

## **Identity and discrimination in the Work Place: An Intersectional, Legal History**

by Cameron Ryan

### **Introduction**

Intersectionality is a theory originating from Kimberlé Crenshaw in 1989. The theory focuses on, “the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups.”<sup>1</sup> This theory is used by feminist theorists to shed light on the plight of African-American women and women of other minority groups. This type of discrimination of these marginalized individuals and minority groups flows throughout American history.

The protection against such discrimination has been a recent development within only a few decades. This development has been fought in the office of lawmakers and in all the levels of the U.S. Courts of law. This article will analyze how the courts have dealt with such discriminatory cases, how the law has transformed, and how opinions have been adjusted to uphold the spirit of the U.S. Constitution.

### **Equal Protection of the Law**

The Fourteenth Amendment was adopted during the Reconstruction period in U.S. history after the Civil War in 1868. U.S. lawmakers made this critical addition to the U.S. Constitution in order to protect the rights and citizenship privileges of former slaves. The first section of the Fourteenth Amendment details that:

“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

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<sup>1</sup> Merriam-Webster, *Intersectionality*, <https://www.merriam-webster.com/dictionary/intersectionality> (last visited Jan. 21, 2019).

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>2</sup>

The legal standard requires that all law be applied equally, that no human being, politician, company, group, etc. may deprive a U.S. citizen of their rights, or the protections entitled to them by any law passed and upheld in the United States of America. Yet, from the Reconstruction period to the modern day, many injustices have been perpetrated against minorities and marginalized human beings.

The Fourteenth Amendment is the basis for laws providing remedies for discriminatory actions and it is the basis for the legal challenges in cases that have been brought since its inception to fight injustices through the due process of law. The laws of our country changed once again with the Civil Rights Movement, which furthered the rights and legal protections of minorities and other marginalized citizens.

### **Title VII and the EEOC**

In 1964, Title VII of the Civil Rights Act<sup>3</sup> was put into action. The purpose of Title VII was to offer legal and definitive protection against any public discrimination and any such practices in situations like educational systems and business. Title VII protects “any person” which has been defined as, “one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal

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<sup>2</sup> Constitute Project, *United States of America 1789 (rev. 1992)*, [https://www.constituteproject.org/constitution/United\\_States\\_of\\_America\\_1992](https://www.constituteproject.org/constitution/United_States_of_America_1992) (last visited Jan. 21, 2019).

<sup>3</sup> *Title VII of the Civil Rights Act of 1964*, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/statutes/titlevii.cfm>, (last visited Feb. 27, 2019.)

representatives, mutual companies, joint--stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 [originally, bankruptcy], or receivers.”<sup>4</sup> This definition includes any person or group regardless of age, race, gender, etc. Title VII provides protection against practices that may target or discriminate against any individual for situations like not hiring you because of your age, race, or both. As a result of Title VII, there have been many intersectional cases that have been brought forth since its inception. Title VII is the stage upon which these discriminatory practices get tried.

The Equal Employment Opportunity Commission (EEOC) was charged with the enforcement of Title VII in 1965 as the governing body designated to handle cases that fall under Title VII. Some of the EEOC’s powers include:

“The Commission is empowered... to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title [section 703 or 704]. (b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause.”<sup>5</sup>

This allows for the combination of discrimination claims based upon a number of different types of allegations and hence the concept of intersectional discrimination. This combination effect also allows for efforts to be

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<sup>4</sup> Id.

<sup>5</sup> Id.

initiated to prevent and protect against discrimination.

Since 1965 the case history for intersectional cases has grown so much that it has its own section on the EEOC's webpage.<sup>6</sup> There are only two cases concerned with just black women and these are labeled as "black female."<sup>7</sup> The recognition of cases where there are two attributes like race and gender combined really only began in December 2004.<sup>8</sup> Which is amazing given the fact that the EEOC started developing case files in 1965.

