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Implicit Bias: An examination of how courts are addressing implicit bias testimony and what to do when confronted with the issue

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"The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). The use of implicit bias evidence, however, risks an employer being found liable for discrimination not because of discriminatory animus, words, or explicit discriminatory practice, but because of the stereotypes decision makers may have that are not even known to them. Some courts have allowed implicit bias evidence – also known as unconscious bias – before the factfinders in employment discrimination cases, thereby leaving the possibility that factfinders may hold decision makers liable for thoughts, attitudes, and perceptions of which they, themselves, may not even be aware.

The purpose of this paper is three-fold: (1) to define implicit bias and how the evidence is being used, or attempted to be used, in trial court by plaintiff's attorneys; (2) to analyze how courts are evaluating implicit bias evidence during litigation; and (3) to give practical guidance on how to handle implicit bias when presented in the course of litigation and within your organization.

I. The theory and use of implicit bias evidence

The idea of "implicit bias" has crept its way from academia into everyday parlance over the past 25 years. The term has entered the national consciousness over the past five years, with "Karens" in society reacting negatively to the everyday behaviors of African Americans, such as barbequing, selling lemonade, or jogging. The term came to prominence with Starbucks closing all its stores on May 29, 2018, to conduct implicit bias training in response to a viral video where two black men were arrested in a Philadelphia Starbucks.

A. What is implicit bias?

"Implicit bias" refers to unconscious stereotyping of certain groups of people with common characteristics. The term was coined in the late 1990s by Dr. Anthony Greenwald and Dr. Mahzarin Banaji who 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." Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 Psych. Rev. 4 (1995). They further opine that these "attitudes are activated outside of conscious attention, by showing both that activation occurs more rapidly than can be mediated by conscious activity . . . and that activation is initiated by (subliminal) stimuli, the presence of which is unreportable." *Id.* at 5. In other words, our actions are guided by subconscious stereotypes that are unrecognized and unreported by us.

Clearly, there is significant appeal for plaintiffs to use implicit bias information in an employment case. It can strengthen an otherwise weak case with little-to-no evidence of explicit discrimination. A plaintiff's attorney can easily say that a decision maker need not show use of slurs or other hostile language or actions, instead chalking negative behaviors up to implicit bias or stereotypes the decision maker did not even realize they were acting upon.

And a number of courts have tacitly recognized the validity of implicit bias evidence in trial to the extent that "stereotypes" are used to establish liability. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discussing the impermissible "stereotyping" of women).[1] Of course, stereotypes can be consciously held, as well as be a construct of implicit bias; in *Price Waterhouse*, given the nature of the comments presented for and against the plaintiff's promotion to partner, one could certainly make the argument that these were explicitly held stereotypes. The First Circuit in *Thomas v. Eastman Kodak* recognized that race discrimination could occur both when "the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias." *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999). The First Circuit went on to collect cases on discrimination based on stereotypes and other cognitive biases. *Id. See also Green v. USX Corp.*, 843 F.2d 1511, 1525 (3d Cir. 1988) ("[W]e cannot believe that it was the intent of Congress to allow unarticulated biases or unconscious prejudices to result in discriminatory hiring practices . . . ."). The EEOC, hardly an impartial commentator, has also included "conscious or unconscious stereotypes" as "intentional discrimination." EEOC, *Questions and Answers about Race and Color Discrimination in Employment*, https://www.eeoc.gov/laws/guidance/questions-and-answers-about-race-and-color-discrimination-employment (last visited May 20, 2020). *But see Naumovski v. Norris*, 934 F.3d 200, 216 n.50 (2d Cir. 2019) ("To be clear, the sex stereotyping we discuss here is only *conscious* stereotyping. As we have explained previously, to establish an Equal Protection violation, a plaintiff must prove that she suffered purposeful or intentional discrimination. A claim of discrimination based on unconscious bias is, by its nature, not purposeful or intentional and therefore inadequate to state a claim under § 1983 and the Fourteenth Amendment." (internal citation and quotation omitted)).

B. How is implicit bias measured and can/should it be?

The "gold standard" for measuring implicit bias is the Implicit Association Test ("IAT"), created by Dr. Greenwald. The IAT

> is a computerized exercise based on automatic word associations that test subjects make when shown pictures of individuals of various genders, races, and ethnicities. The photos are displayed for only milliseconds; then the test subjects are asked to make an association. If a test-taker responds more quickly, say, to the pairing of photographs of African-American faces with negative character trait words than to the pairing of European-American faces with the

[1] *Price Waterhouse* discussed the "stereotyping" evidence presented by Dr. Susan Fiske. Dr. Fiske testified that "partnership selection process at Price Waterhouse was likely influenced by sex stereotyping." 290 U.S. at 235. She recounted several comments submitted on Ms. Hopkins partnership evaluation forms, for example that described her as "macho," that she "overcompensated for being a woman," and that she needed "a course at charm school." Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." Despite these comments, Dr. Fiske stated that she was unable to say that any one (or more) comments were made based on stereotypes of women. *Id.* Notably, defendants did not object to Dr. Fiske's testimony at trial (or, presumably, at the *in limine*/*Daubert* stage) and the Supreme Court held that appellate briefing was to late to mount such a challenge. *Id.* at 255.

> same negative traits, the test taker is said to exhibit an implicit negative stereotype toward African-Americans.

Jones v. Nat'l Council of Young Men's Christian Ass'ns. of the United States of Am., 34 F.Supp.3d 896, 899 (N.D. Ill. 2014). Simply stated, the test measures the speed an individual associates positive and negative words with certain characteristics.

Despite its acceptance as the "gold standard" for measuring implicit bias, the reliability and validity of the IAT are seriously in doubt. "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. Reliability essentially means *consistent* or *dependable* results." Gail M. Sullivan, *A Primer on the Validity of Assessment Instruments*, 3 J. Grad. Med. Educ., 119 (2011). Validity, on the other hand, "refers to how accurately a study answers the study question or the strength of the study conclusions." *Id.*

One measure of reliability is test-retest. Simply stated, test-retest states how accurately a person scores the same score on the same test at different times. Think about a test for depression: if someone were to test severely depressed with suicidal thoughts on one day, but tests without depression on the next, the test would be virtually worthless as a diagnostic tool.

A test is considered reliable if it has a test-retest reliability of at least 0.7, although it is preferred to be over 0.8. Studies have found that racial bias IAT studies have a test-retest reliability score of only 0.44, while the IAT overall is just around 0.5. This puts the IAT well below the threshold of "reliable" in terms of psychological testing.

