



Understanding the Theory and Criticisms

By Sidney R. Steinberg and Benjamin S. Teris

Implicit bias as an issue is not going away. Employment litigators disregard implicit bias evidence at their own and their clients' peril.

Explicitly Excluding Evidence of Implicit Bias in Employment Cases

Imagine a case where an employer is found liable for discrimination not because of explicit or clearly delineated discriminatory animus but rather due to the alleged perception that the decision makers were influenced by

unconscious stereotyping. This is the risk of “implicit bias” evidence—and this is, as they say “not a test.” A number of courts have allowed implicit bias evidence to support claims of discriminatory animus.

The term “implicit bias” has crept its way from academia to common use. Hillary Clinton used it during the 2016 presidential election while discussing police shootings. The term also garnered nationwide attention when Starbucks closed its stores to offer implicit bias training to its employees. Implicit bias refers to unconscious stereotyping of certain groups of people—commonly used in the context

of race, gender, and ethnic groups. The theory is that although individuals may not harbor any explicit animus toward a group, their unconscious stereotypes or attitudes may guide and ultimately influence their actions toward members of that group. For example, a manager’s unconscious stereotyping of women could lead him to promote a man over an equally qualified woman, even if he does not consciously hold any discriminatory animus toward women.

It is clear why plaintiffs would want to use implicit bias evidence in employment cases. It could bolster an otherwise weak

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case with little-to-no evidence of explicit discrimination. Accordingly, the defense bar must gain an understanding of implicit bias to advise employers on the issue and to make effective arguments against the admission of such evidence in discrimination cases.

This article provides a brief summary of implicit bias and the most commonly

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used instrument that purports to measure it. It then examines employment discrimination cases that have considered implicit bias evidence. Finally, this article proposes strategies to exclude implicit bias evidence.

Background: Implicit Bias

For many years, the common assumption was that individuals act only in accordance with their conscious intentions or explicit beliefs. This was also the dominant view in the field of social psychology. Dr. Anthony Greenwald and Dr. Mahzarin Banaji coined the term “implicit bias” in the 1990s, based on research that led them to question this common assumption. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, Psych. Rev. Vol. 10, No. 1, 4–27 (1995). They opined that “social behavior often operates in an implicit or unconscious fashion. The identifying feature of implicit cognition is that past experience influences judgment in a fashion not introspectively known by the actor.” *Id.* Stated differently, our actions are guided by unconscious stereotyping of groups of people developed through our life experience. According to Dr. Greenwald, more than 70 percent of Americans hold implicit biases even though most believe themselves to be unprejudiced.

The proponents of the existence of implicit bias believe that it plays a role in the workplace, including, but not limited to, influencing hiring decisions, promotions, and employee evaluations. They claim that implicit bias tends to manifest when a subjective evaluation of an employee or candidate is part of an employment decision. Even when a decision maker does not hold any conscious stereotypes, the more subjectivity that the employer permits in the evaluative process, the greater the likelihood that implicit bias will affect the evaluation. Subjectivity is a focus of plaintiffs' attorneys who seek to use implicit bias evidence in employment cases.

The Implicit Association Test

In 1998, Dr. Greenwald and other social psychologists released the Implicit Association Test (IAT) as an instrument to measure implicit bias. *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, Journal of Personality and Social Psychology, Vol. 74, No. 6, 1464–80 (1998). The IAT is a computer-based response latency test. Simply stated, the test measures the speed with which an individual associates positive and negative words with certain categories. For example, on an IAT measuring implicit racial bias, the test taker would first be asked to sort words into categories. If the word “black” appeared on one part of the screen, the test taker would be asked to strike a key if a picture of an African-American individual appeared on the other part of the screen. Next, the test taker would be asked to sort positive and negative words—e.g., striking a key when a positive word appeared on the screen. The test taker would then be asked to pair positive words, such as “good,” with pictures of Caucasians, and pair negative words, such as “bad,” with pictures of African Americans. Finally, he or she would then be asked to perform the inverse—pair positive words with African Americans and negative words with Caucasians. Based on the test taker's reaction times, his or her implicit preference in favor of Caucasians or African Americans would be rated “slight,” “moderate,” or “strong.” Implicit bias can be found to exist based on a difference in reaction of mere milliseconds. If the hypothetical test

taker was a millisecond or so faster associating African Americans with negative words compared with Caucasians, he or she would be deemed to harbor a slight implicit bias against African Americans.

