

Enhancing Understanding of Hispanic Employment Discrimination in the U.S. Through the Lens of Intersectionality

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Introduction: The Hispanic Work Force

The number of Hispanics in the workforce is growing and is expected to continue to grow. However, there are a lot of direct and indirect evidence that they are being discriminated against in terms and conditions of employment. They have a higher rate of unemployment and they have lower accumulated household assets (Orrenius et al., 2011).

The latest round of BLS projections for the U.S. labor force, covering 2010-2020, indicates that the growth will slow overall. These projections show that the labor force will increase by 10.5 million in this decade, growing to 164.4 million in 2020 from 153.9 million in 2010. That is less than the increase of 11.3 million from 2000 to 2010, and substantially less than the 16.7 million increase from 1990 to 2000. The projected average annual increase in the labor force from 2010 to 2020—0.7%—is also less than the annual growth of 0.8% from 2000 to 2010 and only about half the 1.3% annual rate of growth from 1990 to 2000 (Orrenius et al., 2011)

Hispanics will account for three-quarters of the growth in the nation's labor force from 2010 to 2020, according to new projections from the Bureau of Labor Statistics (BLS). Birth and migration account for the Hispanic population grows. Additionally, the non-Hispanic white population is aging, thus reducing their numbers in the labor force.

A second important factor is that Hispanics have a higher labor force participation rate than other groups. The nation's labor force participation rate—that is, the share of the population ages 16 and older either employed or looking for work—was 64.7% in 2010. Among Hispanics, the rate was 67.5%. There are two main explanations for this gap: Hispanics are a younger population than other groups, and include a higher share of immigrants. Hispanics, especially Hispanic women, have experienced increases in poverty

within this decade, necessitating longer labor force participation (Moinifar & Hamidi, 2011). They argue that Hispanic women are poor because of both structural factors and individual factors. Since they are increasing in numbers and increasing in labor force participation rates, it can be expected that individuals of Hispanic origins will pursue their rights when they have been discriminated against by their employers.

Dearth of Employment Discrimination Research

State of Research on Employment Discrimination in General

In the past few years, researchers have intensively examined the extent of the current state of research on employment discrimination in general. Ruggs and his colleagues examined research on discrimination in top management journals, and concluded that there is a paucity of such research (Ruggs et al., 2013). They made a persuasive call for such research on marginalized employees. King et al. (2011), whose work predates Ruggs, utilized empirical legal scholarship (the analysis of employment discrimination litigated cases). However, their research and that of others do not appear in Ruggs, et al. analysis, because Ruggs' selection of only the top journals. This limitation was noted by other researchers (Diaz & Bergman, 2013; Joseph & Rousis, 2013; Thompson, Bergman, Culbertson, & Huffman, 2013). Diaz and Bergman (2013), in their review of Ruggs, et al., contends that the lack of publication relating to the absence of research on minority groups, posits that Ruggs did not search widely enough, searching journals that are publications within a narrow subset of journals. In addition, they did not examine journals that are closely allied, such as Journal of Vocational Behavior, Human Performance, Journal of Occupational Health Psychology, Journal of Organizational Behavior, or Group and Organizations.

Ruggs et al. and Thompson et al. note that there is another problem in that the incidents of employment discrimination, though numerous as they are, may not be discernible if research is conducted in one organizational setting. Furthermore, they note a preference for

field research, of which empirical legal scholarship (using a litigated case as the unit of analysis is one method), can be categorized as a field setting research. This is the methodology was used by King et al. Joseph and Rousis (2013) note that management researchers should be casting a wider net and look at journals outside of the specific domain of management, such as communication and social psychology. And although it is recognized that there are multiple bases for discrimination possessed by many marginalized employees, their call for intersectionality in this research seems to be explicitly absent in the management literature (Best, Edelman, Krieger, & Eliason, 2011; Roth, 2010; Sawyer, Salter, & Thoroughgood, 2013), although Ruggs et al. (2010) do implicitly call for more research in industrial psychology in management literature.