Validity is another problem for the IAT. Between 2009 and 2015, four separate meta-analyses each examining between 46 and 167 individual studies, all showed the IAT to be a weak predictor of behavior.[2] Two of these meta-analyses focused solely on the race IAT, while two examined the IAT's links with behavior more broadly. One of these meta-analyses went so far as to conclude the predictive validity was so low that it was "similar to evaluating raincoats on sunny days."

"[W]ith respect to individual-level behavior, the accumulated research findings reveal that it is scientifically inappropriate to use any individual's score on an implicit bias measure as a measure of how likely it is that the individual will have engaged in acts of discrimination in the past or will do so in the future." Gregory Mitchell, *An Implicit Bias Primer*, 25 Va. J. Soc. Pol'y & L. 27, 46 (2018).[3] In making this statement, Mr. Mitchell cites the unreliable and predictive

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[2] Fredrick L. Oswald, Gregory Mitchell, Hart Blanton, James Jaccard, Philip E. Tetlock, Philip E., *Predicting Ethnic and Racial Discrimination: A meta-analysis of IAT criterion studies*, 105 J. of Personality and Soc. Psych. 171 (2013); Anthony G. Greenwald, T. Andrew Poehlman, Eric Luis Uhlmann, Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: Meta-analysis of predictive validity*, 97 J. of Personality and Soc. Psych. 17 (2009); C. Daryl Cameron, Jazmin L. Brown-Iannuzzi, B. Keith Payne, *Sequential Priming Measures of Implicit Social Cognition: A meta-analysis of associations with behavior and explicit attitudes*, 16 Personality and Soc. Psych. Rev. 330 (2012); Rickard Carlsson & Jens Agerstrom, *A Closer Look at the Discrimination Outcomes in the IAT Literature* (2015).

[3] Mr. Mitchell references a meta-analysis of his own conducted in 2013. This meta-analysis showed that "the correlation between measures of implicit racial and ethnic bias . . . was only .15 and between measures of implicit

nature of implicit bias measures, concluding that "[a]n individual who supposedly shows high implicit bias on the IAT is no more likely to discriminate in any given situation than an individual who supposedly shows low implicit bias on the IAT." *Id.* at 47.

Perhaps recognizing the flaws of predictive behavior and the IAT, the administrators of the IAT at Project Implicit caution using it as a predictive tool: "a single IAT is unlikely to be a good predictor of a single person's behavior" and "[t]he link between implicit bias and behavior is fairly small on average but can vary quite greatly." *Frequently Asked Questions*, Project Implicit, https://implicit.harvard.edu/implicit/faqs.html#faq5 (last visited May 18, 2020). For this reason, Project Implicit specifically directs *against* using the IAT to make decisions or assumptions about yourself or others, recognizing "there are problems with using [the IAT] outside of the safeguards of a research institution" and that using the IAT in such a manner "could lead to undesired and unjustified consequences." *Ethical Considerations*, Project Implicit, https://implicit.harvard.edu/implicit/ethics.html (last visited May 18, 2020).

Unfortunately, these warnings are contrary to the views of the developers of the IAT, Dr. Greenwald and Dr. Banaji, who write "the automatic White preference expressed on the Race IAT is now established as signaling discriminatory behavior. It predicts discriminatory behavior even among research participants who earnestly (and, we believe, honestly) espouse egalitarian beliefs." Anthony G. Greenwald & Mahzarin R. Banaji, *Blindspot: Hidden Biases of Good People* 47 (2013).

II. How are courts evaluating the use of implicit bias evidence?

Regardless of the reliability or validity of implicit bias or the measure of it, plaintiffs are attempting to interject the idea of implicit bias into their cases, usually through expert testimony. Plaintiffs have introduced implicit bias evidence to support motions for class certification and evidence of discrimination at trial. The use of this evidence is clear: to "create an inference of intentional discrimination when workplace decisions have discriminatory results, but the decision makers do not believe they harbor animus." Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 Lewis & Clark L. Rev. 919, 935 (2016). The goal is to hold the *employer*, not decision makers, "liable for intentional discrimination for failing to prevent or correct the operation of implicit bias." *Id.* Courts have not reached a consensus on the admissibility and usefulness of implicit bias evidence, with some courts allowing the testimony, some rejecting it outright, and some courts acting as their own implicit bias experts.

A. The Supreme Court (kind of) tackles implicit bias

ethnic bias and behavior was only .12." *Id.* at 49-50. Mr. Mitchell went on to show that, in addition to the "small size of the average correlations," there was also an "accompanying large variance observed . . . . In a number of studies, the observed correlation was negative (i.e., high bias was related to less discriminatory behavior) or approximately zero (no correlation at all was observed)." *Id.* at 50.

Mr. Mitchell cites another meta-analysis conducted by an architect of the IAT which showed an even smaller correlation. This means that "if we had implicit bias scores for 100 persons, and those persons made 100 decisions, only one or two of those decisions might be different if we were to draw a different distribution and compare the decisions of the two groups." *Id.* at 51.

The closest the United States Supreme Court has come to opining on implicit bias is in the case of *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011). Although not referred to as implicit bias, *Dukes* considered stereotyping evidence presented at the class certification stage. *Id.* at 342. A putative class of female workers at Wal-Mart alleged that the "discretion over pay and promotions [was] exercised disproportionately in favor of men, leading to an unlawful disparate impact on female workers." *Id.* at 344.

To support the commonality prong of class certification, the plaintiffs presented the "testimony of a sociologist, Dr. William Bielby, who conducted a 'social framework analysis' of Wal-Mart's 'culture' and personnel practices, and concluded that the company was 'vulnerable' to gender discrimination." *Id.* at 346. Specifically, Dr. Bielby opined that "social science research demonstrates that gender stereotypes are especially likely to influence personnel decisions when they are based on informal, arbitrary, and subjective factors" and that these "subjective and discretionary features of [Wal-Mart]'s personnel policy and practice make decisions about compensation and promotion vulnerable to gender bias."[4] This evidence, in turn, led the trial court to find that "the evidence indicates that in-store pay and promotion decisions are largely subjective and made within a 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." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 152 (N.D. Cal. 2004). The trial court allowed the evidence, certified the class, and the court of appeals affirmed the trial court. *Dukes*, 564 U.S. at 348-49.

