The Legal Intelligencer

Page printed from: *The Legal Intelligencer*

Employment Law

Use of Implicit Bias Evidence to Prove Discrimination

Jeffrey Campolongo, The Legal Intelligencer

January 23, 2015

Are you or your co-workers guilty of "unconscious discrimination"? Is your manager or supervisor guilty of "implicit bias" in the workplace? These terms and others like it are used in social science to describe the inherent nature of stereotyping that takes place in everyone. The issue courts are being confronted with on a more frequent basis revolves around whether evidence of this type of stereotyping can form the basis for liability under anti-discrimination laws.

How Does Implicit Bias Impact Employment Law?

The origin of the term "implicit bias" is unknown; however, one of the leading social scientists to study its impact, professor Anthony G. Greenwald, has explained that it is the unconscious attribution of particular qualities to a member of a certain social group. (See "Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes," by Greenwald and Mahzarin R. Banaji, Psychological Review (1995).) Greenwald believes implicit bias or stereotypes are influenced by experience, and are based on learned associations between various qualities and social categories, including race or gender. Individuals' perceptions and behaviors can be affected by implicit stereotypes, even without the individuals' intention or awareness. The example used by Greenwald to explain the phenomenon is the unconscious stereotype that all pit bulls are dangerous and have a propensity for violence. This stereotype, he explains, can be associated with a singular event in the person's past, but the source of this association may be misidentified, or even unknown by the individual who holds them. Unlike explicit bias, which is typically the result of intentional, conscious and controllable thoughts and beliefs, implicit bias is activated by past experiences, some of which are wholly irrational.

In the employment law context, practitioners have offered evidence of implicit bias through the use of expert testimony and social-science literature to prove bias in decision-making. The debate on the validity of the "science" behind the literature has largely been put to rest by courts that reject *Daubert* challenges. (See, e.g., *Dukes v. Wal-Mart*, 474 F.3d 1214, 1227 (9th Cir. 2007), noting that courts have long accepted that social-science statistics may add probative value to plaintiffs' discrimination claims.) In fact, research has shown that implicit bias studies are already well-accepted by some courts. (See "Federal Judges Agree Hidden Biases May Be at Play in Employment Cases," BNA Daily Lab. Rep, Oct. 19, 2006.)

What Is Your Level Of Implicit Bias? Take The Test

There may be a number of ways to show a decision-maker has acted with a discriminatory level of implicit bias. Greenwald and his colleague, Linda Hamilton Krieger, wrote in 2006 that implicit biases can be discerned reliably, if not exclusively, through the use of something known as the implicit association test (IAT). (See Greenwald and Krieger's article, "Implicit Bias: Scientific Foundations," California Law Review (2006).) The IAT is a test you can take online (for free) at http://goo.gl/FIEFvu that will measure your own unconscious, implicit biases. According to its website, the "IAT measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The main idea is that making a response is easier when closely related items share the same response key." The IAT draws conclusions about implicit attitudes depending upon whether the time the subject takes to recognize pleasant and unpleasant words varies with the race of the person depicted in the image that precedes these words.

The IAT should be used for educational purposes only, according to the disclaimer on the website, because "the IAT sometimes reveals troubling aspects of human nature, [and] poses the possibility of causing harm. ... Using the IAT to make significant decisions about oneself or others could lead to undesired and unjustified consequences." Naturally, I felt compelled to take the test. After completing the gender-career IAT, the test results indicated that I have a "moderate association of male with career and female with family" compared to "female with career and male with family," which puts me in the 32nd percentile for Web respondents. I have no idea what this says about my underlying, implicit biases, other than I fall in the most prevalent category.

There are no reported opinions where the IAT has been used to show evidence of discriminatory decision-making. Given the test's own disclaimer, the fact that it has not been used in court (or, at least in reported opinions) suggests that this type of social-science data is not quite indicative of unlawful motive, be it conscious or subconscious.

The question then is no longer whether implicit bias exists; clearly it does. The question is whether evidence of it can be used to support a finding of invidious discrimination. Under what circumstances could a court consider some other form of implicit bias to support a finding of discrimination? For that answer, courts will have to decide whether admissibility of social-science literature is permitted under Federal Rule of Evidence 404(a).

Is Evidence Of Implicit Bias What Title VII Proscribes?

Federal Rule of Evidence 404(a) provides: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Generally, Rule 404(a) is intended to prevent evidence of an individual's propensity to engage in certain conduct to show that he or she engaged in that conduct on a specific occasion. The use of character evidence in a civil proceeding should never be allowed in to show that the actor acted in conformity with that character.

Persuasive arguments can be made that evidence of implicit bias through social-science literature and expert testimony should be precluded as character evidence. Commentators have argued that this evidence seeks to impose discriminatory intent on decision-makers, not on the employer's own character, but that of experimental research subjects who share similar demographic traits as the employer's decision-makers. (See Allan G. King and Syeeda S. Amin, "Social Framework Analysis as Inadmissible 'Character' Evidence," Law and Psychology Review (2008).)

In stark contrast to those arguments, veteran employment lawyer and professor Alice W. Ballard has offered four approaches in arguing that a decision made on the basis of implicit bias is, indeed, actionable under anti-discrimination laws, in "Appellate Decisions on the Mental Processes of Discrimination: Finding Room for Implicit Bias as a Factor in Causation."

First, Ballard reminds practitioners that Congress passed Title VII not to punish consciously racist behavior, but to provide equal employment opportunity and to remove discriminatory barriers in the workplace including biased assumptions, whether the decision-maker realizes that his or her thinking is biased or not.

Second, the plain language of Title VII makes no mention of intent. The fact that the statute prohibits subtle as well as obvious discrimination means the actor's good or bad faith is irrelevant. The question is whether race or gender or age made a difference in the outcome, not whether the decision-maker is a bad person.

Ballard's third suggested approach is to introduce expert testimony that lays out how implicit bias operated in the facts of your case. This provides the fact-finder with the bridge from implicit bias to causation.

Lastly, a fourth approach would be to use the social-science literature of implicit bias to support an argument that the Supreme Court's pronouncements about mental processes should be taken with a grain of salt, rather than as actual requirements for proof.

Whatever approach you take, Ballard strongly advocates talking about implicit bias without resorting to the phrase "unconscious discrimination," a phrase that "sounds too much like the opposite of 'intentional discrimination.'" The lexicon here is important because the true gravamen of implicit biases are the stereotypes they engender, not whether they were meant to hurt someone's feelings or not.

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.   •