



7-1-2021

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### Recommended Citation

Lindsey Cook, *A Wrinkle in Title VII: Rigid Evidentiary Requirements and Inadequate Causation Tests Trammel Women's Sex-Plus-Age Claims*, 66 Vill. L. Rev. 415 (2021).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol66/iss2/4>

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## Comments

### A WRINKLE IN TITLE VII: RIGID EVIDENTIARY REQUIREMENTS AND INADEQUATE CAUSATION TESTS TRAMMEL WOMEN'S SEX-PLUS-AGE CLAIMS

LINDSEY COOK\*

“So much has been said and sung of beautiful young girls, why don't somebody wake up to the beauty of old women?”<sup>1</sup>

#### I. MRS. WHATSIT, MRS. WHO, AND MRS. WHICH: MEET THE EVERYDAY WOMEN AFFECTED BY SEX-PLUS-AGE DISCRIMINATION

From the big screen to local casinos, age discrimination harshly impacts the careers of older women.<sup>2</sup> In light of a recent Tenth Circuit decision recognizing sex-plus-age claims, Title VII has a new significance for older female employees facing age discrimination.<sup>3</sup> But the larger backdrop of employment discrimination law and the judicial boundaries imposed in other “sex-plus” cases suggest this opinion will not have much of a practical impact.<sup>4</sup>

#### A. *Shining the Spotlight on Industries Where Age Discrimination Against Women Runs Rampant*

It is no secret that ageism in Hollywood is gendered.<sup>5</sup> The “George Clooneys” of the industry become “distinguished,” while female actors

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\* J.D. Candidate, 2022, Villanova University Charles Widger School of Law; B.A., 2017, Arcadia University. This Comment is dedicated to my parents, John and Susan, who blessed me with an idyllic childhood and who continue to support and encourage me every day, and to my sister Chelsea, who has always been my best friend. I am so lucky to be surrounded by my family's steadfast love. I would also like to thank the staff of the *Villanova Law Review* for providing valuable feedback throughout the writing and publishing of this Comment. The headings used throughout this Comment were inspired by A WRINKLE IN TIME. See MADELEINE L'ENGLE, A WRINKLE IN TIME (Square Fish 2007) (1962).

1. HARRIET BEECHER STOWE, UNCLE TOM'S CABIN 125 (Wordsworth Editions Limited 1995) (1852).

2. For a further discussion of industries where age discrimination is worse for women, see *infra* Section II.B.

3. See *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1047–48 (10th Cir. 2020) (becoming first circuit court to recognize sex-plus-age claims under Title VII).

4. For a summary of the probable limited impact of *Frappied*, see *infra* Part V.

5. See Emma Luxton, *New Research Proves What You Already Knew: Hollywood Is Sexist and Ageist*, WORLD ECON. F. (Apr. 11, 2016), <https://www.weforum.org/>

over the age of forty simply get old.<sup>6</sup> Female actors have used their fame to draw attention to this issue in recent years, with Nicole Kidman addressing Hollywood ageism in her acceptance speech at the 2018 Screen Actors Guild Awards and Meryl Streep stating in a *Vogue* interview that the film industry views women as “grotesque” once they are past the age of having children.<sup>7</sup> Women who work in fashion and news broadcasting struggle with age discrimination, too, because these industries—like the film industry—cater to what consumers want to see.<sup>8</sup>

Although female actors and newscasters over the age of forty are making headlines for speaking out against the social implications of ageism, appearance-based age discrimination is not limited to women on televi-

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agenda/2016/04/new-research-proves-what-you-already-knew-hollywood-is-sexist-and-ageist/ [https://perma.cc/RU76-E2TV] (reporting that male actors aged forty-five to sixty-five speak forty percent of the lines in films, compared to twenty percent for female actors in the same age category).

6. See Susan Bisom-Rapp & Malcolm Sargeant, *It's Complicated: Age, Gender, and Lifetime Discrimination Against Working Women—the United States and the U.K. as Examples*, 22 ELDER L.J. 1, 28 (2014) (explaining that wrinkles and gray hair are considered unattractive traits for women but make men appear distinguished); Chris Wilson, *This Chart Shows Hollywood's Glaring Gender Gap*, TIME (Oct. 6, 2015, 12:54 PM), <https://time.com/4062700/hollywood-gender-gap/> [https://perma.cc/9PDC-Q5HF] (surveying George Clooney and Sandra Bullock movie statistics to demonstrate that male actors peak professionally at age forty-six while female actors peak at age thirty).

7. See Lynsey Eidell, *Read Every Word of Nicole Kidman's 2018 SAG Awards Speech on Aging in Hollywood*, GLAMOUR (Jan. 22, 2018), <https://www.glamour.com/story/nicole-kidman-sag-award-acceptance-speech> [https://perma.cc/V4JR-VS59] (describing Kidman's speech imploring Hollywood to continue telling stories of women over forty); Vicki Woods, *Meryl Streep: Force of Nature*, VOGUE (Dec. 12, 2011), <https://www.vogue.com/article/meryl-streep-force-of-nature> [https://perma.cc/V2MB-JWV] (interviewing Streep about the “subtext” behind three different movie directors offering her witch roles the year she turned forty). Interestingly, until her role in *Into the Woods*, Streep had never wanted to play a witch because “the idea of witches” is associated with the “terror of older women that has lived in many cultures.” *Meryl Streep Explains Why She Broke Her Rule of Never Playing a Witch for 'Into the Woods'*, ET ONLINE (Dec. 2, 2014, 4:58 PM), [https://www.etonline.com/movies/154620\\_meryl\\_streep\\_explains\\_why\\_she\\_broke\\_her\\_rule\\_of\\_never\\_playing\\_a\\_witch\\_for\\_into\\_the\\_woods](https://www.etonline.com/movies/154620_meryl_streep_explains_why_she_broke_her_rule_of_never_playing_a_witch_for_into_the_woods) [permalink unavailable].

8. See Denise C. Lewis et al., *Awakening to the Desires of Older Women: Deconstructing Ageism Within Fashion Magazines*, 25 J. AGING STUD. 101, 108 (2009) (acknowledging the lack of older women in fashion magazines, with the exception of anti-aging advertisements); see also Rebecca Hanner White, *Aging on Air: Sex, Age and Television News*, 50 SETON HALL L. REV. 1323, 1327–29 (2020) (noting numerous older female news anchors have sued for discrimination because younger women replaced them once they began “ag[ing] on air”); see also Bonnie Marcus, *The Next #MeToo Movement: Older Women Confront Ageism*, CHI. TRIB. (Mar. 20, 2019, 7:15 PM), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-metoo-ageism-older-women-discrimination-0321-20190320-story.html> [permalink unavailable] (discussing an older woman anxious about losing her job “in the fashion industry, where looks and age matter”).

sion, in movies, or on the runway.<sup>9</sup> Studies show that age discrimination affects working women earlier and more severely than it does men in virtually all professions.<sup>10</sup> It is particularly potent in occupations where looks have an impact on job success.<sup>11</sup> Appearance has traditionally been important for women who work as flight attendants, as administrative assistants, and in retail.<sup>12</sup> Today, the importance of appearance can be illustrated perhaps best by the service industry, where consumer preference can dictate how much money servers make and influence employers' decision-making in the interest of ensuring "the customer is always right."<sup>13</sup> This mentality leads to employers and customers shamelessly

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9. See Angelina Chapin, *Starbucks Discriminates Against Older Workers, According to Former Employees*, HUFFPOST (June 15, 2018, 5:45 AM), [https://www.huffpost.com/entry/starbucks-age-discrimination\\_n\\_5b204db9e4b0adfb826eec77](https://www.huffpost.com/entry/starbucks-age-discrimination_n_5b204db9e4b0adfb826eec77) [<https://perma.cc/JBE9-G2ZR>] ("[Age discrimination is] most common in jobs where employees are visible to the public, like in the service or retail industries, and at companies that want to project a young, hip image.").

10. See Ian Burn et al., *Why Retirement, Social Security, and Age Discrimination Policies Need to Consider the Intersectional Experiences of Older Women* 6 (Nat'l Bureau of Econ. Research, Working Paper No. 27450, 2020), <http://www.nber.org/papers/w27450> [<https://perma.cc/B6AR-4PJC>] (noting women face discrimination earlier than men, around age forty-nine to fifty-one, and "at a higher intensity"); Andrew Soergel, *Older Americans More Likely to Cite Workplace Discrimination*, AP NEWS (May 23, 2019), <https://apnews.com/dc208bc4bbda4f7b9a13559df8b00e50> [<https://perma.cc/WM6S-PSY3>] ("For women, we see an early onset ([of] cases of age discrimination), and the discrimination is much more severe," says Patrick Button, an assistant economics professor at Tulane University. "I think there is a lot of sexism in aging."); see also Elizabeth M. Adamitis, Comment, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 223 (2000) ("An individual's relative attractiveness can profoundly impact employment opportunities and earning potential.").

11. See Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 95 (2003) ("[E]specially . . . 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.").

12. See David Neumark et al., *Is It Harder for Older Workers to Find Jobs? New and Improved Evidence From a Field Experiment* 35 (Nat'l Bureau of Econ. Research, Working Paper No. 21669, 2015), <https://www.nber.org/papers/w21669.pdf> [<https://perma.cc/9ZLW-JBZ5>] (finding significant evidence of age discrimination against older female administrative assistants and older female sales workers, whereas "[f]or men, the analysis generally weaken[ed] the evidence of age discrimination"); Chapin, *supra* note 9 (describing industries where age discrimination is common, such as in retail and service); Rick Seaney, *Do Older Flight Attendants Get a Bad Rap?*, ABC NEWS (May 4, 2012, 9:32 AM), <https://abcnews.go.com/Travel/older-flight-attendants-ageism-attitude/story?id=16277274> [<https://perma.cc/W7C9-ZJ56>] (commenting that as the average age of flight attendants has increased, attendants have gone from being "sex symbols to punching bags").

13. See Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2177 (2018) ("Employers factor customer feedback into a vast array of business decisions, including employment-related decisions such as who to hire, promote, discipline, and fire; employees' pay rates, bonuses, tips, and other remuneration; and work schedules, job duties, and other assignments.").

subjecting women who work as servers, bartenders, and cocktail waitresses to ageist, appearance-related microaggressions.<sup>14</sup>

The driving force behind the plight of older women is something of a tautology: “appearance matters more for women”; consequently, “age [is seen to] detract[ ] from physical appearance for women more than for men.”<sup>15</sup> This phenomenon raises an important question: what can ordinary women do when pervasive ageism starts to impact their careers?<sup>16</sup> Put differently, “if . . . women[ ] in prominent and prestigious positions[ ] can be cast aside when they grow older, what does that portend for the rest of us?”<sup>17</sup>

#### B. *A Primer on Title VII, Sex-Plus-Age Claims*

A woman suing her employer for discrimination on the basis of both her sex and her age has only one statutory remedy.<sup>18</sup> Although the Age Discrimination in Employment Act (ADEA) ostensibly protects workers from age discrimination, an employee experiencing discrimination not just because she is older, but because she is an older *woman*, will not find

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14. See, e.g., Wayne Parry, *N.J. Casino Servers Fired for Not Looking Sexy Enough*, DAY (Apr. 2, 2011, 12:01 AM), <https://www.theday.com/article/20110402/biz03/304029985> [<https://perma.cc/A2JA-WPA4>] (reporting on a casino suspected of trying to weed out older cocktail waitresses when it photographed all waitresses in revealing outfits, instructed some women to “spread their legs a bit or to turn their rear ends toward the camera,” and later fired fifteen of them).

15. Neumark et al., *supra* note 12, at 37 (first citing LINDA A. JACKSON, PHYSICAL APPEARANCE AND GENDER: SOCIOBIOLOGICAL AND SOCIOCULTURAL PERSPECTIVES (1992); then citing Francine M. Deutsch et al., *Is There a Double Standard of Aging?*, 16 J. APPLIED SOC. PSYCHOL. 771–85 (1986)) (explaining why women are more likely than men to experience age discrimination).

16. See White, *supra* note 8, at 1329 (recognizing that “women in television news are hardly the only women to see their careers, or career prospects, diminish with advancing years” (citing Porter, *supra* note 11, at 100–01)).

17. *Id.* at 1329–30 (citing Bisom-Rapp & Sargeant, *supra* note 6, at 28).

