

PRESENTED AT

25th Annual Labor and Employment Law Conference

May 10-11, 2018
Austin, TX

**Emerging from the Shadows:
Unconscious Bias in the Workplace**

Katrina Grider

Author Contact Information:
Katrina Grider
Ogletree, Deakins, Nash, Smoak &
Stewart, P.C.
Houston, TX
katrina.grider@ogletree.com

TABLE OF CONTENTS

I.	DEFINITION OF UNCONSCIOUS BIAS	1
II.	UNCONSCIOUS BIAS AND THE BRAIN	1
III.	UNCONSCIOUS BIAS AND DECISION-MAKING	2
IV.	STUDIES OF UNCONSCIOUS BIAS	4
	A. Confirmation Bias: The Thomas Meyer Legal Memo and Race	4
	B. Perception Bias: Applicant Names and Race	5
	C. Perception Bias: Applicant Names and Gender	5
	D. Affinity Bias: Selection for Orchestra Positions and Gender	5
	E. Affinity Bias: NBA Referees and Race	5
V.	IMPLICIT ASSOCIATIONS TEST (“IAT”): REVEALING HIDDEN BIASES OF GOOD PEOPLE	6
	A. Appropriate Uses of the IAT	7
	B. Inappropriate Uses of the IAT	7
	C. Criticisms of the IAT	8
	D. The IAT Cannot Predict or Determine Whether Actual Discrimination Has Occurred	8
VI.	IMPLICIT BIAS TESTIMONY POST- <i>DUKES</i>	9
	A. <i>Wal-Mart Stores v. Dukes</i> , 131 S. Ct. 2541 (2011)	9
	B. <i>Peterson v. Seagate U.S. LLC</i> , 809 F. Supp. 2d 996 (D. Minn. 2011)	11
	C. <i>Pippen v. Iowa</i> , No. LACK 107038, slip op. (Iowa Dist. Ct. Polk County Apr. 17, 2012)	12
	D. <i>Ellis v. Costo Wholesale Corp.</i> , 285 FRAT 492 (2012)	13
	E. <i>Karlo v. Pittsburgh Glass Works LLC</i> , No. 2:10-CV-1283, 2015 WL 3966852 (W.D. Pa. 2015)	14
VII.	UNCONSCIOUS BIAS FEDERAL INITIATIVES	15
VIII.	THE IMPACT OF UNCONSCIOUS BIAS IN THE WORKPLACE	15
VIII.	UNCONSCIOUS BIAS AND MICRO-INEQUITIES	16

TABLE OF CONTENTS-CON'T.

IX. PREVENTIVE MEASURES: REDUCING THE IMPACT OF UNCONSCIOUS BIAS 17

- A. Recruiting and Hiring..... 17**
- B. Performance Evaluations..... 18**
- C. Job Assignments and Promotions..... 18**
- D. Discipline and Discharge 18**

X. ADDRESSING UNCONSCIOUS BIAS IN LAW FIRMS 19

- A. Law Firm Diversity 19**
- B. Implicit Bias in Law Firms 19**
- C. Key Areas Where It Occurs..... 19**
 - 1. Recruitment..... 20
 - 2. Retention..... 20
 - a. *Presumed or Earned Credibility* 20
 - b. *The “Double Bind.”* 21
 - 3. Business Development..... 21
- D. Conclusions 22**

Emerging from the Shadows: Unconscious Bias in the Workplace

Katrina Grider

A father and his son are in a car accident. The father dies at the scene and the son, badly injured, is rushed to the hospital. In the operating room, the surgeon refuses to operate, saying, "I can't operate on this boy. He is my son."

This well-known brain teaser has puzzled readers for decades. Studies have shown that as many as 75% of people cannot solve it, and those who do figure it out take several minutes to grasp that the boy's mother could be the surgeon.¹

I. DEFINITION OF UNCONSCIOUS BIAS

At any given moment, our brains are receiving 11 million pieces of information. We can only consciously process about 40 of those pieces. To process the remaining 10,999,960 we rely on our subconscious, which helps us filter information by taking mental shortcuts. Unconscious bias refers to the information, attitudes, and stereotypes that inform our subconscious information processing and dictate the process by which we take these mental shortcuts. While unconscious information processing is a critical part of human functioning, the shortcuts we take, and the bias that informs those shortcuts, often introduce errors into our decision-making.

