In The

Appellate Court of Maryland

No. 2290
September Term, 2023

MDEC No. ACM-REG-2290-2023

VIVIAN CHEUNG,

Appellant,

v.

HOWARD HUGHES MEDICAL INSTITUTE,

Appellee.

Appeal from the Circuit Court for Montgomery County
in Case No. 478190V (Hon. David Boynton, Hon. Jill Cummins; Hon. Cheryl McCally)

AMICUS CURIAE BRIEF OF NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF APPELLANT (FILED WITH ALL PARTIES' CONSENT)

Vasanthi Reddy
(AIS No. 1312190039)
Da Hae Kim (Pro Hac Vice Pending)
Elizabeth Theran (Pro Hac Vice Pending)
National Women's Law Center
1350 I Street NW, Suite 700
Washington, DC 20005
(202) 588-5180
vreddy@nwlc.org

Courtney Whang (Pro Hac Vice Pending)
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor,
New York, New York 10010
(212) 849-7000
courtneywhang@quinnemanuel.com

Counsel for Amicus Curiae

COUNSEL PRESS, LLC (888) 277-3259

Table of Contents

Table of Authorities

Cases

Statutes, Rules, and Local Laws

Other Authorities

Statement of the Case

The National Women's Law Center (NWLC) incorporates by reference the appellant's statement of the case.[1]

Statement of Facts

NWLC incorporates by reference the appellant's statement of facts.

Statement of Interest

NWLC fights for gender justice — in the courts, in public policy, and in our society — working across the issues that are central to the lives of women and girls. NWLC uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us — especially women of color, LGBTQ people, and low-income women and families. Since its founding in 1972, NWLC has worked to advance workplace justice, income security, educational opportunities, and health and reproductive rights for women and girls and has participated as counsel or amicus curiae in a range of cases in the U.S. Supreme Court, lower federal courts, and state courts.

[1] No person other than NWLC and its attorneys made a monetary or other contribution to the preparation or submission of the brief.

Argument

Maryland courts routinely refer to federal jurisprudence construing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as persuasive authority in interpreting the Maryland Fair Employment Practices Act (MFEPA), Md. Code Ann., State Gov't §§ 20-601 *et seq.*, and the Montgomery County Human Rights and Civil Liberties Law (MCHRCLL), M.C.C. § 27, and have gone beyond the protections of federal law when doing so serves these statutes' remedial purpose. It is well settled that Title VII allows intersectional claims; every federal appellate court that has reached the issue on the merits has agreed. This Court should likewise allow Dr. Cheung's MFEPA and MCHRCLL claims of discrimination based on sex, race, and national origin to move forward along with her disability claim. Applying an intersectional lens is both legally correct and helps effectuate the purpose of these laws by better capturing the complex realities of how workplace discrimination manifests for disabled women of color.

I. Maryland Courts Interpret MFEPA and MCHRCLL at Least as Broadly as Title VII.

The Supreme Court of Maryland has been unequivocal that it interprets the MFEPA in accordance with Title VII except where the state legislature has directed otherwise. "The MFEPA is a remedial statute, which we interpret broadly in favor of claimants seeking its protection. Further, courts interpret the MFEPA consistent

with its federal corollary, absent legislative intent to the contrary[.]" *Doe v. Catholic Relief Servs.*, 484 Md. 640, 680-81 (Md. 2023) (internal quotation marks and citation omitted); *see also Haas v. Lockheed Martin Corp.*, 396 Md. 469, 491, 494 (2007) (interpreting Maryland employment discrimination statute to confer broader protections against discrimination than the Supreme Court did regarding Title VII). Absent contrary legislative intent, "[Maryland state courts] read [MFEPA] in harmony with [Title VII] and [] construe the two provisions to fulfill the same objectives." *Chappell v. S. Md. Hosp., Inc.*, 320 Md. 483, 494 (1990). Maryland courts therefore "may look to court decisions interpreting" Title VII. *Id.*; *see also Linton v. Johns Hopkins Univ. Applied Physics Lab.*, 2011 WL 4549177, at *4-5 (D. Md. Sept. 28, 2011) (applying Title VII case law to pendent MFEPA claims).

