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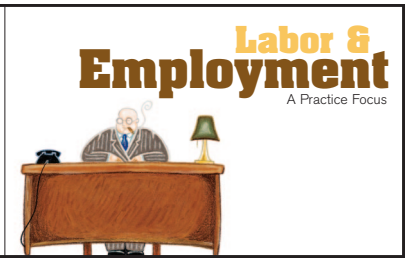
No Intent, No Foul?

Unconscious bias in employment decisions is actionable under current law.



By Martin Katz

Many commentators have criticized current anti-discrimination law on the grounds that it does not adequately prohibit unconscious bias in employment decisions. That claim is wrong: Unconscious bias is fully actionable, and it can generally be proved by knowledgeable employment lawyers.

The idea behind unconscious bias is that well-meaning employers and supervisors, who would likely consider themselves supporters or even champions of equality, might subconsciously harbor attitudes that result in negative employment decisions for women and minorities.

For example, an employer might consciously see himself as strongly egalitarian, believing that men and women are equally qualified and equally dedicated. He might even pass a lie detector test on this question. But subconsciously, he might see women as more dedicated to their families than to their jobs. In making a hiring or promotion decision, he might act based upon this unconscious bias—thus reducing employment opportunity for women.

Most psychologists agree that unconscious bias is likely the most prevalent form of discrimination in today's workplace. So the question is whether modern anti-discrimination law is up to the task of dealing with this type of bias.

Many commentators have charged that current law falls short in this respect, that it is incapable of addressing unconscious bias either because the law does not prohibit unconscious bias or because unconscious bias is too difficult to prove. These critics are, for the most part, wrong. Unconscious discrimination is actionable, and though establishing its existence poses certain challenges, these problems of proof are often overstated.

Causation, Not Intent

The first charge leveled against current doctrine is that it does not prohibit unconscious bias. More precisely, the charge is that "disparate treatment" discrimination (by far the most common type of claim brought by employees) requires "intent," thereby precluding claims of unconscious discrimination. This charge is simply wrong. Disparate-treatment statutes require causation, not intent.

Disparate treatment statutes all require that the challenged employment decision (for example, firing or failure to hire) must have occurred "because of" a protected characteristic of the plaintiff, such as race or sex. The words "because of" clearly require causation. That is, the employer must have used the protected characteristic as a factor in its decision-making. One can debate exactly how the employer must have used the protected characteristic in its decision. Can it be a "motivating" factor? Or does it need to be a "but for" factor? But all of these are causal concepts.

The question is whether, in addition to causation, disparate treatment statutes also require intent. And, if they do, what type of intent? For example, do these statutes require intent to bring about a particular result, such as harm to the plaintiff's group (for example, blacks or women)? Do they require intent to violate the law? Or do they require intent to utilize the protected characteristic (such as race or sex) in one's decision-making? Any one of these three types of intent requirement would likely preclude claims of unconscious bias.

There is no indication in the statutes, or in their legislative history, that they require any of these types of intent. If anything, the statutes have been understood as broad prohibitions on discrimination, which would seem to proscribe unconscious, as well as conscious, discrimination. As the Supreme Court explained in *McDonnell Douglas v. Green* (1973), Title VII of the 1964 Civil Rights Act "tolerates no . . . discrimination, subtle or otherwise."

Cognitive Bias

The few cases to squarely address the issue have held that unconscious discrimination is actionable. The best—and most

frequently cited—discussion of this issue is probably *Thomas v. Eastman Kodak* (1999). There, the U.S. Court of Appeals for the 1st Circuit explained: "The ultimate question is whether the employee has been treated disparately 'because of [a protected characteristic].' This is so regardless of whether the employer consciously intended to base the evaluations on [that characteristic], or simply did so because of unthinking stereotypes or bias." *Thomas* also explained that, "The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus."

Many commentators act as if *Thomas* is an exception to the general rule that disparate treatment law requires conscious discrimination. Yet this is simply not the case. In fact, it is difficult—if not impossible—to find a case that expressly holds that a disparate treatment claim requires conscious discrimination.

So why do so many people believe that disparate treatment law requires conscious discrimination? The answer probably has to do with the unfortunate terminology the Supreme Court has used to distinguish disparate treatment doctrine from disparate impact doctrine: The Court explained that disparate treatment discrimination requires "intent," whereas disparate impact discrimination does not. And the word "intent" conjures up notions of consciousness.

Yet all the Court seems to mean by "intent" in this context is that disparate-treatment doctrine requires an inquiry into the employer's decision-making process, while disparate impact doctrine does not. This required inquiry appears to be nothing more than a search for causation—for facts demonstrating that the employer utilized a protected characteristic such as race or sex in its decision-making.