Intersectionality¹

A major contribution to understanding employment discrimination is through the lens of intersectionality, in terms of the ascribed, achieved and legal. Sawyer, Salter, & Thoroughgood, (2013) note that investigating the intersection of multiple identities will ultimately provide a more holistic perspective in terms of the impact of identity at work. Intersectionality is not a new concept, in that it has been defined in the psychology literature for 30 years. It is “The idea that social identities such as race, class, and gender interact to form qualitatively different meanings in experiences”(Warner, 2008). Sawyer et al., (2013) note that from an employee’s perspective, all of their identities may affect their work, although certain identities may become more salient in particular contexts. Some industrial and organizational psychologists have investigated the differential outcomes that occur when considering multiple identities. It is possible that intersectionality in employment

¹ Intersectionality is the study of intersections between different disenfranchised groups or groups of minorities; specifically, the study of the interactions of multiple systems of oppression or discrimination. Intersectionality is a methodology of studying "the relationships among multiple dimensions and modalities of social relationships and subject formations." The theory suggests that—and seeks to examine how—various biological, social and cultural categories such as gender, race, class, ability, sexual orientation, speciesism, and other axes of identity interact on multiple and often simultaneous levels, contributing to systematic injustice and social inequality. "Intersectionality." Retrieved Feb.19, 2015 <http://www.definitions.net/definition/Intersectionality>.

discrimination research is being conducted, but is not being labeled as such. Ruggs does not mention the term once in their comprehensive review of marginalized employees experiences with discrimination, although in their references, they include many multi-category research studies. These include (Avery, McKay, & Wilson, 2008; Barnum, Liden, & DiTomaso, 1995; Lin, Dobbins, & Farh, 1992; Ragins, 2008; Renwick & Tosi, 1978). Sawyer points out that intersectionality research is being conducted in other disciplines. In social psychology work by (Purdie-Vaughns & Eibach, 2008) and Settles (2006) suggests that there are both the distinct advantages and this distinct disadvantages associated with holding multiple identities.

Raver and Nishii (2010) studied the impact of ethnic and gender harassment in the workplace and concluded that these different types of harassment separately affected employees but also combined to affect employees in different ways. (Triana, Garcia, & Colella, 2010) found differences in how discrimination remediation strategies affect different racial groups. Establishing organizational diversity policies lessened the negative effects of discrimination on commitment for Latinos but exacerbated the negative effects of discrimination on commitment for blacks.

Best and her colleagues point out many of the complexities associated with the studying of intersectionality, especially as it relates to employment discrimination (Best et al., 2011). Individuals may belong to more than one protected class. In addition, researchers of discrimination contend that in many cases, individuals are discriminated against on more than one basis. For example, as described above, an individual of Hispanic origin might also be discriminated against based on sex, race, or age. Logic would indicate that individuals that sue on more than one basis have a greater chance of prevailing. However, some literature suggests that individuals suing on more than one basis might not prevail to the same extent as individuals who sue on a single basis. Work by socio-legal scholars suggests that plaintiffs who face multiple disadvantages fare less well in civil rights litigation than do plaintiffs who

suffer a single form of social discrimination (Austin, 1989; Caldwell, 1991; Carbado & Gulati, 2000; Crenshaw, 1989, 1991a, 1991b; Harris, 1996; Roberts, 1991; Smith, 1991; Wei, 1995; Williams, 1991).

A variety of reasons are put forth for this counterintuitive finding: First, employers hold discrete stereotypes for various intersectional categories. Employers might distinguish between inner-city blacks but not any other category of blacks. Kaufman (2002) concludes that employers often have preconceived notions about which race and sex combinations are right for a job. This makes discrimination difficult to prove within one organization. Secondly, those involved in the judicial process – judges, juries, and lawyers are stereotyping as well.

Third, given the categorical nature of discrimination law, intersectional claims are hard to establish. For example, Title VII of the 1964 Civil Rights Act protects based on race, creed, sex, color, and national origin. The law does not explicitly provide for multiple bases. Although there are some exceptions, judges have not recognized intersectional claims as being legally cognizable and have dismissed them (Crenshaw, 1989). This often occurs in summary judgment, before the case can actually be heard in court. The contention is that there is a significant amount of research on intersectionality, but no research on the effects of intersectionality on inequality/discrimination (Browne & Misra, 2003). Crenshaw hypothesized that intersectional plaintiff's fare worse in discrimination lawsuits but according to Best that hypothesis is not been tested in the subsequent 25 years since it was published.

Given that an individual might have protection under more than one demographic basis and under more than one law, an analysis with promise might be distinguishing between demographic intersectionality and claim intersectionality. Moreover, it can be noted that demographic intersectionality can be defined by ascribed or achieved characteristics.