18. See Porter, *supra* note 11, at 103 (noting that if an older male employee replaced an older female employee, the female employee’s ADEA claim would fail). *But see* Marc Chase McAllister, *Extending the Sex-Plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives*, 60 B.C. L. REV. 469, 517 (2019) [hereinafter McAllister, *Extending*] (“[T]he ADEA’s but-for standard of causation does in fact permit discrimination claims based on the combination of both age and another immutable characteristic, even though most courts to address age-plus discrimination claims have ruled otherwise.”).

relief under its auspices.<sup>19</sup> Instead, she must bring a sex-plus claim under Title VII.<sup>20</sup>

Scholars have long recognized the need for sex-plus-age claims, either under Title VII or under the ADEA.<sup>21</sup> One commentator illustrated this need by explaining that if an employer fires an older woman, but retains numerous young female employees, the older woman cannot prove pure sex discrimination under Title VII; if the employer fires her while retaining older male employees, she cannot prove pure age discrimination under the ADEA.<sup>22</sup> With the sex-plus-age theory, though, the woman theoretically “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.”<sup>23</sup>

Underscoring the unique challenges of older women in the workforce, the Court of Appeals for the Tenth Circuit recently became the first circuit court to recognize a Title VII, sex-plus-age claim in *Frappied v. Affinity Gaming Black Hawk, LLC*.<sup>24</sup> The court focused its analysis on the

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19. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (holding the ADEA does not authorize mixed-motives age discrimination jury instructions). Because the ADEA requires a but-for cause, most courts interpret the ADEA as not covering sex-plus-age claims. See *Bauers-Toy v. Clarence Cent. Sch. Dist.*, No. 10-CV-845, 2015 WL 13574291, at \*4 (W.D.N.Y. Sept. 30, 2015) (“[A] plaintiff in an ADEA case must show that the discriminatory factor (age) was the only reason for the conduct.” (citing *Gross*, 557 U.S. at 167)); see also *DeAngelo v. DentalEZ, Inc.*, 738 F. Supp. 2d 572, 579 (E.D. Pa. 2010) (“*Gross* certainly prohibits plaintiffs from alleging, in the same count, a combined age/gender discrimination claim.”); Joanne Song McLaughlin, *Limited Legal Recourse for Older Women’s Intersectional Discrimination Under the Age Discrimination in Employment Act*, 26 ELDER L.J. 287, 304 (2019) (“The key interpretation of [*Gross*] with respect to age-plus-sex claims is that the intersection of motives under the ADEA is not allowed.”).

20. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (finding that Title VII prohibits sex-plus discrimination). The Court did not refer to Mrs. Phillips’s claim as “sex-plus” in this early case, but denied her employer’s motion for summary judgment, explaining that “[t]he existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under [ ] §703(e) of the Act.” *Id.*; see also Sabina F. Crocette, Comment, *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, 137 (1998) (“Since the U. S. Supreme Court’s initial treatment of ‘sex-plus’ in *Phillips*, the doctrine has been extended to cover other classifications under Title VII.”).

21. See Porter, *supra* note 11, at 102 (opining that courts must recognize sex-plus-age claims because current discrimination theories are inadequate); see also Crocette, *supra* note 20, at 115 (explaining that older women’s employment discrimination claims do not fit easily into either Title VII or the ADEA).

22. See Porter, *supra* note 11, at 105 (describing shortfalls of plain sex discrimination and plain age discrimination claims for older women).

23. *Id.* at 108.

24. 966 F.3d 1038 (10th Cir. 2020). As the *Frappied* court pointed out, several district courts have recognized sex-plus-age claims. See, e.g., *DeAngelo*, 738 F. Supp. 2d at 585 (allowing plaintiff to proceed on sex-plus-age claim); *McGrane v. Profit’s Inc.*, No. C 97-221-MJM, 2000 WL 34030843, at \*9 (N.D. Iowa Dec. 26, 2000) (same); *James v. Teleflex, Inc.*, No. CIV.A. 97-1206, 1998 WL 966009, at \*9 (E.D.

but-for standard of causation, which “is established whenever a particular outcome would not have happened ‘but for’ the purported cause.”<sup>25</sup> The court noted that the motivating-factor standard is another option for sex-plus-age plaintiffs, but did not elaborate.<sup>26</sup>

At first blush, the motivating-factor standard, used for mixed-motives claims, seems the better route for older women suing their employers in industries where appearance is correlated with job success.<sup>27</sup> This is because but-for causation will be difficult to prove if an employer also had a legitimate reason for firing an older woman, such as decreasing popularity with guests or negative customer feedback.<sup>28</sup> A woman in this situation, then, will likely look to the motivating-factor (i.e., mixed-motives) standard to prevail against her employer.<sup>29</sup>

But the mixed-motives framework presents a new challenge: even once a plaintiff proves her protected trait motivated her employer’s decision, she will not receive money damages if the employer can show it would have made the same employment decision absent the protected

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Pa. Dec. 23, 1998) (same). *But see e.g., Bauers-Toy*, 2015 WL 13574291, at \*7 (“[P]laintiff cannot argue to the jury that the hostile work environment and constructive discharge she suffered in violation of Title VII were motivated by both her gender and her age. As to her Title VII claim, she must exclusively argue gender discrimination.”).

25. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020) (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)) (defining but-for standard of causation in employment discrimination cases). The Court elaborated that “a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.” *Id.* In *Frappied*, the court limited its opinion to a but-for analysis. *See Frappied*, 966 F.3d at 1047 n.2.

26. *See Frappied*, 966 F.3d at 1047 n.2 (declining to discuss motivating-factor causation (citing *Bostock*, 140 S. Ct. at 1739–40)).

27. *See* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 513 (2006) [hereinafter Katz, *Fundamental Incoherence*] (noting disparate treatment deals with decision-making, where multiple factors can come into play). The author explains motivating-factor discrimination by way of hypothetical: “An employer making a hiring or firing decision will be influenced by protected characteristics (such as race or sex) at the same time she is influenced by legitimate characteristics (such as experience).” *Id.*

28. For a further discussion of the correlation between appearance and success in certain industries, see *infra* Section II.B. One critic of but-for causation believes it is nearly impossible for plaintiffs to prove. *See* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 655–57 (2008) [hereinafter Katz, *Unifying*]. Indeed, “[t]o prove ‘but for’ discrimination using an admission, the defendant would have to admit not only that it used a protected characteristic (such as race) in its decision-making—itsself unlikely; the defendant would also have to admit that it had no other, independently sufficient motive—ridiculously unlikely.” *Id.* at 657.

29. *See* Charles A. Sullivan, *Making Too Much of Too Little?: Why “Motivating Factor” Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 365 (2020) (explaining that Congress codified the motivating-factor test so “plaintiffs no longer would have the burden of proving but-for causation”).

trait.<sup>30</sup> Another issue older female plaintiffs must account for is that some jurisdictions, including the Tenth Circuit, require opposite-sex comparator evidence.<sup>31</sup> In these jurisdictions, sex-plus plaintiffs must show their employer treated them worse than an employee of the opposite sex who shares the same “plus” factor.<sup>32</sup>

Despite the burdensome landscape of employment discrimination law, *Frappied* represents a victory for older women facing age discrimination at work.<sup>33</sup> Nevertheless, sex-plus-age plaintiffs anticipating successful lawsuits in the wake of this progressive decision will likely be disappointed.<sup>34</sup> Part II of this Comment explores the role that youth and beauty plays in the success of female employees—as illustrated by women in the service industry—and examines the inadequacies of the causation tests that courts apply to sex-plus cases. Part III evaluates the opposite-sex comparator requirement that some jurisdictions impose. Part IV demonstrates how sex-plus-age plaintiffs lacking opposite-sex comparator evidence will fail at the pleadings in some jurisdictions, while in other jurisdictions, the “same-decision test” could severely limit their damages. Part V considers the practical effect of the current evidentiary requirements and causation standards on women suing for sex-plus-age discrimination in certain industries.

## II. A TESSERACT OF MULTIDIMENSIONAL LAWSUITS: SEX-PLUS AND MIXED-MOTIVES CLAIMS RELATED TO AGE AND APPEARANCE

*Frappied* is notable because it is the first circuit court decision to conclude that sex-plus-age claims are no different from any other Title VII,

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30. See 42 U.S.C. § 2000e-5(g)(2)(B) (2018) (providing that if an employer demonstrates it would have taken the same action absent the discriminatory motivating factor, the court “shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment”).

31. See Marc Chase McAllister, *Proving Sex-Plus Discrimination Through Comparator Evidence*, 50 SETON HALL L. REV. 757, 761 (2020) [hereinafter McAllister, *Proving*] (using term “opposite sex comparator evidence” to describe one type of evidence used in sex-plus cases).

32. See *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1047 (10th Cir. 2020) (explaining the need for evidence of discrimination compared to an employee of the opposite sex).

33. See Eric Bachman, *What Is “Sex-Plus” Discrimination And Why Are These Employment Claims On The Rise?*, FORBES (July 30, 2020, 11:53 AM), <https://www.forbes.com/sites/ericbachman/2020/07/30/what-is-sex-plus-discrimination—and-why-are-these-employment-claims-on-the-rise/?sh=4d742ea07357> [<https://perma.cc/9VCC-TWYS>] (suggesting that courts will start recognizing broader claims of sex-plus discrimination)

34. See generally Sullivan, *supra* note 29, at 378 (recognizing that motivating-factor liability has not had much effect on employment discrimination lawsuits “despite its transformative potential”). As a general matter, employment discrimination lawsuits do not have a high rate of success. See Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying A Mixed-Motive Framework*, 26 AM. B. ASS’N J. LAB. & EMP. L. 461, 477 (2011) (referencing a study that found just thirty-two to fifty-five percent of employment discrimination lawsuits survive summary judgment).

sex-plus claim.<sup>35</sup> It is also notable because the holding is grounded in a policy consideration: the “unique discrimination” older women face.<sup>36</sup> A brief summary of *Frappied* generates a further discussion of sex-plus-age claims.<sup>37</sup> *Frappied* also illustrates the fact that certain workplace sectors—the service industry chief among them—are breeding grounds for sex-plus-age claims because of the correlation between aging, appearance, and consumer preference for being served by young, beautiful women.<sup>38</sup>

A. *A Synopsis of Frappied v. Affinity Gaming Black Hawk, LLC*

The sale of a Colorado casino led to the Title VII employment discrimination dispute central to *Frappied*.<sup>39</sup> Affinity Gaming Black Hawk, LLC (Affinity) purchased Golden Mardi Gras Casino in early 2012.<sup>40</sup> Three months after Affinity took over operations, it laid off numerous employees and posted job advertisements for fifty-nine positions.<sup>41</sup> Eight female former employees over the age of forty sued Affinity for Title VII violations, alleging both disparate impact and disparate treatment under a sex-plus-age theory.<sup>42</sup>

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35. See *Frappied*, 966 F.3d 1038, 1047 (10th Cir. 2020) (stating that no circuit court had yet addressed whether plaintiffs can bring sex-plus-age claims under Title VII); see also *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323, 327 (E.D. Pa. 1997) (“[T]he rationale behind the ‘sex-plus’ theory of gender discrimination is to enable Title VII plaintiffs to survive summary judgment where the employer does not discriminate against all members of a sex.”).

36. See *Frappied*, 966 F.3d at 1049 (recognizing the unique discrimination older women face because of sex stereotypes (first citing Porter, *supra* note 11, at 94–101; then citing Patti Buchman, Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COLUM. L. REV. 190 (1985))). Notwithstanding the unique nature of the discrimination older women struggle with, age discrimination may also have a more severe impact on older women’s finances—particularly for older single women—and even more so for older single women of color. See AMBER CHRIST & TRACEY GRONNIGER, OLDER WOMEN & POVERTY, 10–11 (2018), <http://www.justiceinaging.org/wp-content/uploads/2018/12/Older-Women-and-Poverty.pdf> [<https://perma.cc/EU9Y-NUFV>].

37. For a summary of *Frappied*, see *infra* Section II.A.

38. For a further discussion of gendered age discrimination in the service industry specifically, see *infra* Section II.B.

39. See *Frappied*, 966 F.3d at 1047 & n.5 (noting that while other circuit courts had acknowledged the issue, none had resolved it).

40. See *id.* at 1044 (describing how the casino came under Affinity’s control).

41. See *id.* at 1044–45 (explaining the terminations did not constitute a reduction in force because Affinity listed almost sixty job advertisements on Craigslist after layoffs).

42. See *id.* at 1045. Disparate-treatment discrimination is when an employer treats an employee less favorably because of his or her race, religion, sex, or national origin. CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 2 (Rachel E. Barkow et al. eds., 9th ed. 2017). Disparate-impact discrimination, on the other hand, “has no intent requirement: it applies to employment practices that adversely affect one group more than another and cannot be adequately justified.” *Id.* at 167. The *Frappied* plaintiffs also sued for

The district court dismissed the sex-plus-age disparate-impact claim solely because it found sex-plus-age claims not cognizable under Title VII.<sup>43</sup> The court dismissed the disparate-treatment claim partly because it did not recognize the claim and partly because the plaintiffs did not allege the age at which one becomes an “older woman” or produce sufficient allegations of sex discrimination.<sup>44</sup> Deciding the district court erred in concluding that sex-plus-age claims are illegitimate under Title VII, the Tenth Circuit Court of Appeals reversed the dismissal of the disparate-impact claim.<sup>45</sup> It affirmed the dismissal of the disparate-treatment claim for evidentiary reasons unrelated to the legitimacy of the sex-plus-age theory.<sup>46</sup> Although the *Frappied* court ultimately dismissed the sex-plus-age disparate-treatment claim, this Comment focuses on disparate treatment because it is a more popular theory than disparate impact.<sup>47</sup> Further, disparate-treatment claims involve intentional discrimination, which is “the most obvious evil Congress had in mind when it enacted Title VII.”<sup>48</sup>

### B. *Age Discrimination is Worse for Women in Certain Jobs*

As the *Frappied* court recognized, older female employees face “unique discrimination” that often stems from the importance of appearance for women.<sup>49</sup> Society expects women in certain industries to look young and beautiful.<sup>50</sup> When women start showing signs of aging, their employers replace them with younger women or treat them less favora-

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disparate impact and disparate treatment under the ADEA, a topic outside the scope of this Comment. See *Frappied*, 966 F.3d at 1045, 1054–61.

43. See *Frappied*, 966 F.3d at 1049.

44. See *id.* at 1049–50.

45. See *id.* at 1049.

46. See *id.* at 1053 (affirming dismissal because “[p]laintiffs’ . . . allegations do not permit us to infer that Affinity’s discrimination was not based on age alone”).

