UNDERGRADUATE LAW REVIEW AT UC SAN DIEGO

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Expanding Intersectional Analysis: Protecting LGBTQ People of Color in State Employment Discrimination Law

ABSTRACT. LGBTQ people of color in the United States face disproportionately high rates of discrimination and harassment in employment as a population marginalized along the lines of race, sexual orientation, and/or gender identity. This article uses an intersectional lens to examine the use of state antidiscrimination law in protecting LGBTQ people of color. Discrimination protections across states are inconsistent and severely lacking in some jurisdictions. Several states do not prohibit sexual orientation and gender identity discrimination, and most do not recognize an adequate legal framework for analyzing discrimination on the basis of multiple traits. This article proposes statutory, administrative, and judicial solutions that states can adopt to allow LGBTQ plaintiffs of color to challenge discrimination on the basis of both race and sexual orientation/gender identity. Legislatures should amend antidiscrimination statutes to include sexual orientation and gender identity as protected classes, as well as explicitly state that employees can make claims on the basis of multiple protected characteristics. Executive antidiscrimination agencies should provide guidelines to courts on how to evaluate intersectional cases brought by LGBTQ people of color. Finally, state courts should adopt judicial precedents that embrace intersectional analysis and qualify sexual orientation and gender identity as protected categories under existing antidiscrimination statutes.

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INTRODUCTION

Decades after the passage of Title VII of the Civil Rights Act of 1964–which established significant employment discrimination protections[1]–certain individuals are still excluded from antidiscrimination doctrine. It is necessary to examine whether employment discrimination law translates into real-world protections for employees who are vulnerable to workplace mistreatment. This article seeks to examine how LGBTQ people of color, in particular, are conceptualized and excluded in employment discrimination law.[2]

LGBTQ people of color experience a unique form of discrimination as they occupy the "intersection" of race and sexual orientation and/or gender identity. Since its inception in 1989, the theory of "intersectionality" has been used to describe how people's experiences are informed by multiple aspects of their identities, including race, sex, age, and other characteristics.[3] In antidiscrimination law, intersectionality describes how people who are marginalized based on two or more aspects of their identities can experience unique forms of discrimination.[4] For example, a woman of color may encounter the simultaneous impact of race and sex discrimination; compared to a man of color or a white woman, she is subject to a unique set of stereotypes and prejudices informed by the whole of her identity. However, courts have not agreed on how to handle cases in which plaintiffs make discrimination claims based on multiple traits.[5] Legal scholars have scrutinized how the lived experiences of intersectional plaintiffs often fail to fit neatly into current legal frameworks.[6] As a result, these plaintiffs are conceptually erased from legal analysis and often have difficulty winning cases.[7]

LGBTQ people of color must be protected in antidiscrimination doctrine, as they face pervasive rates of employment discrimination. In 2024, the Center for American Progress surveyed adults in the United States (U.S.), finding that 23% of LGBTQ people of color reported being fired or not hired compared to 16% of all LGBTQ

[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2018).

[2] In using the term "LGBTQ," this article discusses sexual orientation and gender identity. In using the term "sexual orientation," it refers to people who identify as lesbian, gay, bisexual or pansexual. In using the term "gender identity," it refers to people who identify with a gender that does not align with the sex assigned to them at birth–this includes transgender people, non-binary people, etc.

[3] *See infra* Part II.A.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See infra* Part II.B.

adults, and 27% of LGBTQ people of color reported experiences with workplace discrimination overall.[8] This necessitates antidiscrimination laws that provide them with avenues for financial relief from discrimination and deter employers from unlawful conduct.

It is worth considering the role states play in protecting these plaintiffs from employment discrimination, as state laws often broaden protections beyond what federal law requires. As it stands, many systemic barriers remain in place for LGBTQ plaintiffs of color in state courts. Approximately 20% of LGBTQ adults in the U.S. reside in states lacking explicit antidiscrimination protections for sexual orientation and gender identity.[9] This is especially concerning from an intersectional perspective, given the significant rates of employment discrimination that LGBTQ people of color face. As one of the most vulnerable groups to workplace discrimination, LGBTQ people of color would benefit from state antidiscrimination protections that fully encompass their complex identity.

This article uses an intersectional lens to examine the efficacy of states' antidiscrimination laws in protecting LGBTQ plaintiffs of color, arguing that states should adopt statutes and legal precedents that expand their protections. Part I will outline the history of federal antidiscrimination laws in the U.S., including existing protections for LGBTQ people of color. Part II will explain the concept of intersectionality and its application to antidiscrimination law. Part III will examine state antidiscrimination law, focusing on the degree to which claims based on sexual orientation, gender identity, and intersectionality are legitimized by state statutes and judicial precedent. Finally, Part IV will propose legislative, administrative, and judicial solutions to ensure states can adequately protect LGBTQ people of color in employment discrimination law.

I. THE HISTORY AND EVOLUTION OF ANTIDISCRIMINATION LAWS

A. Federal Antidiscrimination Statutes

[8] Caleb Smith & Haley Norris, *The LGBTQI+ Community Reported High Rates of Discrimination in 2024*, Center for American Progress (Mar. 12, 2025), https://www.americanprogress.org/article/the-lgbtqi-community-reported-high-rates-of-discrimination-in-2024/.

[9] Movement Advancement Project, *Employment Nondiscrimination,* (Apr. 20, 2026), https://www.mapresearch.org/equality-maps/employment_non_discrimination_laws.

Title VII of the Civil Rights Act of 1964 is the foundational federal law for addressing employment discrimination.[10] Title VII prohibits employers, employment agencies, and labor organizations from discriminating against employees on the basis of race, sex, color, national origin, or religion.[11] It also prohibits retaliation against employees who make discrimination charges, testify, or participate in enforcement proceedings.[12] Unlawful employment practices involve treating employees in a way that adversely impacts their employment status or deprives them of employment opportunities on account of a protected trait.[13] This includes failing or refusing to hire, firing, or "otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment."[14]

Title VII also established the Equal Employment Opportunity Commission (EEOC), the executive agency responsible for enforcing all federal antidiscrimination laws.[15] Plaintiffs alleging employment discrimination under federal law are required to file a Charge of Discrimination with the EEOC.[16] If the EEOC finds evidence of discrimination, they provide the plaintiff with a Notice of Right to Sue letter.[17] Most federal statutes require plaintiffs to exhaust the administrative process and obtain this letter before they file a lawsuit in federal court.[18] It is through this administrative process that employees facing workplace discrimination can pursue remedies.