Put simply, unconscious bias is how we perceive the world around us and make decisions accordingly. There are many elements that factor into our individual unconscious bias:

- How, or where we were brought up
- How we were socialized during our developmental stages
- Our exposure to social identities or group
- The friends we associated with (or still associate with)
- Media influences that we identified with

All the above examples can have a significant effect on the way we perceive people, groups, or situations in general. They affect our everyday lives, and carry over into our business decisions. Unconscious or implicit bias is an issue that affects every person and every organization, no matter how inclusive people think they may be, or how diverse their organization has tried to become.

II. UNCONSCIOUS BIAS AND THE BRAIN

Unconscious bias is innate to all human beings. People are hardwired to prefer those who look, sound, and share similar interests. Neurologically, these preferences are unconscious and bypass rational thinking. Each day the brain processes billions of stimuli. This process takes place in the amygdala, the region of the brain associated with threat and fear. Information processed in the amygdala is used to survive, make assumptions, and feel emotions that cause one to be attracted to certain people (those

¹ D.J. Reynolds, A. Garnham, & J. Oakhill, J., *Evidence of Immediate Activation of Gender Information from A Social Role Name*, 59 QUARTERLY JOURNAL OF EXPERIMENTAL PSYCHOLOGY 886-903 (2006).

in the in-group) but not to others (those in the out-group). Due to the quickness and efficiency of this part of the brain, bias often results for which the person is unaware.

Information received by the brain also travels through the hippocampus. This part of the brain forms links between memories and quickly deciphers the meaning of data received. When data received is matched to a person's stored memories and personal stories, the brain processes that those stored memories are the "correct" ones. Outside of one's conscious awareness, the brain seeks to reinforce just how right we are and, as a result, may cause us to make decisions based upon individual biases.

Other parts of the brain also play a part in unconscious bias. The left temporal lobe of the brain stores information about people and objects and is the place for social stereotyping. The brain's frontal cortex is the area associated with empathy, reasoning, and forming impressions of others. The brain quickly processes and categorizes the vast amounts of information it receives and then tags that information with general descriptions that it can rapidly sort. Bias occurs when those categories are labeled as "good" or "bad" and those labels are applied to entire groups. While this type of categorizing helps the brain to make quick decisions about what is safe or not safe, this type of hardwiring in the brain creates unconscious bias that is universal to everyone.

III. UNCONSCIOUS BIAS AND DECISION-MAKING

Most human decisions are made emotionally. The brain has a hardwired pattern of making decisions about others that are based on what feels safe, likeable, competent, and valuable. Bias towards what is similar drives decisions more so than actual merit. To compound this, unconscious processing in the brain governs most of important decisions we make. The brain is unable to simultaneously decide and at the same moment notice if that decision is biased. What this means it that because we have brains, essentially, we are all biased. Unconscious biases affect us and our decision-making processes in many ways:

- *Our Perception* – how we see people and perceive reality
- *Our Attitude* – how we react towards certain people
- *Our Behaviors* – how receptive/friendly we are towards certain people
- *Our Attention* – which aspects of a person we pay most attention to
- *Our Listening Skills* – how much we actively listen to what certain people say

In addition to individual bias, unconscious bias also occurs at the organizational level. Collective unconscious patterns of behavior have great and often long-lasting influence over organizational decisions and cultural thinking and interaction. These types of patterns perpetuate old, negative norms and keep unhealthy behavior firmly rooted at the expense of the good of the organization and its employees.

There are more than 150 types of unconscious bias that are common to the workplace. Some of the types of unconscious bias that can impact an organization include:

- Affinity Bias. Having the tendency to prefer or like those similar to oneself.
- In-Group Bias. Perceiving those who are similar in a more positive way.
- Halo Effect. Having the tendency to believe only good about someone because they are liked or letting someone's positive qualities in one area influence the overall perception of that person. For example, when looking through someone's CV/resume we may see they went to a particularly highly regarded college where they received a certain high grade, or they had undertaken some

Also available as part of the eCourse

[2018 Labor and Employment Law eConference](#)

First appeared as part of the conference materials for the
25th Annual Labor and Employment Law Conference session
"Emerging from the Shadows: Unconscious Bias in the Workplace"