Since its introduction, there have been numerous studies based on the IAT. In addition, various versions of the IAT are available for anyone to take on the website for Harvard University's Project Implicit, <https://implicit.harvard.edu/implicit>. This includes IATs for race, gender, religion, sexual orientation, national origin, age, and even weight (fat versus thin). Millions of people have used the Project Implicit website to take the IAT. Other instruments have since been developed to measure implicit bias, but the IAT is seen as the gold standard.

Criticism

Despite widespread acceptance of the IAT among social psychologists, the media, and even the general public, there are serious questions about whether the “gold standard” meets the standard by which psychometric instruments are judged—reliability and validity. “Reliability refers to whether an assessment instrument gives the same results each time it is used in the same setting with the same type of subjects[,]” while “validity refers to how well the assessment tool actually measures the underlying outcome of interest.” Gail M. Sullivan, *A Primer on the Validity of Assessment Instruments*, J. Grad. Med. Educ. Vol. 3, No. 2, 119–20 (2011).

A 2017 *New York Magazine* exposé detailed how the Implicit Association Test falls below acceptable standards in both reliability and validity. Jesse Singal, *Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job*, *New York Magazine* (2017). For example, one measurement of reliability is test-retest reliability, measuring how a person scores when repeating the same test under the same conditions. The accepted standard of reliability for a psychometric instrument is a .80 on a 0 to 1 scale. The race-IAT, however, measures at a mere .42, which is well below the accepted standard. That number, by the way, does not come from a critic of the IAT, but instead from the director of research at Project Implicit. There are, therefore, legitimate questions as to the

reliability of the IAT test (and self-evident non-biased factors that could influence how quickly an individual taps a computer key—particularly when measured in milliseconds).

As for validity, a comprehensive 2013 study concluded that “the IAT provides little insight into who will discriminate against whom, and provides no more insight than explicit measures of bias.” Frederick Oswald *et al.*, *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, *Journal of Personality and Social Psychology*, Vol. 105, No. 2, 171–92 (2013). The same researchers reanalyzed key IAT studies to determine whether they could validate the ability of the race IAT to predict employment discrimination. Hart Blanton *et al.*, *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, *Journal of Applied Psychology*, Vol. 94, No. 3, 567–82 (2009). They concluded that “psychologists and legal scholars do not have evidentiary warrant to claim that the race IAT can accurately or reliably diagnose anyone’s likelihood of engaging in discriminatory behavior, less still that there is substantial evidence of such linkages.”

These are just a few examples of the scientific criticism of the Implicit Association Test. Moreover, even the test’s creators have conceded that it cannot be used to predict the likelihood of a particular individual to act on his or her implicit biases in a real-world scenario. Instead, they claim that based on data collected from many people, the IAT can predict general behavior in society at large in areas including employment decisions.

The criticism of the IAT begs the question what, if anything, could be considered credible evidence of implicit bias in the courtroom? The IAT is the most popular instrument used to measure implicit bias, and as noted, it is considered the gold standard in the field. This makes it probable that any proposed implicit bias evidence will be based in part on the IAT. If the Implicit Association Test falls below accepted standards for psychometric instruments, there is a strong argument that implicit bias evidence should, at the very least, be viewed with skepticism.

Implicit Bias Evidence in Employment Cases

And yet, counsel for individuals claiming bias in the workplace continue to seek to inject issues of implicit bias into matters for which there is otherwise little or no evidence of discriminatory animus.