However, federal discrimination relief was not accessible to LGBTQ people of color for most of antidiscrimination doctrine's history. Sexual orientation and gender identity have never been expressly listed as protected classes within Title VII or any other federal law. Without explicit statutory protections, discrimination against LGBTQ employees was not considered unlawful.[19] To rectify this, Congress has attempted to pass legislation prohibiting discrimination on these grounds. The earliest attempt was the Equality Act of 1974, which would have prohibited discrimination on the basis of sex, marital status, and sexual orientation (gender identity was not included

[10] 42 U.S.C. § 2000-e2.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] 42 U.S.C. § 2000-e4.
[16] *What You Can Expect After You File a Charge*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge (last visited Nov. 25, 2025).
[17] *Id.*
[18] *Id.*
[19] *See* Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979); Bostock v. Clayton Cty. Bd. of Comm'rs, 723 Fed. Appx. 964, 964–965 (11th Cir. 2018), rev'd 590 U.S. 644 (2020).

in the bill).[20] Additionally, the Employment Nondiscrimination Act (ENDA), proposed in 1994 and amended in 2007, aimed to prohibit sexual orientation and gender identity discrimination.[21] Most recently proposed was the second Equality Act, introduced in 2015, which would have prohibited sex, sexual orientation, and gender identity discrimination in employment.[22] Unfortunately, none of these bills successfully passed.

Across several decades, legislative attempts to enshrine federal discrimination protections for sexual orientation and gender identity have stalled. Despite this, a total of twenty-two states currently have explicit protections for sexual orientation and gender identity in the language of their antidiscrimination statutes.[23] While the passage of federal legislation remained unreliable, LGBTQ plaintiffs depended on state statutes to find relief from discrimination until the Supreme Court expanded protections under Title VII in 2020.

B. Bostock vs. Clayton County

The United States Supreme Court's decision in *Bostock vs. Clayton County* (2020) determined that plaintiffs could make federal discrimination claims based on sexual orientation and gender identity under Title VII.[24] The primary plaintiff, Gerald Bostock, was a child welfare advocate working for Clayton County, Georgia. Shortly after joining a gay recreational softball league, Bostock began receiving disparaging comments about his sexual orientation from influential members of the community, soon prompting his termination for conduct "unbecoming" of a county employee.[25] *Bostock* was combined with two other cases: *Zarda vs. Altitude Express* (2018) and *R.G. & G.R. Harris Funeral Homes vs. EEOC & Stephens* (2018).[26] Plaintiff Donald Zarda was fired days after mentioning he was gay while at work.[27] Aimee Stephens, a

[20] Equality Act of 1974, H.R. 14752, 93rd Cong. (1974).
[21] Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994); Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007).
[22] Equality Act of 2015, H.R. 3185, 114th Cong. (2015).
[23] Movement Advancement Project, *supra* note 9.
[24] Bostock v. Clayton Cnty., 590 U.S. 644, 651–652 (2020).
[25] *Id.* at 653–654.
[26] *Id.*
[27] *Id.*

transgender woman, initially presented as male when she began her job and was fired after informing her employer that she intended to present as a woman.[28]

Bostock came before the Supreme Court to resolve a circuit split, as appellate courts differed on whether sexual orientation and gender identity discrimination violated Title VII.[29] The Supreme Court ultimately held that these categories are protected under the statutorily protected category of "sex," because sexual orientation and gender identity "are inextricably bound up with sex."[30] For example, an employer who fires an employee for being gay is essentially discriminating against this employee because he is a man attracted to men, while the employer would not fire a woman attracted to men. The employer is willing to tolerate this particular trait (attraction to men) in a female, but not a male. Therefore, the employee's sex plays a motivating role in the employer's discriminatory conduct. Similarly, gender identity discrimination also occurs "because of" sex when the *gender* an employee identifies with is at odds with the *sex* the employer perceives them to be.[31]

Bostock's precedent allows LGBTQ plaintiffs to make sexual orientation and gender identity discrimination claims in federal court, even in the absence of explicit protections within Title VII.[32] Since the decision, courts in ten states have adopted *Bostock*'s model by protecting sexual orientation and gender identity under existing sex discrimination prohibitions.[33] However, sixteen states have no statutory or judicial protections for these groups, with some courts reluctant to adopt the *Bostock* model under their statutes.[34] For LGBTQ plaintiffs living in these states, the most reliable way to bring forward discrimination claims is through federal courts.

Bostock's potential impact does not end with protecting sexual orientation and gender identity. The decision in *Bostock* is inherently intersectional.[35] The idea that sexual orientation and gender identity discrimination "necessarily entails discrimination based on sex"[36] illustrates the interlocking between two identity characteristics: sex and sexual orientation/gender identity. While the Supreme Court

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[28] *Bostock*, 590 U.S. at 653–654.
[29] *Id.*
[30] *Bostock*, 590 U.S. at 660–661.
[31] *Id.*
[32] Movement Advancement Project, *supra* note 9.
[33] *Id*.
[34] *Id.*; *see infra* Part III.A.
[35] Jamillah B. Williams, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, Georgetown Law Faculty Publications and Other Works 1, 22–24 (2025).
[36] *Bostock*, 590 U.S. at 651–652.

has not addressed intersectionality directly, they recognize in *Bostock* how the combination of multiple traits motivates a distinct form of discrimination. The resulting precedent has dynamic potential for redetermining LGBTQ people of color's position in antidiscrimination doctrine.

C. The McDonnell Douglas Framework

When analyzing discrimination cases, federal and state courts often rely on the McDonnell Douglas framework established by the Supreme Court in *McDonnell Douglas Corp. vs. Green* (1973).[37] This framework outlines the evidentiary requirements a plaintiff must fulfill to meet their initial burden of proof and establish a prima facie case for discrimination.[38] Under modern applications of the framework, a plaintiff generally must demonstrate that (a) they are a member of a protected class, (b) they were qualified for the job or position, (c) they were treated adversely, and (d) they were treated differently than other employees or applicants who are outside of their protected class.[39] Once the prima facie burden is met, the burden of proof shifts to the employer, who must "articulate some legitimate, nondiscriminatory reason"[40] for their conduct. If the employer successfully provides a legitimate reason to justify their actions, the employee must then prove that it was merely a pretext to conceal discrimination.[41]

The purpose of the McDonnell Douglas framework is to prove that a plaintiff faced adverse employment treatment "because of" a protected trait.[42] *McDonnell Douglas* allows plaintiffs to use circumstantial evidence to prove discrimination in the absence of direct evidence, such as an overtly discriminatory statement from the employer.[43] Plaintiffs demonstrate that the employer's actions suggested discriminatory intent by eliminating potential legitimate reasons for adverse treatment.[44] Nonetheless, the strict multi-step requirements of *McDonnell Douglas* also impose a high

[37] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–803 (1973).
[38] *Id.*
[39] *See Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 801.
[43] *Id.*
[44] Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?,* 53 Emory L. J. 1887, 1894 (2005).

evidentiary burden on plaintiffs.[45] In using the McDonnell Douglas framework, courts tend to apply a strict causation standard to discrimination claims, requiring plaintiffs to prove that their membership with a protected class was the "determinative" factor driving an employer's unlawful conduct.[46] This makes it difficult to demonstrate discrimination that may have been motivated by a variety of factors, both intentional and unintentional. For plaintiffs who encounter complex forms of discrimination—especially intersectional discrimination— the application of this framework can be limiting.[47]