47. See *infra* note 91.

48. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

49. See *Frappied*, 966 F.3d at 1049 (examining discrimination resulting from stereotypes about older women); see also Porter, *supra* note 11, at 96 (“[P]hysical appearance is a chief measure of women’s worth throughout the life cycle.” (quoting FRIDA KERNER FURMAN, *FACING THE MIRROR: OLDER WOMEN AND BEAUTY SHOP CULTURE* 117 (1997))); see also Adamitis, *supra* note 10, at 209 (explaining that the correlation between beauty and youth has a disproportionate effect on older women).

50. See White, *supra* note 8, at 1329 (discussing employment discrimination attorney’s comment that TV stations regularly fire women based on their age because they are looking for someone “young and sexy and hot” (quoting 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> [https://perma.cc/N4J6-AGVK])); Porter, *supra* note 11, at 95 (“[I]n occupations where appearance is believed to be important, the treatment of older women is much worse than that of older men or younger women.”). While the importance of appearance is obvious in industries such as TV, “one survey found appearance to be the single most important factor in employee selection for a wide variety of jobs.” Porter, *supra* note 11, at 95.

bly.<sup>51</sup> The mainstream media has dedicated a significant amount of research and attention to women facing age discrimination in glamorous industries such as film, news broadcasting, and fashion.<sup>52</sup> It seems less common for the media to report the equally severe age discrimination that threatens women working in industries such as service and hospitality.<sup>53</sup>

A New York-based employment discrimination lawyer told HuffPost in 2018 that age discrimination is most prevalent “in jobs where employees are visible to the public, like in the service or retail industries, and at companies that want to project a young, hip image.”<sup>54</sup> Research indicates that

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51. See Porter, *supra* note 11, at 94 (stating that wrinkles and gray hair appear distinguished on men but are “the kiss of death” for women (quoting Buchman, *supra* note 36, at 191)); Marcus, *supra* note 8 (discussing an anonymous female executive in the fashion industry who receives Botox treatments to hide signs of aging for fear of being replaced).

52. See, e.g., Porter, *supra* note 11, at 95, 97 (noting that youth and beauty are key for women on TV or in fashion magazines); White, *supra* note 8, at 1327–28 (introducing the topic of ageism against women by discussing the numerous firings of older female news anchors over the past year).

53. See Burn et al., *supra* note 10, at 6 (discussing disparate treatment of older women versus older men and noting that “[a]ttractiveness may matter for many bridge jobs, such as retail sales, where there is often interpersonal contact”). A “bridge job” is a position that closes the gap between full-time career employment and retirement. Keven E. Cahill, *Are Traditional Retirements a Thing of the Past? New Evidence on Retirement Patterns and Bridge Jobs* 4 (U.S. Dep’t of Labor, Working Paper No. 384, 2005), <https://www.bls.gov/osmr/research-papers/2005/pdf/ec050100.pdf> [<https://perma.cc/9TWZ-MG4B>].

54. Chapin, *supra* note 9 (considering employers’ reasons for hiring younger staff). Chapin quoted the attorney in a 2018 HuffPost article about age discrimination at Starbucks, which reported that the company terminated or pushed out multiple former managers over the age of forty. See *id.* Notably, all the managers who participated in the interview were women. See *id.* For example, Starbucks rejected Andrea, a fifty-two-year-old store manager, from twenty-nine different office positions despite her having been with the company for fifteen years. *Id.* Diana Kelly, another former Starbucks employee, told HuffPost she had hired a lawyer and planned to sue for wrongful termination due to ageism. *Id.* Another sixty-five-year-old female barista filed a complaint with the Maryland Commission on Human Rights when Starbucks fired her and replaced her with two employees in their twenties. *Id.* Candice, a former manager over forty, filed a complaint with the EEOC after her thirty-something manager complained Candice’s store was dirty—despite its quality control inspection score of 98.6%—and ultimately fired her. *Id.* Starbucks also fired Kelly, a high-ranking sixty-year-old district manager, for holding an unopened bottle of wine at a going-away party for her coworker. *Id.* Finally, Angela Gustavston, a fifty-three-year-old manager, left the company for receiving unfair criticism and corrective actions that seemed to stem from her age. *Id.* Although older women seem to be a target at some Starbucks stores, the fact that sixty-seven percent of Starbucks’s positions are filled by women could also factor into this disparity. See *Workforce Diversity at Starbucks*, STARBUCKS (Oct. 14, 2020), <https://www.starbucks.com/responsibility/community/diversity-and-inclusion/aspirations> [<https://perma.cc/ES72-QERN>] (providing diversity statistics).

Starbucks is not the only coffee shop chain with an apparent preference for young employees: in 2012, the EEOC investigated Marylou’s, a Massachusetts coffee shop chain, for its practice of hiring “overwhelmingly young, attractive women.” See The Associated Press, *Massachusetts Coffee Shop Chain Denies It Practices*

the practice of basing employment decisions on youthful appearance has the most negative impact on female employees because women's appearance is more important than men's and because society perceives the physical aging process to be harsher on women.<sup>55</sup>

In the service industry, attractive women often receive better tips, leading to anxiety about needing to appear perfectly groomed and anxiety about aging.<sup>56</sup> One study on average tip earnings between male and female servers found that attractive waitresses earned more than less attractive waitresses, while attractiveness did not affect earning potential for waiters.<sup>57</sup> Though employers have no control over the tips their staff earn, attractiveness and youth nonetheless play into hiring decisions because of "the tacit assumption of marketers and managers who rely on attractive individuals and employees to enhance consumer experience."<sup>58</sup> On that point, one study found that food actually tasted better to male customers when an attractive woman served it, whereas attractiveness of the staff had

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*Age, Sex Discrimination*, NEW HAVEN REG., <https://www.nhregister.com/news/article/Massachusetts-coffee-shop-chain-denies-it-11535009.php> [<https://perma.cc/KG9A-6VJY>] (last updated July 27, 2017, 7:07 PM).

55. See Dario Maestriperi et al., *A Greater Decline in Female Facial Attractiveness During Middle Age Reflects Women's Loss of Reproductive Value*, FRONTIERS PSYCHOL., Feb. 2014, at 1, 4 (noting that one study on perceived attractiveness in aging men and women showed "the decline in facial attractiveness of 51–65 year old (and presumably post-menopausal) women relative to 35–50 year old (and presumably pre-menopausal) women was significantly larger than the decline in facial attractiveness for the corresponding male age groups"); see also Neumark et al., *supra* note 12, at 37 (explaining why women are more likely than men to experience age discrimination). Another commentator explains that age discrimination often implicitly involves appearance and stereotypes associated with aging. See Adamitis, *supra* note 10, at 206–07. "[F]or women in particular, age and beauty often may be intertwined in an appearance-related discrimination claim." *Id.* at 207.

56. See Mandy Isser, *The Grooming Gap: What "Looking the Part" Costs Women*, THESE TIMES (Jan. 2, 2020), <https://inthesetimes.com/article/grooming-gap-women-economics-wage-gender-sexism-make-up-styling-dress-code> [<https://perma.cc/M9CH-7DDL>] ("As you get older, as a female bartender, your tips can go down," Jeeva says. Katie says she "hope[s] to leave [the service industry] in the next 10 years, before [she] get[s] too ugly."). Although women tend to face age discrimination more frequently, men in the service industry also struggle with it to some degree. See Kyle Arnold, *Youthful Hires Are 'Unwritten Rule' at Restaurants, EEOC and Others Allege*, ORLANDO SENTINEL (May 26, 2017, 10:40 AM), <https://www.orlandosentinel.com/business/os-bz-age-discrimination-20170417-story.html> [permalink unavailable] (reporting on a fifty-year-old server, who said servers over forty at one high-end restaurant in Orlando faced more criticism from management and knew they "were going to be targeted").

57. See Michael Lynn & Tony Simons, *Predictors of Male and Female Servers' Average Tip Earnings*, 30 J. APPLIED SOC. PSYCHOL. 241, 247–48 (2000) (researching the effect of attractiveness on tips for female versus male servers).

58. Lila Lin et al., *When Beauty Backfires: The Effects of Server Attractiveness on Consumer Taste Perceptions*, 94 J. RETAILING 296, 307 (2018) (remarking that this assumption could work against managers after finding that unpleasant food could be perceived as tasting worse in the presence of physical attractiveness).

no impact on the taste perceptions of female customers.<sup>59</sup> Another study found that “tips [are] quadratically related with the largest tips going to women in their thirties”—especially to slender, large-breasted blonde women in their thirties.<sup>60</sup>

Restaurant managers are probably inclined to prefer staff members who are popular with customers and make the highest tips, especially considering some states require employers to pay the difference when their tipped employees earn below the state minimum wage.<sup>61</sup> Accordingly, if declining popularity with guests does not result in termination, managers often place less popular servers in sections with fewer customers, resulting in lower tip earnings.<sup>62</sup> In legal terms, reassignment to an emptier section of the restaurant probably constitutes an adverse employment action for employees who work solely off tips.<sup>63</sup>

Consumer preferences also play into the hiring practices of restaurant hosts.<sup>64</sup> One blogger wrote about the prevalence of young, beautiful women working the front door at restaurants, commenting that “restaurant managers (even female ones) will often hire more attractive women with

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59. See *id.* at 308 (“[M]ale consumers’ expectations and actual taste perceptions are susceptible to the presence of physically attractive female cues, but female reactions to attractive males or females did not impact taste expectations or perceptions.”). The corollary of this phenomenon, as the study confirmed, is that attractive female servers could lead to male consumers perceiving bad food as worse due to the “mismatch between expectations and taste experience.” *Id.* at 307.

60. See Michael Lynn, *Determinants and Consequences of Female Attractiveness and Sexiness: Realistic Tests with Restaurant Waitresses*, 38 ARCHIVES SEXUAL BEHAV. 737, 743 (2009) (theorizing that tips are higher for female servers in their thirties than female servers in their twenties because men over thirty-five have a better chance of “picking up” women in their thirties).

61. See SYLVIA A. ALLEGRETTO & DAVID COOPER, ECON. POLICY INST., TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE 17 (July 10, 2014), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.643.1195&rep=rep1&type=pdf> [permalink unavailable] (acknowledging that tipped employees could be reluctant to ask their employers, “who determine[ ] whether this employee will be given the most lucrative shifts, the best restaurant sections (in the case of waiters and waitresses), or if the employee will retain her job at all,” for lost wages).

62. See *Rowe v. Jagdamba, Inc.*, 302 F. App’x 59, 62 (2d Cir. 2008) (assuming, without deciding, that “[in] ‘a profession where wage is determined almost solely by tips, the consistent decision to place the plaintiff in a section with fewer customers than anywhere else’ could ‘amount[ ] to a decreased wage’” (second alteration in original) (quoting *Reed v. Cracker Barrel Old Country Store, Inc.*, 133 F. Supp. 2d 1055, 1071 (M.D. Tenn. 2000))).

63. See *Reed*, 133 F. Supp. 2d at 1071 (finding an adverse employment action where an employer regularly required a server to work longer shifts, to stay until closing, and placed her in less desirable sections of the restaurant, leading to lower tips).

64. See Peter Camarero, *The Pretty Face at the Door*, RESTAURANT MANIFESTO (Apr. 5, 2018), <https://www.restaurantmanifesto.com/restaurant-hostesses/> [https://perma.cc/D79X-RWJ5] (discussing attention that male VIP guests bestow on college-aged hostesses).

less restaurant experience over less attractive women who have more.”<sup>65</sup> More experience tends to mean more years on the job, suggesting—at least at some restaurants—that older women are at a disadvantage despite their capabilities.<sup>66</sup> Theoretically, employers cannot use their consumers’ preferences for seeing pretty, young girls at the host desk as an excuse to discriminate against older women.<sup>67</sup> But because appearance is not a protected trait under Title VII, employers *can* defer to consumers’ preferences for attractive staff.<sup>68</sup> While employers technically must apply consumer preferences equally to male and female employees, the intersection of age and standards of attractiveness disproportionately impacts women.<sup>69</sup> Courts typically find no disparate treatment as long as the differentiated appearance requirements impose equal burdens on male and female employees—despite the fact that consumers’ appearance preferences burden older female employees more heavily than older male employees.<sup>70</sup> This judicial practice harkens back to the disproportionate impact the aging process has on women.<sup>71</sup>

Bartenders face similar problems with ageism.<sup>72</sup> Employers often overlook women for bartender positions because of their appearance and

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65. *Id.* (addressing extreme hiring practices at high-end restaurants in New York City, some of which are known for only hiring models as hostesses).

66. *See id.* (reasoning that although hiring models as hostesses may open doors for modeling careers, these practices tend to discriminate against non-model applicants).

67. *See* Emily Gold Waldman, *The Preferred Preferences in Employment Discrimination Law*, 97 N.C. L. REV. 91, 99 (2018) (explaining that courts usually decline to find a BFOQ if it stems from customer preference for employees of a particular age or sex). “BFOQ” is short for “bona fide occupational qualification[,] . . . [a] defense to intentional discrimination based on sex, religion, national origin, and age.” *Id.* at 93. Outside the courtroom, however, the customer feedback that factors into employment decisions is often intentionally or unintentionally biased. Flake, *supra* note 13, at 2190.

68. *See* Adamitis, *supra* note 10, at 195 (“Federal protection [against appearance discrimination] applies only to claims related to already-protected categories of discrimination, including disability, race, color, religion, sex, national origin, and age.”); *see also supra* note 6 and accompanying text (discussing how aging process enhances men’s appearance but not women’s).