The Supreme Court issued a unanimous decision on the commonality element of the case. After reciting general class action criteria and specifying the law on commonality, the Court explained that commonality in a discrimination case must be the common answer to the question "why was I disfavored." *Id.* at 352. One of the ways in which the common answer of discrimination can be proven is by "[s]ignificant proof that an employer operated under a general policy of discrimination . . . ." *Id.* at 353.

After the general recitation of the law, the Court held that "significant proof" was "entirely lacking" from the plaintiffs' case. The Court noted that

> [t]he only evidence of a "general policy of discrimination" [plaintiffs] produced was the testimony of Dr. William Bielby, their sociological expert. Relying on "social framework" analysis, Bielby testified that Wal–Mart has a "strong corporate culture," that makes it "vulnerable" to "gender bias." He could not, however, determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal–Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking.

Id. at 353-54 (internal citations and quotations omitted).

[4] William Bielby report, *available at* http://www.walmartclass.com/staticdata/reports/r3.html#_ftn1 (last visited May 18, 2020).

If this testimony were admissible,[5] Dr. Bielby'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 whether there was "significant proof" Wal-Mart "operated under a general policy of discrimination." The *Dukes* decision highlights the main problem with implicit bias vis-à-vis causation: there is no reliable method to determine whether an individual (or multiple) employment decision was caused by implicit bias (or was the motivating factor, the "but for" factor, or contributing factor).

B. The lower courts are, unsurprisingly, split

Despite this guidance from the Supreme Court – or perhaps because it came in the context of the commonality requirement for class certification and not on the admissibility of expert testimony generally – the lower courts remain split on whether to admit implicit bias evidence when considering the merits of the case.

1. Courts admitting implicit bias evidence

Before addressing how the defense bar has successfully kept implicit bias testimony from the factfinder, I first discuss how plaintiffs have been successful in eliciting it. This discussion is guided by *Samaha v. Wash. State Dep't of Transp.*, No. CV-10-175, 2012 WL 11091843 (E.D. Wash. Jan. 3, 2012), *Martin v. F.E. Moran, Inc.*, No. 13 C 03526, 2017 WL 1105388 (N.D. Ill. Mar. 24, 2017) and its companion case *Martin v. F.E. Moran, Inc.*, No. 13 C 03526, 2018 WL 1565597 (N.D. Ill. Mar. 30, 2018), and the extraordinary case of *Kimble v. Wisc. Dep't of Workforce Dev.*, No. 07C0266, 690 F.Supp.2d 765 (E.D. Wisc. 2010).

a. *Samaha v. Wash. State Dep't of Transp.*, No. CV-10-175, 2012 WL 11091843 (E.D. Wash. Jan. 3, 2012)

The most plaintiff-friendly use of implicit bias evidence can be seen in *Samaha*. Elias Samaha, of Arab descent, brought several claims under federal civil rights statutes and their state counterparts for race and national origin discrimination. *Id.* at *1. In support of Mr. Samaha's claims, Dr. Greenwald – inventor and proponent of the IAT – submitted an expert report with findings, *inter alia*, that 70% of Americans are implicitly biased, 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.*

Defendants moved to exclude Dr. Greenwald's testimony as irrelevant, unfairly prejudicial, and unreliable, specifically arguing that Dr. Greenwald did not find fact-specific bias as it relates to Mr. Samaha's race, color, national origin, or ethnicity and offered no support for the proposition that implicit bias had an effect on the specific employment decision challenged in the case. They also argued that evidence of implicit bias does not make the existence of *intentional* discrimination more or less likely.

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[5] Justice Scalia expresses skepticism over whether Dr. Bielby's testimony would even pass the *Daubert* test for the admission of expert testimony.

After a perfunctory review of the applicable law, the *Samaha* court analyzed Dr. Greenwald's opinions for reliability, helpfulness, and fit, and found them to be reliable. It credited Dr. Greenwald's research, particularly the IAT. Notably, the validity and reliability of the IAT was "unchallenged by Defendants" and the court noted it was "validated . . . by evaluating thousands of participants in laboratory research studies. *Id.* at *3. Without any kind of challenge mounted by the defense, the court was "satisfied that Dr. Greenwald's opinions are sufficiently 'ground[ed] in the methods and procedures of science.'" *Id.* (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993)).

On helpfulness and fit, the defendants argued that Dr. Greenwald's generic education on the topic of implicit bias "neither applies the principles of implicit bias to the case nor opines to any degree whether implicit bias played any role in any employment decision made by the Defendants." *Id.* The *Samaha* court agreed that Dr. Greenwald did "not provide a conclusion as to whether his findings are consistent with the alleged actions of Defendants." *Id.* at *4. Rather, the court made use of the Advisory Committee Notes to the 2000 Amendments to Federal Rule of Evidence 702:

> Yet it might also be important in some cases for an expert to educate the factfinder about general principles without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or blood clotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles.

That Advisory Committee Note sets forth a four-step test to determine the admissibility of expert testimony that does not apply the principles and methods to the facts of the case:

> Rule 702 simply 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.[6]

After summarily deciding that Dr. Greenwald was qualified, and that his opinions were based on reliable methodologies and relevant, the court found "[t]estimony that educates a 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 *4.

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[6] This is in contrast to the traditional test in the text of Rule 702 which permits testimony by a qualified expert if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. The principal difference is that the test for generalized testimony does not require that "the expert has reliably applied the principles and methods to the facts of the case."

b. *Martin v. F.E. Moran, Inc.*, No. 13 C 03526, 2017 WL 1105388 (N.D. Ill. Mar. 24, 2017) and *Martin v. F.E. Moran, Inc.*, No. 13 C 03526, 2018 WL 1565597 (N.D. Ill. Mar. 30, 2018)

The most recent decisions admitting implicit bias evidence are the *Martin* opinions from the Northern District of Illinois. The *Martin* opinions consist of an order on the *Daubert* challenge to implicit bias testimony (2017 WL 1105388, *Martin I*) and order following a twelve-day bench trial in which the use of the implicit bias testimony was recounted in detail and analyzed as part of the decision against the plaintiffs (2018 WL 1565597, *Martin II*).