The issue of implicit bias in employment cases generally arises through proposed expert testimony. Plaintiffs have introduced implicit bias to support motions for class certification, as evidence of discrimination at trial, and have even sought to compel decision makers to take the IAT. Courts have not reached a consensus on the admissibility of implicit bias evidence. Below is a sampling of cases on both sides of the issue.

The Supreme Court Weighs In

In *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011), the Supreme Court considered the use of stereotyping evidence similar to implicit bias in a sex discrimination case under Title VII of the Civil Rights Act of 1964. *Dukes* concerned a motion to certify a class of current and former female employees of Wal-Mart. *Id.* at 342. The plaintiffs alleged that the discretion delegated to local Wal-Mart supervisors over pay and promotions resulted in unlawful discrimination against women. They did not contend that Wal-Mart had an overarching corporate policy that expressly discriminated against women but rather that the discretion delegated to the local managers disparately impacted female employees with respect to pay and promotion. *Id.* at 344.

Dukes centered on the commonality prong for class certification under Federal Rule of Civil Procedure 23. To support their motion for class certification, the plaintiffs relied on, among other things, “the testimony of a sociologist... who conducted a ‘social framework analysis’ of Wal-Mart’s ‘culture’ and personnel policies, and concluded that the company was ‘vulnerable’ to gender discrimination.” *Id.* at 346. The expert evaluated Wal-Mart’s policies and practices, which included managers’ deposition testimony, documents describing the history and culture of Wal-Mart, equal opportunity issues, reports, memoranda, and organizational charts. He then analyzed those items “against what social

science shows to be factors that create and sustain bias and those that minimize bias.” He opined that “social science research demonstrates that gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors[.]” and “the evidence indicates that in-store pay and promotion decisions are largely subjective and made within a

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substantial range of discretion by store or district level managers, and that this is a common feature which provides a wide enough conduit for gender bias to potentially seep into the system.”

Wal-Mart unsuccessfully moved the district court to strike the sociologist’s report and other evidence. Wal-Mart argued that the expert’s conclusion that it was “vulnerable” to gender bias and stereotyping should not be admissible because he did not identify any particular discriminatory policy and he could not state how often stereotypes impacted employment decisions. The district court denied Wal-Mart’s motion to strike and granted the plaintiffs’ motion to certify the class. The court of appeals substantially affirmed the district court. *Id.* at 347–48. The Supreme Court granted certiorari.

Writing for a unanimous Court on the question of “commonality,” Justice Scalia noted that the only evidence offered by the plaintiffs of a “general policy of discrimination” was the sociologist’s expert testimony that Wal-Mart’s “strong corporate culture” made it “vulnerable” to



“gender bias.” *Id.* at 353–54. Significantly, the sociologist could not even “determine with any specificity how regularly stereotypes play[ed] a meaningful role in employment decisions at Wal-Mart.” *Id.* at 354. Justice Scalia was also skeptical of whether the sociologist’s testimony satisfied the standard for admission under Federal Rule of Evidence 702 and *Daubert v.*



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Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). Nonetheless, even if the testimony were admissible, the sociologist’s inability to answer “whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking” rendered his testimony irrelevant on the issue of whether the plaintiffs had “[s]ignificant proof” that Wal-Mart “operated under a general policy of discrimination.” *Id.* at 354–55. For that and other reasons, the Supreme Court held that the plaintiffs failed to satisfy the commonality prong for class certification.

Although *Dukes* does not reference implicit bias by name, the decision offers a roadmap for employers to challenge its admissibility. Indeed, *Dukes* highlights the main problem with implicit bias evidence in employment cases: there is no reliable method to measure the effect of implicit bias on specific employment decisions.

Implicit Bias Evidence Excluded

Since as early as 2012, Dr. Greenwald, the co-originator of the term implicit bias and the Implicit Association Test, has been

busy testifying for plaintiffs seeking to support a legal theory for implicit bias. Multiple courts have excluded his proposed expert testimony.

