LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
TUESDAY, DECEMBER 18, 2018

PERSPECTIVE

The coming battle over 'implicit bias' in employment discrimination cases

By Anthony J. Oncidi

Plaintiffs in most employment discrimination cases assert and seek to prove "disparate treatment" by the employer. Disparate treatment claims require proof of discriminatory intent on the part of the employer or management. However, because direct evidence of discriminatory intent is rare, enterprising plaintiffs' lawyers are increasingly trying to fill the gap by relying upon evidence of purported "implicit bias" to create an inference of discriminatory intent.

In 1998, Anthony Greenwald, Ph.D., a social psychologist and professor of psychology at the University of Washington, and his colleagues created the Implicit Association Test, which is readily available on the internet (https:// www. tolerance.org/professional-development/ test-yourself-forhidden-bias).

The Implicit Association Test purports to measure implicit bias lurking in the test-taker's unconscious mind. There are different tests for a wide variety of purported implicit biases, including race, religion, age, skin-tone, sexual orientation and disability.

It is important to note that even the proponents of implicit bias research concede that "[t]he link between implicit bias and behavior is fairly small [and] can vary quite greatly."

Not surprisingly, plaintiffs' counsel in employment discrimination cases are eager to inject expert opinion about the purported ubiquity of implicit bias into cases where such "evidence" most definitely does not belong — i.e., those requiring proof that illegal discrimination was a substantial motivating factor that resulted in the challenged employment decision. *See, e.g., Harris v. City of Santa Monica*, 56 Cal. 4th 203, 232 (2013) ("Requiring the plaintiff to show that discrimination was a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision").

Purported evidence of implicit bias is precisely what the California Supreme Court warned against and sought to exclude in *Harris*. In fact, such "evidence" is even more ephemeral than "mere thoughts" in that the Implicit Association Test ostensibly detects bias that the individual does not even know he or she possesses — i.e., "mere *unconscious* thoughts."

Nevertheless, some employees already have succeeded in getting this type of testimony in front of a factfinder. For example, in *Samaha v. Washington State Dep't of Transp.*, 2012 WL 11091843 (E.D. Wash. 2012), a federal district court denied the employer's motion to exclude the testimony of an expert witness (Dr. Greenwald himself) in a case in which the employer argued the expert had not identified any particular bias that related to the plaintiff's race, color, national origin or ethnicity nor had he determined whether implicit bias played any role in any particular employment decision made by the employer.

The *Samaha* court agreed with the plaintiff that Dr. Greenwald's testimony about implicit bias was relevant to the proof of intentional discrimination and could be "helpful to the jury" in understanding how implicit bias functions in the employment setting. The court further held that it was satisfied that Dr. Greenwald's opinions were sufficiently "grounded in the methods and procedures of science" (quoting the *Daubert* standard for admitting expert testimony).

In another recent case, a federal district court allowed expert testimony from an assistant law professor with a Ph.D. in social psychology concerning implicit bias in a race-discrimination case. *Martin v. F.E. Moran, Inc.*, 2017 WL 1105388 (N.D. Ill. 2017). The judge admitted the expert testimony about implicit bias in this case in part because it was a bench trial, recognizing that "the court can hear the testimony at trial and determine the weight of the evidence at trial without a fear of prejudicing the untrained ear of a juror."

Ultimately, however, the court determined that "Plaintiffs failed to tie [the expert's] opinions regarding implicit bias to the individual circumstances surrounding their employment … as required to prove intentional discrimination actually occurred." *Martin v. F.E. Moran, Inc.*, 2018 WL 1565597 (N.D. Ill. 2018).

The Case against Admissibility of Implicit Bias Testimony

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354-55 (2011), the U.S. Supreme Court expressly rejected the "social framework analysis" that was put forth in the form of expert testimony from a sociologist who testified that Wal-Mart had a "strong corporate culture" that made it vulnerable to gender bias. The Court determined that the expert's testimony did nothing to advance plaintiffs' case: "Whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking is the essential question on which respondents' theory of commonality depends. If [the expert] admittedly has no answer to that question, we can safely disregard what he has to say." *Id.* Expert testimony regarding implicit bias is vulnerable to similar challenges. *See, e.g., Pippen v. State of Iowa*, 2012 WL 1388902 (D. Iowa 2012) (Dr. Greenwald's opinion was "conjecture, not proof of causation").