II. INTERSECTIONALITY

A. Intersectionality as a Theory

LGBTQ people of color face a unique dilemma—they have a distinct positionality that is marginalized along the lines of race, sexual orientation and/or gender identity. As such, their ability to claim employment discrimination must be considered with an intersectional analysis. The term "intersectionality" was coined in 1989 by Kimberlé Crenshaw to describe the unique circumstances people face when they are "multiply-burdened" by two or more marginalized identities.[48] For example, a woman of color may be burdened by the simultaneous impact of race and sex discrimination. Crenshaw specifically examined this intersection between race and sex to understand why Black women often have difficulty winning discrimination cases.[49]

An early case concerning intersectionality was *DeGraffenreid vs. General Motors* (1976), in which five Black women brought suit against their employer under Title VII, alleging race and sex discrimination.[50] However, because the company employed both *white* women and Black *male* employees, the district court ruled that neither sex nor race discrimination was present, dismissing the case.[51] The court neglected to consider how the plaintiffs were subject to a distinct combination of race and sex

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[45] Zimmer, *supra* note 44, at 1892–1909.
[46] *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).
[47] *See infra* Part II.B.
[48] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, University of Chicago Legal Forum 139, 140 (1989).
[49] *Id.*
[50] Degraffenreid v. GM Assembly Div., 413 F. Supp. 142 (1976).
[51] *Id.* at 144–145.

discrimination that their Black male and white female peers did not encounter. When following this "single-axis framework," courts will consider factors that contribute to discrimination separately, rather than evaluating how they work in tandem to shape the plaintiffs' experiences.[52]

This issue arises from the assumption that an underprivileged class is privileged in every other respect. In the case of LGBTQ people of color, they are often made invisible by the default assumption that the LGBTQ community is largely white and middle-class.[53] On the other hand, antiracist measures appear to be centered around heteronormative and cisgender people of color.[54] Under this exclusionary rationale, those who identify as LGBTQ would not need additional legal protections because sexual orientation and gender identity are often viewed as "behavioral" traits rather than "immutable" traits like race or sex—they are assumed to be otherwise unmarginalized.[55] Not only are sexual orientation and gender identity discrimination delegitimized, but the compounding racial discrimination that LGBTQ people of color face is forgotten. The single-axis analysis of discrimination artificially separates an individual's identity into distinct, compartmentalized categories assumed to have no relationship to each other. This does not comport with the lived experiences of LGBTQ people of color and the disproportionately high rates of employment discrimination they face.[56]

B. Intersectionality in the Courts

No language in federal legislation explicitly protects plaintiffs on the basis of two or more protected characteristics. The Supreme Court has yet to review a case directly addressing intersectionality, and courts across the U.S. have not adopted a uniform method for analyzing cases of this nature.[57] Whether plaintiffs can successfully claim

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[52] Crenshaw, *supra* note 48, at 140.

[53] Darren L. Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 Cornell L. Rev. 1358, 1368–1375 (2000). (Hutchinson criticizes the lack of intersectional advocacy in racial justice and pro-LGBTQ scholarship and activism. Due to the analytical shortcomings of these respective social justice movements, the role of advocacy groups in promoting equal rights protections for LGBTQ people of color has been limited.)

[54] *Id.* at 1375–1378.

[55] *Id.*

[56] Smith & Norris, *supra* note 8.

[57] Williams, *supra* note 35, at 10–22.

intersectional discrimination largely depends on the jurisdiction in which their cases are considered.[58]

Historically, it has been difficult to bring forward an intersectional claim in court. Empirical evidence shows that plaintiffs alleging multiple types of discrimination in their charges are disadvantaged as opposed to plaintiffs who allege just one type. Rachel Kahn Best and her coauthors conducted an empirical study of equal opportunity cases between 1965 and 1999, finding that plaintiffs who made multiple claims were less than half as likely to win their cases as those who made single-factor claims.[59] A study of employment discrimination cases in the Eighth Circuit between 2008 and 2010 found that only 7.5% of cases involving intersectional claims made it past summary judgment, compared to 30.3% of cases involving single claims.[60]

Courts have expressed reluctance to adopt intersectionality, concerned that doing so would lead to bloated claims that disproportionately favor intersectional plaintiffs. The district court in *Degaffenreid* claimed "the creation of new classes of protected minorities... clearly raises the prospect of opening the hackneyed Pandora's box" in the form of a "super remedy."[61] In the opinion of *Judge vs. Marsh* (1986), a district court stated that sex-plus claims (where plaintiffs allege discrimination based on sex and another non-sex related trait)[62] have the potential to turn into a "many-headed Hydra" where "protected subgroups would exist for every possible combination of race, color, sex, national origin, and religion."[63] This skeptical analysis of intersectional claims trivializes them as exaggerated efforts to win remedies, disregarding how multiple identity traits are relevant to a plaintiff's experience with discrimination.

The issue is that courts' understanding of intersectionality is limited, and consequently, not applied to existing antidiscrimination frameworks. It is important to recognize that as antidiscrimination doctrine has evolved, so has the nature of discrimination itself. In modern contexts, it often takes the form of subtle bias that manifests indirectly. Employers may not be directly expressive or even intentional in their negative conduct towards an employee, but discriminatory bias nonetheless

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[58] Williams, *supra* note 35, at 10–22.

[59] Rachel K. Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 Law & Society Review 991, 1009 (2011).

[60] Emma R. Denny, *Mo' Claims Mo' Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation*, 30 L. & Inequality 339, 354–355 (2012).

[61] Degraffenreid v. GM Assembly Div., 413 F. Supp. 142, 143 (1976).

[62] *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–547 (1971); Jefferies v. Harris Cnty. Action Ass'n, 615 F.2d 1025, 1032–1035 (5th Cir. 1980).

[63] Judge v. Marsh, 649 F. Supp. 770, 780 (D.C. Cir. 1986).

underlies their actions.[64] This is especially true for intersectional discrimination, where adverse conduct based on one trait may be apparent while other traits motivate the discrimination in less obvious ways. However, courts tend to focus on overt forms of discrimination that are easier to prove and evaluate in antidiscrimination doctrine, neglecting to analyze the less-visible nuances of an employee's situation.[65] This is especially burdensome for the "complex" intersectional subject, who must connect an employer's discriminatory actions to multiple characteristics.[66]

Under the McDonnell Douglas framework, intersectional plaintiffs bear the increased burden of presenting evidence for each trait upon which they claim discrimination. In particular, *McDonnell Douglas* requires evidence that similarly situated employees outside of the plaintiff's protected class are treated differently.[67] Ideally, a plaintiff could demonstrate that a difference in treatment between them and a comparator indicates that their protected class was the determinative factor in their discrimination. However, this is less straightforward for intersectional plaintiffs. For LGBTQ people of color, they must find comparators for racial discrimination (white employees), sexual orientation discrimination (heterosexual employees), and/or gender identity discrimination (cisgender employees). In such cases, identifying another employee whom courts consider an appropriate comparator can be a difficult burden to meet.