The plaintiffs in *Jones v. National Council of YMCA*, No. 09-C-6437, 2013 U.S. Dist. Lexis 129236 (N.D. Ill. Sept. 5, 2013), brought disparate impact claims under Title VII. They alleged that the YMCA’s policies resulted in African-American employees receiving lower pay and fewer promotions than Caucasian employees. *Id.* at *3–4. The plaintiffs sought to introduce implicit bias evidence through the report and testimony of Dr. Greenwald to support their motion for class certification—particularly the commonality prong.

Dr. Greenwald’s opinions were primarily based on his studies using the IAT. According to Dr. Greenwald’s report, “implicit or hidden biases... cause ‘adverse impact that is likely unintended and of which perpetrators are likely unaware’” and “implicit bias causes more than 70 percent of American Whites and Asians to favor White/European Americans in preference to Black/African Americans.” *Id.* at *18–19.

The defendants moved to strike the evidence proffered by Dr. Greenwald under Federal Rule of Evidence 702, arguing that his opinions were neither reliable nor relevant because he had not considered the specific facts of the case and his expertise did not apply to “the complex environment of a workplace.” *Id.* at *14–15. To support their argument, the defendants offered the report of their own expert, Dr. Philip Tetlock, who is the coauthor of the two flawed IAT studies referenced above. Dr. Tetlock’s report criticized Dr. Greenwald’s reliance on the IAT. He opined that the IAT is not a reliable predictor of behavior and thus cannot be applied to the facts at issue. He also conducted his own study of the YMCA’s employment practices and determined that they mitigated any unconscious bias that might exist. The plaintiffs, on the other hand, argued that Dr. Greenwald’s theories were based on settled science. They countered the YMCA’s argument that Dr. Greenwald did not opine that implicit bias actually influenced the employment decisions at issue by contending such an opinion would invade the province of the jury.

A recommendation and report by a United States magistrate judge found that

although Dr. Greenwald’s report discussed implicit bias, “he did not conduct an analysis of the [YMCA] or offer specific opinions regarding whether implicit bias applies to the conduct of the [YMCA] that [the] [p]laintiffs allege was discriminatory.” *Id.* at *19–20. The plaintiffs argued that it is not necessary for an expert to apply the specific facts to his methods. They based this argument on the Advisory Notes to the 2000 Amendment to Federal Rule of Evidence 702, which they claimed contemplates generalized testimony similar to that offered by Dr. Greenwald. In light of the plaintiffs’ argument, the court analyzed Dr. Greenwald’s report under the four requirements for admission of generalized expert testimony under Rule 702, which requires that “(1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony ‘fit’ the facts of the case.” *Id.* at *23.

There was no dispute that Dr. Greenwald was qualified. Over the defendants’ objections, the court found that Dr. Greenwald’s testimony could assist the factfinder. Specifically, the court refused to foreclose “the possibility of a need for a factfinder to be educated on implicit bias if it is reliable testimony applicable to the facts of the case.” *Id.* at *25. As for reliability, the defendants directly attacked the IAT’s applicability to employment decisions. Specifically, they disagreed “that Dr. Greenwald’s research, based on a computerized exercise that indicates automatic word associations that people make, within milliseconds, when confronting strangers of various ethnic and other backgrounds, applies to employment decision-making.” *Id.* at *25. The court agreed that Dr. Greenwald’s opinions were not reliable. It found that Dr. Greenwald did “not identify a study conducted in a business setting that showed how [Implicit Association Test] scores could predict discrimination in pay-setting or performance evaluation.” *Id.* at *27–28. Applying *Daubert* and Federal Rule of Evidence 702, the court recommended that the report and testimony should be excluded “[i]n light of the fact Dr. Greenwald did not consider the facts of [the] case or give a scientific basis to apply his general theories based on the IAT test-

ing to the decisions managers make in a workplace setting.” *Id.* at *30.