69. *See* Waldman, *supra* note 67, at 105 (explaining there is no disparate treatment under Title VII if employers’ appearance requirements equally burden male and female employees).

70. *See id.* at 105–06 (discussing Christine Craft, a female television reporter demoted because her appearance received negative feedback from viewers). The court found for the defendant news station because the station supposedly had equal appearance standards for its men and female employees. *See id.* at 106. The news director told Craft he was reassigning her “because the audience perceived her as too old, too unattractive, and not deferential enough to men.” *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1209 (8th Cir. 1985).

71. *See supra* note 15 and accompanying text (describing negative impact of aging on women).

72. *See* Gabriella Mlynarczyk, *The Bar Industry Has an Age-Discrimination Problem. And No One Seems to Care.*, LIQUOR (Dec. 21, 2018), <https://www.liquor.com/articles/bartender-age-discrimination/> [<https://perma.cc/Q3KJ-WQ79>] (describ-

age, particularly when male managers make the hiring decisions.<sup>73</sup> For example, Live Nation Entertainment recently fired fifty-nine-year-old Barbara Simpson, known in some quarters as “the best bartender in the world,” because it wanted only women under the age of forty bartending at the music halls.<sup>74</sup> Live Nation claimed it terminated Simpson because it could maintain only a limited number of employees at its venues—an explanation that became dubious when it hired a group of younger female bartenders shortly thereafter.<sup>75</sup> Simpson sued; the case ultimately settled.<sup>76</sup>

Another area of the service industry where appearance-based age discrimination affects women severely is in casinos.<sup>77</sup> As noted above, the plaintiffs in *Frappied* were older female casino employees.<sup>78</sup> However, they were far from the first women to sue a casino for age discrimination. In 2015, for instance, fourteen women applied for slot attendant positions at a Colorado casino.<sup>79</sup> The casino hired all but the three oldest applicants

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ing quintessential bartender “look” as fresh-faced, stylish, and in age range of mid-twenties to mid-thirties). Though the article begins with a focus on ageism against female bartenders, the author goes on to state that both male and female bartenders with experience are often overlooked because of their age. *See id.*

73. *See id.* (discussing Los Angeles Food Fest founder’s observation that male hiring managers often turn down women for bar positions based on their appearance but justify their decisions by saying the applicants are just not right for the job).

74. *See* Priscilla DeGregory, *Best Bartender in the World: I Was Fired for Being Too Old*, N.Y. POST (Apr. 9, 2019, 7:30 PM), <https://nypost.com/2019/04/09/best-bartender-in-the-world-i-fired-for-being-too-old/> [<https://perma.cc/YM3F-PXCP>] (reporting on Barbara Simpson’s lawsuit against Live Nation for terminating her employment after twenty years).

75. *See id.*

76. *See* Letter from Sanjay V. Nair, Littler Mendelson, P.C., to The Honorable Robert D. Kalish, Judge, N.Y. Cty. Supreme Court, *Simpson v. Live Nation Entm’t LLC*, No. 153644/2019 (Mar. 9, 2020), [https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=KyKAieZvdJhL\\_PLUS\\_ITmFD/ftQ==](https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=KyKAieZvdJhL_PLUS_ITmFD/ftQ==) [<https://perma.cc/TKQ3-CB66>] (requesting cancellation of conference and thirty-day period to execute settlement agreement).

77. *See* Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL’Y 257, 261 (2007) (using fictionalized cocktail waitress to illustrate problems cocktail waitresses face in Las Vegas).

At 32 years old, she knows that this job will not last forever; if she keeps in shape, she may be able to last until she hits 38 or 40. She knows a number of women who are serving cocktails at other casinos who are well into their 40’s. But she is not sure how much longer she has at the job because the casinos are increasingly hiring younger women to serve cocktails.

*Id.* at 261.

78. *See* *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1045 (10th Cir. 2020) (recounting how Affinity Gaming Black Hawk purchased Golden Mardi Gras Casino then proceeded to fire eight female employees and one male employee over age forty).

79. *See* Press Release, U.S. Equal Emp’t Opportunity Comm’n, Reserve Casino Hotel to Pay \$250,000 to Settle EEOC Age and Sex Discrimination Lawsuit (July 6, 2016), <https://www.eeoc.gov/newsroom/reserve-casino-hotel-pay-250000-settle->

and declined to hire a sixty-three-year-old cocktail waitress, resulting in a lawsuit that settled for \$250,000.<sup>80</sup> In 2012, seven female cocktail waitresses working at Golden Nugget Casino in Atlantic City, New Jersey sued for discrimination when the casino refused to let them work in the “party pits.”<sup>81</sup> They claimed the casino let only young, petite women work in the pits, meaning the older women had less earning potential.<sup>82</sup>

Unfortunately, some casino-goers seem to appreciate casinos’ discriminatory strategies. Elie Mystal, a Harvard Law graduate, wrote an opinion piece in 2011 about older cocktail waitresses, stating:

One casino was doing something about [its] depressing ambiance. It was getting rid of all of its old cocktail waitresses. Believe me when I tell you that this is an important move. Imagine sitting in A.C. down a grand at 4 a.m. and starting to think to yourself if there is any Swingers potential and then your watered-down drink comes back only it’s brought to you by a woman old enough to be your grandmother. And so instead of trying to figure out how to have sex with the waitress, you’re sitting there kind of thinking of how your mother would disapprove if she saw you in that moment. It’s enough to make you want to kill yourself.<sup>83</sup>

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eeoc-age-and-sex-discrimination-lawsuit [https://perma.cc/KN6N-5RVY] (noting that the EEOC’s investigation found considerable disparity in the casino’s hiring of female applicants and applicants forty or older).

80. *See id.* The EEOC’s lawsuit further alleged that casino management took photos of employees on the floor and used the photos to weed out the less attractive employees. *See id.*

81. *See* Lauren Disanto, *Cocktail Waitresses Sue Golden Nugget for Bias*, NBC 10 PHILA. (Sept. 19, 2012, 6:26 PM), <https://www.nbcphiladelphia.com/news/local/cocktail-waitresses-sue-golden-nugget-for-bias/1942217/> [https://perma.cc/KAQ4-QJD6] (stating that the majority of plaintiffs in Golden Nugget action were older than forty). Party pits are different than the rest of the gaming floor because they have themes, dancing, strobe lights, loud music, and “instead of regular dealers, . . . [the] most gorgeous ladies oversee [ ] the games.” *The Latest Trend in Las Vegas Gaming: The Party Pit*, BUS. INSIDER (Nov. 3, 2011, 1:43 PM), <https://www.businessinsider.com/the-latest-trend-in-las-vegas-gaming-the-party-pit-2011-11> [https://perma.cc/2LEE-QK6F].

82. *See id.* (explaining that appearance and age discrimination seemed to stem partially from the fact that pit workers wore “see-through negligee[s]”); *see also* *Alexander v. Casino Queen, Inc.*, 739 F.3d 972, 980–81 (7th Cir. 2014) (finding that floor reassignments at a casino constitute an adverse employment action due to less lucrative tips).

83. *See* Elie Mystal, *Women Are Not Sex Objects; Cocktail Waitresses, On the Other Hand . . .*, ABOVE L. (May 31, 2011, 6:15 PM), <https://abovethelaw.com/2011/05/women-are-not-sex-objects-cocktail-waitresses-on-the-other-hand/?rf=1> [https://perma.cc/V6LA-ZRF8] (voicing disapproval over age discrimination lawsuits by older cocktail waitresses). Of course, not all casino-goers share Mystal’s views—some cocktail waitresses who have worked in the same casinos for decades feel customers keep coming back to see the waitresses they have known since the ’70s and ’80s. *See* Ron Sylvester, *Cocktail Waitresses Make Lifelong Careers Serving Casino Customers*, LAS VEGAS SUN (Aug. 5, 2012, 2:00 AM), <https://lasvegassun.com/news/>

“Surely,” Mr. Mystal continued, “we can live in a society where we can say [sixty-six] years old is too old to be a cocktail waitress without risking litigation.”<sup>84</sup> Congress does not share these sentiments, however, and at least attempts to protect vulnerable employees with statutory remedies.<sup>85</sup>

### C. *Legal Remedies for Employees Facing Sex-Plus-Age Discrimination*

Congress instructs employers that it is unlawful under Title VII “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>86</sup> The two causation standards applied to Title VII disparate-treatment cases are but-for causation and motivating-factor causation.<sup>87</sup> Plaintiffs prove but-for causation using the single-motive framework established in *McDonnell Douglas Corp. v. Green*.<sup>88</sup> Plaintiffs prove motivating-factor causation using the mixed-motives framework born of *Price Waterhouse v. Hopkins*<sup>89</sup> and legislatively amended by the Civil Rights Act of 1991.<sup>90</sup> To understand how these two causation standards might affect future sex-plus-age plaintiffs, it is helpful to have a working knowledge of the cases and statutes that developed the current jurisprudence on disparate-treatment claims.<sup>91</sup>

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2012/aug/05/cocktail-waitresses-make-lifelong-careers-serving-/ [https://perma.cc/X4BA-EZBV] (discussing career cocktail waitresses).

84. *See id.* (declaring that women in their late fifties should work at Bennis’s instead of in casinos). Ironically, Mystal has recently attempted to rebrand himself as a feminist, writing, in a 2020 article: “We live in a deeply sexist culture, and that misogyny is broadcast and reinforced through every cultural vector available.” *See* Elie Mystal, *Sexism Sank Elizabeth Warren*, NATION (Mar. 5, 2020), <https://www.thenation.com/article/politics/warren-sexism-2020/> [https://perma.cc/KC8T-ARQZ].

85. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (2018).

86. *Id.* (defining unlawful discrimination).

87. *See* Katz, *Unifying, supra* note 28, at 652 (differentiating necessity, or but-for causation, from minimal, or motivating-factor causation). A but-for cause is necessary to bring about the event, whereas a motivating factor merely has the tendency to bring about the event. *See id.* at 653.

88. 411 U.S. 792 (1973).

89. 490 U.S. 228 (1989).

90. *See id.* at 258 (concluding that once a plaintiff proves that discrimination motivated the employment decision, the defendant may avoid liability by proving it would have made the same decision regardless). Congress later altered this holding by establishing that discrimination is an unlawful employment practice regardless of whether other factors motivated the decision. *See* § 2000e-2(m).

91. *See* Porter, *supra* note 11, at 84 (suggesting that readers with basic knowledge of other employment discrimination frameworks are better prepared to explore sex-plus theory). Note that there are two main methods of proving Title VII discrimination, disparate treatment and disparate impact. *See generally id.* at 81. However, this Comment discusses only disparate treatment, because it is “by far, the most popular theory used.” *See id.*

### 1. *Proving Disparate-Treatment Causation*

Until the Supreme Court reviewed Ann Hopkins's lawsuit against her employer in 1989, Title VII plaintiffs did not know whether they needed to prove but-for causation to prevail.<sup>92</sup> A Title VII plaintiff establishes but-for causation by demonstrating her employer would not have made its challenged employment decision but for the plaintiff's protected characteristic.<sup>93</sup> Ms. Hopkins, a senior manager at a nationwide accounting firm, sued for sex discrimination under Title VII when the decision-making partners first placed her bid for partnership on hold and later declined to reconsider her.<sup>94</sup> However, Ms. Hopkins could not prove that she would have made partner but for her sex: though her sex played a role in the partners' ultimate decision, so did her lack of interpersonal skills.<sup>95</sup>

Rather than barring Ms. Hopkins from recovering simply because her employer also had legitimate reasons for not making her a partner, the Court explained that Title VII prohibits "[employment] decisions based on a mixture of legitimate and illegitimate considerations."<sup>96</sup> In other words, if an employee's protected trait, such as her sex, motivated her employer's challenged decision, she has a cause of action under Title VII.<sup>97</sup> This framework came with a caveat: the Court held that an employer could avoid liability by proving it would have made the same decision even if it had not considered the employee's protected trait.<sup>98</sup>

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92. *See Price Waterhouse*, 490 U.S. at 240 n.6 ("This passage [in an earlier Supreme Court case] . . . does not suggest that the plaintiff must show but-for cause; it indicates only that if she does so, she prevails.").

93. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020) (explaining that courts find but-for cause by changing one thing at a time and determining whether the outcome would be different).

94. *See Price Waterhouse*, 490 U.S. at 231–32 (describing Ms. Hopkins's experience with the partnership selection process at Price Waterhouse).

95. *See id.* at 234–35 (stating that some partners knew Ms. Hopkins to be abrasive, short with staff, and difficult to work with, which ultimately "doomed her bid for partnership"). At least some of the partners viewed Ms. Hopkins's personality traits more negatively because she was a woman, commenting on her lack of femininity and suggesting she enroll in charm school. *See id.* at 235; *see also* *Mazzella v. RCA Glob. Commc'ns, Inc.*, 642 F. Supp. 1531, 1549 (S.D.N.Y. 1986) (finding the company terminated plaintiff for her poor performance and not because of her pregnancy), *aff'd*, 814 F.2d 653 (2d Cir. 1987).

96. *Price Waterhouse*, 490 U.S. at 241 (explaining the phrase "because of" in Title VII does not mean "solely because of" (internal quotation marks omitted)).

97. *See id.* at 250. The Court explained:  
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. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.

*Id.* (footnote omitted).

