The term “implicit bias” is commonly used to refer to ingrained beliefs, whether positive or negative, about other individuals or groups that are triggered automatically. These beliefs are not conscious thoughts but rather represent reflexive reactions at the unconscious level.

The developers of the theory, social psychologists Anthony Greenwald and Mahzarin Banaji, first used the term to describe the theory in 1995. Greenwald and Banaji also created a test to attempt to measure an individual’s implicit bias. Known as the Implicit Association Test ("IAT"), the test is designed to provide data on the unconscious associations people maintain between social groups and positive or negative characteristics.

Some social psychologists, including Greenwald and Banaji, believe that these unconscious attitudes actually predict behavior. These social psychologists posit that people’s unconscious beliefs in certain stereotypes result in biased decisionmaking and discriminatory behaviors based on unintentional preferences.

Since 1995, the theory of implicit bias has moved from the halls of academic debate to the parlance of everyday Americans with remarkable speed. Many people may recall that in the first presidential debate between Hillary Clinton and Donald Trump, Clinton responded to a question from Lester Holt regarding whether police were implicitly biased by stating, “Implicit bias is a problem for everyone, not just police.” Part of this visibility is owed to the fact that the IAT is easily accessible via the website Project Implicit, hosted by Harvard University. In fact, according to Greenwald, the test has been taken over 17 million times on the Project Implicit website.
All of this might lead one to believe that the concept of implicit bias and its relationship with discriminatory behaviors is well-settled. That is certainly not the case. Although many social psychologists agree that people often possess non-conscious preferences, the degree to which such biases play a role in deliberative behavior is hotly contested. Further, many academics have specifically criticized the IAT itself as an ineffective metric of implicit bias.

WORKPLACE TRAINING

Despite academic divergence over the impact of implicit bias in the workplace, corporations have shown a marked willingness to adopt training measures intended to combat the issue. The exercises are designed to facilitate uncovering employees’ unconscious biases, in the hopes that by revealing certain stereotypes, people may begin to eliminate them.

A June 12, 2017 New York Times article entitled, “150 Executives Commit to Fostering Diversity and Inclusion” describes a new initiative called “C.E.O. Action for Diversity” in which the CEOs of many of the nation’s largest and most recognizable companies have pledged to “support more inclusive workplaces” in part via a commitment to “implement and expand unconscious bias education.” The website for the initiative notes, “Unconscious bias education enables individuals to begin recognizing, acknowledging, and therefore minimizing any potential blind spots he or she might have, but wasn’t aware of previously. We will commit to rolling out and/or expanding unconscious bias education within our companies in the form that best fits our specific culture and business. By helping our employees recognize and minimize their blind spots, we aim to facilitate more open and honest conversations. Additionally, we will make non-proprietary unconscious bias education modules available to others free of charge.”

According to the Wall Street Journal, one estimate by the FutureWork Institute predicts that unconscious bias training will be provided by more than 50 percent of large U.S. employers with diversity programs by 2019.

Often, however, these corporate exercises designed to reveal and eliminate implicit biases have unintended consequences. In one noteworthy case, statements made by participants during a diversity training were used as direct evidence to support a class action suit alleging discrimination on the basis of sex. Beyond legal ramifications, the well-meaning exercises may also unintentionally reinforce certain negative attitudes simply by providing a mechanism to voice their existence. This is not to say that companies must shy away from providing diversity trainings to their employees; just that such trainings should be carefully evaluated to ensure that they are more helpful than harmful.

In addition to large corporations, the ABA has also launched endeavors aimed at combatting implicit bias, including the aptly named, “Implicit Bias Initiative” created “To help combat implicit bias in the justice system.”

IMPLICIT BIAS THEORY IN EMPLOYMENT LAW

For many employment practitioners, the theory of implicit bias raises complex questions when applied to the traditional legal standards and theories of proof in discrimination cases. Implicit bias has encountered a mixed reception in the judiciary, primarily due to the difficulty of establishing a causal link between employer conduct and discriminatory action. Importantly, this link is closely tied to the requirement in Title VII disparate impact cases that plaintiffs identify a specific employment practice causing the disparate impact based on a protected category. Where this causal link is more obvious, courts are more willing to accept that bias may have permeated individual decisions.

Courts Rejecting Implicit Bias

The lack of conclusive links between implicit bias and actual decision-making have left some courts wary of accepting evidence or expert testimony concerning implicit bias, even where disparities in employment outcomes exist. The Supreme Court most notably rejected the application of general evidence of implicit bias in Wal-Mart v. Dukes, as did the Iowa courts in Pippen v. Iowa. In Wal-Mart v. Dukes, the Court rejected a proposed class of 1.5 million women nationwide who had been employed by Wal-Mart because it found social science evidence of implicit bias in the exercise of managerial discretion insufficient to support their allegations of discrimination. The plaintiffs alleged, among other things, that Wal-Mart’s policy of granting local managers discretion over pay and promotion decisions had caused a disparate impact on the basis of gender. To
establish commonality for a class of employees.