The district judge adopted the magistrate judge’s recommendation and expounded that in addition to the irrelevancy of Dr. Greenwald’s opinions to the plaintiffs’ disparate impact claims, the plaintiffs could not use Dr. Greenwald’s “opinions to support their intentional discrimination claims, since [his] opinions speak only to the question of implicit, or hidden, bias—not intentional acts.” *Jones v. National Council of YMCA*, 34 F. Supp. 3d 896, 901 (N.D. Ill. 2014).

The court reached the same conclusion in *Karlo v. Pittsburgh Glass Works, LLC*, 2:10-cv-1283, 2015 U.S. Dist. Lexis 90429 (W.D. Pa. Jul. 13, 2015). The plaintiffs in *Karlo* brought age discrimination claims under the Age Discrimination in Employment Act (ADEA) against their former employer, Pittsburgh Glass Works (PGW). Dr. Greenwald again offered the Implicit Association Test as the basis of his opinions on implicit bias. *Id.* at *9–10. Dr. Greenwald opined that general research on implicit bias applied to the facts of the case, including that “implicit biases are pervasive [.]” “approximately 80 percent of all research participants hold implicit... bias based on age[.]” and “[i]mplicit bias is scientifically established as a source of discriminatory behavior in employment....” *Id.* at *13–14. Dr. Greenwald determined that implicit bias “could have” played a role in employment decisions related to the plaintiffs due to the presence of subjective decision making by supervisors. *Id.* at *14–15. Notably, Dr. Greenwald did not address the facts of the case until the twenty-ninth paragraph of his 30-paragraph report.

Pittsburgh Glass Works moved to bar Dr. Greenwald’s testimony, arguing that his opinions “lack any relation to the facts of th[e] case and... his methodology is unreliable.” *Id.* at *16. The court agreed that Dr. Greenwald’s opinions, at least as they related to the facts presented, were unreliable. Specifically, Dr. Greenwald did not visit PGW, did not interview any of the managers who made the decision about the reduction in force that affected some plaintiffs, or “subject any of those individuals to his self-invented IAT....” *Id.* at *25. Dr. Greenwald’s failure to provide an analysis of whether implicit bias factored into

the decision to terminate other plaintiffs after the reduction in force further diminished the reliability of his opinion. *Id.* The court concluded with a harsh critique, referring to the opinion as “the say-so of an academic who assumes his general conclusions from the IAT would also apply to PGW” and noted that the IAT “says nothing about those who work(ed) at PGW.” *Id.* at *27 (alteration in original).

Dr. Greenwald’s opinion also did not fit to the facts of the case. While his report indicated his opinion could aid a judge or jury in their determination of “whether the Plaintiffs’ ages substantially motivated the Defendants’ actions outlined in the Complaint[.]” the court found this evidence to be incompatible with the “but-for” standard for a disparate impact claim under the ADEA. *Id.* at *28. The court further discounted the relevancy of Dr. Greenwald’s implicit bias testimony to any ADEA claim. *Id.* at *29. Specifically, the evidence concerning the role that unconscious bias may play in decision making appears incompatible with disparate treatment claims, which require proof of discriminatory motive. *Id.* Regarding disparate impact claims, the court found that implicit bias evidence “makes even less sense,” given that there is no requirement for the plaintiff to “show motive.” *Id.* at *30.

On appeal, the Third Circuit affirmed the district court’s decision to exclude Dr. Greenwald’s testimony, but the judges emphasized that they were not holding “that implicit-bias testimony is never admissible,” even with disparate impact claims. *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 85 (3d Cir. 2017).

Dr. Greenwald was also recently called upon in *Johnson v. Seattle Pub. Utils.*, No. 76065-3-1, 2018 Wash. App. Lexis 1145 (Wash. Ct. App. May 14, 2018). In *Johnson*, the Washington Court of Appeals affirmed the decision of a trial court to exclude Dr. Greenwald’s proposed expert testimony in a discrimination case. The court held that the judge properly concluded that Dr. Greenwald’s “generalized opinions... are not tied to the specific facts of this case” and “would be confusing and misleading for the jury.” *Id.* at *21.