98. *See id.* at 258 (holding that once an employee shows that gender motivated the employer's decision, the burden of proof shifts to the employer-defen-

Congress partially codified *Price Waterhouse* two years later by supplementing Title VII with a motivating-factor standard of causation.<sup>99</sup> This addition to the statute abrogated the portion of *Price Waterhouse* that allowed a defendant to completely avoid liability by proving it would have made the same employment decision absent the impermissible motivating factor.<sup>100</sup> Consequently, *Price Waterhouse's* same-decision test now operates slightly differently: once a plaintiff proves that discrimination motivated the employer's decision, the employer "may . . . invoke lack of but-for causation as an affirmative defense."<sup>101</sup> That is, the employer must show it would have made the same decision even without the protected trait.<sup>102</sup> If the employer prevails under the same-decision defense, it is still liable for discrimination, but the plaintiff's remedies are limited to attorney's fees, declaratory relief, and some injunctive relief (excluding job admission, reinstatement, hiring, promotion, or payment).<sup>103</sup>

## 2. *But-For Causation is Hard to Prove; Motivating-Factor Causation Curtails Damages*

Both the but-for test and the motivating-factor test are problematic in some ways.<sup>104</sup> But-for causation is difficult to prove and enables employers to get away with some amount of discrimination.<sup>105</sup> As one scholar

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dant to "prov[e] by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account"). Concurring in the judgment, Justice O'Connor noted that the plurality's misreading of Title VII turned its causation standard into an affirmative defense for the defendant. *See id.* at 275–76 (O'Connor, J., concurring). Similarly, Justice Kennedy wrote in dissent that "the import of today's decision is not that Title VII liability can arise without but-for causation, but that in certain cases it is not the plaintiff who must prove the presence of causation, but the defendant who must prove its absence." *See id.* at 286 (Kennedy, J., dissenting).

99. *See* 42 U.S.C. §§ 2000e–2(m), 2000e–5(g)(2) (2018); *see also* Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 348–49 (2013) (explaining the "motivating factor" language Congress added to Title VII codified the "lessened-causation framework of *Price Waterhouse*").

100. *See Nassar*, 570 U.S. at 349 (noting that defendant employers can no longer defeat liability entirely after enactment of 1991 Act).

101. *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020) (describing Congress's version of the motivating-factor/same-decision standard). *See generally* William R. Corbett, McDonnell Douglas, 1973–2003: *May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 199 (2003) (summarizing *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), where the Supreme Court held that an employment discrimination plaintiff does not need direct evidence to receive a mixed-motives jury instruction).

102. *See Katz, Fundamental Incoherence*, *supra* note 27, at 503 (explaining there is no but-for causation if an employer "would have taken the 'same action' absent the forbidden criteria" (citing § 2000e–5(g)(2)(B))).

103. *See* § 2000e–5(g)(2).

104. *See Katz, Fundamental Incoherence*, *supra* note 27, at 550–51 (concluding that but-for test and motivating-factor test are both flawed).

105. *See id.* at 515 (describing problems with but-for causation). Katz also argues that the but-for test can yield a windfall to defendants whenever there are two

remarked, “the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed.”<sup>106</sup> Put simply, the plaintiff must prove a negative.<sup>107</sup> More concerning is the fact that the but-for standard permits some degree of wrongdoing: if an employer discriminates at a minimal level without rising quite to the but-for level, the but-for standard shields the employer from liability.<sup>108</sup>

Enter the motivating-factor standard, which the Supreme Court has called a lesser and more forgiving standard of causation than the but-for test.<sup>109</sup> Despite “the theoretical advantages of motivating-factor liability for plaintiffs,” plaintiffs generally stick with the traditional but-for theory.<sup>110</sup> For one thing, the motivating-factor standard is procedurally inconsistent between jurisdictions.<sup>111</sup> At summary judgment, for example, some courts allow the parties to decide between but-for or motivating-fac-

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factors sufficient to fire the plaintiff, one discriminatory and one not. *See id.* at 515, 520–27.

106. Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 67 (1956) (criticizing the practice of having juries decide “what would have happened if the defendant had not been guilty of the conduct charged against him”). Another scholar believes “[w]e place unrealistic expectations on our adversary system and its evidentiary format when we ask a judge to find as a matter of fact what would have occurred if the discrimination, already shown to have been a motivating consideration, had not so operated.” Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 320 (1982).

107. *See* Katz, *Unifying*, *supra* note 28, at 656 (“[T]o prove ‘but for’ causation, a plaintiff needs to prove a negative: the absence of any additional, independently sufficient reasons for the challenged action.”). It is also difficult for plaintiffs to show how large of a role the plaintiff’s protected trait played in the employer’s decision because the employer typically controls the evidence needed to prove this. *See* Katz, *Fundamental Incoherence*, *supra* note 27, at 515–16, 516 n.104 (citing Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1905 n.77 (2004)).

108. *See* Katz, *Fundamental Incoherence*, *supra* note 27, at 518 (examining how but-for causation might enable employers to discriminate at lesser levels). The but-for test allows employers to get away with harmful behavior unattached to the “ultimate employment action” and with conduct that is harmful to society at large but not specifically to the plaintiff. *See id.* at 518–20.

109. *See* *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739–40 (2020) (describing the motivating-factor standard as more forgiving to plaintiffs because it holds employers liable for sex discrimination even if sex was not the but-for cause of employment decision); *see also* *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020) (characterizing the motivating-factor test as a “lesser standard”).

110. *See* Sullivan, *supra* note 29, at 396 (noting plaintiffs’ tendency to use the but-for standard could be due in part to judicial resistance to motivating-factor standard); *see also* SULLIVAN & ZIMMER, *supra* note 42, at 79 (recognizing that while motivating-factor standard seems plaintiff-friendly, “courts have not applied ‘motivating factor’ analysis very often”).

111. *See* Picco, *supra* note 34, at 465 (explaining courts differ as to who decides which framework should apply and at what point during litigation).

tor causation, while other courts take it upon themselves to decide the more appropriate standard.<sup>112</sup> At trial, some courts let the plaintiff request a mixed-motives jury instruction, allowing the employer to raise the same-decision defense, while other courts decide the jury instructions on their own.<sup>113</sup>

Procedural confusion aside, plaintiffs probably avoid the motivating-factor standard because an employer can avoid paying damages if it can prove it would have made the same employment decision notwithstanding the plaintiff's Title VII-protected trait.<sup>114</sup> Put differently, if the defendant proves a *lack* of but-for causation—the higher standard of proof the plaintiff wanted to avoid in the first place—the plaintiff receives only attorney's fees (maybe) and “certain injunctive relief (mostly of the ‘don't do it again’ variety).”<sup>115</sup> One judge noted that a “‘mixed motive’ claim has the very real potential to be a Trojan Horse for the plaintiff”: “although the trier of fact may well find liability on a ‘mixed motives’ claim, the plaintiff may ultimately recover nothing if the trier of fact also finds for the defense on the ‘same decision’ defense.”<sup>116</sup>

### 3. *Some Sex-Plus-Age Plaintiffs Must Sue Using Motivating-Factor Causation*

Because older women are the focal point of this Comment, it is important to assess how the but-for standard compares to the motivating-factor standard for female, sex-plus-age plaintiffs.<sup>117</sup> Under the but-for framework, a sex-plus-age plaintiff must prove her employer would not have taken its adverse employment action but for her status as an older

112. *See id.* (describing how different courts treat mixed-motives framework at summary judgment).

113. *See id.* (discussing who decides whether a mixed-motives jury instruction is available).

114. *See Sullivan, supra* note 29, at 397–98 (reiterating that the plaintiff receives no monetary damages or reinstatement if the defendant proves it would have made the same decision).

115. *Id.* at 386 n.125 (recognizing that once a defendant prevails on same-decision defense, injunctive relief is often nothing more than a slap on the wrist (citing 42 U.S.C. § 1981a(3) (2018))); *see Garcia v. City of Houston*, 201 F.3d 672, 678 (5th Cir. 2000) (stating that in mixed-motives cases, awards of attorneys' fees is usually left to discretion of trial court); *see also Katz, Fundamental Incoherence, supra* note 27, at 528 (“Liability attaches only where there is ‘but for’ causation—or, more precisely, where the defendant fails to prove a lack of ‘but for’ causation.”).

116. *Coe v. N. Pipe Prod., Inc.*, 589 F. Supp. 2d 1055, 1097–98 (N.D. Iowa 2008) (theorizing that not many plaintiffs would be willing to go through an employment discrimination trial only to receive no money damages while their lawyer still gets paid). Lack of money damages is a problem particularly for women in low-paying occupations, including service and retail. *See generally Occupational Employment Statistics*, U.S. BUREAU LAB. STATS., [https://www.bls.gov/oes/current/oes\\_nat.htm#43-0000](https://www.bls.gov/oes/current/oes_nat.htm#43-0000) [<https://perma.cc/J9G8-FA7N>] (last updated Mar. 31, 2021) (providing occupational salary statistics).

117. *See generally McAllister, Proving, supra* note 31, at 765–66 (finding it more common for plaintiffs to assert single motive claim in sex-plus case).

woman.<sup>118</sup> Under the motivating-factor framework, a sex-plus-age plaintiff needs to prove her status as an older female played a part in the adverse employment action, though legitimate factors also motivated the employer.<sup>119</sup>

An older female employee who faces age discrimination in an office setting—or any job where consumer preference for young, beautiful women is not tied to job success—can likely sue under the but-for standard, as long as her employer did not have another, legitimate reason for its adverse action.<sup>120</sup> Conversely, any older female employee whose age negatively affects how guests perceive her will need to use the motivating-factor standard because negative customer feedback is an arguably legitimate reason for an employer to assign her to a less busy section or even fire her.<sup>121</sup> But a prudent potential plaintiff should question whether it is worth suing her employer under this less onerous standard and risk walking away with nothing.<sup>122</sup> The answer depends in part on whether her jurisdiction requires opposite-sex comparator evidence.<sup>123</sup>

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118. See *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1047 (10th Cir. 2020) (“[I]f a female plaintiff shows that she would not have been terminated if she had been a man—in other words, if she would not have been terminated but for her sex—this showing is sufficient to establish liability under Title VII.”). For sex-plus plaintiffs, “termination is ‘because of sex’ if the employer would not have terminated a male employee with the same ‘plus-’ characteristic.” *Id.* at 1048 (upholding *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199 (10th Cir. 1997)).

119. See generally *McAllister, Extending, supra* note 18, at 510 (“[W]hen Title VII was amended in 1991 to incorporate a ‘motivating factor’ standard, that amendment was not meant to change the law with respect to plus discrimination claims, which often involve a combination of *discriminatory* motives. Rather, the 1991 amendments simply clarified the standards of proof for the type of mixed-motive claim present in Title VII cases involving both a discriminatory motive and a legitimate one.”).

120. See *James v. Teleflex, Inc.*, No. Civ.A. 97-1206, 1998 WL 966009, at \*9 (E.D. Pa. Dec. 23, 1998) (using the but-for theory to analyze a plaintiff’s sex-plus-age discrimination claim). Of course, older women who work directly with customers in restaurants, bars, or casinos may also allege but-for causation if their age did *not* lead to an arguably legitimate reason, such as lower popularity with guests, for termination or another adverse employment action. See, e.g., *Frappied*, 966 F.3d at 1047 n.2 (applying but-for standard).

121. Cf. *Price Waterhouse v. Hopkins*, 490 U.S. at 236, 253 (summarizing the district court judge’s finding that Price Waterhouse “legitimately emphasized interpersonal skills in its partnership decisions” and “Hopkins’ interpersonal problems were a legitimate concern”).

122. See *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1339 (4th Cir. 1996) (Michael, J., dissenting) (recognizing that when the defendant prevails under the same-decision affirmative defense, “a plaintiff in a mixed-motive case is expressly precluded from recovering money damages and her right to injunctive relief is severely limited”).

123. See generally *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (clarifying that mixed-motives plaintiffs do not necessarily need direct evidence because “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence” (internal quotation marks omitted) (quoting *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508 n.17 (1957))).

### III. A HAPPY MEDIUM, OR AN IMPOSSIBLE TASK?: OPPOSITE-SEX COMPARATORS ADD ANOTHER LAYER OF COMPLEXITY

Courts often hold that sex-plus claims fail in the absence of opposite-sex comparator evidence.<sup>124</sup> This means an older female plaintiff suing for sex-plus-age discrimination must demonstrate that her employer discriminated against her but did *not* discriminate against an older male employee.<sup>125</sup> But courts are split on whether such evidence is required.<sup>126</sup>

#### A. Jurisdictions with No Opposite-Sex Comparator Requirement

Not all jurisdictions require opposite-sex comparator evidence.<sup>127</sup> For instance, the United States District Court for the Eastern District of Pennsylvania recognized a sex-plus claim where a school principal's discriminatory comments constituted direct evidence and his favorable treatment of a woman without disabled children—compared to his treatment of a woman with disabled children—constituted same-sex comparator evidence.<sup>128</sup> Similarly, the Second Circuit Court of Appeals allowed a sex-plus plaintiff without an opposite-sex comparator to get past summary judgment because she produced direct evidence of her employer's stereotypical comments about mothers' inability to balance work with chil-

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124. See McAllister, *Proving, supra* note 31, at 775 (noting that courts that require opposite sex comparator evidence for sex-plus plaintiffs to prevail “include the United States Courts of Appeal[s] for the Second, Third, and Tenth Circuits, along with various federal district courts” (footnote omitted)). Though not all courts require opposite sex comparator evidence, it probably “is not enough to point to same sex comparator evidence,” such as an older female plaintiff using young female employees as comparators, “without also providing evidence of how similarly situated persons of the opposite sex were treated.” *Id.* at 790.