Likewise, the MCHRCLL is "substantially similar, but not necessarily identical, to prohibitions in federal and state law." *Cohen v. Montgomery Cnty. Dep't of Health & Hum. Servs.*, 149 Md. App. 578, 590 (2003) (quoting MONTGOMERY CNTY., MD., CODE § 27-1 (2001)). Indeed, Maryland courts have held that the MCHRCLL confers certain antidiscrimination protections—even in the absence of explicit textual support—because those protections are present in the federal law on which the MCHRCLL was modeled. *Id.* (holding that a denial of reasonable accommodation constitutes disability discrimination under the MCHRCLL, even though the MCHRCLL "does not expressly say so…"). Thus, as described further

below, the ample federal case law interpreting Title VII to cover intersectional discrimination provides strong persuasive authority that the MFEPA and MCHRCLL do the same.

II. Federal Appellate Courts Have Recognized Intersectional Claims Under Title VII Based on Reasoning Equally Applicable to MFEPA and MCHRCLL.

A. Title VII's "But-For" Causation Standard Encompasses Claims of Discrimination Based on Multiple Protected Classes.

As the Supreme Court recognized recently in *Bostock v. Clayton County*, Title VII's prohibition against discrimination carried out "'because of'" an individual's protected characteristics incorporates the "'simple' and 'traditional' standard of but-for causation." 590 U.S. 644, 656 (2020). Thus, "a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision," since multiple but-for causes may be operating at the same time. *Id.* (emphasis in original); *see also id.* ("[I]f a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision.… [A] defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision." (internal citations omitted)); *Burrage v. United States*, 571 U.S. 204, 211 (2014) ("[W]here A shoots B, who is hit and dies, we can say that A [actually] caused B's death, since but for A's conduct B would not have

died. The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back.").

As the *Bostock* Court recognized, but-for analysis gives "sweeping" force to antidiscrimination laws. 590 U.S. at 656. To evaluate an allegation of discrimination, courts have "embraced the view that where the outcome would be different 'but for' the protected class status of those affected, anti-discrimination law is violated." *See* Katie Eyer, *The But-For Theory of Antidiscrimination Law*, 107 VA. L. REV. 1621, 1624 (2021). As *Bostock* observed, in drafting Title VII Congress could have taken a more restrained approach to causation by, for example, adding the word "solely" or the phrase "primarily because of" to the text. But "[n]one of this is the law we have." 590 U.S. at 657.[2]

Claims alleging intersectional discrimination, where several protected characteristics together fuel the alleged discriminatory conduct, fit comfortably within Title VII's but-for causation standard.[3] So long as a plaintiff alleges

---

[2] Indeed, the *Bostock* Court noted, "If anything, Congress has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice. Civil Rights Act of 1991, § 107, 105 Stat. 1075, codified at 42 U.S.C. § 2000e‑2(m)." 590 U.S. at 657.

[3] Although not expressly at issue here, we note that the but-for causation standard also permits intersectional discrimination claims under Title VII where only one of the bases for discrimination is protected by law. *See infra* at X.

discrimination "based in part on" a protected characteristic, that plaintiff has a cause of action under Title VII. 590 U.S. at 659.

B. Federal Courts Have Long Recognized that Title VII Prohibits Discrimination Based on Subsets of Protected Classes, Including Intersectional Claims.

With Title VII, Congress intended to "strike at the entire spectrum of disparate treatment of men and women …." *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). Accordingly, the Supreme Court has recognized that Title VII's protections are not limited to discrimination that affects all members of a protected class within a particular workplace. *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.") (citations omitted); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (reinstating plaintiff's claim that her employer discriminated against women with pre-school-age children as compared to its treatment of men with pre-school-age children).