Jones, *Karlo*, and *Johnson* applied a similar critique of the proposed expert testimony on implicit bias as *Dukes*. Dr.

Greenwald failed or was unable to link his opinions that implicit bias played a part to the particular employment decisions at issue. The district court in *Karlo* took its critique one step further, seemingly to indicate that implicit bias evidence should never be admissible in a “but-for” causation case—a view that was not shared by the Third Circuit.

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Implicit Bias Evidence Admitted

Not all courts, however, have excluded implicit bias evidence. Unlike *Jones* and *Karlo*, the court in *Samaha v. Washington State Department of Transportation*, No. cv-10-175-RMP, 2012 U.S. Dist. Lexis 190352 (E.D. Wash. Jan 3, 2012), admitted the testimony of Dr. Greenwald. Elias Samaha, who is of Arab descent, brought racial and national origin discrimination claims against his employer and supervisors under federal and state law, alleging disparate treatment.

In support of Samaha’s claims, Dr. Greenwald presented a declaration containing his general findings, such as “implicit bias is prevalent in the employment context” and “significant majorities of Americans prefer lighter skin tone over darker and European-American relative to Arab ethnicity....” *Id.* at *2–3. His findings were based on his own research and the IAT. *Id.*

The defendants sought to exclude the expert testimony of Dr. Greenwald through a motion in limine. They presented similar arguments to those made by the defendants in *Jones* and *Karlo*—that Dr. Greenwald



offered no support for the proposition that implicit bias had an effect on the specific employment decision at issue. *Id.* at *3–4. They also argued that evidence of implicit bias does not make the existence of intentional discrimination more or less likely. The *Samaha* court analyzed Dr. Greenwald’s opinions for reliability, helpfulness, and fit, and unlike the cases rejecting the

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evidence, the *Samaha* court found Dr. Greenwald’s opinions reliable. It credited Dr. Greenwald’s research, particularly the IAT. The defendants did not challenge Dr. Greenwald’s assertion that “researchers have validated [the Implicit Association Test] by evaluating thousands of participants in laboratory settings.” On helpfulness and fit, the court found that “[t]estimony that educates the jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee.” *Id.* at *8–9. Accordingly, the court denied the defendants’ motion to exclude Dr. Greenwald’s testimony. The case settled within a week of the court’s order.

Notably, the defendants in *Samaha* did not challenge the validity of the Implicit Association Test. If they had done so, they possibly could have mounted a stronger defense on the reliability of Dr. Greenwald’s testimony. The court’s opinion in *Samaha* provides less of a comprehensive analysis of the factual and legal issues at hand compared to the court opinions in *Jones* and *Karlo*.

In *Kimble v. Wisconsin Department of Workforce Development*, 690 F. Supp. 2d 765 (E.D. Wis. 2010), the court’s consideration of implicit bias came in the context of its findings of fact after a bench trial. The *Kimble* court embraced implicit bias evi-

dence in its analysis of claims under Title VII, 42 U.S.C. §1981, and 42 U.S.C. §1983.

Kimble, an African-American male, alleged that his employer discriminated against him on the basis of race and gender by not giving him a pay raise. His supervisor, J. Sheehan Donoghue, also a named defendant, was a Caucasian female. During her tenure in that position, Donoghue gave pay raises to Caucasian employees but not to Kimble. *Id.* at 768.