Often, comparators share only one characteristic with the plaintiff, making it difficult to accurately represent their experiences. In *Moore vs. Hughes Helicopters, Inc.* (1983), the plaintiff Tommie Moore, a Black woman, attempted to present statistical evidence showing disparate impact against female employees and Black employees.[68] Moore intended to prove that Black women at Hughes Helicopters were facing compounded discrimination due to race *and* sex.[69] However, since Moore claimed discrimination as a *Black woman*, the court would not allow her to use evidence that "represents" white female employees or Black male employees.[70] Moreover, the percentage of Black males employed in Hughes Helicopters' workforce exceeded the

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[64] Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 Colum. Hum. Rts. L. Rev. 657, 662–663 (2002–2003).
[65] *Id.*
[66] Minna J. Kotkin, *Diversity and Discrimination: A look at Complex Bias*, 50 Wm. & Mary L. Rev. 1439, 1490–1498 (2009).
[67] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–803 (1973).
[68] Moore v. Hughes Helicopters, Inc., Div. of Summa Corp., 708 F.2d 475, 478 (9th Cir. 1983).
[69] *Id.*
[70] *Moore*, 708 F.2d at 480.

percentage of Black males employed in the Los Angeles County workforce at the time.[71] Therefore, the court reasoned that Moore could not prove racial discrimination.[72] Moore was ultimately unable to establish a prima facie case for sex or race.[73] Her evidence became redundant due to the court's decision to center *white* women and Black *men* in its analysis of both claims.[74]

Employees who possess only *one* marginalized trait will often serve as the standardized model comparators against whom discrimination claims are measured. The single-axis framework formulaically categorizes intersectional plaintiffs in relation to comparators rather than analyzing the actual nature of the discrimination itself. Such analysis attempts to situate the plaintiff within a protected *group* instead of determining whether they are protected as an *individual* with a unique set of experiences. This produces an oversimplified understanding of the plaintiffs' situation. It forces them into narrowly constructed identity categories, misrepresenting their lived realities and ultimately disadvantaging them in court.

C. Lam vs. University of Hawaii

In some cases, courts have evolved from the single-axis framework to assess intersectional cases. In *Lam vs. University of Hawaii* (1994), the Ninth Circuit Court explicitly recognized that discrimination may be based on a combination of traits.[75] Maivan Lam, a professor at the University of Hawaii, claimed discrimination under Title VII on the basis of race, national origin, and sex as a Vietnamese woman.[76] Lam had applied for and was anticipated to be the director of the university's Pacific Asian Legal Studies Program, but the faculty canceled two separate searches for a director without hiring anyone for the position.[77] The district court initially granted summary judgment to the defendant, since the university faculty had favorably considered an Asian man and a white woman in their candidate search.[78]

The Ninth Circuit criticized the district court's reasoning, as it "seemed to view racism and sexism as separate and distinct elements amenable to almost mathematical

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[71] *Moore*, 708 F.2d at 480.
[72] *Id.*
[73] *Id.* at 484–486.
[74] Crenshaw, *supra* note 48, at 143-146.
[75] Lam v. University of Hawaii, 40 F.3d 1551, 1561–1562 (9th Cir. 1994).
[76] *Lam*, 40 F.3d at 1554–1558.
[77] *Id.*
[78] *Id.*

treatment, so that evaluating discrimination against an Asian woman became a simple matter of... looking for racism [and] sexism 'alone...'"[79] The court contended that "the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences,"[80] since the combination of these traits subjects an individual to a unique set of stereotypes and assumptions.[81] Ruling in favor of Lam, the Ninth Circuit embraced the legitimacy of intersectional claims, presenting a framework that evaluates a plaintiff in the totality of their identity rather than through a singular categorical lens.[82]

Legal scholars consider the precedent in *Lam* to have set the ideal standard for how courts should adopt intersectionality.[83] However, this framework has not been universally adopted. The Supreme Court has yet to rule on establishing a framework for handling cases involving multiple claims, and courts across the U.S. remain divided on the issue. For LGBTQ plaintiffs of color, an intersectional claim based on race and sexual orientation/gender identity is subject to similar obstacles as other intersectional claims.[84] In states that lack specific protections for sexual orientation and gender identity, plaintiffs have more difficulty proving that the discrimination they face violates an antidiscrimination statute.[85]

D. Sexual Orientation, Gender Identity, and Race Claims

The "mathematical treatment" of discrimination criticized by the Ninth Circuit often manifests when plaintiffs attempt to claim race and sexual orientation/gender identity discrimination. There is a tendency to disaggregate these claims into mutually exclusive categories, which risks misrepresenting and weakening plaintiffs' cases. In several cases, plaintiffs can only proceed on one claim.

1. Doe vs. Triangle Doughnuts

In *Doe vs. Triangle Doughnuts* (2020), the plaintiff Doe faced severe harassment from coworkers and customers for being transgender, in addition to being subject to

[79] *Lam*, 40 F.3d at 1561–1562.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] Kotkin, *supra* note 66, at 1475.
[84] *See infra* Part II.D.
[85] *See infra* Part III.A.

derogatory racial slurs.[86] However, Doe was only permitted to proceed with her gender identity harassment claim.[87] The race claim was dismissed because the evidence, according to the court, "fail[ed] to show a workplace in which Doe suffered sufficiently pervasive or severe discrimination *because of her race.*"[88] The Court perceived race and gender identity as separate categories, requiring the plaintiff to meet the burden of proof for each individually.[89] While much of Doe's evidence illustrated gender identity discrimination, she also demonstrated that racial bias was present through her coworkers' racially motivated comments.[90] However, when her claims were disaggregated, the evidence was insufficient to support a single claim of racial discrimination.

2. Hoover vs. Beacon Container Corp.

Hoover vs. Beacon Container Corp. (2024) similarly involved race and gender identity discrimination. The plaintiff, Levi Hoover, was frequently treated with hostility and intimidation at his workplace by other employees and the owner.[91] This included repeated derogatory sex-based and race-based comments.[92] On some occasions, it involved physical intimidation, such as employees getting in Hoover's face or one employee throwing a box at him.[93] Additionally, the plaintiff suffered a work-related injury and was forced to continue performing certain tasks despite his medical restrictions.[94] Hoover was suspended under the pretext of "inadequate work tasks" and eventually terminated.[95] While the plaintiff's gender identity claim for a hostile work environment and discrimination survived, his race claim did not. According to the court, the "sporadic and isolated" race-based comments were not sufficient to plead racial discrimination.[96] Similar to *Doe*, the court failed to consider how race discrimination manifested as subtle bias, as opposed to the more blatant

[86] Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 122–124 (E.D. Pa. 2020).
[87] *Id.* at 128–130.
[88] *Id.* at 131.
[89] *Id.* at 128–131.
[90] *Id.* at 122-124.
[91] Hoover v. Beacon Container Corp., Civil No. 5:23-cv-04630-JMG, 2024 U.S. Dist. LEXIS 92299, at 1–5 (E.D. Pa. May 23, 2024).
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Hoover*, 2024 U.S. Dist. LEXIS 92299 at 9.

gender identity discrimination Hoover endured. The single-axis approach defeated the possibility of perceiving the plaintiff's multidimensional experience, where gender identity discrimination was also racialized.