125. See *Frappied*, 966 F.3d at 1047 (upholding an earlier case requiring female sex-plus plaintiff to show her employer treated her worse than male employee with same “plus” characteristic (citing *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997))). A sex-plus-age plaintiff no longer needs to prove that an employer treated the entire subclass of older women adversely compared to the corresponding subclass of older men in light of the Supreme Court's focus on individual discrimination in *Bostock*. See *id.* (citing *Bostock v. Clayton County*, 140 S. Ct. 173 (2020)).

126. See McAllister, *Proving, supra* note 31, at 787 (“[C]ourts disagree as to whether opposite sex comparator evidence is required to prove a sex-plus discrimination claim . . .”).

127. See *id.* at 781–82 (noting that some courts consider same-sex comparator evidence in sex-plus claims).

128. See *id.* at 783–84 (highlighting lack of opposite-sex comparator evidence in *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323 (E.D. Pa. 1997)). In a sex-plus-age claim, direct evidence combined with same-sex comparator evidence might constitute an employer telling an older female applicant she has too many wrinkles to work behind the bar and hiring a young woman in her twenties or thirties instead. See *id.* at 766 (stating that direct evidence “does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group” (quoting *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003))).

dren.<sup>129</sup> The First Circuit Court of Appeals plainly stated that it does not espouse the opposite-sex comparator evidence requirement because “such a standard would permit employers to discriminate free from Title VII recourse so long as they do not employ any subclass member of the opposite gender.”<sup>130</sup>

Even though some courts apply a more lenient standard, plaintiffs without direct evidence still need some sort of circumstantial evidence to show discrimination.<sup>131</sup> While comparator evidence is not the only type of circumstantial evidence, it is probably the most common.<sup>132</sup> And “[b]ecause . . . opposite sex comparator evidence directly exposes the employer’s differential treatment of the sexes, . . . [it] is the most persuasive type of comparator evidence a plaintiff can invoke in a sex-plus case.”<sup>133</sup>

### B. *Jurisdictions with an Opposite-Sex Comparator Requirement*

The persuasive value of opposite-sex comparator evidence is such that many courts will not allow sex-plus-age plaintiffs to proceed without it.<sup>134</sup> The United States District Court for the Southern District of Ohio, for example, held that a female, sex-plus plaintiff could not prevail without showing unfavorable treatment relative to the corresponding subclass of

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129. *See id.* at 785–86 (citing *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004)) (summarizing the Second Circuit Court of Appeals’ conclusion that 42 U.S.C. § 1983 is actionable without opposite-sex comparator evidence). However, in cases where a sex-plus plaintiff tries to prove discrimination using primarily comparator evidence (i.e., without direct evidence) the Second Circuit does require opposite-sex comparator evidence. *See id.* at 780 (discussing comparator evidence requirements in the Second Circuit following *Fisher v. Vassar Coll.*, 70 F.3d 1420 (2d Cir. 1995), *aff’d en banc*, 114 F.3d 1332 (2d Cir. 1997)).

130. *Franchina v. City of Providence*, 881 F.3d 32, 52 (1st Cir. 2018) (pointing out flaws in the employer’s argument, which advocated for an opposite-sex comparator requirement). The employer argued that the plaintiff would need to show it treated her unfavorably compared to the corresponding subclass. *See id.* This is no longer the case after the Supreme Court recently instructed lower courts to focus on the individual rather than the entire protected class or subclass. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020). But the notion that employers could avoid Title VII consequences by simply not hiring subclass members of the opposite sex remains valid. *See Franchina*, 881 F.3d at 52.

131. *See McAllister, Proving, supra* note 31, at 796 (“According to most courts, circumstantial evidence of discrimination—which includes comparator proof—is only required where direct evidence of discriminatory intent is lacking.”).

132. *See id.* at 761 (“[O]ne common method of proving sex discrimination—whether for a pure sex discrimination claim or a sex-plus claim—is through comparator evidence.”).

133. *Id.* at 762–63 (discussing persuasive value of opposite sex comparator evidence).

134. *See id.* at 775 (listing cases where the court explicitly or impliedly held that opposite sex comparator evidence is necessary for Title VII, sex-plus claims, including *Fisher*, 70 F.3d at 1446–47; *Bryant v. Int’l Sch. Servs., Inc.*, 675 F.2d 562, 575 (3d Cir. 1982); and *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1202–05 (10th Cir. 1997)).

men.<sup>135</sup> The United States District Court for the Middle District of Tennessee dismissed a sex-plus-parental status claim because the female plaintiff could not show that her employer treated fathers with young children more favorably.<sup>136</sup> The Third Circuit Court of Appeals stated in a sex-plus-marital status case that “[a]bsent proof of the standard applied to similarly situated males, appellants have not established that such standard differs from the one applied to females.”<sup>137</sup>

The Tenth Circuit has arguably the strongest stance regarding opposite-sex comparator evidence: in *Coleman v. B-G Maintenance Management of Colorado, Inc.*,<sup>138</sup> a 1997 opinion cited heavily in *Frappied*, the Tenth Circuit concluded that “gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender.”<sup>139</sup> As such, it reversed the district court for failing to address the comparative class requirement in its jury instructions.<sup>140</sup> The absence of an opposite-sex comparator subclass meant the jury could find for the plaintiff based solely on her marital status (her “plus factor”), which is not a type of discrimination that Title VII prohibits.<sup>141</sup>

*Coleman*’s status as good law is arguable in light of *Bostock v. Clayton County*.<sup>142</sup> In *Bostock*, the Supreme Court directed lower courts to determine whether an employer discriminated against the plaintiff as compared to an individual employee of the opposite sex, rather than comparing en-

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135. *See id.* at 780 (noting reason for dismissal of sex-plus claim in *Fox v. Brown Mem’l Home, Inc.*, No. 2:09-cv-915, 2010 WL 3167849, at \*3 (S.D. Ohio Aug. 10, 2010)).

136. *See id.* at 781 (stating holding of *Fuller v. GTE Corp./Contel Cellular, Inc.*, 926 F. Supp. 653 (M.D. Tenn. 1996)).

137. *Bryant v. Int’l Sch. Servs., Inc.*, 675 F.2d 562, 575 (3d Cir. 1982) (asserting the need for opposite sex comparator evidence to establish a prima facie case of sex-plus discrimination). Presumably, the approach the Third Circuit Court of Appeals took in *Bryant* differs from the approach the United States District Court for the Eastern District of Pennsylvania took several years later in *McGrenaghan*, *see supra* note 35, because the plaintiffs in *Bryant* did not have direct evidence in addition to their comparator evidence, whereas the plaintiff in *McGrenaghan* had both same sex comparator evidence and direct evidence. *See McAllister, Proving, supra* note 31, at 784 (“As *McGrenaghan* shows, opposite sex comparator evidence is not always required to raise an inference of sex-plus discrimination, particularly where the plaintiff produces direct evidence of discriminatory animus against her particular subgroup in combination with same sex comparator evidence.”).

138. 108 F.3d 1199 (10th Cir. 1997), *abrogated on other grounds by Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038 (10th Cir. 2020).

139. *Id.* at 1204 (deciding that different treatment compared to similarly situated employees of opposite sex is a “requisite showing” in gender-plus Title VII claims).

140. *See id.* (concluding that jury instructions at trial constituted reversible error).

141. *See id.* (“[T]he instructions allowed the jury to award a verdict in Ms. Coleman’s favor if marital status alone were the reason for her termination. Title VII prohibits employers from treating married women differently than married men, but it does not protect marital status alone.”).

142. 140 S. Ct. 1731 (2020).

tire classes or subclasses.<sup>143</sup> Even with this change in focus, the *Frappied* court concluded that *Bostock* affirmed *Coleman*'s comparator requirement.<sup>144</sup> But now, instead of requiring a sex-plus-age plaintiff to prove that her employer treated an entire subclass more favorably, she simply needs to "show unfavorable treatment relative to [one] employee of the opposite sex who also shares the 'plus-' characteristic."<sup>145</sup>

The *Frappied* plaintiffs fell short of making this showing: the court rejected much of the plaintiffs' comparator evidence as conclusory, including their statements that "Affinity 'viewed older females unfavorably and/or graded older females more harshly than . . . older males.'"<sup>146</sup> The plaintiffs produced statistics that the court also found insufficient.<sup>147</sup> It declined to consider statistics about the treatment of older women compared to younger women (same-sex comparator evidence), or the treatment of women of any age compared to men of any age (which would only indicate pure sex discrimination).<sup>148</sup> And the statistics the plaintiffs presented about older women relative to older men "did not compare older women to *only* older men."<sup>149</sup> The court agreed, then, that while sex-plus-age claims are cognizable under Title VII, the statistics in this case were insufficient to "give rise to an inference of disparate treatment of women over forty as compared to men over forty."<sup>150</sup> Accordingly, the court affirmed the lower court's dismissal of the disparate-treatment claim.<sup>151</sup>

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143. *See id.* at 1740 (reasoning that focus of discrimination claims should "be on individuals, not groups").

144. *See Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1047 (10th Cir. 2020) (concluding that sex-plus plaintiffs still must produce comparator evidence).

145. *See id.* at 1048 (clarifying relevant comparators for sex-plus-age plaintiffs after *Bostock*).

146. *Id.* at 1051 (alteration in original) (illustrating insufficiency of conclusory statements as comparator evidence). As noted above, the district court also dismissed the disparate treatment claim because the plaintiffs did not allege at what age a sex-plus-age plaintiff becomes an older woman. *See id.* at 1050. The Tenth Circuit rejected this finding because the complaint "repeatedly and interchangeably refers to employees 'age forty or older' and employees 'in the protected age group.'" *Id.*

147. *See id.* at 1051 (noting that statistics are especially probative in Title VII disparate-treatment cases involving mass terminations).

148. *See id.* at 1052 (pointing out the irrelevance of certain types of comparator evidence). For a further discussion of how other courts treat same-sex comparator evidence, see *supra* notes 128–30 and accompanying text.

149. *Id.* at 1053 (emphasis added). "Although the p-value is probative of whether Affinity discriminated against older women, because the plaintiffs did not compare older women to only older men in calculating it, the p-value does not itself give rise to a plausible inference of discrimination *because of sex*." *Id.*

150. *Id.* at 1049, 1053.

151. *Id.* at 1053 (dismissing disparate-treatment claim because age and sex were merely possible causes of plaintiffs' termination); *see supra* notes 43–48 and accompanying text (summarizing why the court upheld the disparate-impact claim but not the disparate-treatment claim).

IV. THE TRANSPARENT COLUMN: EVALUATING THE CONSEQUENCES OF  
OPPOSITE-SEX COMPARATOR REQUIREMENTS ON SEX-PLUS-AGE  
CLAIMS

Female sex-plus-age plaintiffs like the women in *Frappied* may have a hard time obtaining opposite-sex comparator evidence for two main reasons: (1) they work in an all-female job, or (2) the aging process does not have the same negative effect on older men in their workplace, meaning employers can lawfully differentiate between older women and older men because of the men's continued job success.<sup>152</sup> The fact that opposite-sex comparators are frequently unavailable works to the detriment of mixed-motives, sex-plus-age plaintiffs.<sup>153</sup> If sex-plus-age plaintiffs do not fail at the pleadings, not having an opposite-sex comparator will likely result in curtailed damages.<sup>154</sup>

A. *The Pros and Cons of Requiring an Opposite-Sex Comparator*

One commentator recognized that requiring opposite-sex comparator evidence is problematic because “[w]hat matters . . . is not whether the plaintiff can generate evidence of how the employer treated an opposite sex comparator, but rather whether the plaintiff can show that her gender motivated the employer.”<sup>155</sup> On the other hand, it seems logical to require an opposite-sex comparator from a plaintiff proving her case solely through comparator evidence.<sup>156</sup> For example, if an older woman proves that her employer treated a younger woman more favorably, her claim, without more, appears to be one of pure age discrimination, not sex-plus-age discrimination.<sup>157</sup>

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152. See, e.g., *Franchina v. City of Providence*, 881 F.3d 32, 52 (1st Cir. 2018). The *Franchina* court highlighted the difficulties of obtaining opposite-sex comparator evidence in a job where the employer does not employ members of the opposite sex who share the plaintiff's plus factor. The court stated, “[u]nder such an approach, for example, discrimination against women with children would be unactionable as long as the employer employed no fathers.” *Id.* Even if the employer does hire members of the opposite sex who share the plus factor, the plus factor could negatively impact one gender but not the other, which also leads to problems. See *infra* notes 168–71 and accompanying text.

153. See McAllister, *Proving*, *supra* note 31, at 802–03 (explaining that opposite-sex comparator evidence is vital to plaintiffs proving discrimination solely with comparator evidence).

154. For a further discussion of jurisdictional requirements regarding opposite-sex comparator evidence and how they affect sex-plus-age plaintiffs' cases at varying points in the litigation, see *infra* Sections IV.B.1, IV.B.2.

155. McAllister, *Proving*, *supra* note 31, at 801 (rejecting notion that opposite-sex comparator evidence is always necessary).

156. See *id.* at 802–803 (noting that if plaintiff proves claim using only comparator evidence, it would be impossible, without opposite-sex comparator evidence, to prove that sex played a part in adverse decision).

157. See *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1053 (explaining that because statistics did not compare treatment of older women to *only* older men, “[p]laintiffs' contradictory allegations do not permit us to infer that Affinity's discrimination was not based on age alone”).