Kimble lacked direct evidence of discrimination, and thus, he had to prove his claim under the *McDonnell Douglas* burden-shifting test. *Id.* at 769. The court found that Kimble satisfied all elements of the prima facie case: (1) he was a member of a protected class (African-American male); (2) he performed his job satisfactorily (which was undisputed); (3) he suffered an adverse employment action (lack of pay raise); and (4) similarly situated employees outside his protected class received pay raises. *Id.* at *769–72. The court then turned to the defendants’ explanation for not giving the plaintiff a raise: “the comparators and others deserved raises but... [Kimble] did not perform his job well enough to merit one.” This explanation was, according to the court, “unconvincing,” particularly due to Donoghue’s incredible testimony, which was contradicted by other evidence in the record. Thus, the court determined that Kimble had met his burden of establishing unlawful discrimination. *Id.* at *772–75.

Despite already finding liability, the court proceeded to address “additional evidence” that “provide[d] a fuller explanation of the challenged decision.” The court explained that “when the evaluation of employees is highly subjective, there is a risk that supervisors will make judgments based on stereotypes of which they may or may not be entirely aware”—*i.e.*, implicit bias. *Id.* at 775–76. Citing several law review articles, the court found that “[w]ith respect to the operation of stereotypes in the employment context, most scholars believe that stereotyping is a form of categorizing” and “[a] supervisor’s view of an employee may be affected by such lines and categories whether or not the supervisor is fully aware that this is so.” *Id.* at 776. Applying this theory to the facts, the court determined that implicit bias

played a role in Donoghue’s decision not to give Kimble a pay raise. The court cited Donoghue’s apparent avoidance of Kimble, her quick-to-blame attitude toward him, her overemphasis on his proofreading and writing, and her dismissal of his achievements as opposed to those of his Caucasian colleagues as suggesting “the presence of implicit bias.” *Id.* at 776–78.

The plaintiff in *Kimble* did not seek to introduce implicit bias evidence through expert testimony. Instead, the court seemingly raised the issue sua sponte in its fact-finding role. Notably, the court did not consider implicit bias until it had already ruled in favor of the plaintiff and thus, did not view it as dispositive. Absent from the court’s analysis is a discussion of the possibility that Donoghue avoided Kimble because she did not care for him. There is also no analysis by the court of a sample of Kimble’s writing that could either substantiate or discredit Donoghue’s complaints.

In a subsequent case, *Martin v. F.E. Moran, Inc. Fire Prot.*, Case No. 13 C 3526, 2018 U.S. Dist. Lexis 54179 (N.D. Ill. Mar 30, 2018), the court cited *Kimble*, but found the implicit bias theory was too speculative. The court specifically rejected the plaintiff’s lay attempt to explain that certain emails were evidence of a manager’s implicit bias against African Americans, finding that although “[t]he emails could reflect an implicit racial bias against African Americans,” they could also reflect something entirely different.

Strategies to Exclude Implicit Bias Evidence

Strategies to exclude implicit bias evidence are (1) start by not accepting the Implicit Bias Test as gospel; (2) remember the standard of proof; (3) pound the facts; and (4) hit the breaks to ensure that if your client offers implicit bias training, it will not do more harm than good.

Do Not Accept the Implicit Association Test as the Gospel

If faced with an attempt to introduce implicit bias evidence through reliance on the Implicit Association Test, it would be a mistake to let its effectiveness go unchallenged. Indeed, the *Samaha* court pointed to the defendants’ failure to challenge the validity of the IAT as one of the bases for its

determination that the expert's opinion on implicit bias evidence was reliable. There are many documented concerns about the reliability and validity of the IAT as an instrument to measure implicit bias. These concerns have been raised by individuals in the same field as those who invented the IAT and can be used to attack the admissibility of implicit bias evidence. Challenging the Implicit Association Test can be done through examination of the expert on the various shortcomings of the instrument. Retaining a recognized critic of the IAT as an expert should also be considered, as the defendants did in *Jones*. An expert could add credibility to an attack on the IAT due to the common assumption of the instrument's validity.

Remember the Standard of Proof

A case involving an antidiscrimination statute that requires "but-for" causation, such as the ADEA, should be incompatible with implicit bias evidence, particularly with a disparate treatment claim. Specifically, if a plaintiff must prove that a manager would not have made the employment decision "but for" his or her discriminatory motive, the fact that unconscious stereotyping may have played a role in the decision should be irrelevant. Having a firm understanding of the theory of implicit bias should assist in making this argument.