The *Martin* plaintiffs were African Americans who brought claims of racial discrimination against the Fire Protection of Norther Illinois (FPN). *Martin I*, at *1. To support their claims, they offered the opinions of Dr. Destiny Peery who was designated to testify on stereotyping, aversive racism, social tuning, and implicit bias. "The purpose of her testimony is to describe the context in which FPN made employment decisions and to rebut FPN's proffered legitimate business reasons as pretextual" under the *McDonnell Douglas* burden shifting analysis. *Id.* at *2. Among Dr. Peery's opinions was that there was "evidence of explicit racial stereotypes at FPN," that there was "aversive racism," and that the culture and processes of FPN were prone to the influence of implicit bias. *Id.*

The *Martin* court easily disposed of qualifying Dr. Peery and, instead, focused on the reliability of her opinions. The defendants specifically challenged Dr. Peery's report "for a lack of scientific basis and testable methodology." *Id.* at *3. The court found, however Dr. Peery was not "purporting to conduct a traditional scientific assessment, but rather is basing her opinion on general psychological principles and her experience in the field." *Id.* Because the court found that "Peery's testimony related to the science of implicit bias will be helpful in contextualizing the other evidence of at trial[,]" it allowed her to testify. *Id.* at *4. The *Martin* court did consider the Supreme Court's precedent of *Dukes*, but concluded it was distinguishable as the implicit bias evidence there was used to address the commonality requirement of class certification, and "was not rejected under *Daubert* standards." *Id.* at *3.

Although implicit bias evidence was admitted by the *Martin* court, the court did limit Dr. Peery's testimony in one key aspect. After noting that the plaintiffs were "offering Peery's testimony as circumstantial evidence indicating that FPN's proffered legitimate business reason for its adverse employment actions was pretext," the court concluded that Dr. Peery would not be allowed to testify that the adverse employment actions *were* caused by implicit bias. *Id.* at *4. Instead, the court allowed Dr. Peery to opine on the "*presence* of stereotypes and aversive racism at FPN and how that *could have influenced* decision makers." *Id.*

Notably, *Martin* was a bench trial, a fact reiterated by the court in *Martin I.* As such, the court demurred on its "gatekeeping role of keeping unreliable expert testimony from the jury." *Id*. The outcome could very well have been different given a jury trial given the lack of "fear of prejudicing the untrained ear of a juror." *Id.*

Because *Martin* was a bench trial, we are privy to the deliberations of the factfinder in recounting and using implicit bias testimony in *Martin II*. After recounting what implicit bias is,

and that it was "remarkably" resistant to change, Dr. Peery testified that a number of emails circulated by the decision makers at FPN "contained racial stereotypes [and] conveyed a protectionist attitude toward whiteness that could feed stereotyping and implicit bias." *Martin II*, at *20-21. These emails may cause lower level employees to adopt the attitudes of their superiors and create and "us-versus-them" mentality." *Id.* at *21. "Ultimately, Dr. Peery opined that FPN had a corporate culture that fosters implicit bias at multiple levels and a decision-making process susceptible to the influence of implicit bias." *Id.* at *22.

The *Martin* court found that "[e]vidence that a workplace had an atmosphere of racial bias . . . goes to motive and whether such atmosphere or attitudes may have tainted the adverse employment decision." *Id.* at *27. While Dr. Peery's testimony provided "circumstantial evidence that helped contextualize other evidence presented at trial" and "showed how stereotypes and aversive racism *could have* influenced decision-makers," the court ultimately found that this evidence does not show that FPN decision-makers made adverse employment decisions based on plaintiffs' race. *Id.* at *28.

The court also found that the "corporate culture" could not be imputed to the actual decision maker. *Id.* Therefore, the plaintiffs were required to show that the decision maker, himself, were "improperly influenced by an implicit bias." *Id.* This they failed to do. Ultimately, the court found that emails received and forwarded by the decision maker "could reflect an implicit racial bias against African Americans[, but] they could also reflect a more benign frustration with affirmative action initiatives . . . ." *Id.* at *29. In this way, "Plaintiffs failed to tie Dr. Peery's opinions regarding implicit bias to the individual circumstances surrounding their employment with FPN as required to prove intentional discrimination actually occurred at FPN." *Id.* The court found against the plaintiffs on their discrimination claims.

c. *Kimble v. Wisc. Dep't of Workforce Dev.*, No. 07C0266, 690 F.Supp.2d 765 (E.D. Wisc. 2010)

The last case which considers and admits implicit bias evidence is particularly striking because the issue was not presented by an expert, was not subject to a reliability analysis, and did not go through a *Daubert* challenge. This is because the court seemingly interjected the evidence into the case *sua sponte*. *Kimble* considers an African American male plaintiff, who had alleged that his employer discriminated against him on the basis of race and gender by not giving him a pay raise.

Lacking direct evidence of discrimination, Kimble proceeded under the *McDonnell Douglas* burden-shifting analysis. *Id.* at 769. After establishing a *prima facie* case, the court turned to the defendant's explanation for the adverse actions and found the evidence "unconvincing" in light of other evidence in the record. Thus, the court concluded that Kimble had established discrimination. *Id.* at 772-75.

After liability was established, the court tacked on a section to its opinion titled "Additional Evidence." Here, although lacking citations to the record, testimony of witnesses, or documentary evidence, the court acts as its own expert witness on the theory of implicit bias. The *Kimble* court starts with the premise that subjectivity in decision making can make decisions prone to the

influence of implicit bias. *Id.* at 776. After defining for itself implicit bias and "categorizing," the court cites several law review articles and recounts an anecdotal hypothetical from one. *Id.* The court concludes that "something similar occurred in the present case." *Id.* The court then goes on to give examples of negative employment actions, likens them to the anecdotal hypothetical, and concludes that the supervisor "behaved in a manner suggesting the presence of implicit bias."