Every federal appellate court to have considered the issue on the merits has held that Title VII covers intersectional discrimination claims. The Fifth Circuit was the first to recognize this principle in *Jefferies v. Harris County Community Action Association*, where it found that "the use of the word Title VII's list of protected

characteristics 'evidences Congress' intent to prohibit employment discrimination based on *any or all* of the listed characteristics.'" 615 F.2d 1025, 1032 (5th Cir. 1980) (emphasis added). Since *Jefferies*, the Second, Sixth, Ninth, and Tenth Circuits have all found that Title VII covers intersectional discrimination and that plaintiffs can therefore bring suits alleging discrimination based on one or more protected characteristics, either alone or in combination. *See, e.g.*, *Cruz v. Coach Stores*, *Inc.*, 202 F.3d 560, 572 (2d Cir. 2000) ("the interplay between … two forms of harassment" can rightly serve as evidence about the severity of workplace harassment claims, since "a jury could find that … racial harassment exacerbate[s] the effect of … sexually threatening behavior and vice versa."; *Shazor v. Pro. Transit Mgmt., Ltd*., 744 F3d 948, 958 (6th Cir. 2014) (finding the plaintiff successfully established a prima facie claim under Title VII for discrimination on the basis of race and sex combined)); *Lam v. Univ. of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir. 1994) (finding that Title VII requires consideration of whether an employer discriminates "on the basis of [a] *combination* of factors, not just whether it discriminates against people of the same race or of the same sex") (alteration in original); *Frappied v. Affinity Gaming Black Hawk, LLC*, 986 F.3d 1038, 1049 (10th Cir. 2020) ("A failure to recognize intersectional discrimination [in Title VII] obscures claims that cannot be understood as resulting from discrete sources of discrimination.").

The Ninth Circuit's decision in *Lam* is particularly instructive here. The plaintiff in *Lam* was an Asian American professor who brought a Title VII lawsuit alleging that the University of Hawai'i had discriminated against her by refusing to hire her because of her sex, race, and Vietnamese national origin. *Id. at* 1554-55. The Ninth Circuit reversed the lower court's ruling for defendants on summary judgment, which had relied on the University's favorable consideration of job applications from an Asian man and a white woman. *Id.* at 1561. The court decried the district court's approach to "racism and sexism as separate and distinct elements amenable to almost mathematical treatment." *Id.* Observing 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," the court recognized that there are distinct biases against individuals with multiple, overlapping protected characteristics. *Id.* Such individuals may be "targeted for discrimination even in the absence of discrimination against [men of a given racial category] or white women." *Id.* Moreover, the court held that the district court erred in "looking for racism 'alone' and looking for sexism 'alone,'" *id.*, with favorable treatment of other members of the plaintiff's race and sex classifications sufficing to foreclose Title VII claims for members of *both* groups. *Id.* at 1561-62.

C. The Reasoning of the Federal Title VII Cases Applies with Equal Force to the MFEPA and MCHRCLL.

The text of MFEPA and MCHRCLL make it clear that federal courts' interpretation of Title VII's text to encompass intersectional claims also applies to MFEPA and MCHRCLL. Although Title VII, MFEPA, and MCHRCLL all differ slightly with respect to which classes they protect, all three laws use the words "because of" and "or" identically. Title VII prohibits employers from discriminating against employees "*because of* such individual's race, color, religion, sex, *or* national origin." 42 U.S.C. § 2000e(a) (emphasis added). Similarly, MFEPA's prohibition reads:

> An employer may not [discriminate] *because of*: (i) the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, military status, *or* disability unrelated in nature and extent so as to reasonably preclude the performance of the employment; *or* (ii) the individual's refusal to submit to a genetic test or make available the results of a genetic test.

MD. CODE ANN., STATE GOV'T § 20-606 (emphasis added). MCHRCLL specifies that an employer may not discriminate "*because of* the race, color, religious creed, ancestry, national origin, age, sex, marital status, sexual orientation, gender identity, family responsibilities, or genetic status of any individual *or* disability of a qualified individual." M.C.C. § 27-19 (emphasis added). Thus, because courts understand Title VII to cover intersectional claims based on its use of these terms, the same rationale applies to the MFEPA and MCHRCLL.

Indeed, this is exactly why Maryland courts rely on Title VII's "but-for" analysis when adjudicating MFEPA and MCHRCLL claims. *See, e.g.*, *Edgewood*

Mgmt. Corp. v. Jackson, 212 Md. App. 177, 204, (Md. Ct. Spec. App. 2013) (conducting but-for analysis under MFEPA); *White v. Parker*, No. 2171, Sept. Term, 2014, 2017 WL 727794, at *11 (Md. Ct. Spec. App. Feb. 24, 2017) ("We see no reason why we would not adopt the but-for causation standard established [by the U.S. Supreme Court] for [M]FEPA retaliation claims."); *Montrose Christian Sch. Corp. v. Walsh*, 363 Md. 565, 570–71 (2001) (quoting MONTGOMERY CNTY., MD., CODE § 27-19 (2001) ("It shall be an unlawful employment practice to do any of the following acts … because of any reason that would not have been asserted but for the race, color, religious creed, ancestry, national origin, age, sex, marital status, handicap, or sexual orientation of the individuals.")

