



Combating Implicit Bias In The Workplace

News

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A term once used by few now takes the national stage on a regular basis. “Implicit bias” has made headlines in the past year; most recently when Hillary Clinton tied it to the shooting of an unarmed black man. The topic continues to be relevant, including in workplace matters. Even when employers are committed to diversity in the workplace, some social scientists claim that implicit bias and stereotypes may negatively influence employment decisions.

The term “implicit bias” refers to the role unconscious attitudes, feelings and stereotypes play in decision-making. According to social psychology research, implicit bias stems from a natural survival instinct. To filter and process the overwhelming amount of information we encounter in our daily lives, our brains evolved to take mental shortcuts that allow us to make rapid decisions about safety and other essential life functions.

Studies show, however, that making these unconscious mental shortcuts in the workplace may lead to discriminatory employment decisions. For example, in a 2004 study, economists from the Massachusetts Institute of Technology and the University of Chicago distributed 5,000 resumes to 1,250 employers. The researchers assigned stereotypically Caucasian and African-American names to otherwise identical resumes. Resumes with stereotypically Caucasian names led to 50 percent more callbacks than resumes with stereotypically African-American names. Additionally, a 2012 study found that science professors at research universities rated applicants for a manager position more favorably and offered a higher starting salary if the name on the application was male.

Federal Initiatives

The U.S. [Equal Employment Opportunity Commission](#) targeted implicit bias in its five-year “Eradicating Racism and Colorism from Employment” (E-RACE) initiative from 2008 to 2013 and committed to holding public meetings that would address implicit bias. The EEOC also tackled implicit bias through guidance defining “intentional discrimination” to include unconscious stereotypes regarding the abilities, traits or performance of individuals belonging to certain racial groups.

While implicit bias research may be useful in identifying and understanding less visible forms of discrimination that may occur in the workplace, the theory appears to be incompatible with the two existing frameworks for proving employment discrimination: disparate treatment and disparate

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Tensions with Disparate Treatment

A disparate treatment claim requires proof that an employer intentionally discriminated against an employee because of the employee's protected characteristic. In contrast, implicit bias, as its name suggests, is the antithesis of intent; it is a function of one's subconscious biases. As a federal district court explained in *Jackson v. Harvard University*, 721 F. Supp. 1397, 1432 (D. Mass. 1989), because disparate treatment analysis is concerned with intentional discrimination, it cannot and was not designed to police subconscious attitudes.

Even if a plaintiff persuades a court that intent includes subconscious bias, the plaintiff must overcome the hurdle of proving causation. Expert testimony on implicit bias might show that many, or even most, individuals hold some sort of implicit bias, but how does that prove a particular decision maker harbored an implicit bias and made a decision because of that bias? Existing implicit bias research offers plaintiffs little assistance in proving causation, particularly because some of the research suggests that implicit attitudes do not necessarily cause discriminatory actions.

Disparate Impact Claims

Disparate impact claims involve facially neutral employment practices that have a disproportionate impact on a protected class. Unlike disparate treatment claims, disparate impact claims focus on the consequences of practices rather than the intent of the decision maker. Thus, viewed at 10,000 feet, implicit bias theory seems compatible with the disparate impact doctrine in that they both seek to prevent discriminatory outcomes even though there is no perceptible evidence of discriminatory intent.

But the harmony between disparate impact claims and the implicit bias theory evaporates upon closer inspection. Whereas disparate impact claims focus on the impact of a broadly applicable employment policy on a group of employees, implicit bias theory explains how an individual decision maker's unconscious bias may influence a discrete employment decision affecting an individual employee. In many cases challenging an employment decision caused by alleged implicit bias, particularly when the adverse employment action is an individual termination, plaintiffs will struggle to identify the neutral employment policy required to pursue a disparate impact claim.

Some plaintiffs have argued that implicit bias research shows, when an employer has a neutral policy affording supervisors subjective discretion to make employment decisions, the supervisors' stereotypes are likely to influence personnel decisions. Almost 30 years ago, the U.S. Supreme Court recognized that an employer's practice of subjective decision-making could be analyzed under the disparate impact framework in appropriate cases. *Watson v. Fort Worth Bank & Trust* 487 U.S. 977 (1988). However, in these cases, the plaintiff must show more than a statistical disparity in the workforce. Instead, the plaintiff must prove through statistical evidence that a specific employment

workforce. Instead, the plaintiff must prove through statistical evidence that a specific employment practice caused, for example, the exclusion of a certain group from promotions.

Causation stands as a formidable obstacle for plaintiffs in disparate impact cases premised on a neutral policy of subjective decision-making. Implicit bias research may explain why there might be a disparate impact when employers afford too much discretion to lower-level supervisors. And an expert statistician may opine that, for example, women receive disproportionately fewer promotions than men. But even in combination, this testimony still fails to prove that all or even most of the employer's promotion decisions resulted from subjective decision-making or its managers' implicit bias.

This was the conclusion reached in *Pippen v. State of Iowa*, 2012 (Iowa Dist. April 17, 2012), *aff'd* 854 N.W.2d 1 (Iowa 2014), in which a class of African-American employees alleged that the state of Iowa's hiring and promotion practices caused a disparate impact based on race. The plaintiffs' social science expert testified that, based on studies showing an implicit bias among the general population, the evidence was "strongly presumptive" that Iowa managers' hiring and promotion decisions were infected with implicit bias. The plaintiffs' expert statistician testified that the state hired and promoted a disproportionately low number of African-Americans. Yet the court identified flaws in the experts' testimonies: (1) the social science expert's opinion was not based on studies specific to the Iowa decision makers and their decisions, and (2) the statistician could not tie the statistical disparity to any particular employment practice. Accordingly, the court rejected the plaintiffs' disparate impact claims.

Although implicit bias theory does not cleanly fit into the frameworks for disparate treatment and disparate impact, employers should expect to see an uptick in employees alleging they were impacted by implicit bias as the topic continues to gain popularity. Further, as research on the theory develops, so too will plaintiffs' strategies for incorporating the theory in discrimination cases.

Some of the same research emphasizing the innate nature of implicit bias finds that once people are made aware of potential biases, they can consciously intervene to prevent those biases from impacting their conduct. For that very reason, employers have and should continue to take steps to combat unconscious bias by:

- Raising managers' awareness of their hidden biases through surveys and tests such as the Implicit Association Test (available at implicit.harvard.edu);
- Creating structures governing hiring, promotions and firing processes that allow for more deliberative and objective criteria to be used in employment-related decision-making. For example, some employers have decided to hide applicant's names and other identifying characteristics from job applications reviewed by hiring managers. Other organizations now rely on standardized interview questions to minimize bias; and

- Periodically auditing employment practices and procedures for disparate impacts on particular groups.

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