The plaintiffs relied on statistical evidence of pay and promotion disparities based on sex, anecdotal evidence of sex discrimination, and the testimony of sociologist Dr. William Bielby. Dr. Bielby conducted a social-framework analysis of Wal-Mart’s culture and personnel practices and concluded that Wal-Mart was “vulnerable to gender discrimination.” The Court found this testimony unpersuasive, noting that Dr. Bielby could not “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart … [and at] his deposition … conceded that he could not calculate whether 0.5 or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” Based on this criticism, the Court found Dr. Bielby’s analysis insufficient to establish commonality under Rule 23 and also expressed doubt that this evidence would survive a Daubert analysis. The Court, in a footnote, recognized peer criticism of Dr. Bielby’s report for “testifying about social facts specific to Wal-Mart” with “no verifiable method for measuring and testing any of the variables that were crucial to his conclusions.” The Court stated that “[o]ther than the bare existence of delegated discretion, [the plaintiffs] have identified no ‘specific employment practice’—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice.” In this opinion, the Supreme Court raised substantial doubt as to whether social science analysis that the exercise of managerial discretion is vulnerable to bias, even when coupled with sex-based disparities in pay and promotions, can establish a policy of discrimination sufficient to establish commonality for a class of employees.

Soon after, in Pippen v. Iowa, a class of African-American employees asserted Title VII and state law claims of disparate impact based on race in Iowa state court. The plaintiffs alleged that the state of Iowa’s discretionary, merit-based hiring and promotion practices systemically discriminated against African-American employees. The plaintiffs submitted the testimony of two experts who opined that it was possible that implicit bias affected decision-makers and that implicit bias is so pervasive that it would affect any merit-based employment system, merely serving to legitimize inequality. Neither of the experts opined on any specific employment decisions by the relevant Iowa officials. For reasons similar to those in Dukes, the court rejected the use of such generalized social science evidence. The court criticized the plaintiffs’ failure to identify a specific employment practice creating the racial disparity and echoed the idea that “[d]elegated discretion without a specific employment practice, even supported by adverse outcomes in ultimate hiring statistics” will not suffice. Where the experts showed no evidence of how many discretionary employment decisions made in Iowa’s hiring process resulted from unconscious bias, the court concluded the experts had not demonstrated that the “bottom-line figures were caused by implicit racial bias.”

Other courts have recently rejected the use of social science evidence in employment discrimination cases on evidentiary grounds under the standards of Daubert. In Jones v. Nat’l Council of Young Men’s Christian Associations of the United States of America, the Northern District of Illinois refused to admit the plaintiffs’ expert testimony on implicit bias theory during the class certification stage of a race discrimination case. The court determined that general evidence on the existence of implicit bias could not be used to “educate the fact-finder” because it was not “adequately tied to the facts of the case to be useful to a jury. Even opinions about general principles have to be logically related to the factual context of a case to be admissible—those general principles must still ‘fit’ the case.” Under similar circumstances, the Third Circuit concluded in Karlo v. Pittsburgh Glass Works, LLC that the trial court had not abused its discretion by excluding expert testimony on implicit bias theory in an age discrimination case on the grounds that it did not “fit” the facts of the case as required by Daubert.

Courts Accepting Implicit Bias

Other jurisdictions have proven more receptive; notably these cases involve a single plaintiff and workplace.

In Thomas v. Eastman Kodak Co., the First Circuit reviewed the lower court’s grant of summary judgment against a plaintiff claiming that she was discriminatorily laid off because of her race. In assessing whether the employer’s articulated reason for the plaintiff’s layoff was pretextual and whether the true reason was discrimination, the court noted that where “the employee has been treated disparately ‘because of race,’” a disparate treatment claim survives “regardless of whether
the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias.” The court relied on disparate treatment case law and several law review pieces (accepting the existence of implicit bias) to support its statement that several types of biased thinking are “widely recognized.”

In Ahmed v. Johnson, the First Circuit reversed the trial court’s grant of summary judgment to an employer in a single plaintiff case alleging the discriminatory denial of a promotion based on race, national origin, and religion. Although not explicitly relying on implicit bias theory, the court noted that “[o]utright admissions of impermissible [discriminatory] motivation are infrequent” and “unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus.”

THE EEOC PERSPECTIVE

The EEOC has made its position regarding the role of unconscious bias in employment discrimination clear. According to its own guidance on race and color discrimination, the EEOC notes that intentional discrimination occurs “when an employment decision is affected by the person’s race . . . includ[ing] not only racial animosity, but also conscious or unconscious stereotypes about the abilities, traits, or performance of individuals of certain racial groups.”

From 2008 to 2013, the EEOC implemented an initiative known as “Eradicating Racism and Colorism from Employment” or E-RACE. The purpose of the E-RACE initiative, according to the EEOC website, was to “retool [the EEOC’s] enforcement efforts to address contemporary forms of overt, subtle and implicit bias.” As part of its E-RACE efforts, the EEOC committed to holding a series of public hearings to address implicit bias in employment. Other examples of the EEOC’s position on implicit bias, specifically with respect to race and color discrimination, include:

1. In its recommended best practices for employers on how to prevent race and color discrimination, the EEOC recommends that employers “Establish neutral and objective criteria to avoid subjective employment decisions based on personal stereotypes or hidden biases.”