As noted in *Karlo*, implicit bias evidence may be even less relevant to disparate impact claims. To prove a disparate impact claim, plaintiff must show that an employment policy or practice had a disparate impact on a protected category of employees—e.g., women, a racial minority, etc. Whether the individuals who promulgated the policy held discriminatory animus toward the impacted employees is not part of the analysis. Thus, their unconscious stereotypes or attitudes concerning those employees are just as irrelevant to the analysis as any explicit biases they may hold.

Pound the Facts

General concepts of implicit bias may not fit the facts of a case. Evidence of implicit bias in the general population does not mean that implicit bias played a role in the challenged employment decision. As emphasized by Justice Scalia in *Dukes*, and

echoed in *Jones*, *Karlo*, and *Johnson*, if the plaintiff or expert cannot even state that it is more likely than not that stereotyping played a role in the particular employment decision at issue, it is weak evidence that discrimination occurred and should be discounted. Considering that the IAT's creators will not even say that IAT results directly correlate to a particular individual's real world decisions, it is difficult to imagine an expert credibly opining that implicit bias more likely than not affected a specific employment decision.

There is presently no authority to stand for the proposition that implicit bias evidence standing alone can support a discrimination claim. The *Kimble* court even highlighted that it did not find that the plaintiff had proved discrimination based on implicit bias evidence alone. As such, if there is little to no evidence of discrimination, a plaintiff should not be able to maintain a claim solely through implicit bias evidence.

Note that a factual argument may lead plaintiffs to seek to compel decision makers to submit to an Implicit Association Test as a form of an independent medical examination. The plaintiff tried to do just that in *Palgut v. City of Colorado Springs*, Civ. A. No. 06-cv-01142-WDM, 2008 U.S. Dist. Lexis 123115 (D. Col. Jul. 3, 2008), purportedly to help demonstrate Title VII's mental element. The court, however, denied the plaintiff's motion to compel, noting that the particular employees were not parties to the case, and the defendant's mental condition was not in controversy. In *Karlo*, the court noted the lack of evidence that any managers had taken the IAT as part of its rationale for excluding Dr. Greenwald's testimony. This leaves open the possibility that the court could have ruled differently if the plaintiffs had evidence that the managers had IAT scores revealing implicit biases against older workers.

Should Employers Be Advised to Hold Implicit Bias Training?

At first blush, it would appear that an effective defense to an argument that implicit bias factored into an employment decision would be evidence that the employer offered training on implicit bias. Lawyers should advise clients to hit the breaks to ensure that the training does not do more

harm than good—particularly if the training involves managers taking the IAT to "learn" their biases. As noted above, evidence of a decision maker's IAT results could end up in the courtroom. A judge who is open to the use of implicit bias evidence could determine that Implicit Association Test results are discoverable. This is not to say that all implicit bias training is bad,

If a plaintiff must prove that a manager would not have made the employment decision "but for" his or her discriminatory motive, the fact that unconscious stereotyping may have played a role in the decision should be irrelevant.

only that it should be carefully selected, and administering IAT tests to employees and managers, even as a training exercise, is potentially fraught. The training should focus on broader issues, such as a reduction of subjectivity in employee evaluation.

Conclusion

The issue of implicit bias is not going away. Setting criticism of the IAT aside, employment litigators disregard implicit bias evidence at their own and their clients' peril. Implicit bias evidence might not be an issue in every case, but the fact that the issue continues to gain prominence makes it likely to come up more frequently in cases in the future. There is also the possibility that legislatures could amend antidiscrimination statutes in a way purportedly to combat implicit bias. Thus, it is important to gain a basic understanding of the theory and criticisms of implicit bias to mount an effective defense against its admission should it arise in your next case.