For this reason, the Tenth Circuit Court of Appeals likely decided *Frappied* correctly: the plaintiffs did not sufficiently allege Affinity discriminated against them for being older *women*, as opposed to discriminating against them simply for being *old*.<sup>158</sup> But the mere fact that sex-plus plaintiffs may *sometimes* need opposite-sex comparator evidence to prevail does not justify declaring that *no* plaintiff may *ever* prevail without it.<sup>159</sup>

B. *The Effect of Opposite-Sex Comparator Requirements on Mixed-Motives Plaintiffs*

The potential issue with this evidentiary standard can be illustrated with a consideration of mixed-motives cases, where a plaintiff concedes her employer had a legitimate reason for taking an adverse action in addition to its illegitimate, discriminatory reason.<sup>160</sup> As the First Circuit Court of Appeals noted in *Franchina v. City of Providence*,<sup>161</sup> “[r]equiring a plaintiff to point to a comparator of the opposite gender implies the inquiry is that of ‘but-for’ causation.”<sup>162</sup> It compels the plaintiff “to make a showing that, all else being equal (the ‘plus’ factors being the same), the discrimination would not have occurred but for her gender.”<sup>163</sup> This approach does not account for scenarios where an employer fires someone for being an older female *and* for a legitimate business reason, but that legitimate business reason had a correlation to her status as an older woman.<sup>164</sup>

Such a scenario may very well occur when the aging process negatively affects how guests perceive female employees at casinos, bars, and restaurants.<sup>165</sup> If an employer intuitively feels that replacing an older female employee with someone “young and sexy and hot” could be financially beneficial, the employer has a legitimate—albeit unfair—reason to do so.<sup>166</sup> The

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158. See *id.* (summarizing reasons behind plaintiffs’ failure to state claim).

159. Compare *id.* at 1047 (“[*Bostock*] affirms our ruling in *Coleman* that a female sex-plus plaintiff must show that her employer treated her unfavorably relative to a male employee who also shares the ‘plus-’ characteristic.”), with McAllister, *Proving*, *supra* note 31, at 802 (criticizing approach that some courts have taken regarding comparator evidence).

160. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (“Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.”).

161. 881 F.3d 32 (1st Cir. 2018).

162. *Id.* at 53 (identifying inherent flaws in the opposite-sex comparator requirement).

163. *Id.* (asserting that Title VII does not require such proof).

164. See McAllister, *Extending*, *supra* note 18, at 513 (“[In] the Title VII mixed-motive context, . . . the presence of a legitimate motive serving as an *independent basis* for the employer’s decision rules out a finding of but-for causation as to the illegitimate and unlawful motive.”); see also *supra* notes 64–71 and accompanying text (discussing how consumer preferences disproportionately burden older female workers).

165. See, e.g., Mystal, *supra* note 84 (“[T]o be effective and profitable bait for the casino, those babies need to float, not sag.”).

166. See White, *supra* note 8, at 1329 (quoting Clair Suddath, *Beloved Nashville Anchor Sues Meredith for Age Discrimination*, BLOOMBERG (Dec. 10, 2018, 11:09 AM))

plaintiff's status as an older woman is not a but-for cause as long as her employer also had a valid reason (such as her declining popularity with guests) to replace or reassign her, meaning she will have to plead mixed motives.<sup>167</sup>

There are two scenarios in which an older woman will not be “[ ]lucky enough to [have] a comparator in . . . her workplace”: either she works in a primarily “female” job (for example, cocktail waitressing), or she works in a job that employs men and women equally (for instance, serving or bartending), where her employer fires older women but retains older men because age does not impact the men’s job success.<sup>168</sup> In the unlikely event that an older man’s aging appearance *did* impact his job success, only an employer completely ignorant of the possibility of a Title VII lawsuit would choose to retain the unpopular older male employee but reassign or terminate the older female.<sup>169</sup> Indeed, if such irrefutable comparator evidence existed, the older female plaintiff would have sued under the but-for standard in the first place.<sup>170</sup> This is because penalizing an older female employee, but not an older male employee, when both

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(discussing television stations’ regular practice of firing older women because of age in search of fresh talent or more eye-catching on-air presence); *see also* Burn et al., *supra* note 10, at 103 (recognizing importance of attractiveness in jobs with interpersonal contact).

167. *See generally* SULLIVAN & ZIMMER, *supra* note 42, at 73 (explaining that because plaintiff in *Price Waterhouse v. Hopkins* also had interpersonal issues, her employer’s “nondiscriminatory reason was not ‘pretext’ for discrimination and, if single motive paradigm applied, plaintiff would have lost”).

168. *See Franchina*, 881 F.3d at 53 (1st Cir. 2018) (rejecting notion that Title VII becomes ineffective when “discrimination adversely affects a plaintiff who is unlucky enough to lack a comparator in his or her workplace”); *see also Confessions of the \$100,000 Waitress*, WORKOPOLIS (May 14, 2015), <https://careers.workopolis.com/advice/confessions-of-the-100000-waitress/> [<https://perma.cc/4KN3-WD4G>] (asking successful waitress whether her looks impacted her earning potential). The server, who her interviewer described as “obviously very physically attractive,” said her appearance did not make a big difference in the tips she earned. *See Confessions of the \$100,000 Waitress, supra*. However, she implied that the other waitresses at the restaurant were also pretty (“I wasn’t the prettiest one there by any means”) and noted that “[t]he bartender, a 70-year-old-man, made more than any of us,” suggesting that age and appearance were not an issue for male bartenders at her job. *See id.*

169. *See* McAllister, *Proving, supra* note 31, at 759 (“[E]mployment discrimination claims are often proven with evidence that the employer treated an employee in a protected class differently than those outside the employee’s protected class . . .”).

170. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 236 (1989) (noting that although the firm declined Ms. Hopkins’ bid for partnership because she lacked interpersonal skills and granted partnership to male candidates who also lacked interpersonal skills, “these candidates possessed other, positive traits that Hopkins lacked”). If the male candidates had been completely equal to Ms. Hopkins and still made partnership over her, it is possible she could have sued using the but-for standard. In a 1986 case, the court used the but-for framework and held that comparator evidence is relevant when other employees “engaged in conduct similar to the plaintiff’s, without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it.”

received negative guest feedback, could hardly be called a legitimate business decision.<sup>171</sup>

Of course, some older women can produce opposite-sex comparator evidence, such as an older woman denied employment by a restaurant hiring only young female servers and older male maître d's.<sup>172</sup> But sex-plus-age “plaintiff[s] . . . unlucky enough to lack a comparator in [their] workplace” will want to play close attention to their jurisdiction’s requirements for comparator evidence when deciding whether suing under a mixed-motives theory is worth the time and expense.<sup>173</sup>

1. *In Some Jurisdictions, Sex-Plus Plaintiffs Without an Opposite-Sex Comparator Fail at the Pleadings*

Sex-plus plaintiffs suing under Title VII in jurisdictions with an opposite-sex comparator requirement have a very slim chance of prevailing.<sup>174</sup> Indeed, *Frappied* suggests that a female, sex-plus-age plaintiff who cannot demonstrate that her employer treated an older male employee more favorably than she will not get past a motion to dismiss.<sup>175</sup> Because the court focused its analysis on the but-for standard, it is not certain whether the opposite-sex comparator requirement extends to mixed-motives cases.<sup>176</sup>

A close reading of the opinion suggests it does. The *Frappied* court found its opposite-sex comparator requirement from *Coleman* to be good

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*See* *Mazzella v. RCA Glob. Commc'ns, Inc.*, 642 F. Supp. 1531, 1547 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 653 (2d Cir. 1987).

171. *See* Waldman, *supra* note 67, at 105. Waldman’s discussion of the equal burden test suggests that if an older male employee and an older female employee both received negative guest feedback but the employer fired only the female, this would be an example of an unequal burden giving rise to a disparate-treatment claim.

172. *See* Porter, *supra* note 11, at 96 n.134 (discussing “the example of a fifty-five year-old woman who is refused a waitress job because she does not fit the image of the restaurant, which hires older men for maître d’s and younger women as waitresses”).

173. *See* *Franchina*, 881 F.3d at 53 (recognizing the disadvantage to sex-plus plaintiffs who lack opposite-sex comparators). *See generally* McAllister, *Proving*, *supra* note 31, at 761 (explaining that “[w]hen . . . comparator evidence is used to prove a sex-plus claim . . . courts are split over whether the proper comparator *must* be a person of the *opposite sex* as the plaintiff who shares the same plus characteristic”).

174. *See* McAllister, *Proving*, *supra* note 31, at 775–81 (examining courts that reject sex-plus claims without opposite-sex comparator evidence).

175. *See* *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1049, 1053 (10th Cir. 2020) (acknowledging intersectional discrimination toward older women but dismissing plaintiffs’ claim for failing to show employer treated them differently than older men).

176. *See id.* at 1047 n.2 (explaining that analysis does not depend on motivating-factor test (citing *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739–40 (2020))).

law.<sup>177</sup> Notably, the district judge in *Coleman* had given a mixed-motives jury instruction.<sup>178</sup> On appeal, the court found that the instructions constituted reversible error because the judge did not tell the jury that “gender-plus claimants must establish that they were treated differently from similarly situated members of the opposite sex.”<sup>179</sup> Its reversal of the lower court reveals that sex-plus plaintiffs need an opposite-sex comparator even for motivating-factor cases.<sup>180</sup> Because *Frappied* upheld *Coleman*, it seems likely that courts in the Tenth Circuit will require opposite-sex comparator evidence in future sex-plus, mixed-motives cases.<sup>181</sup> As such, older women in the service industry who lose their jobs for a mixture of legitimate and illegitimate reasons, but who have no opposite-sex comparator, will be left without a legal remedy.<sup>182</sup>

Recall, for instance, Elie Mystal’s article.<sup>183</sup> Suppose a casino manager tells a fifty-year-old waitress, “I am reassigning your weekend section because one of our best customers, Mr. Mystal, said he will stop coming here on Saturday nights unless Crystal, Megan, or Jane serve his drinks.”<sup>184</sup> Suppose Crystal, Megan, and Jane are women in their twen-

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177. See *id.* at 1047 (“[*Bostock*] affirms our ruling in *Coleman* that a female sex-plus plaintiff must show that her employer treated her unfavorably *relative to a male employee who also shares the “plus-” characteristic.*”).

178. See *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1202 n.1 (10th Cir. 1997) (reproducing jury instructions). The relevant instructions read: In showing that Plaintiff’s gender or gender along with her personal relationship were motivating factors, plaintiff is not required to prove that her gender or gender and personal relationship were the sole motivations or even the primary motivation for the defendant’s decisions. The Plaintiff need only prove that her gender or her gender and personal relationship played a part in the defendant’s decision even though other factors may also have motivated the Defendant.

*Id.*

179. *Id.* at 1203 (agreeing with defendant’s argument regarding erroneous jury instructions). The circuit court found that the instructions were further erroneous because they stated: “[Plaintiff] has the burden of proving by a preponderance of the evidence that the defendant’s actions were motivated by the Plaintiff’s gender *or gender along with her personal relationship with Mr. Newborn.*” *Id.* at 1204 (alteration in original) (internal quotation marks omitted). The court reasoned that such instruction “envisions a subclass of women who had a personal relationship with Mr. Newborn . . . for which there is no corresponding subclass of men—that is, men with a common-law marriage to Milton Newborn.” *Id.*

180. See *id.* at 1204 (reversing jury verdict likely based on erroneous jury instructions).

181. See *Frappied*, 966 F.3d at 1047, 1049 (discussing current applicability of *Coleman*).

182. See *id.* at 1051 (“[F]emale sex-plus plaintiffs *must* show discrimination compared to men who share the same ‘plus-’ characteristic.” (emphasis added)).

183. See Mystal, *supra* note 84 (criticizing older female cocktail waitresses).

184. See *id.* (describing being served by older cocktail waitresses as “enough to make you want to stop gambling”). It is not clear how this scenario would play out if the casino manager explicitly told the waitress he was firing her because the guests did not like older women; even in jurisdictions with an opposite-sex comparator requirement, if an employer used obviously biased guest feedback in making

ties.<sup>185</sup> After being reassigned, the older waitress makes half the tips she did before.<sup>186</sup> She knows the real reason her manager reassigned her—Mr. Mystal did not want to be served by an older woman.<sup>187</sup>

Without an older male comparator, however, the waitress does not have a Title VII, sex-plus-age claim in the Tenth Circuit—and she does not have a comparator for the simple reason that older men do not serve cocktails in casinos.<sup>188</sup> Under Title VII, the woman will fail at the pleadings.<sup>189</sup> (Under the ADEA, she has no claim at all because her employer reassigned her for reasons both lawful and unlawful, meaning her claim is mixed-motives, and thus unactionable).<sup>190</sup> In effect, the casino manager has avoided liability simply by not employing older men.<sup>191</sup>

2. *In Other Jurisdictions, Sex-Plus Plaintiffs Without an Opposite-Sex Comparator Could Win at Trial but Ultimately Lose Damages*

Older women suing in jurisdictions that do not require them to produce an older male comparator will have an advantage because they will be able to use other types of evidence to prevail.<sup>192</sup> Unlike in the Tenth Circuit, a sex-plus-age plaintiff lacking an opposite-sex comparator will probably make it past pretrial motions.<sup>193</sup> Recall, though, that aging cock-

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an employment decision, “it seems clear that . . . the employer could—and should—be liable.” See Flake, *supra* note 13, at 2196.