Ascribed status is the social status a person is assigned at birth or assumed involuntarily later

in life. It is a position that is neither earned nor chosen but assigned. Achieved status is a concept developed by the anthropologist Ralph Linton denoting a social position that a person can acquire based on merit; it is a position that is earned or chosen (Linton, 1936). Ascribed intersectionality, achieved intersectionality, and legal intersectionality – protections that can be from state discrimination laws, federal discrimination laws or laws not explicitly formulated to protect against employment discrimination should be examined to obtain a more complete picture.

This approach is efficacious for studying discrimination of individuals of Hispanic origin, since they vary not only in national origins, but also in race, sex, socioeconomic status, employment level, and accent among others (Best et al., 2011; Cuadraz & Uttal, 1999; Ortega, Plagens, Stephens, & Berry-James, 2012; Root, 2004; Roscigno, 2000; Smalls, 2004).

Significant advances were made using an intersectionality approach. Best et al., (2011) studied thousands of litigated employment discrimination cases from the years 1965 to 1999. While groundbreaking in its approach in gaining understanding of employment discrimination, there are sampling shortcomings in that the data collection ended in 1999, and certainly laws and court rulings have transpired subsequently.

Methodology

The approach to researching intersectionality is not without its controversies. Bowleg (2008) noted that, critics of the additive approach deride the notion that social identities and inequality that are intersectional can be separated, treated independently, or added (Collins, Maldonado, Takagi, & Thorne; Cuadraz & Uttal, 1999; Weber & Parra-Medina, 2003). Yet, addition is often a critical step in preliminary analysis. Despite their criticism of the additive approach to intersectionality, Cuadraz and Uttal (1999) concede that isolating the meaning of

each identity is an essential analytical step to understanding intersectionality, but it is necessary to analyze each structural inequality separately, as well as simultaneously.

Following the method employed by Best and others, the current study, uses litigated employment discrimination cases as the unit of analysis (Eisenberg, 2004). The data were acquired by randomizing cases retrieved from the years 2011 to 2014 from a database of all litigated cases called Fastcase. The search terms were (Hispanic or Latino or Latina) AND (Employment AND discrimination). The total number of cases in the sample is 120. A power analysis indicated that the sample size was appropriate for the number of independent variables.

Multiple coders were used to code ascribed, acquired, and legal intersectionality bases for discrimination.

Hypothesis

Hypothesis 1: There is no relationship between certain case characteristics such as multiple plaintiffs, professional employees, and retaliation in case outcomes in favor of the individual.

Hypothesis 2: There is no relationship between intersectionality ascribed and/or achieved factors and case outcomes in favor of the individual.

Hypothesis 3: There is no relationship between various Federal U.S. employment laws, and case outcomes in favor of the individual.

Results

The reader's attention is first directed to Table 1, in which it is explained in detail how the variables were coded. The reader's attention is then directed to Table 2, in which frequencies of all coded case characteristics are portrayed. In column one are Hispanic plaintiffs and in column two are non-Hispanic plaintiffs. In general, the cases can be described as litigation at the District Court level, with high level of EEO involvement. They are primarily in the private sector. The organization wins approximately half of the time,

while the remaining decisions are split decisions, meaning the individual had a partial ruling in his or her favor and the organization had a partial ruling in its favor approximately one-third of the time.

Of particular note are the following differences: Hispanic plaintiffs only had union involvement 25.8% of the time, while non-Hispanic plaintiffs had union involvement 36.2% of the time. Similarly, there was other third-party involvement in Hispanic plaintiff cases 11.7% of the time in comparison to non-Hispanic plaintiffs' cases, where the third party was involved 19% of the time. Race was involved more heavily in the non-Hispanic plaintiff cases. Professional employees were involved in between 45% and 56% of the cases, whether or not the plaintiff was Hispanic. Age was slightly more of an issue in the Hispanic plaintiff cases – 28.3% versus 20.7%. Sexual harassment was three times more prevalent in Hispanic plaintiff cases than in non-Hispanic plaintiff cases: 15% versus 5.2%.

It is also important to note the frequencies of the intersectionality variables: intersectionality ascribed levels 1, 2, and 3; intersectionality achieved levels 1, 2, and 3 and intersectionality levels legal 1, 2, and 3. The variables that comprise these intersectionalities are described in Table 1. Of particular note is that for Hispanic plaintiffs there were the highest levels of ascribed intersectionality at level 2, but for non-Hispanic plaintiffs ascribed intersectionality is the highest at level 1. Both Hispanic and non-Hispanic plaintiffs show similar intersectionality for achieved in that level 1 achieved intersectionality is the highest for both groups of plaintiffs. For intersectionality legal, non-Hispanic plaintiffs had a higher proportion of cases in which there was just one: 43.6% for non-Hispanics and 29.8% for Hispanics.