### **The Case of Emma DeGraffenreid and Other Late 20<sup>th</sup> century Intersectional Cases**

*Emma DeGraffenreid, et al. v. General Motors Assembly Division*,<sup>9</sup> St. Louis, was a law suit based on the employment practices of General Motors. The case, filed in 1977, focused on the firing of Emma DeGraffenreid and the appellants in 1974. The General Motors practices challenged by this law suit were the defendant's seniority system and last hired-first fired layoff scheme and were the only issues addressed by the parties on appeal.<sup>10</sup> The appellants, all black women, were fired in 1974. It was alleged that Emma DeGraffenreid was only hired due to a business recession in 1973.<sup>11</sup> The Court decided that, "In response to cross-motions for summary judgment the court dismissed on the merits the sex discrimination claims, and dismissed without

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<sup>6</sup> *E-Race*, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm>, (last visited Feb. 28, 2019.)

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Emma Degraffenreid, et al., Appellants, V. General Motors Assembly Division, St. Louis, Et Al., Appellees*. 558 F.2d 480 (8<sup>th</sup> Cir. 1977), <https://openjurist.org/558/f2d/480/emma-degraffenreid-et-al-v-general-motors-assembly-division-st-louis>, (last visited Feb. 28, 2019.)

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

prejudice the claim charging racial discrimination.” The effect of this ruling was that a complaint such as this one, under Title VII, might state a "cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.”<sup>12</sup> To summarize, the appellants and Emma DeGraffenreid could not sue on the basis of being a black female. They had to choose between one or the other, not their entire identity.

Eventually, this case made it to the Supreme Court who decided,

“Thus, when appellants failed to file charges with the EEOC within one hundred eighty days following their entry into service, GM was entitled to consider its earlier failure to hire appellants as lawful, a mere "unfortunate event in history which has no present legal consequences... we must affirm the dismissal of appellants' Title VII claims. However, appellants' race discrimination claims based on 42 U.S.C. § 19812 remain.”<sup>13</sup>

The Supreme Court agreed with the district court’s dismissal of Title VII claims, but not based on choosing a singular part of their complex, intersectional identity, but on a limit of when you can file under Title VII. The Supreme Court said that the race discrimination claim based on a different law, remained. Though in the case of Emma DeGraffenreid, the end result was that calling attention to the discrimination of black women in the work place based upon the Supreme Court’s interpretation of the law would serve to restrict the women’s access to protection rather than actually protect them.

In 1982, plaintiff Ruby Clark took American Broadcasting Companies (ABC)

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<sup>12</sup> Id.

<sup>13</sup> Id.

to court for a broadcast about street prostitution.<sup>14</sup> Ruby, a black woman, was walking down the street when she was made a part of the broadcast without her knowledge by way of photographs. Within the facts section of the Supreme Courts summary, the following was said about the plaintiff, “Plaintiff’s face was clearly visible. The plaintiff appeared to be in her early to mid-twenties. She was attractive, slim, and stylishly dressed...Apparently, plaintiff was unaware that she was being photographed. As plaintiff appeared, the narrator made the following remarks, ‘But for black women whose homes were there, the cruising white customers were an especially humiliating experience.’ Sheri Madison, a black female resident of the neighborhood plagued by prostitution appeared on the screen seconds after plaintiff. She stated, “Almost any woman who was black and on the street was considered to be a prostitute herself. And was treated like a prostitute.”<sup>15</sup> ABC, who filmed the broadcast, did not even question the plaintiff. With the added commentary, the bias created a terrible view of black women on that street and conveyed it to the public.

In the district court, Ruby’s case was dismissed at summary judgement due to the court having, “concluded that the broadcast was not libelous.”<sup>16</sup> The plaintiff filed an appeal. Not looking into the factual question of whether the broadcast was defamatory, the Supreme Court ruled that, “We conclude that the broadcast was capable of a defamatory meaning. Because the Broadcast was susceptible to two interpretations, one defamatory and the other non-defamatory, summary judgment for ABC was improvidently granted. Accordingly, we reverse and remand the case to the district court for proceedings consistent with this opinion.”<sup>17</sup> This decision allowed Ruby

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<sup>14</sup> *Ruby Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208 (6<sup>th</sup> Cir. 1982), <https://law.justia.com/cases/federal/appellate-courts/F2/684/1208/40768/>, (last visited Feb. 28, 2019.)