185. See *id.* (“A civilized society provides old people with graceful transition to their golden years; it doesn’t dress them up in steel-reinforced bustiers and make them compete with 20-year-olds for tips.”).

186. For a further discussion of lowered wages constituting an adverse employment action, see *supra* notes 61–62, 82 and accompanying text.

187. See Mystal, *supra* note 84 (expressing that “50-year-old women need to find something else to do besides walking around half-naked and serving drinks”).

188. See McGinley, *supra* note 77, at 262 (“Nevada casinos openly and self-consciously sell sexual appeal by limiting cocktail serving jobs to women dressed in alluring outfits. While they do not advertise the jobs as exclusively for women, they hire women exclusively as cocktail servers . . .”).

189. See *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1053 (10th Cir. 2020) (affirming dismissal for failure to state claim).

190. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (concluding that the ADEA does not authorize mixed-motives claims).

191. See *Franchina v. City of Providence*, 881 F.3d 32, 52 (1st Cir. 2018) (proposing that opposite-sex comparator requirements “permit employers to discriminate free from Title VII recourse so long as they do not employ any subclass member of the opposite gender”).

192. See McAllister, *Proving*, *supra* note 31, at 794–96 (noting that many courts allow sex-plus plaintiffs who lack opposite-sex comparator proof to prove discrimination using other methods, such as direct evidence and other types of circumstantial evidence).

193. See, e.g., *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323, 327 (E.D. Pa. 1997) (denying summary judgment). In their motion for summary judgment, “defendants argue[d] that every full-time teaching position for the 1996–97 school year was filled by a woman and that plaintiff . . . failed to establish that any male employees were treated more favorably than female employees.” *Id.* at 326. The court found the plaintiff met her burden to produce evidence of a prima facie case

tail waitresses and older female servers will likely need to sue under the mixed-motives standard if their employers also had legitimate reasons to replace or reassign them.<sup>194</sup> If they can prove mixed-motives discrimination, they will face a different hurdle later in the litigation: the same-decision test.<sup>195</sup> To restate, the same-decision test operates as an affirmative defense, allowing an employer to avoid paying damages if it can prove it would have made the same decision without considering the impermissible motivating factor (the plaintiff's protected trait).<sup>196</sup>

Though older women technically do not need an opposite-sex comparator if they are suing in a jurisdiction that does not require it, the same-decision test will make it difficult for them to win damages without one.<sup>197</sup> Consider this: if an older female has an opposite-sex comparator, she has already demonstrated that the employer *did not* make the same decision in the absence of her protected trait (her sex) because she has already proven that her employer treated an older male more favorably.<sup>198</sup> Consequently, one might assume that the employer could not prevail under the same-decision defense.<sup>199</sup> The plaintiff, at least theoretically, would be able to recover in full.<sup>200</sup>

But if a sex-plus-age plaintiff does *not* have an opposite-sex comparator, the same-decision defense will work against her for one important reason: her employer can demonstrate that it would have taken the same action against *any* employee losing the company money, whether the employee belonged to a Title VII-protected class or not.<sup>201</sup> Making a finan-

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by providing direct evidence and evidence of favorable treatment toward another woman who was "not a member of the subclass." *Id.* at 327.

194. For a further discussion of the reasons why women in certain industries may need to use the mixed-motives standard, see *supra* notes 117–23 and accompanying text.

195. See 42 U.S.C. § 2000e-5(g)(2)(B) (2018) (codifying same-decision defense).

196. See *id.* § 2000e-5(g)(2)(B)(ii) (providing limits on damages).

197. See Sullivan, *supra* note 29, at 383 ("[T]he liability/same decision structure allows juries to reach compromise verdicts and, when they do, deny the plaintiff monetary recovery other than fee awards, which . . . typically go to their attorney.").

198. See McAllister, *Proving*, *supra* note 31, at 762 ("Evidence that an employer treats such an opposite sex comparator more favorably than the plaintiff could be used . . . as proof that the employer utilizes 'one hiring policy for women and another for men . . .'").

199. See *e.g.*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95–97, 102 (2003) (affirming, in case where plaintiff presented opposite-sex comparator evidence, jury verdict that employer would not have made same decision absent plaintiff's sex).

200. See *id.* at 96–97 (reciting jury instructions given at trial). The pertinent instructions stated, "[t]he plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision." *Id.* (quoting *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 858 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003)).

201. See Brodin, *supra* note 106, at 293 (noting that when "the impermissible factor did not make a difference in the ultimate result," the same-decision test

cially savvy employment decision seems like—and *is*—a solid defense.<sup>202</sup> Notably, the employer need not produce its own opposite-sex comparator to prevail under the same-decision test—it simply needs some type of objective evidence demonstrating that it would have taken the same action in the absence of the plaintiff’s protected trait.<sup>203</sup>

The issue is that while an employer can show it hypothetically would have terminated any employee receiving negative feedback, in reality, only female employees need to worry that their aging appearance will result in an adverse employment action deemed financially beneficial to the company.<sup>204</sup> Predictably, older women get the short end of the proverbial stick.<sup>205</sup> If an employer succeeds under the same-decision defense, it is, of course, still liable for mixed-motives discrimination.<sup>206</sup> But a mere finding of liability, without monetary damages, means precious little.<sup>207</sup>

#### V. ABSOLUTE ZERO: THE PRACTICAL IMPACT OF SEX-PLUS-AGE RECOGNITION ON WOMEN IN THE SERVICE INDUSTRY

It bears mentioning that *all* sex-plus Title VII plaintiffs—not just sex-plus-age females—who lack an opposite-sex comparator will lose a motion to dismiss if their jurisdiction requires an opposite-sex comparator.<sup>208</sup>

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might be “characterized as a ‘harmless error’ doctrine” (quoting *Jones v. Alexander*, 609 F.2d 778, 782 (5th Cir. 1980)).

202. See *Sylvester*, *supra* note 83 (discussing effect of Las Vegas cocktail waitresses on casinos’ revenues). *Sylvester* quotes Christine Hardigree, previously the chair of hotel management at the University of Las Vegas: “The Rio started becoming known for having smoking-hot cocktail waitresses, and at first they saw a 30 percent bump in their gaming revenue, which they credited to that,” Hardigree said. “Then other casinos on the Strip followed.” *Id.*

203. See *Garcia v. City of Houston*, 201 F.3d 672, 677 (5th Cir. 2000) (finding “the contemporary, objective evidence presented by [defendant] about the overall process for selection and [plaintiff’s] lack of frontline tactical experience the evidence . . . sufficient to support the jury’s verdict” that employer would have made the same decision not to promote the plaintiff even without considering his race).

204. See *White*, *supra* note 8, at 1329–30, 1330 n.39 (“Discussions of how aging affects women typically reference the problem of appearance.” (quoting *Bisom-Rapp & Sargeant*, *supra* note 6, at 28)).

205. See *Porter*, *supra* note 11, at 80 (asserting that “the experiences of older women from a social and economic perspective . . . are truly unique from the experiences of older men or younger women”).

206. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (explaining the same-decision test provides “the employer [with] a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff”).

207. See *Coe v. N. Pipe Prod., Inc.*, 589 F. Supp. 2d 1055, 1098 (N.D. Iowa 2008) (“When faced with the real possibility of passing through the gauntlet of an employment discrimination trial, this court doubts that many plaintiffs would be willing to run the risk of prevailing on liability, but still receiving no monetary compensation for their efforts.”).

208. See, e.g., *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1053 (dismissing for failure to state claim of disparate treatment of older women relative to older men). Although *Frappied* is a sex-plus-age case, the rule of thumb on comparator evidence applies to any type of sex-plus case. See generally *McAllister*, *Proving*, *supra* note 31, at 775 (“[N]umerous courts have held, or impliedly

Similarly, all mixed-motives Title VII plaintiffs risk losing monetary damages if their employer prevails under the same-decision defense.<sup>209</sup> That said, the evidentiary requirement will disproportionately affect sex-plus-age females in industries where older male comparators are unlikely.<sup>210</sup> And the same-decision test will disproportionately affect sex-plus-age females because the employer will likely be able to prove it would have fired any employee receiving negative feedback, even if, realistically, it is only older women receiving such feedback.<sup>211</sup> Whether an older female plaintiff without an opposite-sex comparator fails at the pleadings or whether her employer prevails under the same-decision test, her lack of success is all but guaranteed.<sup>212</sup>

Thus, while *Frappied* acknowledges the unique discrimination older women face, it probably will not lead to a myriad of victorious older female plaintiffs.<sup>213</sup> The fact that most women's age discrimination claims are appearance-related suggests that many future sex-plus-age plaintiffs will be women working in industries where appearance is crucial to job success.<sup>214</sup> Unfortunately, many of the industries in which a woman's appearance (and correlatively, her youth) might mean the difference be-

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expressed the view, that Title VII sex-plus discrimination claims necessarily fail in the absence of opposite sex comparator evidence.”).

209. See Sullivan, *supra* note 29, at 396 (noting the motivating-factor standard “creates a risk of juries splitting the baby, that is, finding for plaintiffs on liability while finding for defendants on the same decision defense”).

210. See *Franchina v. City of Providence*, 881 F.3d 32, 53 (1st Cir. 2018) (discussing the diluted effect of Title VII when courts require opposite-sex comparators of plaintiffs who lack them in their workplace).

211. See Corbett, *supra* note 101, at 218 (“[M]ost people probably do recognize that most employment actions are taken for a number of reasons. Most employees against whom adverse actions are taken have given employers some legitimate reasons on which they could act. Thus, the same-decision defense often reflects reality and people’s sense of reality.” (footnote omitted)). Of course, women who receive negative feedback for aging do not “give” their employers a reason to take action; however, as one commentator noted, “as employers become more reliant on feedback from customers, they grant those customers more sway over employing functions that were once reserved exclusively to management, such as hiring, firing, and compensation.” Flake, *supra* note 13, at 2202–03.

212. See *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1340 (4th Cir. 1996) (Michael, J., dissenting) (“[A] plaintiff in a mixed-motive case is expressly precluded from recovering money damages and her right to injunctive relief is severely limited.”).

213. *But see* Porter, *supra* note 11, at 111 (predicting that older women will be given “the benefit of equal opportunity in employment” once courts recognize sex-plus-age claims).

214. See Adamitis, *supra* note 10, at 206–207 (“Although many age-discrimination complaints are not based on appearance per se, they may implicitly involve an applicant’s or employee’s ‘old’ or ‘older’ appearance and the stereotypical assumptions derived from that visual perception. Further, for women in particular, age and beauty often may be intertwined in an appearance-related discrimination claim.”); see also Porter, *supra* note 11, at 95 (“[E]specially when 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.”).

tween keeping her job and unemployment are not known for their high pay.<sup>215</sup>

Within the service industry, the United States Department of Labor reported in 2019 that servers earned an annual mean wage of \$26,800, bartenders earned \$28,000, and hosts earned \$24,010.<sup>216</sup> Unskilled jobs outside the service industry did not fare much better; for example, retail sales workers earned an annual mean wage of \$27,600, and receptionists earned \$31,250.<sup>217</sup> Because appearance-based discrimination is common in these types of “bridge jobs,” one might expect older women to steer clear of them.<sup>218</sup> But that isn’t always an option for older women, as they make up the very group that often needs to earn extra money at a bridge job before retirement is possible.<sup>219</sup> On a broad scale, women represent two-thirds of all individuals over sixty-five living in poverty, meaning the stringent requirements for sex-plus-age claims will unfairly burden one of America’s most financially vulnerable groups.<sup>220</sup>

*Frappied* is grounded in admirable policy concerns, but the court’s approach to recognizing sex-plus-age claims will exclude older women in certain sectors from Title VII’s protections.<sup>221</sup> And until society stops regarding older men more favorably than older women because older men are seen as more financially stable, sexually potent, and “socially useful” than their counterparts, employers will continue catering to consumer preference in a way that enables gendered sex-plus-age discrimination.<sup>222</sup> These judicial and social ramifications diminish the notion that “Title VII serves the interest of American society by ridding the workplace of the pollutant of employment discrimination.”<sup>223</sup> That lofty ideal certainly has limited practical implications for older women who need the same two things that strict comparator requirements and the same-decision test deny them: money and a job.

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215. See Burn et al., *supra* note 10, at 6 (“Attractiveness may matter for many bridge jobs, such as retail sales, where there is often interpersonal contact.”).

216. See *Occupational Employment Statistics*, *supra* note 116 (providing annual salary statistics per occupation).

217. See *id.*

218. See Chapin, *supra* note 9 (remarking that age discrimination is worse in industries where workers interact with the public, such as retail and service).

219. See Burn et al., *supra* note 10, at 5 (“Hiring discrimination can . . . be a major barrier to many older workers, especially women, who seek to extend their work lives with bridge jobs.”).

220. See CHRIST & GRONNIGER, *supra* note 36, at 3–4 (discussing distribution of economic insecurity amongst older adults in America).

221. See *supra* Sections IV.A & B.1.

222. See Porter, *supra* note 11, at 99 (quoting REVISIONING AGING: EMPOWERMENT OF OLDER WOMEN 18 (Jenny Onyx, et al., eds., Peter Lang Publishing, Inc. 1999)) (examining reasons behind inferior treatment of older women compared to older men).

223. See *Garcia v. City of Houston*, 201 F.3d 672, 679 (5th Cir. 2000) (considering whether Congress intended for courts to allocate attorneys’ fees in most mixed-motives cases).