Notably, the *Kimble* court had already established liability by rejecting the defendants' explanation for the employment actions under the *McDonnel Douglas* analysis. There was no reason to engage in the implicit bias analysis or to add the "Additional Evidence" section to its opinion making it pure *dicta*. The precedential value of *Kimble* should, consequently, be limited.[7]

2. Courts rejecting implicit bias evidence

Although the cases that admit implicit bias evidence are sufficient to induce nightmares in the defense bar, the are significantly more courts that have excluded implicit bias evidence. Most courts that have considered implicit bias evidence have rejected it because the evidence cannot be linked to the facts of the case, the general premise is, therefore, irrelevant or is within the common knowledge of the jury, and admission of implicit bias evidence is more prejudicial than probative under Federal Rule of Evidence 403.

a. *Jones*

The first set of cases to exclude implicit bias evidence, and the cases to which most other courts cite, is the *Jones v. Nat'l Council of Young Men's Christian Ass'ns of the United States of America* opinions. *Jones I* (2013 WL 7046374) is a report and recommendation from the Magistrate Judge to the district court, and *Jones II* (34 F.Supp.3d 896 (N.D. Ill. 2014)) is the adoption of the report and recommendation. The *Jones* plaintiffs were African American employees who brought disparate impact claims under Title VII. They alleged that the YMCA's policies resulted in African American employees receiving lower pay, lower evaluations, and fewer promotions than similarly situated Caucasian employees. *Jones I*, at *2. On a motion to certify the class – particularly with respect to the commonality prong, plaintiffs sought to introduce the testimony of Dr. Greenwald. The plaintiffs argued that "Dr. Greenwald's work 'helps Plaintiffs demonstrate commonality by serving as common evidence for resolving a common question on Plaintiffs'' discrimination claims.'" *Id.* at *4.

Dr. Greenwald's opinion was to encompass the definition of implicit bias, an opinion that "implicit bias causes more than 70% of American Whites and Asians to favor White/European Americans in preference to Black/African Americans, and the concept that "implicit or hidden biases . . . cause 'adverse impact that is likely unintended and of which perpetrators are likely unaware.'" *Id.* at *6. Further, Dr. Greenwald opined that "unconscious bias against African

[7] The *Kimble* court is not alone in acting as its own expert on implicit bias. In *Kassman v. KPMG LLP*, 416 F.Supp.3d 252 (S.D.N.Y. 2018), the court considered the commonality of a disparate treatment and disparate impact class for female employees. Although applying *Dukes*, the court questions the underlying assumption from it: "that 'left to their own devices most managers in any corporation . . . would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.'" *Id.* at 258, n.2 (quoting *Dukes*, 564 U.S. at 355). The court attacks this underlying assumption as "contradicted by studies finding that implicit bias has profound effects" and quotes what appears to be the court's own research.

Americans, which is widely present in the American population – poses greater risk of manifesting itself in conjunction with subjective criteria . . . ." *Id.*

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 laboratory expertise did not extend to the "complex environment of a workplace." *Id.* at *5. To support these arguments, defendants offered their own expert to opine that the IAT – the basis of many of Dr. Greenwald's conclusions – is not a reliable predictor of behavior and cannot, therefore, be applied to the facts of *Jones*.

The Magistrate recited the general rule that an "expert [must] reliably appl[y] his principles and methods to the facts of the case." *Id.* at *6 (citing Federal Rule of Evidence 702 and *Daubert*). The Magistrate called this "bridging the analytical gap" between the existence of the science and principles and the facts of the case. After recounting this standard, the Magistrate recounts in detail the factual deficits in Dr. Greenwald's opinions, *inter alia*, failure to visit or speak with employees of the YMCA, read the employee declarations, conduct an IAT on decision makers, or review the criteria used in performance evaluations. *Id.* In short, Dr. Greenwald did not "conduct an analysis of the Y or offer specific opinions regarding whether implicit bias applies to the conduct of the Y that Plaintiffs allege was discriminatory." *Id.* at *7.

Conceding to these noted deficiencies, plaintiffs attempt to proceed down the *Samaha*/*Martin* path to admissibility and "argue that an expert does not need to apply the facts of the case to his principles and methods" and that, given his role as educator to the factfinder, "how much or how little Prof. Greenwald knows about the Y is irrelevant." *Id.* The Magistrate demurs on whether implicit bias and the existence of stereotypes is within the common knowledge of the population and thus is a proper topic for factfinder education. Instead, the Magistrate moves into an analysis of whether Dr. Greenwald's laboratory research can be reliably applied to the workplace and concludes it cannot.

This conclusion was based on defendants' argument that "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 *8. The Magistrate agreed that Dr. Greenwald "has no scientific argument that [his IAT] observations can be transposed to an entirely different area . . . ." *Id*. On this point the Magistrate credits the defendants' expert who opines that "laboratory experiments, unlike actual employment settings, rarely include 'strong incentives for getting things right, or strong disincentives for getting things wrong . . . .'" *Id.* Ultimately, the IAT does not measure the *intent* that a manager uses in making employment decisions. *Id.*

The Magistrate concluded that "Dr. Greenwald has done nothing that would reliably equip an expert to say something meaningful about employment practices at the Y" and that his opinions are "speculative, without any scientific basis, and 'will not] assist the Court in deciding class certification." *Id.* Applying Federal Rule of Evidence 702 and *Daubert*, the Magistrate therefore recommended that the report and testimony should be stricken "[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 testing to the decisions managers make in a workplace setting." *Id.* at *9.

The district judge adopted the magistrate's recommendation over the plaintiffs' objections. The district court took exception to the idea that Dr. Greenwald was to provide testimony on "general principles" as Dr. Greenwald's report

> does not merely opine that Americans *might* harbor implicit bias against African Americans that *might* manifest itself in the absence of objective information and criteria; he opines that "implicit or hidden biases . . . *are now established as causes of adverse impact* that is likely unintended and of which perpetrators are likely unaware.

Jones, 34 F.Supp.3d at 899 (emphasis in original). In other words, plaintiffs signaled their intention to use Dr. Greenwald as proof of discriminatory animus or causation. As such, the court did "not credit plaintiffs' contention that Dr. Greenwald's testimony is for the limited purpose of educating the factfinder as to general principles . . . ." *Id.* at 900. This blurring of causation into "general principle," the court found, runs the risk of confusing or misleading the jury, making its exclusion also viable under Federal Rule of Evidence 403.

The district court also endorsed the magistrate's recommendation that a laboratory setting was not comparable to the workplace. In so doing, the court adopts the defendants' argument that, unlike a split second decision in a laboratory, *Jones* involves

> deliberate business decisions in the workplace . . . by individuals who know the people for whom they are making important decisions concerning their pay, promotions, and performance evaluations, in a setting where the decisionmakers operate in a supervised environment and under the constraints of EEO policies and laws, the violation of which has serious consequences, including individual liability.

