Diversity and Discrimination: A Look at Complex Bias

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Abstract:
Multiple claims are a fixture of employment discrimination litigation today. It is common if not ubiquitous for opinions to begin with a version of the following litany: plaintiff brings this action under Title VII and the ADEA for race, age and gender discrimination. EEOC statistics show the exponential growth of multiple claims, in part because its intake procedures lead claimants to describe their multiple identities, at a time when they have little basis upon which to parse a specific category of bias. But increased diversity in workplace demographics suggests that frequently, disparate treatment in fact may be rooted in intersectional or complex bias: while stereotypes for women have somewhat dissipated, those for older African-American women still hold sway. Complex bias provides a counter-narrative to the currently in vogue characterization of workplace discrimination as subtle or unconscious.

Despite the common sense notion that the more different a worker is, the most likely she will encounter bias, empirical evidence shows that multiple claims - which may account for more than 50% of federal court discrimination actions - have even less chance of success than single claims. A sample of summary judgment decisions on multiple claims reveals that employers prevail at a rate of 96%, as compared to 73% for employment discrimination claims generally.

Multiple claims suffer from the failure of courts and intersectional legal scholars to confront the difficulties inherent in proving discrimination using narrowly circumscribed pretext analysis. Applying sex-plus concepts does not address the underlying paradox inherent in the proof of these cases: the more complex the claimant's identity, the wider the evidentiary net must be cast to find relevant comparative, statistical and anecdotal evidence. Overcoming the courts' reluctance to follow this direction requires the development and introduction of social science research that delineates the nuanced stereotypes faced by complex claimants.

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