3. Molina vs. John Jay Institute for Justice and Opportunity

In *Molina vs. John Jay Institute for Justice and Opportunity*, the plaintiff's race and sexual orientation claims were rejected under a single-axis analysis. Juan Molina, who identified as an Afro-Latino pansexual male, presented refusal to hire and promote claims on account of sexual orientation and race discrimination.[97] Molina initially applied and interviewed for the Director of Career Pathways position, which was offered to a white heterosexual male, while Molina received a different position as a Mentoring and Alumni Coordinator.[98] Molina alleged that afterward, one of the interviewers commented that "[Plaintiff's] pants were too tight; [Plaintiff] was flamboyant; and [Plaintiff] was rude and catty."[99] These reasons allegedly motivated his rejection by the interviewer. Molina claimed that the interviewer, who identified as a white gay woman, was aware of "the invidiously discriminatory connotations of the term flamboyant, and the stereotypical ascription of unprofessionalism associated with [Plaintiff]'s presentation."[100] This formed the basis of his sexual orientation claim. Later, when Molina attempted to apply for a promotion to another director position, the same interviewer declined to interview him.[101] Meanwhile, after two of his supervisors left the Institute, Molina was required to perform their work in addition to his own, without an increase in title or pay.[102] Only after he left the Institute was the position he applied for filled by "an African American heteronormative-presenting male, who had less professional experience than Plaintiff."[103]

Furthermore, racial bias and hostility were present in Molina's workplace. In addition to Molina, thirteen Black or Latino staff members complained to the defendants about discrimination and/or a racially hostile work environment, and all

[97] Molina v. John Jay Inst. for Just. & Opportunity, et al., No. 23 Civ. 1493, at 2–7 (S.D.N.Y. Sept. 24, 2024).
[98] *Id.*
[99] *Id.* (internal quotations and citations omitted).
[100] *Id.* (internal quotations and citations omitted).
[101] *Id.*
[102] *Id.*
[103] *Id.*

eventually resigned, were fired, or were constructively discharged.[104] Among the complaints, they alleged that the defendants refused to consider or hire them for managerial positions, denied them equal pay, frequently demeaned their work, and used discriminatory language.[105] The defendants also repeatedly refused to investigate race discrimination claims, as well as Molina's sexual orientation discrimination claim.[106]

The court ruled against Molina, reasoning that Molina's claims of sexual orientation and race discrimination both ultimately failed.[107] The race claim, according to the Court, was not sufficiently supported by factual allegations, despite numerous other staff members also experiencing discrimination.[108] It was also observed that an African American heteronormative-presenting male was hired in Molina's place.[109] Regarding sexual orientation, the Court pointed out that the interviewer who refused to hire and promote Molina is a gay woman, and "[w]hen the person who allegedly discriminated against plaintiff is a member of the same protected class as plaintiff, the court applies an inference against discrimination."[110]

The Court neglected to perceive the plaintiff's unique position at the intersection of sexual orientation and race by viewing them as standalone factors in the case. The Court was inclined to make an inference against discrimination because the person who was hired over the plaintiff was an African American *heteronormative*-presenting man, and the interviewer who neglected to hire or promote him was a gay *white* woman. Through this restricted lens, the Court failed to perceive how Molina's positionality as a gay man of color disadvantaged him overall. Moreover, the single-axis framework weakened his discrimination claim because the evidence Molina presented was insufficient to support his individual claims. Despite the presence of both sexual orientation and racial bias, the single-axis framework left him unable to prove either.

III. ANTIDISCRIMINATION LAW AND THE STATES

State laws often extend discrimination protections beyond the standards set by federal law. Some states have broadened protections for plaintiffs by specifying

[104] *Molina*, No. 23 Civ. 1493 at 8–9.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 19–22.
[108] *Id.*
[109] *Id.*
[110] *Id.*

additional protected classes in their laws, including sexual orientation and gender identity. Additionally, while the issue of intersectionality has not been clearly resolved under federal law, it should be considered to what extent state antidiscrimination laws would enable intersectional claims to succeed. While some states have implemented these measures, many have yet to follow suit. It is necessary to examine where states have successfully expanded protections for LGBTQ people of color and where they have fallen short.

A. Sexual Orientation and Gender Identity in the States

Currently, twenty-two states have explicitly designated sexual orientation and gender identity as protected classes under antidiscrimination law.[111] Meanwhile, protections in several states are not statutory, but dependent on the state courts' affirmation of *Bostock vs. Clayton County* (2020) to integrate sexual orientation and gender identity into the protected category of sex. For example, the Michigan Supreme Court cited *Bostock* in *Rouch World, LLC vs. Department of Civil Rights* (2022) when it held that sexual orientation is a protected status due to the state's statutory prohibitions against "sex" discrimination.[112]

However, the application of *Bostock* has been inconsistent across state lines. Sixteen states do not explicitly protect sexual orientation and gender identity within their discrimination statutes or their judicial precedent.[113] Two states, Iowa and Wisconsin, protect sexual orientation but not gender identity.[114] Some state judges have expressed reluctance to adopt the Supreme Court's reasoning in extending "sex" discrimination prohibitions to sexual orientation and gender identity. The dissenting opinion of *Bostock*, authored by Justice Samuel Alito, encapsulates the primary dispute against the majority opinion's rationale:

> Title VII prohibits discrimination because of *sex itself*, not everything that is related to, based on, or defined with reference to, 'sex'... In 1964 [when the Civil Rights Act of 1964 was first passed], ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual

[111] Movement Advancement Project, *supra* note 9.
[112] Rouch World, LLC v. Dep't of Civ. Rights, 510 Mich. 398, 404–433 (2022).
[113] Movement Advancement Project, *supra* note 9.
[114] *Id.*

> orientation, much less gender identity. The *ordinary meaning* of discrimination because of 'sex' was discrimination because of a person's biological sex, not sexual orientation or gender identity.[115]

The arguments against *Bostock* are based on (a) whether protections for sexual orientation and gender identity are based on legislative intent and (b) whether it is within the courts' power to establish those protections when they are not explicitly mentioned in statutes.[116] The dissenting opinion advocates for a textualist interpretation of antidiscrimination laws where "sex" refers to a plaintiff's biological sex as male or female, arguing that courts should rule in line with legislative intent.[117]

After *Bostock*, the dissenting opinion in *Rouch World* argued along the lines of Justice Alito's rationale.[118] It claims that the language of Michigan's antidiscrimination statute "does not prohibit sexual-orientation discrimination, and it is not within the constitutional power of this Court to alter that language."[119] Establishing discrimination protections based on sexual orientation, the dissenting opinion argued, is a responsibility left to lawmakers. The dissent is highly concerned with legislative intent and contends that expanding sex discrimination to encompass other categories amounts to policymaking, accusing the *Bostock* decision of judicial overreach.

