Discrimination

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by

Professor Julie Goldscheid

CUNY Law School

Flushing, NY, USA

Introduction

- “Multiple Discrimination” – important and evolving issue in U.S. theory and practice
- U.S. courts have grappled with the concept since the 1970’s
- Unlike the EU, no formal codification
- “Intersectionality” – first articulated by Professor Kimberle Crenshaw, 1989, 1991
- Concept generally embraced
 - Theorists: embellished and critiqued
 - Courts: mixed results

Roadmap

- Theory: evolution
- Data: empirical studies
- Caselaw:
 - Analysis of cases that uphold/ reject claims
 - Disparate treatment
 - Harassment
- Questions for discussion

Terminology

- “Additive” or “Compound”
 - More than one ground, may be connected
- “Intersectionality”
 - Influence of various grounds for discrimination can’t be disentangled

Theory

- Core insight – employment discrimination law should account for membership in more than one subordinated group.
 - For example, experience of African American women different from that of white women or African American men.
 - Nature of discrimination is different, e.g., different stereotypes

Theory – Elaborations and Critiques

- Responses include:
 - Multidimensionality (Hutchinson (2001, 2002); Levit (2002))
 - Identity performance (Carbado & Gulati 2001)
 - “Infinite regress” (Ehrenreich (2002))
 - Risk of backlash and stereotyping (Schacter (1997))
 - Reliance on comparators (Goldberg (2011))
 - Shift focus from identity categories to structures of subordination (Ehrenreich (2002); Williams (2002); Levit (2002))

Data

- Employment Discrimination claims generally
 - Plaintiff success 15% (jobs cases) vs. 51% (non-jobs cases) (Clermont & Schwab 2009)
 - Defendant success in 73% of motions for summary judgment in employment discrimination cases (Federal Judicial Center 2008)

Data (cont.)

- Multiple claims:
 - Defendant motions: complete or partial success in 96% of cases involving multiple claims (Kotkin (2009))

Status

- Have courts “given up” on multiple claims?
- How to square with changing demographics?

Caselaw

- Many courts embrace the concept
 - Though some accept concept but reject the claim
- Some early cases rejected as “super-remedy”
 - *DeGraffenreid v. GM*, 558 F.2d 480 (8th Cir. 1977)
- Some flatly critique:
 - “multi-headed hydra”
 - Risk that “protected subgroups would exist for every possible combination of race, colour, sex, national origin and religion.” *Judge v. Marsh*, 649 F. Supp. 770, 780 (D.D.C. 1986)

2 types of cases

- Disparate treatment
- Harassment

Disparate Treatment

- Adverse job action, e.g., termination, failure to promote or hire.
- Claim fails because employer demonstrates favorable treatment of members of separate identity categories.
- For example, claim by African American woman fails because a white woman or African American man was hired instead.

Harassment

- Nature of harassment involves comments, epithets, conduct that reflect either:
 - Stereotypes about more than one group; or
 - Stereotypes unique to the intersectional category, e.g., African American women; Asian women

Disparate Treatment

- Unlawful to discriminate against “subclass” of African American women. (*Jeffries v. Harris County Community Action Ass’n*, 615 F.2d 1025 (5th Cir. 1980))
- “Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women, . . . e.g., geisha, dragon lady, concubine, lotus blossom.” (*Lam v. Univ. of Hawaii*, 40 F.3d 1551 (9th Cir. 1994))
- Need “wide net” to capture complex bias. (*Lam v. Univ. of Hawaii*, 40 F.3d 1551 (9th Cir. 1994))

Harassment

- Courts require, *inter alia*, proof of “pervasiveness or severity”.
- *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987): “in determining the pervasiveness of the harassment against a plaintiff, a trial court may aggregate evidence of racial hostility with evidence of sexual hostility.”

Harassment (cont.)

- *Cruz v. Coach Stores*, 202 F.3d 560 (2d Cir. 2000) (Sotomayor, J.): recognizes issue; no need to reach based on facts of case.
- Other cases recognize that one type of “hostility” can exacerbate the effect of another.
- *Anthony v County of Sacramento*, 898 F. Supp. 1435 (E.D. Cal. 1995): racial slurs, sex-based comments, combination.

Why cases fail?

- Different statutory bases
- Inadequate proof
 - “all boxes checked”
 - Legitimate business reason
 - Subset of claims survive
 - Judicial hostility
 - Limited awareness

Questions for discussion

- Raising awareness
 - Expand use of expert evidence (Kotkin 2009)
 - Program on Worklife Law as example
- Limits to the theory
 - Application to all combined groups versus those subject to stereotypes
 - Use of comparators

Conclusion

- Multiple discrimination – increasingly important given demographic changes.
- Value of explicit legislative and policy directives.
- Importance of bridging theory and practice.

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