Id. Finally, the plaintiffs could not use "his opinions to support their intentional discrimination claims, since Dr. Greenwald's opinions speak to the question of implicit, or hidden bias – not intentional acts." *Id.* at 901.

b. *Karlo*

Relying heavily on the *Jones* opinions and upheld by the Third Circuit, the Western District of Pennsylvania also excluded testimony by Dr. Greenwald in *Karlo v. Pittsburgh Glass Works, LLC*, Case No. 2:10-cv-1238, 2015 WL 4232600 (W.D. Pa. Jul. 13, 2015), *aff'd Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017). The plaintiffs in *Karlo* brought an age discrimination suit under the Age Discrimination in Employment Act (ADEA) against PGW.

Dr. Greenwald again offered the IAT as the basis of his conclusions and opined that implicit bias is pervasive, 80% of all research participants hold implicit biases based on age, and implicit bias is scientifically established as a source of discriminatory behavior in employment. *Id.* at *5.

PGW moved to exclude Dr. Greenwald's opinions "because they lack any relation to the facts of this case and because his methodology is unreliable." *Id.*

The *Karlo* court agreed that Dr. Greenwald's opinions lacked relation to the facts at issue, noting – just like in *Jones* – he "did not visit PGW . . . or speak with any current or former employee, interview the managers who took part in the [adverse employment action], or subject any of those individuals to his self-invented IAT . . . ." *Id.* at *7. Dr. Greenwald's failure to provide an "analysis on whether implicit biases played any role in the" adverse employment actions further diminished the reliability of is opinions. *Id.* Without these underlying facts, the court concluded that "[t]his sort of superficial analysis of the data underlying his opinion is not expert material; it is the say-so of an academic who assumes that his general conclusions from the IAT would also apply to PGW." *Id.*

Notably, the *Karlo* court also attacks the validity of the IAT itself. Although conceding that it was taken more than fourteen million times, the court notes that "Dr. Greenwald cannot establish that his publicly available test was taken by a representative sample of the population – let alone any person or the relevant decision-maker(s) at PGW." *Id.* at *8. The court questions whether the data could be skewed by those who self-select to participate, take the test multiple times, or are affected by external factors during the test. *Id.* In short, "the IAT . . . says nothing about those who work(ed) at PGW." *Id.*

Dr. Greenwald's opinions also did not "fit" the legal theories presented in the case. His report indicated his opinion would aid a factfinder in determining "whether the Plaintiffs' ages substantially motivated the defendants' actions outlined in the Complaint." *Id.* As *Karlo* was a disparate impact claim under the ADEA, age must be shown to be the "but-for" cause of the employer's adverse employment action – not the lesser standard of motivating factor applied in a Title VII case. *Id.*

Finally, the *Karlo* court expressly doubted whether implicit bias evidence could be used in *any* discrimination case. Disparate treatment claims require proof of intentional discrimination and discriminatory motive, which is "incompatible with a theory in which bias may play an unconscious role in decision-making." *Id.* at *9. The court went on to find that, with respect to the disparate impact claims, "evidence of implicit bias makes even lesss sense, particularly because a plaintiff need not show motive." *Id.*

On appeal, the Third Circuit affirmed the district court's decision to exclude Dr. Greenwald's testimony, holding it not to be an abuse of discretion. The Third Circuit did not, however hold that implicit bias testimony is never admissible, as it remains in the district court's discretion to "determine that such testimony elucidates the kind of headwind disparate-impact liability is meant to redress." *Karlo*, 849 F.3d at 85. Nonetheless, the Third Circuit did explicitly endorse the notion that implicit bias testimony was incompatible with disparate impact claims as plaintiffs "are not required to prove that any particular psychological mechanism cause the disparity in question" only that the "disparity itself is 'sufficiently substantial that [it] raise[s] such an inference of causation.'" *Id.* (internal citation omitted).

c. And all the rest…

The remainder of the cases excluding implicit bias testimony all share commonalities with *Jones* and *Karlo*:

- *Johnson v. Seattle Pub. Utils.*, 3 Wash. App. 2d 1055 (Wash Ct. App. 2018): Dr. Greenwald's testimony excluded by the trial court was not an abuse of discretion. Reviews *Jones*, *Samaha*, and *Karlo* and concludes the trial court did not abuse its discretion in finding "Dr. Greenwald's testimony consisted only of 'generalized opinions that are not tied to the specific facts of this case'" and "'would be confusing and misleading for the jury.'" Notably, the defendant did not dispute that Dr. Greenwald's testimony was "based on reliable methods."

- *White v. BNSF Ry. Co.*, 726 Fed. App'x 603 (9th Cir. 2018): exclusion of implicit bias testimony was not an abuse of discretion because it "was not based on a significant review of the facts of his case . . . ." *Id.* at 604. Endorses the conclusion that implicit bias and unconscious attitudes are not relevant "in a disparate treatment case requiring evidence of intentional discrimination." *Id.*

- *Benson Cooper v. KSHB-TV 41*, No. 17-0041-CV (W.D. Mo. Jan. 17, 2019): rejects implicit bias testimony because "evidence that individuals harbor *subconscious* opinions that they may unknowingly act on will [not] help the jury determine whether Defendant engaged in *intentional* discrimination." *Id.* at *5 (emphasis in original).
    - "The logical flaw seems obvious: if people are not aware that they are acting on their subconscious beliefs, then how does the existence of those beliefs help the jury decide whether decisionmakers intentionally discriminated?" *Id.* at *7.
    - Distinguishes *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) because defendant did not object to the expert's testimony and "does not hold that the fact that individuals have unconscious biases that they may or may not act on *unintentionally* is relevant when determining whether they *intentionally* acted based on a person's race or gender in given circumstance, nor does it establish that an expert can testify to those facts over the defendant's objection." *Id.* at *8, n.2.

- *Jackson v. Scripps Media, Inc.*, No. 18-00440, 2019 WL 6619859 (W.D. Mo. Dec. 5, 2019): quotes *Benson Cooper* and finding that subconscious beliefs is not relevant to show whether defendant intentionally discriminated. Rejects that implicit bias testimony is "background evidence" (presumably the general education application of Fed. R. Evid. 702).