Following the dissenting opinions in *Bostock* and *Rouch World*, certain states have avoided integrating *Bostock* into their own antidiscrimination doctrine. For example, the Missouri Supreme Court held in *R.M.A. vs. Blue Springs R-IV School District* (2025) that gender identity is not protected under the Missouri Human Rights Act (MHRA).[120] Responding to arguments based on *Bostock,* the Court claimed that the "plain meaning" of "sex" under Missouri law refers only to biological sex.[121] The Court also considered that the Missouri legislature repeatedly rejected proposals to amend the MHRA to include gender identity.[122] Furthermore, the Court justified its refusal to adopt the Supreme Court's precedent by alleging the plaintiff sued for public accommodations discrimination, not employment discrimination.[123] This is despite

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[115] *Bostock*, 590 U.S. at 694–706.
[116] *Id*. at 704–717.
[117] *Id*. at 706.
[118] *Rouch*, 510 Mich. at 433–502.
[119] *Id*. at 435.
[120] R.M.A. v. Blue Springs R-IV Sch. Dist., 717 S.W.3d 187, 191–198 (Mo. 2023).
[121] *Id.* at 195.
[122] *Id.*
[123] *Id.* at 195–197.

the fact that the MHRA prohibits both public accommodations *and* employment discrimination.[124] Rejecting *Bostock*'s interpretation of the law's language in relation to public accommodations allowed the Missouri Supreme Court to avoid applying the same protections to employment.

An appellate court in West Virginia went even further in explicitly rejecting *Bostock* in *Jones vs. Town of Lumberport* (2024), an employment discrimination case filed under state law.[125] The majority opinion held that the "plain and unambiguous" language of the West Virginia Human Rights Act (WVHRA) does not protect sexual orientation under "sex."[126] Additionally, they argue, the West Virginia Legislature's repeated failures to enshrine sexual orientation as a protected class indicate that it does not intend for sexual orientation to be protected.[127] The plaintiff cited *Bostock* in an attempt to convince the Court to recognize his discrimination.[128] However, the majority dismissed the argument, stating simply that "our conclusion that the word 'sex' in the WVHRA plainly does not encompass 'sexual orientation' is a compelling reason to justify a different result than that reached in *Bostock*."[129] The court broke from the tradition of interpreting WVHRA in line with federal interpretations of Title VII, relying solely on the "plain text" argument that fails to consider the central logic of *Bostock*—that an employer who discriminates on the basis of sexual orientation discriminates "because of" sex.[130]

Ultimately, the decision in *Bostock* did not resolve the conflict arising in the absence of explicit statutory protections for LGBTQ plaintiffs. As long as state legislatures do not implement express protections for sexual orientation and gender identity, and the courts choose to interpret those statutes literally, LGBTQ plaintiffs will continue to be neglected in antidiscrimination doctrine. For LGBTQ plaintiffs of color, this means they have the burden of proving discrimination solely based on race, even if sexual orientation or gender identity played a significant role in their mistreatment.

B. Intersectionality in the States

[124] Mo. Rev. Stat. §§ 213.055, 213.065 (2025).
[125] Jones v. Town of Lumberport, W. Va., No. 2023-C-75, 2024 W. Va. App. LEXIS 405, at 6–9 (Cir. Ct. Harrison Cnty. Dec. 23, 2024).
[126] *Id.*
[127] *Id.* at 11.
[128] *Id.* at 10–11.
[129] *Id.*
[130] *Id.* at 15–29.

In 2024, California became the first state to statutorily recognize intersectionality with the passage of S.B. 1137, amending the Fair Employment and Housing Act (FEHA) and the Unruh Civil Rights Act to prohibit discrimination "not just because of one protected trait, but also because of the combination of two or more protected bases."[131] Citing Kimberlé Crenshaw, the California legislature "recognizes that where two or more bases for discrimination or harassment exist, they cannot be neatly reduced to distinct components" and "it may be necessary to determine whether the discrimination or harassment occurred on the basis of a combination of those factors, not just based on any one protected characteristic by itself."[132] The legislature also officially affirmed the Ninth Circuit's decision in *Lam vs. University of Hawaii.*[133] This represents an important advancement towards legitimizing intersectionality, not just as a theory, but as an explicit protection in antidiscrimination doctrine. With the passage of these amendments, LGBTQ plaintiffs of color in California now have a clear legal foundation for challenging forms of discrimination specific to them.

Although the impact of C.A. S.B. 1137 is limited to California, it could potentially set a precedent for other state legislatures to broaden statutory protections for intersectional plaintiffs. California is currently the only state to have defined the concept of intersectionality within a statute. The majority of states have failed to confront the issue or clarify how intersectional claims should be handled. Without a clear definition or guidelines outlining a framework for analyzing intersectional cases, courts are likely to default to the single-axis framework that divides a plaintiff's identity into separate but limited categories. Intersectional claims are likely to encounter similar obstacles in state jurisdictions as they do in federal courts. Since state courts commonly adopt the McDonnell Douglas framework, plaintiffs may be forced into a categorical framework that misrepresents the discrimination they faced. State courts must be provided with a clear understanding of intersectionality and how it should be applied to statutes, in order to give plaintiffs the best chance of representing their complex cases.

IV. SOLUTIONS

It is necessary to establish frameworks that allow LGBTQ people of color to challenge discrimination, win remedies, and deter employers from discrimination.

[131] S.B. 1137, 2023–2024 Reg. Sess. (Cal. 2024).
[132] *Id.*
[133] *Id.*

They should be able to make intersectional claims that represent their lived experiences and endure in courts. Given that federal law has not directly addressed intersectionality, plaintiffs cannot afford to wait until Congress passes a law or the Supreme Court rules to have their claims recognized. States should offer an alternative by implementing legislative, administrative, and judicial measures to protect the status of LGBTQ people of color in antidiscrimination doctrine.

A. Legislative

Statutory language is the strongest and most ideal form of protection against employment discrimination, as it clarifies existing protections rather than leaving them to court interpretation. For LGBTQ people of color, state legislatures must amend antidiscrimination statutes to (a) specify that discrimination based on a combination of multiple protected traits is prohibited and (b) explicitly list sexual orientation and gender identity as protected classes.

This requires legislatures to explicitly recognize discrimination on the basis of multiple traits within statutory language. The passage of C.A. S.B. 1137 demonstrated this by declaring that the state's antidiscrimination statutes "prohibit discrimination not just because of one protected basis, but also because of the combination of two or more protected bases."[134] For LGBTQ people of color, this would allow them to address the combination of racial *and* sexual orientation/gender identity discrimination.

States must also add language to their antidiscrimination statutes that specifically names sexual orientation and gender identity as protected classes. This is especially important in states where the judiciary refused to adopt *Bostock* under strict textualist interpretations. Moreover, these measures must be made as *amendments* to state antidiscrimination statutes rather than as stand-alone statutes. For the statutory recognition of intersectionality to be effective, sexual orientation and gender identity must be included in the language of already-existing antidiscrimination statutes so plaintiffs can aggregate their claims with racial discrimination.

Individual states have already surpassed federal protections in this regard since they tend to add new protected categories in the form of amendments to existing statutes.[135] The federal legislative precedent, meanwhile, is for Congress to add protected

[134] S.B. 1137, *supra* note 131.

