Implicit Bias Testimony Post-*Dukes*

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The term "implicit bias" (also known as "unconscious bias" or "unconscious stereotyping") refers to the role unconscious cognitive responses play in decision making. Implicit bias theory posits that, no matter how enlightened an individual decision-maker may profess to be, employment decisions cannot be made in isolation. Proponents argue that courts must account for ingrained social norms in organizations that inevitably produce discriminatory employment decisions.

The Supreme Court's decision in *Wal-Mart Stores v. Dukes* highlighted the role that implicit bias social-science testimony can play in employment discrimination cases. 131 S.Ct. 2541 (2011). In *Dukes*, the plaintiffs represented a class of 1.5 million female employees who alleged that Wal-Mart discriminated against women in violation of Title VII of the Civil Rights Act of 1964 (Id. at 2547; see 42 U.S.C. Sec. 2000e-2(k)), by knowingly permitting local managers to exercise discretion over pay and promotion decisions in a manner that disproportionately favored male employees and had an unlawful disparate impact on female employees. Id.; see 42 U.S.C. Sec. 2000e-2(a). The plaintiffs further alleged that this violation resulted from Wal-Mart's "strong and uniform 'corporate culture' [that] permits bias against women to infect, perhaps subconsciously, the discretionary decision-making of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice." Id. at 2548.

The U.S. District Court for the Northern District of California initially granted the plaintiffs' motion for class certification based, in part, on the implicit-bias expert testimony of sociologist Dr. William Bielby. *Dukes v. Wal-Mart Stores*, 222 F.R.D. 137, 152-154 (N.D. Cal. 2004). The Ninth Circuit affirmed the District Court's certification order. *Dukes v. Wal-Mart Stores*, 603 F.3d 571, 601 (9th Cir. 2010). The Supreme Court, however, reversed the Ninth Circuit and rejected Bielby's testimony (*Dukes*, 131 S.Ct. at 2551), finding that the plaintiffs' claims, which potentially encompassed thousands of individual employment decisions made by thousands of managers exercising discretion in thousands of Wal-Mart stores, causing thousands of individual harms, lacked the common questions of law and fact required to satisfy F.R.C.P. 23(a)(2). Thus, despite the substantial implicit-bias social-science testimony presented by the plaintiffs, the

Supreme Court found that the plaintiffs could not sufficiently allege a single common reason for those employment decisions.

Notably, the plaintiffs attempted to establish that Wal-Mart "operated under a general policy of discrimination" by using Bielby's generalized implicit-bias testimony that Wal-Mart's "strong corporate culture" made it "vulnerable to" gender bias. See *Dukes*, 222 F.R.D. at 153. The court rejected Bielby's testimony, however, because he was unable to "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart," and had "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." *Dukes*, 131 S.Ct. at 2553 (citing *Dukes,* 222 F.R.D. at 192).

The court's decision was based largely on methodological flaws in Bielby's social framework, which improperly linked generalized research to specific facts. The court therefore concluded that Bielby's testimony "did not meet the standards expected of social science research into stereotyping and discrimination." Id. Bielby's report "provides no verifiable method for measuring and testing any of the variables that were crucial to his conclusions and reflects nothing more than Dr. Bielby's 'expert judgment' about how general stereotyping research applied to all managers across all of Wal-Mart's stores nationwide for the multi-year class period." Id. at 2554.

Following *Dukes*, the District of Minnesota, in *Peterson v. Seagate*,809 F.Supp.2d 996 (D.Minn. 2011),evaluated implicit-bias testimony in the context of a motion seeking to exclude implicit-bias expert-opinion testimony and decertify a class of terminated employees. The plaintiffs alleged Seagate discriminated against them on the basis of age, contending that the employment decisions at issue were part of a single, company-wide plan to reduce its workforce across all facilities, utilizing the same guidelines, timeline and communications at each location, adversely affecting employees over age 40. The plaintiffs proffered the expert report of economist Dr. Marc Bendick. Bendick performed a statistical analysis of termination rates associated with Seagate's reductions and concluded that Seagate had discriminated on the basis of age. Importantly, Bendick also concluded that this analysis was consistent with statistical patterns that resulted when ageist stereotypes were applied, and, because ageist stereotypes might lead to adverse employment actions, Seagate's actions must have resulted from these negative stereotypes. Seagate argued that the opinion as to age stereotyping should

be excluded because he failed to perform any analysis as to whether age-based stereotypes *actually* existed at Seagate.