Although the Court has repeatedly characterized disparate treatment as "intentional" discrimination, it has never indicated that disparate treatment doctrine requires "intent" in the sense of intending to cause harm to a group, intending to violate the law, or intending to use a protected characteristic in one's decision-making. Thus, there seems to be no requirement of "intent" in the sense of requiring conscious bias.

Proving Unconscious Bias

The second, and more persuasive, charge leveled against current doctrine is that proving unconscious bias can be difficult. Of course, lots of things that are illegal are difficult to prove. The question is whether proving unconscious discrimination is so difficult that the law cannot effectively combat this problem.

In this regard, it is important to recognize that the difficulties of proving unconscious bias are, to some extent, overstated.

Critics' primary culprit is the "pretext" method of proving discrimination set out in *McDonnell Douglas*. This method allows plaintiffs to prove discrimination by allowing them to attack the reason proffered by the defendant for the challenged action. Suppose, for example, that the defendant claimed it fired the plaintiff because the plaintiff was habitually tardy. Under *McDonnell Douglas,* the plaintiff can prove discrimination by challenging the defendant's proffered reason—here, the claim that she was habitually tardy.

There are other methods of proof available that might be used to show discrimination, whether conscious or unconscious. But some of these methods, such as admissions of guilt or statements indicating bias, are not available in most cases. Others, such as statistical proof, are expensive to collect and present (in addition to being unavailable for small employers that cannot provide enough data for an adequate sample size). Thus, *McDonnell Douglas* tends to be the most common way in which plaintiffs prove disparate treatment. Accordingly, this method has been the focus of the dispute over unconscious discrimination.

The critics of current doctrine have suggested that *McDonnell Douglas* is incapable of addressing unconscious bias for two reasons.

First, the critics claim that *McDonnell Douglas* requires dishonesty, which precludes the test from ferreting out unconscious discrimination. They believe that a defendant would lie only when he is consciously discriminating.

It is true that *McDonnell Douglas* requires dishonesty. Challenging the defendant's proffered reason permits an inference of discrimination because, if the reason is wrong, a fact-finder may conclude (1) that the defendant lied, (2) that the lie served to cover up wrongdoing, and (3) what was being covered up was discrimination.

But dishonesty is not limited to those who consciously discriminate. In fact, the whole premise of unconscious discrimination suggests otherwise. The idea of unconscious discrimination is that an employer can lie to himself. He can believe that he subscribes to egalitarian notions and yet act based upon unconscious stereotypes.

Thus, there is no reason why the lie required for *McDonnell Douglas* precludes the detection of unconscious discrimination. There is no reason why a fact-finder who doubts the reason proffered by the defendant cannot conclude that he is lying (to himself or to the court) to cover up conscious or unconscious discrimination.

A second, related claim by critics of *McDonnell Douglas* is that it presents an either/or paradigm, which precludes claims of unconscious bias. Critics charge that *McDonnell Douglas* requires a fact-finder to conclude either (1) that the defendant acted for legitimate reasons, or (2) that he discriminated. Such a framework would seem to provide no room for a finding that the defendant acted based on both legitimate and illegitimate considerations—a situation that often occurs in cases of unconscious bias.

At one level, this charge is erroneous. *McDonnell Douglas* requires a fact-finder to conclude only that a particular proffered reason is true or false. It does not require the fact-finder to conclude that a particular proffered reason is the only reason for the challenged action. For example, a fact-finder could conclude that one of the employer's proffered reasons (excessive tardiness) was true, but that another (poor performance on a project) was false—and a coverup for discrimination. In other words, *McDonnell Douglas* is perfectly capable of addressing so-called "mixed motive" cases.

But at another level, the either/or charge is valid. *McDonnell Douglas* is not capable of addressing cases where

the proffered reason is factually correct, but where that reason is nevertheless infected by bias—whether conscious or unconscious. For example, suppose that the employer is correct that the plaintiff was habitually tardy. But suppose that the employer was particularly prone to notice tardiness in female employees because of a tendency to view females as dedicated more to family than to work.

In such a case, the decision would be discriminatory. Women would be subjected to a higher standard for tardiness than men. But such discrimination would not be amenable to detection by *McDonnell Douglas*. That method of proof works only if the employer's proffered reason is false—not if it is true but tainted by discrimination.

This observation, however, is not a valid indictment of *McDonnell Douglas*. It means only that, in some cases, the *McDonnell Douglas* pretext method of proving discrimination will not work. In such cases, plaintiffs will need to find some other way to prove discrimination—or they will lose. But the fact that *McDonnell Douglas* will not work in all cases hardly means that it is an impediment to proving discrimination—conscious or unconscious.

If *McDonnell Douglas* is insufficient to detect discrimination in a large portion of unconscious bias cases, and if other existing means of proving discrimination are also ineffectual in such cases, perhaps disparate treatment law needs to be adjusted. But before we look to change current doctrine, we should appreciate—and make sure that courts appreciate—the ways in which existing law can address unconscious bias.

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