[135] Nicole Delaney & Joanna N. Lahey, *The ADEA at the Intersection of Age and Race*, 40 Berkeley Journal of Employment and Labor Law 61, 85–87 (2019).

categories by passing new laws instead of amending Title VII. For example, disability, age, and pregnancy became protected under the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Pregnancy Discrimination Act (PDA), respectively.[136] A similar method was used when congressional legislators attempted to pass the Employment Nondiscrimination Act (ENDA) to prohibit sexual orientation and gender identity discrimination.[137]

The issue with a bill such as ENDA is that plaintiffs attempting to claim race and sexual orientation/gender identity discrimination would have to do so under two different statutes—Title VII and ENDA.[138] Legislative recognition for intersectionality would be in vain if plaintiffs had to aggregate claims across more than one statute.[139] Federal age and race discrimination claims made under Title VII and the ADEA have illustrated this issue, as plaintiffs encountered difficulty presenting combined claims to courts under the respective statutes.[140] A bill like the Equality Act would ideally integrate sexual orientation and gender identity into Title VII as amendments rather than as a separate statute.[141] However, the Equality Act has been in limbo since 2021, making it unlikely that plaintiffs can rely on its passage in the near future. While important bills have stalled and the scope of federal legislation remains limited, LGBTQ plaintiffs of color must be able to rely on state laws to find redress for discrimination. However, legislatures in several states have been unsuccessful or unwilling to enact such measures. In these states, emphasis should be placed on adopting administrative and judicial solutions to provide protection.

B. Administrative

States typically have employment antidiscrimination enforcement agencies called Fair Employment Practice Agencies (FEPAs), which are responsible for enforcing the state's antidiscrimination laws.[142] Functioning similarly to the EEOC, these agencies

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[136] 42 U.S.C. §§ 12111–12117, 2000e(k) (2018); 29 U.S.C. §§ 621–634.

[137] Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994).

[138] Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law,* 24 Duke Journal of Gender Law & Policy 107, 126–129 (2017).

[139] *Id.*

[140] Delaney & Lahey, *supra* note 135, at 82–83.

[141] Equality Act of 2015, H.R. 3185, 114th Cong. (2015).

[142] *Filing a Charge of Discrimination*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/filing-charge-discrimination (last visited Nov. 23, 2025).

administer a charge process through which plaintiffs can report employment discrimination.[143] FEPAs can take administrative action by providing specific guidelines to courts on how to address claims involving sexual orientation, gender identity, and intersectionality.[144] Providing state courts with standardized guidelines enables FEPAs to clarify how these cases should be addressed where statutes prove ineffective. This would promote judicial visibility of LGBTQ plaintiffs of color and correct preconceptions that recognizing intersectional claims would give these plaintiffs undue favorability. FEPAs should emphasize that intersectional claims are not attempts to inflate claims and win a "super remedy."[145] Rather, they aim to accurately reflect a plaintiff's multidimensional experience and the associated discrimination.

First, it is necessary to establish a clear definition of intersectionality that state courts can refer to, in order to establish a uniform understanding of how to evaluate such cases.[146] FEPAs should specifically define intersectionality as a theory that, under antidiscrimination doctrine, describes the *unique* discrimination people encounter due to multiple identity characteristics. FEPAs should emphasize the interconnectedness and inseparability of identity traits that result in distinct types of discrimination employees may encounter.

Second, these guidelines should discourage state courts from using a single-axis analysis framework to assess these cases, as it distorts the nature of the plaintiffs' situation.[147] Parceling plaintiffs' claims into strictly defined, separate identity categories makes it difficult for them to represent their circumstances in court. When identity characteristics are analyzed in isolation, plaintiffs cannot aggregate their evidence to support a broad intersectional claim. Evidence that might otherwise demonstrate discrimination is diminished to something "isolated" and "sporadic," insufficient to prove claims when the single-axis approach is applied.[148]

Third, FEPAs should emphasize the legitimacy of sexual orientation and gender identity discrimination. This includes formally affirming the decision in *Bostock* to pressure courts into adopting this precedent. This is especially necessary where these categories are absent in the language of statutes. FEPAs have a responsibility to recognize the forms of discrimination that negatively impact workers in their state, and

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[143] *Filing a Charge of Discrimination*, *supra* note 142.

[144] *See* Bradley A. Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 Geo. Mason U. C.R. L.J. 199, 232–234 (2006–2007).

[145] Degraffenreid v. GM Assembly Div., 413 F. Supp. 142, 143 (1976).

[146] *See* Areheart, *supra* note 144.

[147] *Id.*

[148] *See supra* Part II.D.

must recognize that sexual orientation and gender identity discrimination persistently impact employees' real-world experiences. FEPAs must take further measures to communicate with courts to ensure these workers can adequately challenge discrimination and win financial relief.

As administrative agencies, FEPAs do not have the same authority as legislatures and the judiciary in implementing employment discrimination protections. However, by publishing guidelines, they can standardize and clarify the existence of implied protections within state jurisdictions. Most importantly, agencies can use their administrative platform to legitimize claims made by LGBTQ people of color in their entirety and encourage courts to do the same.

C. Judicial

State antidiscrimination statutes are commonly modeled on federal statutes such as Title VII. As such, adopting certain federal precedents in state courts can provide frameworks for LGBTQ plaintiffs of color to argue their discrimination claims, especially where statutory gaps exist. Courts need to address (a) the difficulty that intersectional plaintiffs currently have in accurately representing their cases and (b) protections for sexual orientation and gender identity discrimination.

1. The Mixed-Motive Framework

A common issue for LGBTQ plaintiffs of color is conforming to the strict evidentiary burdens of the McDonnell Douglas framework, particularly when they encounter subtle bias or attempt to identify appropriate comparators. Alternatively, the mosaic, or "mixed-motive," framework should be considered. Under a mosaic framework, a plaintiff's adverse treatment may result from a combination of both legitimate and discriminatory reasons, under which they can still win damages.[149]

The mixed-motive approach was initially articulated in *Price Waterhouse vs. Hopkins* (1989), when the Supreme Court held that if "an impermissible motive played a motivating part in an adverse employment decision," the employer must "show that it would have made the same decision in the absence of the unlawful motive" to avoid liability.[150] An employer had to demonstrate that there were legitimate reasons for their conduct, which they would have relied on regardless of the employee's protected trait.

[149] Price Waterhouse v. Hopkins, 490 U.S. 228, 237–258 (1989).
[150] *Id.* at 250.

Following *Price Waterhouse,* Congress amended Title VII to formally recognize the mixed-motive framework, prohibiting adverse employment actions that occur when a protected characteristic "was a motivating factor for any employment practice, even though other factors also motivated the practice."[151] This is more favorable for plaintiffs because it makes it more difficult for employers to obscure discrimination behind a pretextual reason.

An initial limitation of the mixed-motive framework, as established by *Price Waterhouse,* was that it required plaintiffs to present direct evidence to prove discrimination was a "substantial factor" in the employer's decision, not just a "motivating factor."[152] However, this changed with the Supreme Court's holding in *Desert Palace, Inc. vs. Costa* (2003), a sex discrimination case.[153] The female plaintiff, Catharina Costa, endured sexual harassment in her workplace and was treated less favorably than male employees.[154] After a physical altercation with a male employee, she was terminated, while the male employee only received a temporary suspension.[155] The district court had given a jury mixed-motive instructions, stating that "if... the plaintiff's sex was a *motivating factor* in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason."[156] This decision was affirmed by the Supreme Court, holding that plaintiffs are not required to present direct evidence to proceed under a mixed-motive argument.[157] Now, rather than relying strictly on direct evidence to support their claims, plaintiffs can use circumstantial evidence, as they would under *McDonnell Douglas*. The change in evidentiary requirements makes the mixed-motive framework available to more plaintiffs than was previously possible under *Price Waterhouse.*[158] Notably, this includes intersectional plaintiffs, who can benefit from this framework in a modern context.