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Clark to have her day in court.

### **Intersectional Discrimination**

The modern era is no stranger to discrimination, it is still prevalent in public places. Society has learned to become a watchdog against such issues. In March 2016, the EEOC filed a class action lawsuit on behalf of African-American workers, *Equal Employment Opportunity Commission v. Stone Pony Pizza, Inc.*<sup>18</sup> The EEOC began their investigation after Chendra Johnson-Hampton filed a charge of discrimination with the EEOC on March 17, 2011, alleging that she was denied a position as a server at Stone Pony in September of 2010 because she is black, and that white females were hired for open server positions instead.<sup>19</sup> The EEOC investigated and subsequently filed a class action suit after finding, “additional [evidence] of class-wide discrimination against African Americans as a class.”<sup>20</sup>

The EEOC informed Stone Pony of its determination by letter dated June 29, 2012, and invited Stone Pony to engage in conciliation discussions. Stone Pony responded with a wholesale denial of the EEOC's findings...the EEOC issued a new determination letter with the additional finding of class-wide discrimination against African Americans as a class. In October of 2012, the EEOC invited Stone Pony to engage in a face-to-face conciliation conference and issued a proposed conciliation agreement that provided specific relief for individuals as well as class-wide... Stone Pony rejected the proposed

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<sup>18</sup> *Equal Employment Opportunity Commission v. Stone Pony Pizza*, 172 F.Supp.3d 941 (Mississippi 2016,) <https://law.justia.com/cases/federal/district-courts/mississippi/msndce/4:2013cv00092/34580/259/>, last visited Feb. 28, 2019.)

<sup>19</sup> *Id.*

<sup>20</sup> *Stone Pony Pizza Sued for Race Discrimination*, U.S.E.E.O.C., (May 20, 2013), <https://www.eeoc.gov/eeoc/newsroom/release/5-20-13.cfm>, (last visited Feb. 28, 2019.)

conciliation agreement.<sup>21</sup>

Another of the contested issues put forth by the defendant was that the EEOC did not have the power to submit such an action on behalf of individuals and therefore moved for summary judgement. The court denied the defendant's motion for summary judgement and affirmed the EEOC's power to bring a class action law suit when the finding of fact so warrants. The Court ruled that the summary judgements of both sides were granted in part, and dismissed in part. Of particular note, the court found that a defendant's constitutional rights to due process under the 7<sup>th</sup> Amendment were not violated by having the EEOC bring this class action law suit.<sup>22</sup> So, the EEOC's right to intervene was found to be appropriate.

The theory of Intersectionality looks at the individual indices of discrimination but also for the collective effect of discrimination on individuals and minorities based upon the various components of our complex identities. The fact that a black woman and other black applicants were denied while white women were hired for these server positions is part of the intersectional experience.

### **Conclusion**

These intersectional cases reflect the complexity of the reality of Crenshaw's theory of Intersectionality that describes the reality of discrimination in the work place and in our lives. By reviewing recent cases, evidence shows that intersectional discrimination existed from employers, media companies, and judges. The research also led to a look and analysis of laws protecting against discrimination in such public places with the Equal Employment Opportunity Commission (EEOC) being the agency on the front

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<sup>21</sup> *Equal Employment Opportunity v. Stone Pony Pizza*, 172 F. Supp. 3d 941(2016,) <https://www.leagle.com/decision/infdc020160329a96>, (last visited Feb. 28, 2019.)

<sup>22</sup> *Id.*

lines. The recent case, *EEOC v. Stony Pony Pizza, Inc.*, showed how procedural issues can impede the opportunity of the court to deal with the substantive issues. In any case, it is up to society to speak out and demand parity and fairness from our administrative agencies, the courts, and employers. It is also important to note that, “we the people” need to be aware of the legal requirements and interpretations of our laws that can so substantially affect our rights.