Intersectional discrimination claims—which at their core are claims of discrimination with multiple, simultaneous but-for causes—are thus equally cognizable under the MFEPA and MCHRCLL as they are under Title VII. If Maryland courts do not recognize intersectional claims, a plaintiff who experiences discrimination based on her membership in multiple protected classes would be left with no remedy. This result would contravene the Maryland legislature's text and intent with regard to MFEPA's and MCHRCLL's broad remedial purposes.

III. Intersectional Claims Reflect the Reality of Workplace Discrimination.

Professor Kimberlé Crenshaw, the originator of the term "intersectionality," argues that because discrimination can occur on multiple axes of identity, applying

a single-axis framework for identifying discrimination "obscures claims that cannot be understood as resulting from discrete sources of discrimination." Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. REV. F. 139, 140 (1989). Viewing discrimination claims based on more than one axis of identity through an intersectional lens is essential to effectuating the remedial objectives of fair employment statutes because it addresses the ways in which individuals inhabiting multiple protected classes may experience discrimination. For example, Asian American women face different experiences of discrimination than women of other races and Asian American men. *See* Virginia W. Wei, Note, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 BOS. COLL. L. REV. 771 (1996).

A. Asian American Women Continue to Face Intersectional Biases That Are Specific to, and Exacerbated By, the Combination of Identities in Their Workplaces.

In the 1960s, racial stereotypes of Asian Americans resulted in the "model minority myth" and the "perpetual foreigner" stereotype. The model minority myth describes Asian Americans as high achieving through hard work and cultural respect for education in the country of their origin. Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105, 118-119 (1999). The

myth also highlights Asian Americans' supposedly apolitical nature, attributing it to a cultural stereotype of being more interested in intra-community matters than in society at large; it notes with approval the educational and financial attainments of Asian Americans that were supposedly made without making demands for civil rights. *See id.* at 119; *see also* Leti Volpp, *The Excess of Culture: On Asian American Citizenship and Identity*, 17 ASIAN AM. L.J. 63, 72 (2010).

The model minority myth erases the hundreds of ethnicities that exist within the broader group of Asian Americans, conflating and condensing their identities into a monolithic group of "Asians." Kim, *supra*, at 118-19. It implies that Asian Americans will never be American, no matter how long their families have been in the United States—i.e., perpetual foreigners. *Id.* at 126. The myth also harms other communities of color. Focusing on a model minority diverts "attention from challenging institutional racism and structural inequality and hinder other racial minorities' demand for social justice," Kristy Y. Shih, Tzu-Feng Chang, & Szu-Yu Chen, *Impacts of the Model Minority Myth on Asian American Individuals and Families: Social Justice and Critical Race Feminist Perspectives*, 11 J. FAM. THEORY & REV. 412, 415 (2019), while continuing to prop up the idea that Asian Americans are perpetual foreigners, Sherry C. Wang & Bianca Marie C. Santos, *At the Intersection of the Model Minority Myth and Antiblackness: From Asian*

American Triangulation to Recommendations for Solidarity, 70 J. COUNSELING PSYCH. 352, 353 (2023).

Stereotypes that are unique to Asian American women, combined with the model minority myth and the perpetual foreigner stereotype that plague all Asian Americans, mean that Asian American women often experience intersectional discrimination. *See* Shih et al., *supra*, at 420; Helen H. Yu, *Revisiting the Bamboo Ceiling: Perceptions from Asian Americans on Experiencing Workplace Discrimination*, 20 ASIAN AM. J. PSYCH 158, 158 (2020). A survey of existing qualitative studies identified four common themes in the ways that Asian American women report intersectional discrimination: "(1) Exoticization, hypersexualization, and fetishization; (2) Ascription of the servile and passive Asian woman; (3) White female beauty standards and representation; and (4) Workplace tokenization and scrutiny." Nicola Forbes, Lauren C. Yang & Sahnah Lim, *Intersectional Discrimination and its Impact on Asian American Women's Mental Health: A Mixed-Methods Scoping Review*, 11 FRONTIERS PUB. HEALTH 1, 5 (2023). As the survey found, "[i]n addition to the racialized sexist stereotypes that emerged in the workplace, Asian American women also reported tokenization by their superiors and colleagues across five studies. Women described having excess responsibilities due to being the only Asian woman, the only woman of color, or the only person of color in the workplace." *Id.* at 6.