- *Haydar v. Amazon Corp., LLC*, No. 2:16-cv-13662, 2019 WL 5079704 (E.D. Mich. Oct. 10, 2019): excludes implicit bias testimony that is not tied to the facts of the case.
    - Finds testimony on "the general concept that all people hold some type of unconscious bias" unnecessary in determining "intentional discrimination." *Id.* at *5.
    - Excludes evidence under Fed. R. Evid. 403 because expert "has little evidence that those who provided feedback or evaluated Haydar held unconscious, negative biases toward Muslims or Syrians. She does not have the results of any implicit-

association test, she did not observe the workplace, and she did not conduct any type of statistical analysis suggesting hidden bias." *Id.* Concludes the expert "has little to infer that those who assessed Haydar's leadership held a negative, unconscious bias toward Syrians or Muslims" and "even less to infer that Haydar's evaluators *acted* on any unconscious bias that they might have had." *Id.*

  - "[I]f the jury were to hear that every person holds some type of unconscious bias, it may well leap to concluding that Haydar's negative feedback wa tainted by an unconscious bias against Muslims or Syrians. Given the weak foundation, that would be undue advantage." *Id.*

- *Pippen v. State*, No. LACL 107038, 2012 WL 1388902 (Iowa Dist. Apr. 17, 2012): Plaintiffs attacking state hiring on a disparate impact theory sought "to bridge the gap between disparate racial outcomes and discretionary subjective decision-making through reliance on implicit bias." *Id.* Dr. Greenwald's testimony excluded because "[i]mplicit bias does not mean prejudice, but merely reflects attitudes. More pointedly, he offered no empirical data regarding Iowans and implicit racial bias, did not opine that [statistical disparities] were caused by implicit racial bias and offered a causal link as an 'untested hypothesis.'" *Id.* Concludes that "[t]he implicit bias evidence does not prove causation." *Id.*

- *Maciel v. Thomas J. Hastings Props., Inc.*, No. 10-12167, 2012 WL 13047595 (D. Mass. Nov. 30, 2012): Fair Housing Act case sought to elicit implicit bias testimony to show race discrimination in purchasing an affordable housing condominium. Excludes testimony as unreliable because the expert "does not provide any connection between, or scientific support for, his general statements about bias and his opinion that Defendants were biased in this case. He does not describe how the listed events indicate bias, the method by which he determined that these event indicate bias, or how his experience informed this conclusion." *Id.* at *5. Expert "does not describe [the IAT's] application to, or use in, this case." *Id.* Implicit bias testimony fails to bridge the analytical gap between the data and the opinion and is connected only by *ipse dixit. Id.*

III. So what should you do?

A. Help! I have a plaintiff that is attempting to present implicit bias evidence.

So you're litigating an employment case and are presented with a designation of experts that names an implicit bias expert. Here is advice gleaned from the courts that have considered implicit bias evidence.

- **Do a challenge of some sort, any sort. Please.** As the defendants in *Samaha* and *Price Waterhouse* learned, although a court may be unsympathetic to implicit bias evidence, failing to mount a defense at all to the proposed evidence or mounting it at the appellate stage is not a particularly successful way to tackle this issue.

- **Pay attention to the theories advanced in litigation.** Proponents of the use of implicit bias evidence in discrimination trials are well aware that "implicit bias

evidence is more likely to be admitted if offered to prove intentional discrimination." Anthony Kakoyannis, *Assessing the Viability of Implicit Bias Evidence in Discrimination Cases: An Analysis of the Most Significant Federal Cases*, 69 Fla. L. Rev. 1181, 1200 (2017). Disparate impact's "failure to consider the role of the individual decision-maker whose discrimination led to an adverse employment action renders cognitive bias theory unnecessary." Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 Harv. C.R.-C.L. L. Rev. 481, 491 (2005). If you're facing an implicit bias expert in a disparate impact case, then, you should challenge the relevancy in the face of the plaintiff not having to show a discriminatory animus.

- **Get your own expert** – don't bring a knife to a gun fight. If your plaintiff is confident enough in their case to justify the expense outlay for an expert, you should be worried enough to have a competing expert.

- **Beware the analytical gap.** Pay attention to the case-specific and employer-specific facts the proposed expert uses to opine that implicit bias may have contributed to the actions in question. Did the expert visit the location? Speak with current or former employees or managers? Review your anti-discrimination policy and training which may have a mitigating effect on implicit bias?[8] Were the only materials they reviewed ones that were supplied by plaintiff's counsel?[9] The *Jones* and *Karlo* courts were particularly critical of the lack of factual development implicit bias experts had performed. Make sure you spend a significant time during deposition enquiring into the factual development the implicit bias expert conducted.

- **Attack the IAT itself.** Several of the defendants successful in excluding implicit bias evidence attacked the self-selecting nature of the IAT and the non-representativeness of the population at issue (either geographically – like *Pippen*'s notation there was no Iowa-specific information – or for the employer at issue – much like the *Karlo* court's admonishment there was no proof the IAT had been taken by any employees of the defendant or the specific decision makers). While you should continue to mount defenses such as this, your own expert may be able to provide information in reliance on the meta-analyses that the reliability and validity of the IAT are not sufficient to provide a scientific basis for the IAT as a measure of implicit bias such as were discussed in the first portion of this paper. No cases have yet discussed this aspect of defense, so how a court may rule has yet to be determined.

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[8] *Jones I* recounts the report of a defendant's expert who testifies that things such as an EEO policy, enforcement of and discipline under that policy, and anti-discrimination training provide "debiasing conditions and factors" which make the workplace unlike the clinical laboratory. 2013 WL 7046374 at *3.

[9] The *Karlo* makes note that Dr. Greenwald did some factual development of the employment practices of PGW, but all was "selected and supplied to him by the counsel for Plaintiffs." 2015 WL 4232600 at *7. The court then collects cases which impugn the reliability of expert testimonies which rely on evidence provided by counsel who "have an interest in the outcome" of litigation. *Id.* (citing *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 CIV 8272(RPP), 2003 WL 22124991 (S.D.N.Y. Sept. 15, 2003).

- **Attack the application of the IAT to the workplace.** The *Jones* courts, relying on the report of defendant's expert, were particularly persuaded that the principles gleaned from the IAT where "people . . . spontaneously react to virtual strangers in laboratory settings whom they will never meet or see again, with nothing at stake" are divorced from the realities of the workplace where decision makers are supervised, know the individuals for whom they are making these decisions, and are guided by company policy and law. 34 F.Supp.3d at 900.

- **Watch out for causation-in-disguise.** Perhaps your court is inclined to allow general information that implicit bias *could* exist. Does anything in the report seem to indicate that there will be evidence that is *does* exist in your case? The *Jones* court expressed skepticism at the "general principles" argument given that the plaintiffs "seek to rely on Prof. Greenwald's report and testimony . . . as evidence of general causation." 34 F.Supp.3d at 899. Dr. Greenwald further opined that "implicit or hidden biases . . . are now established as causes of adverse impact . . . ." Similarly, the *Karlo* court noted Dr. Greenwald proposed to "determine whether the Plaintiffs' ages substantially motivated the defendants' actions outlined in the Complaint." 2015 WL 4232600 at *8. If the court does allow "general testimony," make sure you're on guard for these causation-in-disguise opinions.