Intersectional claims are by their very nature mixed-motive, as they involve a combination of motivating factors.[159] Unlike the stringent evidentiary requirements of *McDonnell Douglas*, the mixed-motive framework offers a more flexible way for

[151] 42 U.S.C. § 2000e-2(m).
[152] *Price Waterhouse*, 490 U.S. at 276.
[153] Zimmer, *supra* note 44, at 1914–1921.
[154] Desert Palace, Inc. v. Costa, 539 U.S. 90, 95–97 (2003).
[155] *Id.*
[156] *Id.*
[157] *Id*. at 101–102.
[158] Zimmer, *supra* note 44, at 1920–1921.
[159] Denny, *supra* note 60, at 361–365.

plaintiffs to present their claims in their entirety. LGBTQ people of color could address the issue of subtle bias and the nature of their intersectional claims to prove the existence of discriminatory motives. As such, state courts should consider adopting the mixed-motive framework as established in federal law. Particularly in states that do not acknowledge sexual orientation and gender identity as protected classes, where these forms of discrimination are not considered "unlawful," the mosaic framework can present a way to earn damages if the plaintiffs demonstrate that race and sex played *any* motivating role in the employer's decision.

2. Adopting Federal Judicial Precedents

Courts must also directly address intersectionality, which could be done by adopting a model like that established by the Ninth Circuit in *Lam vs. University of Hawaii*. The analytical method it proposes is simple—the plaintiff's identity is evaluated in its totality, and claims are aggregated under the same set of facts. It recognizes how multiple characteristics can simultaneously play a role in discrimination.[160] Embracing intersectional claims in their entirety allows LGBTQ plaintiffs of color to have their complex claims fully recognized in state courts.

State courts should also adopt the Supreme Court's holding in *Bostock* in states where sexual orientation and gender identity are not statutorily protected. Under this precedent, existing protections for sex discrimination can serve as a basis for LGBTQ plaintiffs to claim sexual orientation and gender identity discrimination, even if they are absent in statutory language. For LGBTQ people of color specifically, *Bostock's* precedent goes even further to argue in favor of an intersectional interpretation of statutes. The majority opinion reasons that there is an indivisible relationship between sex and sexual orientation/gender identity, pointing to an "intersection" between these characteristics that results in a unique form of discrimination. While the Supreme Court has not addressed intersectionality directly, its relevance is strongly implied in *Bostock*.

Where state courts hesitate to expand discrimination protections due to conflicting textualist interpretations, they could look to the precedent established by the Supreme Court in *Oncale vs. Sundowner Offshore Services, Inc.* (1998).[161] Here, the court held that same-sex sexual harassment in the workplace, while not specifically mentioned in

[160] Lam v. University of Hawaii, 40 F.3d 1551, 1561–1562 (9th Cir. 1994).
[161] Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998).

Title VII, is actionable under "sex" discrimination prohibitions.[162] The majority opinion stated that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[163] An explicitly named prohibition in a statute (a "principle evil") does not stand by itself—it can give rise to other forms of discrimination ("reasonably comparable evils") that should be encompassed by the statute as well. *Oncale* implies the existence of protections beyond what is explicitly stated in the law. As such, its precedent can be used to address intersectional, sexual orientation, and gender identity discrimination.

Oncale's reasoning can be used to advocate for the full recognition of intersectionality, since discrimination based on two or more traits simultaneously is *reasonably comparable* to discrimination based on any one trait by itself.[164] Antidiscrimination statutes are meant to protect employees from adverse treatment based on their individual characteristics. However, discrimination based on a combination of those characteristics is similar enough to single-characteristic discrimination to also be prohibited. Therefore, under *Oncale's* rationale, plaintiffs can argue for their claims to be aggregated under a single intersectional claim rather than being evaluated individually.[165]

Oncale was also cited in the majority opinion of *Bostock* to justify encompassing sexual orientation and gender identity within "sex" discrimination protections.[166] It responds to the argument that "homosexuality and transgender status are distinct concepts from sex," since *Oncale* pointed out that although "'[s]exual harassment' is conceptually distinct from sex discrimination... it can fall within Title VII's sweep."[167] Similarly, sexual orientation and gender identity discrimination can be understood as "reasonably comparable evils" to the "principal evil" of sex discrimination, therefore falling under statutory protections as well. Moreover, contrary to the textualist interpretation articulated in Justice Alito's dissent, *Oncale* suggests that legislative intent is secondary to the language of the law and its implications, as "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[168] Sexual orientation and gender identity are implied to be protected

[162] *Oncale*, 523 U.S. at 78–82.
[163] *Id.* at 79.
[164] Patrick Berning-O'Neill, "*A Reasonably Comparable Evil": Expanding Intersectional Claims Under Title VII Using Existing Precedent*, 24 U. Pa. J. Const. L. 907, 932–938 (2022).
[165] *Id.*
[166] *Bostock*, 590 U.S. at 651–652.
[167] *Id.*
[168] *Oncale*, 523 U.S. at 79.

under the category of sex, regardless of the social context in which an antidiscrimination law was passed and whether the legislature intended them to be included in discrimination protections.

Where the language of statutes falls short of protecting LGBTQ plaintiffs of color, there is existing precedent to legitimize their claims. Expansive federal precedents such as *Lam, Bostock,* and *Oncale* acknowledge that certain forms of discrimination exist despite not being clearly written in the law. It is the role of courts to reconcile the plain text of antidiscrimination laws with the lived experiences of plaintiffs. Intersectional discrimination against LGBTQ people of color is undeniably real, and it is necessary for antidiscrimination doctrine to reflect that.

CONCLUSION

States have the potential to offer broader protections for U.S. employees against discrimination and workplace harassment, and many have done so. However, protections for LGBTQ people of color are still severely lacking in several states, statutorily and judicially. As a group facing some of the highest rates of discrimination in the country, they should be able to challenge discrimination in court on both the state and federal levels. This entails legislative, administrative, and judicial actions that account for LGBTQ people of color's intersectional identities in their totality. Measures must be taken to protect sexual orientation and gender identity, particularly in states that have not yet done so. Additionally, protections must be provided for plaintiffs on the grounds of intersectionality, requiring states to recognize the legitimacy of multiple-characteristic claims. Beyond providing opportunities for individual financial remedies, these antidiscrimination protections could have a long-term effect in deterring workplace discrimination against LGBTQ people of color. Through recognizing the legitimacy of the unique discrimination these individuals face and adopting legal protections, state legislatures and courts can provide LGBTQ people of color with equitable opportunities to address employment discrimination.