In *Jones v. YMCA of the USA*, 34 F. Supp. 3d 896, 901 (N.D. Ill. 2014), the district court granted the employer's motion to strike Dr. Greenwald's expert report and testimony concerning implicit bias in a Title VII class action lawsuit. The plaintiffs blandly asserted that Dr. Greenwald's opinions were offered merely "to educate the factfinder on general principles."

However, the *Jones* court determined that despite what they said, plaintiffs actually were seeking to use Dr. Greenwald's opinions to prove causation: "Dr. Greenwald maintains that it is 'more likely than not' that implicit discriminatory bias accounts for any dispar-

ity between the treatment of African Americans and other racial groups." After the court concluded that Dr. Greenwald's report and testimony were relevant neither to plaintiffs' disparate treatment nor disparate impact race discrimination claims, it struck them.

Still another court recently excluded expert testimony about implicit bias, including, once again, testimony from Dr. Greenwald, on the ground that his opinion "is not based on sufficient facts or data. It is not the product of reliable methods. And it would not assist the factfinder in resolving an issue in this case." *Karlo v. Pittsburgh Glass Works, LLC*, 2015 WL 4232600 (W.D. Pa. 2015), *aff'd in pertinent part*, 849 F.3d 61 (3d Cir. 2017) (Dr. Greenwald's "population-wide statistics have only speculative application to [this particular defendant-employer] and its decision-makers").

Moreover, a recent study conducted by researchers at the University of Wisconsin, Harvard University, and the University of Virginia examined 499 studies over 20 years involving 80,859 participants who took the Implicit Association Test and similar tests. These researchers discovered that the correlation between implicit bias and discriminatory behavior (which is, of course, the only thing that is relevant in an employment discrimination case) is weak and that the test does not reveal whether a person will tend to act in a biased manner. *See* "Can We Really Measure Implicit Bias? Maybe Not," The Chronicle of Higher Education (Jan. 5, 2017) (https://www. chronicle.com/article/Can-We-Really- Measure-Implicit/238807).

The "CEO Action Pledge"

Despite the growing rejection by courts of proffered evidence of implicit bias in employment discrimination cases, hundreds of CEOs recently signed the CEO Action for Diversity & Inclusion (https:// www.ceoaction.com/the-pledge/). The pledge is a well-intentioned initiative designed to promote diversity in the workplace. Notably, signatories publicly pledge, among other things, to "Implement and expand unconscious bias education."

The number and pedigree of companies that have signed the pledge is impressive. More than 450 CEOs and presidents across 85 industries have signed on already. Some of the nation's largest and most well-known companies are represented here as are some of the world's foremost institutions of higher learning. The list also includes leading technology companies and financial institutions, major retailers, airlines and accounting firms, insurance companies, large international law firms, and high-profile non-profit organizations, among others.

The pledge requires CEOs to commit "to implementing all of the elements within the Pledge," so there is no picking and choosing which parts to adopt. Further, because the announcement is public, companies that commit themselves to the pledge should anticipate that they will be held to the commitment and possibly will have it used against them if they fail to implement any of the elements.

One thing is for sure: It is easy for a plaintiff's lawyer to figure out which companies have signed the pledge — the list of signatories is publicly available and easily accessed on the web. It is well known that a number of leading plaintiffs' lawyers are actively trolling the pledge website in search of the names of employers who have signed it on the theory that it will be more difficult for those companies to successfully exclude purported evidence of implicit bias the next time they're sued for discrimination.

Conclusion

Expert testimony about implicit bias can be very powerful stuff, and plaintiffs' attorneys are increasingly trying to rely on it to compensate for gaps in the evidence, especially regarding the employer's alleged intent to discriminate. But once that genie is out of the bottle in front of the jury, it is very difficult for defense counsel to contain it. Arguing that there was no intent to discriminate by the employer after the jury hears detailed testimony from an expert witness about how everyone in the world possesses implicit or unconscious bias will be a Herculean task to say the least.

Anthony J. Oncidi *is a partner in and the chair of the West Coast Labor and Employment Department of Proskauer Rose LLP in Los Angeles. You can reach him at (310) 284-5690 or aoncidi@proskauer.com.*

ONCIDI