The term "bamboo ceiling" was coined to draw attention to the underrepresentation of Asians in senior-level leadership positions. Yu, *supra*, at 159. While Asian immigrants and Asian Americans make up a large part of the labor force in the science, technology, engineering, and math (STEM) fields, Pyong Gap Min & Sou Hyun Jang, *The Concentration of Asian Americans in STEM and Health-Care Occupations: An Intergenerational Comparison*, 38 ETHNIC & RACIAL STUD. 841, 841–42 (2014); Yu, *supra*, at 160, they are the least likely among all racial/ethnic groups to become executive leaders, especially Asian women, Yu, *supra*, at 158.

In addition, Asian American women in workplaces are often expected to conform to the stereotypes of servile "lotus blossoms" or as a fierce "dragon ladies." Shih et al., *supra*, at 419–20. Conforming to these stereotypes hinders Asian American women from getting ahead in the workplace because they are more likely to be overlooked for promotions or perceived as overly aggressive and "bitchy." *Id.*

Despite these experiences of discrimination, Asian Americans are often deemed not to be an underrepresented minority and are left out of STEM diversity initiatives based on the stereotype that "'Asian people are good at math/sciences,'" *id.* at 420; Shruti Mukkamala & Karen L. Suyemoto, *Racialized Sexism/Sexualized Racism: A Multimethod Study of Intersectional Experiences of Discrimination for*

Asian American Women, 9 ASIAN AM. J. PSYCH. 32, 42 (2018)**.** These omissions leave their experiences of discrimination unrecognized.

B. Asian Americans with Disabilities Face Unique Forms of Oppression at the Intersection of Multiple Marginalized Identities.

The perception that Asian Americans possess an inherent advantage over other racial groups diminishes the lived experiences of individuals unable to live up to these stereotypes and creates unique, ableist assumptions associated with the needs and capacities of Asian American workers. For example, the model minority myth may cause employers to downplay the disability-related needs of an Asian American employee, and subsequently judge their work more harshly.

One study examined the rates of discrimination within the Asian American community, comparing the experiences of Asian American and Pacific Islanders (AAPIs) with and without a reported disability. The study's results indicate that "AAPIs with disabilities reported more experiences of everyday discrimination, poorer psychological and physical health, and poorer ratings of their mental and physical health [than AAPIs without reported disabilities]." Ethan H. Mereish, *The Intersectional Invisibility of Race and Disability Status: An Exploratory Study of Health and Discrimination Facing Asian Americans with Disabilities*, 5 ETHNICITY & INEQS. IN HEALTH & SOC. CARE 52, 57 (2012).

Conclusion

The text of MFEPA and MCHRCLL, interpreted in conjunction with Title VII, mandates the recognition of intersectional discrimination claims. Claims based on a single protected characteristic, such as race or disability, too often fail to uncover the distinctive harms facing plaintiffs like Dr. Cheung. This Court should recognize that intersectional discrimination claims are cognizable under the MFEPA and MCHRCLL and reverse the lower court's dismissal of her claims of gender, race, and national origin discrimination, which intersect with the disability claim that was allowed to move forward.

Certification of Word Count and Compliance With Rule 8-112

1. This brief contains 3,642 words, excluding the parts Rule 8-503 exempts from the word count.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112 (Times New Roman, 14 point).

Certificate of Service

I hereby certify that, on September 20, 2024, I filed this paper by MDEC, which will serve a copy on all persons entitled to service, and that no paper copies of this page-proof brief are required under Rule 8-501(*l*)(2).

/s/ Vasanthi Reddy____

Vasanthi Reddy, # 1312190039