2. According to the Compliance Manual, Section 15: Race & Color Discrimination, “Racially biased decisionmaking and treatment, however are not always conscious. The statute thus covers not only decisions driven by racial animosity, but also decisions infected by stereotyped thinking or other forms of less conscious bias.”

To a much more limited degree, the EEOC has also addressed implicit bias with respect to sex discrimination. Thus, in the EEOC’s enforcement guidance for unlawful disparate treatment of workers with caregiving responsibilities, the agency notes, “Investigators should be aware that it may be more difficult to recognize sex stereotyping when it affects an employer’s evaluation of a worker’s general competence than when it leads to assumptions about how a worker will balance work and caregiving responsibilities. Such stereotyping can be based on unconscious bias, particularly where officials engage in subjective decision-making.”

Finally, a number of panelists speaking before the EEOC have recently integrated the concept of implicit bias into their testimony. Although those testifying do not speak on behalf of the agency, the comments made during public hearings may reflect the EEOC’s own perspective and may even provide insight into future EEOC initiatives.

Thus, for example:

1. On October 13, 2016, Marko J. Mrkonich, Shareholder with Littler Mendelson P.C., testified that “Big Data, used correctly, can be a powerful tool to eliminate overt and implicit bias from an employee selection process, and a misplaced, rigid adherence to outdated legal tests and standards cannot prevent this progress from taking place.”

2. On May 18, 2016, Kweilin Ellingrud, Partner with McKinsey & Company testified regarding promoting diverse and inclusive workplaces in the tech sector. In his testimony, Ellingrud noted, “There are . . . companies that are using advanced analytics to understand and assess unconscious bias much more strongly throughout their people processes. They are searching for keywords in review memos and other sources for gender-skewed feedback on things like ‘abrasive style’ and ‘lack of executive presence,’ for women vs. men.”

3. On March 16, 2016, Betsey Stevenson, Associate Professor of Economics and Public Policy at the
University of Michigan, argued that the proposed revisions to the EEO-1 Report would assist in “making employers aware of implicit bias.” However, for a contrary view, see Camille A. Olson’s testimony on the proposed revisions to EEO-1.

• On July 1, 2015, Rachel D. Godsil, Professor at Seton Hall University School of Law described implicit bias at length, noting, “Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects.”

• On April 15, 2015, Barbara Arnwine, President for the Lawyers’ Committee for Civil Rights Under Law testified that “The sad fact is that the explicit discrimination that existed for decades, when state statutes and union rules expressly excluded African Americans from many job opportunities, has been succeeded by a new and enhanced set of barriers to employment for African Americans and other disadvantaged groups. These added barriers range from a simple double standard in the minds of hiring managers—implicit bias that unconsciously results in African Americans being required to demonstrate superior qualifications to be considered—to new examples of explicit criteria, like criminal background checks, credit background checks, unemployment bias, and entry-level tests of various abilities, many of which have a devastating impact to deprive African Americans of equal opportunity to obtain jobs and advance in their careers.”

Notes


13 For example, training should focus on action and positive solutions rather than negative stereotypes.

Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., Sec. 703(k)(1)(A) and (B), 42 U.S.C. 200e-2(k)(1)(A) and (B).


Pippen v. Iowa, 854 N.W.2d 1 (Iowa 2014).

Note that the Supreme Court and First Circuit, decades ago, had rejected the attempt to use implicit biases as evidence of discrimination. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) (“subconscious stereotypes and prejudices… may not prove discriminatory intent”); Jackson v. Harvard Univ., 721 F. Supp. 1397, 1432-33 (D. Mass. 1989), aff’d, 900 F.2d 464 (1st Cir. 1990), cert. denied, 498 U.S. 848 (1990) (“[d]isparate treatment analysis is concerned with intentional discrimination….[S]ubconscious attitudes… are precisely the sort that disparate treatment analysis cannot and was never designed to police.”)

Dukes, supra, 564 U.S. at 346, 353.

Id. at 346 (internal quotation marks and citation omitted).

Id. at 354 (internal quotation marks and citation omitted).


Dukes, supra, 564 U.S. at 354 n.8.

Id. at 357.

In an opinion issued soon thereafter with very similar allegations and reasoning as Dukes, the Sixth Circuit echoed the logic of the Supreme Court. Davis v. Cintas Corp., 717 F.3d 476, 489 (6th Cir. 2013) (finding unpersuasive the plaintiffs’ implicit bias theory evidence and finding the proposed class lacked commonality).


Pippen at 1.

Pippen at 31.

Pippen at 52-54.

Pippen at 52.

Pippen at 53.


Id. at 900.


Id. at 59-61.

Ahmed v. Johnson, 752 F.3d 490, 503 (1st Cir. 2014).

Id. at 503.