The reader's attention is directed to Table 3 in which there are cross tabs, chi-squares, and phi coefficients for selected variables. With respect to multiple plaintiffs, 32 of the cases involved multiple plaintiffs and the employee won or split decisions in 22 of them. Sixty-two

of the cases involved professional employees, and the employee won or split in 34 of them. Eighty of the cases involved retaliation. The employee won or split in 34 of them and the employer won in 46.

Table 4 should be the focus of the reader's attention now. In this table are portrayed the intersectionalities. When there is ascribed intersectionality, on only one basis, the employer wins 13 out of 24 cases. When there are two ascribed intersectional ties, the employer wins 13 out of 30 cases, and three or more the employer wins 12 out of 17 cases. When there is only one achieved intersectionality, the employer wins 29 out of 55 cases, when two the employer wins five out of 13 cases and when there are three achieved intersectionalities, the employer wins one out of three cases. With respect to the legal intersectionality, the respective numbers are 21 out of 42, 25 out of 42, and 13 out of 29 cases.

The conclusion that can be drawn from the data is that there is minimal intersectionality that is empirically provable. The following reasoning might help explain this. It is possible that the employer, recognizing the strength of the Hispanic employee's case settled at lower levels. Either this could have occurred in the state courts, which are not included in this study, or it could have occurred even before litigation. Alternatively, because of their illegal immigration status in some instances, Hispanic employees might be reluctant to pursue their rights. Alternatively, there are performance related reasons for how the individual was treated, that are beyond the scope of the present study. This means that perhaps there were discipline-related reasons for the actions the employer took.

In future research, an important variable that is missing from the study needs to be added: whether the victim of discrimination was of Hispanic origin. In the present study, the variable was the plaintiff Hispanic. It has also been suggested that summary judgment cases and cases involving other procedural matters be eliminated or at least analyze separately.

While the present researchers approached the coding of the variables in the same manner as Best and her colleagues (2011) did, that is additive, it is possible that the variables are multiplicative or need to be weighted in some manner.

Contributions

While it is difficult for some researchers to accept that their hypothesized results are mostly not significant, there are a few bright sides to this. First, Hispanic and non-Hispanic plaintiffs are being treated in a consistent manner in the courts, in that there are not significant differences between their cases. Second, this methodology in this study helps support the notion that empirical legal scholarship can be used to overcome some of the previous problems in studying employment discrimination, namely that there are not many instances in one organization, which is the typical unit of analysis for employment discrimination research.

Table 1 How Variables Were Coded

CASE CHARACTERISTICS

Court 1 State 2 District 3 Appeals 4 Supreme
Plaintiff Hispanic 1 Yes 0 No
EEO involvement 1 Yes 0 No
Union involvement 1 Yes 0 No
Other third party involvement 1 Yes 0 No
Multiple plaintiffs 1 Yes 0 No
Type of employer 1 Private 2 Public 3 Non profit
Retaliation
Case Outcome 1 Individual 2 Split 3 Organization

DEMOGRAPHICS--ASCRIBED CHARACTERISTICS

Race 1 Yes 0 No
Color 1 Yes 0 No
National origin, 1 Yes 0 No
Sex of person of Hispanic origin
1 Male
2 Female
Professional employee 1 Yes 0 No

DEMOGRAPHICS—ACHIEVED CHARACTERISTICS

Language or accent 1 Yes 0 No
Residency requirements 1 Yes 0 No
Immigration status 1 Yes 0 No
Drugs or alcohol involved 1 Yes 0 No
Health status involved 1 Yes 0 No
Housing—residency requirement involved in case 1 Yes 0 No
Level of education
Some high school 1
High school graduate 2
Some college 3
College graduate 4
Education as an issue 1 Yes 0 No

LEGALITIES

FMLA 1 Yes 0 No
Age as an issue 1 Yes 0 No
Sexual harassment as an issue 1 Yes 0 No
Title VII of 1964 Civil Rights Act 1 Yes 0 No
Age Discrimination in Employment Act ADEA 1 Yes 0 No
Immigration Reform and Control Act 1 Yes 0 No
State Discrimination Laws 1 Yes 0 No
Fair Labor Standards Act 1 Yes 0 No
Americans With Disabilities Act ADA 1 Yes 0 No
Gender as basis for discrimination 1 Yes 0 No
Intersectionality Ascribed: Race + Color + National origin + Female sex
Intersectionality Achieved: Residency + Immigration status + Drugs alcohol + Health status + Housing +
Professional + Language or accent + Education as an issue
Intersectionality Legal: FMLA + Title VII + ADEA + Immigration Reform Control Act + State Laws +
Fair Labor Standards Act + ADA