- **Don't forget your other objections.** A *Daubert* challenge should not be the only tool in your arsenal for attempting to exclude implicit bias testimony. Also consider:
    - Fed. R. Evid. 401: Rule 401 excludes irrelevant testimony. Depending on how you've litigated the case, you may be able to argue that laboratory research is irrelevant to the workplace; nationwide, self-selected testing is irrelevant to your particular workplace or decision maker; that unconscious attitudes are irrelevant to intentional discrimination; or that motivation is irrelevant to the impact of your facially neutral rule.
    - Fed. R. Evid. 403: Rule 403 will exclude testimony when it is more prejudicial than probative. As the *Jones* court noted, even were implicit bias evidence presented under the general education test, it blurs "if not erase[s] altogether, the line between hypothetical possibility and concrete fact." 34 F.Supp.3d at 901. This runs the risk that a jury would be "unable to ascertain [the] line" between education and causation. *Id.* Even in *Martin* – a case which admitted implicit bias testimony – the court demurred on its "gatekeeping role of keeping unreliable expert testimony from the jury" noting that there was no "fear of prejudicing the untrained ear of a juror." 2017 WL 1105388 at *4.
    - Fed. R. Evid. 404: Rule 404(a) provides that "[e]vidence 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 . . . ." In the context of an employment case, "the 'character' trait that implicit bias evidence is used to demonstrate is the tendency of managers or decisionmakers to hold negative stereotypes regarding persons of other demographic groups." Allan G. King, Syeeda S. Amin, *The Propensity to Stereotype As*

Inadmissible "Character" Evidence, 27 ABA J. Lab. & Emp. L. 23, 33 (2011). However, as King and Amin, point out, implicit bias evidence based on the IAT and other tests, goes even further: "When implicit bias evidence is introduced, it is not the words or actions of the defendant-employer that are offered as proof, but rather the unconscious beliefs and attitudes of third-party test-takers who share the same race, gender, or age as the particular decisionmakers at issue. Thus, the expert projects onto an employer's managerial hierarchy the implicit discriminatory 'character' of the subjects of a social science experiment to prove that these managers acted in conformity with that discriminatory character." *Id.* at 35.[10]

- **Do NOT let them test your decision makers.** Federal Rule of Civil Procedure 35 allows for the mental examinations of parties and those controlled by the parties. Plaintiffs could seek to compel your decision makers to implicit bias testing. There are three flaws to this request.
    - First, the IAT purports to identify the existence of bias, but it is not capable of measuring if or the extent to which bias played a role in an individual decision. Incorporate your "implicit bias cannot prove actions were taken in conformity" arguments when objecting on these grounds.
    - Second, the IAT measures bias at a point in time – remember the test-retest reliability. If the plaintiff cannot prove that implicit bias existed *at the time* of the adverse employment action, any test during litigation would lack relevance.
    - Last, a plaintiff's ability to compel mental or cognitive testing should not rely on *their* pleaded theories, but at what *you* put in controversy. For example, in *Taylor v. National Group of Cos., Inc.*, 145 F.R.D. 79 (N.D. Ohio 1992), the plaintiff sought to compel a mental examination of an alleged sexual harasser because the plaintiff alleged intentional sexual harassment that put the defendant's mental state in question. The court ruled that "Only if his answer, rather than her complaint, affirmatively raised the issue of his mental processes could the issue of his mental status be viewed as being in controversy." *Id. See also Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (the relevant mental condition must be shown to be "in

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[10] A Rule 404 attack has had some success in analogous situations. For example, in the case of *Bushell v. Dean*, 781 S.W.2d 652 (Tex. Ct. App. 1989), the court considered "profile testimony" about sexual harassers. This profile evidence consisted on an expert testifying about "certain common 'facts' about persons who exhibit a particular behavior . . . . The research consists of compiling information on the personalities of *an unrelated test group of other persons* accused of sexual harassment." *Id.* at 655 (emphasis supplied to show commonality with the IAT). The court ruled this evidence was inadmissible with the following distillation: "(1) sexual harassers have particular personality traits; (2) the defendant possesses these traits; (3) therefore, the defendant probably did harass the victim." *Id.* at 656. The court concluded this was improper character evidence.

Similarly, Korean corporate culture was examined in the breach of contract case of *Jinro American, Inc. v. Secure Investments, Inc.*, 266 F.3d 993 (9th Cir. 2001). In that case, the plaintiff's expert witness testified that Korean businesses had a "culture" of corruption, untrustworthiness, and evasion of currency laws. *Id.* at 1007. The court reduced the expert's testimony: "(a) Korean businesses generally are corrupt; (b) [defendant] is a Korean business; (c) therefore, [defendant] is corrupt." *Id.* The Ninth Circuit excluded the testimony as violative of Rule 403 and did not analyze Rule 404. The comparison to implicit bias testimony is apt: (a) Americans have implicit bias; (b) the decision makers are Americans; therefore (c) the decision maker is biased.

controversy"). The key to applying this last point is to not plead or argue that implicit bias did not or does not exist in your organization.

Finally, Rule 35 allows for examinations of "parties" and the Supreme Court has made clear that the rule only applies to "a party to the case . . . ." *Schlagenhauf v. Holder*, 379 U.S. 104, 115 (1964). The Court left open whether someone who is "merely the agent of a party" is subject to examination. *Id.* at n.12. The notes to the 1970 Amendments to Rule 35 have similarly demurred, only saying that "[t]he amendment makes no reference to employees of a party." Obviously, if your decision makers are not individual defendants, you should challenge the propriety of examining them on these grounds.

B. Help! What do I tell my client about implicit bias?

So your client has had Starbuck's-worthy incident or otherwise wants to implement implicit bias training. Should you? Your best weapon against the permeation of implicit bias into your culture is to set and uniformly execute criteria for hiring, evaluations, and promotions. To the extent possible, remove subjective criteria and focus on objective, measurable factors. When subjectivity is required, encourage thoughtful and purposeful consideration of all factors and make sure your clients can support their subjective decisions with articulable reasoning.