The district court granted Seagate's motion to exclude Bendick's expert opinion and concluded it was not relevant, reliable or supported by the evidence, specifically highlighting Bendick's failure to perform an analysis regarding whether age-based stereotypes *actually* existed at Seagate, instead, finding that Bendick simply relied on studies and behaviors of other employers that generally found people had negative, ageist stereotypes. The court did allow Bendick to opine that age stereotyping generally existed among employers. See also *Pippen v. Iowa*,No. LACL 107038, slip op. (Iowa Dist. Ct. Polk Cnty Apr. 17, 2012), aff'd 854 N.W.2d 1 (The expert did not use data relevant to the case to determine any connection between alleged implicit bias and the discretionary subjective employment decisions leading the court to state that the implicit bias testimony was simply an "opinion of conjecture, not proof of causation.")

Similarly, in *Jones v. Nat'l Council of Young Men's Christian Assocs.*, 34 F. Supp. 3d 896 (N.D. Ill. 2014),generalized implicit-bias testimony was rejected following the defendant's motion to strike. In *Jones*, YMCA employees alleged disparate impact race discrimination and retaliation in salary and promotion decisions. The plaintiffs sought class certification and proffered the expert testimony of a sociologistto "educat[e] the jury about the general principle that people in the United States 'operate on the basis of implicit biases – stereotypes – that function on an unconscious level even amongst good, well-intentioned people and lead us to relatively favor whites and relatively disfavor blacks.'" Id. at 899. In rejecting the plaintiffs' suggestion that they offered the expert for the limited purpose of educating the jury, the district court found that the plaintiffs sought to use his testimony as evidence of causation because he opined that "implicit biases … *are now established as causes of adverse impact* that is likely unintended and of which perpetrators are likely unaware." Id. The court found the expert report failed to provide "a reliable basis to support an opinion that implicit bias of the Y's managers caused any disparity in performance evaluations, pay, or promotions at the Y." Id. at 900. In addition, the district court found that:

Neither Dr. Greenwald nor the plaintiffs establish[ed] a logical connection between the principle that hidden bias may be manifested in the absence of any other information and the premise that hidden bias says anything about the results of employment decisions made by supervisors

and managers who are armed with abundant data and are personally invested in the results of the process.

Despite the employer-friendly holdings in the foregoing cases, the Northern District of California's decision in *Ellis v. Costco Wholesale Corp*.,285 F.R.D. 492 (2012),suggests that, at least in the Ninth Circuit, plaintiffs can use narrowly tailored, factually supported implicit-bias testimony to attempt to prove commonality. In *Ellis*, the plaintiffs alleged that Costco's culture "fosters and reinforces stereotyped thinking, which allows gender bias to infuse the promotion process from the top down." *Id.* at 520. The plaintiffs offered the opinion of their expert, who conducted a "social framework" analysis to determine whether unconscious bias existed at Costco, examined Costco's personnel and promotion policies and practices, and posited that: "[c]entralized control, reinforced by a strong organizational culture, creates and sustains uniformity in the personnel policies and practices throughout Costco's operational units. This common culture is characterized by unwritten rules and informal, undocumented personnel practices featuring discretion by decision makers." Id. As a result, "these informal, yet cohesive practices are 'likely to be tarnished by biases that operate against women.'" Id.

Unlike *Dukes*, the court in *Ellis* found the expert's testimony that Costco had a culture of "gender stereotyping and paternalism," to be "persuasive." The court cited substantial evidence concerning the strong role Costco's corporate culture played in influencing its promotion practices, including Costco's CEO's admitted direct involvement in company promotion practices, the relatively high level of seniority for the positions at issue, and the small number of top executives involved in the recruitment and selection process at issue.

There is a great deal of compelling research on implicit bias. Litigants and courts are still struggling with how to best utilize that research in the context of employment litigation. We will likely see more gender stereotyping claims in which plaintiffs seek to establish discriminatory intent through proffers of implicit-bias testimony. Given the difficulties inherent in offering implicit-bias testimony as demonstrated in the cases discussed above, it appears, however, that courts will be reluctant to allow that testimony without specific connection to the facts of the case at issue.