Table 2 Frequencies of Case Characteristics

CASE CHARACTERISTICS	Hispanic Plaintiff N=62	Non-Hispanic Plaintiff N=58
<u>Court</u>		
District	85.5	87.9
Appeals	12.9	8.6
Supreme	1.6	1.7
Plaintiff Hispanic	61.3	65.5
EEO involvement	25.8	36.2
Union involvement	11.7	19
Other third party involvement	25.8	27.6
<u>Multiple Plaintiffs</u>		
<u>Type of employer</u>		
Private	58.1	60.3
Public	38.7	31
Retaliation	67.1	63.8
<u>Case Outcome</u>		
Individual	9.7	15.5
Split	37.1	31
Organization	53.2	15.4
DEMOGRAPHICS--ASCRIED		
Race Involved	80.6	93.1
Color Involved	14.5	39.7
National origin Involved	67.7	20.7
Sex of person of Hispanic origin		
Female	34.4	33.3
DEMOGRAPHICS--ACHIEVED		
Residency requirements	1.6	3.4
Immigration status	3.2	1.7
Drugs or alcohol involved	3.2	3.4
Health status involved	6.4	3.4
Professional employee	56.5	46.6
Language or accent	4.8	5.2
Education as an issue	6.7	8.8
LEGALITIES		
FMLA	8.1	8.6
Age as an issue	28.3	20.7
Sexual harassment as an issue	15	5.2

Title VII of 1964 Civil Rights Act	93.4	89.7
Age Discrimination in Employment Act ADEA	21.7	12.1
Immigration Reform and Control Act	0	1.7
State Discrimination Laws	60.7	41.4
Fair Labor Standards Act	6.7	1.7
Americans With Disabilities Act ADA	10	13.8
Gender as basis for discrimination	27.4	13.8
Intersectionality Ascribed Levels 1,2,3	25.9, 46.3, 27.8	58.8 , 29.4, 11.8
Intersectionality Achieved Levels 1,2,3	80, 15, 5	74.2, 22.6, 3.2
Intersectionality Legal Levels 1,2,3	29.8, 40.4, 29.8	43.6, 34.5, 21.8

Table 3 Crosstabs, Chi Square And Phi Coefficients For Variables

		Case Outcome		Total
		Employee and split	Employer	
<u>Multiple Plaintiffs</u>	No	34	54	88
	Yes	22	10	32
	Total	56	64	120
	<u>Pearson Chi-Square</u>	<u>df</u>	<u>Phi</u>	
	8.55**	1	-.267	
		Case Outcome		Total
		Employee and split	Employer	
<u>Professional Employee</u>	No	22	36	58
	Yes	34	28	62
	Total	56	64	120
	<u>Pearson Chi-Square</u>	<u>df</u>	<u>Phi</u>	
	3.442*	1	-0.181	
		Case outcome		Total
		Employee and split	Employer	
<u>Retaliation</u>	No	22	18	40
	Yes	34	46	80
	Total	56	64	120
	<u>Pearson Chi-Square</u>	<u>df</u>	<u>Phi</u>	
	1.674	1	0.118	
*.05 to .1				
**.01				

Table 4 Crosstabs, Chi Square And Phi Coefficients For Intersectionality Variables

		Case Outcome		
		Employee and split	Employer	Total
<u>Intersection 1 Ascribed</u>	1	11	13	24
	2	17	13	30
	3 or More	5	12	17
	Total	33	38	71
	<u>Pearson Chi-Square</u>	<u>df</u>	<u>Phi</u>	
	3.24634	2	0.210	
		Case Outcome		
		Employee and split	Employer	Total
<u>Intersection 2 Achieved</u>	1	26	29	55
	2	8	5	13
	3 or More	2	1	3
	Total	36	35	71
	<u>Pearson Chi-Square</u>	<u>df</u>	<u>Phi</u>	
	1.175	2	0.129	
		Case outcome		
		Employee and split	Employer	Total
<u>Intersection 3 Legal</u>	1	20	21	41
	2	17	25	42
	3 or More	16	13	29
	Total	53	59	112
	<u>Pearson Chi-Square</u>	<u>df</u>	<u>Phi</u>	
	1.542	2	0.117	

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