

**PANEL: GETTING TO KNOW YOU: USE AND MISUSE OF
SELECTION DEVICES FOR HIRING AND PROMOTION**

**PAPER: “DON’T I THINK I KNOW YOU ALREADY?”: EXCESSIVE
SUBJECTIVE DECISION-MAKING AS AN IMPROPER TOOL FOR HIRING
AND PROMOTION**

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The issue of what tools employers can and should use to screen applicants and incumbents for hiring and promotional purposes implicates numerous areas of law – including, *e.g.*, Title VII (particularly disparate impact analysis under 42 U.S.C. § 2000e-2(k)(1)(A)), the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, and various state laws.¹

When we think about screening devices for promotion and especially for hiring, we tend to think about tests and background checking. Monitoring such tests and checks for adverse, unjustified disparate impact is a critical component of Title VII enforcement.

Preventing and challenging excessively subjective practices for hiring and promotion is no less critical, however, and no less amenable to disparate impact analysis. Unchecked subjectivity allows decisionmakers’ biases and stereotypes to infect decisions just as much as an unfair paper-and-pencil tests. Although openly prejudiced individuals may be counseled out of corporations or learn not to advertise their biases, subtler forms of discrimination remain, with unconscious bias being, according to some scholars, “today’s most prevalent type of

¹ For a summary of procedures employers who use background checks need to follow under the Fair Credit Reporting Act, see <http://www.ftc.gov/bcp/online/pubs/buspubs/credempl.shtm>.

discrimination.” Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161, 1164 (1995). Such discrimination, if unchecked, can result in statistically significant disparities in promotions and hiring across similarly-situated employee groups.

The good news is that companies can implement ready solutions. Rather than instructing (or allowing) decisionmakers to use subjective practices that permit invidious bias to affect decisions, companies can cabin that subjectivity and instead implement best practices that focus on job-related criteria. This approach not only encourages decisionmakers to hire and reward employees based on their relevant skills and accomplishments, but also brings companies in line with modern social psychological understanding of human behavior. It also ensures compliance with Title VII’s mandate against discriminatory outcomes -- and is good business practice.²

What does the research say?

1. People naturally process information by relying on cognitive shortcuts, *e.g.*, stereotypes. Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination*, 40 *Harv. C.R.-C.L. L. Rev.* 481, 482 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161, 1186-1209 (1995); Max Bazerman, *Judgment and Managerial Decision Making* (4th ed. 1997), at 7. People’s brains form these shortcuts from the moment of first meeting. Krieger

² In August 2008, the Commission on Women in the Profession released the Second Edition of “Fair Measure: Toward Effective Attorney Evaluations” (ABA). This book, which focuses on the legal practice, is an excellent summary of how hidden bias affects everyday workplace interactions and explanation of how those biases can unfairly affect evaluations. Authors Joan C. Williams, Distinguished Professor at Hastings College of the Law – University of California and Co-Director of the Project for Attorney Retention, and Consuela A. Pinto, Director of Education of the Project for Attorney Retention, make an excellent and persuasive *business* case for evaluation systems that are fair to women as well.

at 1199. The natural human process of categorizing like objects together can reinforce implicit reliance on stereotypes. Via these stereotypes, people hold “implicit expectancies” about unknown people, which “influence how incoming information is interpreted” and remembered. *Id.* Incoming information is easily accepted and strongly retained if consistent with the stereotype. Otherwise it is grudgingly accepted, even rejected, and/or readily forgotten. The stereotype acts as a mold that new facts are measured against and pressed into, distorting facts into memories that are more consistent with stereotypes than the actual facts were. *Id.* at 1202-04. This cognitive mechanism is so powerful that people “remember” stereotype-consistent behavior that did not actually occur, and discount or forget stereotype-inconsistent behavior that did occur. *Id.* at 1209. Thus, people’s natural modes of processing and recalling information can cause them to discriminate. *Id.*

2. Unconscious bias is prevalent. For example, an analysis of 88 studies involving almost 20,000 data points showed that whites assign significantly higher evaluation ratings to whites than to blacks. Kraiger & Ford, *A Meta-analysis of Rater Race Effects in Performance Ratings*, 69 *J. Applied Psychology* 56 (1985); J.M. Stauffer & M.R. Buckley, *The Existence And Nature Of Racial Bias In Supervisory Ratings*, 90 *J. App. Pysch.* 586-91 (2005); see also Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 *Harv. L. Rev.* 817, 830 (1991) (finding that car dealers’ opening sale price offers to black males were significantly higher than to white males). Another study revealed that responses to thousands of resumes listing stereotypically white-sounding names, such as Emily, were substantially more positive (50% more callbacks) than to resumes with identical qualifications listing stereotypically African American names, such as Lakisha. Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Brendan More Employable than Latoya and Tyrone? Evidence on Racial Discrimination in the Labor Market from a Large Randomized Experiment*, 94 *Am. Econ.*

Rev. 991 (2004). Further, in a study of orchestra auditions, female success rates increased by 48% when decisionmakers did not know the applicants' gender. See Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 Am. Econ. Rev. 715, 716 (2000).

3. There are particular conditions that facilitate stereotyping. For example, stereotyping is likely (a) when the target individual is unusual (such as a rare minority worker among more numerous white workers), (b) when the target's category (e.g., African American) does not fit neatly with his or her occupation (e.g., research scientist), and (c) when the target is evaluated based on ambiguous criteria (e.g., using subjective factors). Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 Am. Psychologist 1049, 1050-51 (1991); see also *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) (noting "the tendency of unique employees (that is, single employees belonging to a protected class, such as a single female or a single minority in the pool of employees) to be evaluated more harshly in a subjective evaluation process").

4. Unconscious bias is adaptable and persistent even when you already know the person you are evaluating. "[E]ven before having any interaction with a particular individual, background assumptions will influence how a decisionmaker perceives a job candidate. A white candidate may be viewed as more charismatic, thoughtful, collegial, or articulate than a black candidate, not because the white candidate in fact possesses those higher qualifications, but because of the decisionmaker's preexisting assumptions." Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 746 (2005); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning With Unconscious Racism*, 39 Stan. L. Rev. 322-25 (1987); Ann C. McGinley, *¡Viva La Evolucion!: Recognizing*

Unconscious Motive in Title VII, 9 Cornell J.L. & Pub. Pol’y 432-434 (2000). Research has shown that people remember more positive information about and behave more helpfully to in-group members. Samuel L. Gaertner, et al., *Aversive Racism: Bias without Intention*, in *Handbook of Employment Discrimination Research* 377, 386 (L. B. Nielsen and R.L. Nelson eds., 2005) (internal citations omitted); Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 Am. Soc. Rev. 593 (2006) (in group preference may contaminate managerial judgment). People simply tend to seek stereotype-confirming individuating information.³

5. Companies can use system-wide controls to check excessive subjectivity. For example, decisionmakers can be instructed in uniform ways that enable them to overcome “automatic reliance on stereotypes.” Susan T. Fiske, *Power Can Bias Impression Processes: Stereotyping Subordinates by Default and by Design*, 3 Group Processes & Intergroup Rel. 227, 228 (2000). Additional safeguards to decrease the likelihood of stereotyping and discrimination include: (a) structured appraisals, (b) heterogeneous work and decisionmaking groups, (c) interdependent in-group and out-group members, and (d) decisionmaker accountability for decisions. Barbara Reskin, *The Proximate Causes of Employment Discrimination*, 29 Contemp. Soc. 319 (2000).

Are subjective employment criteria subject disparate impact analysis?

Yes. Title VII forbids employment practices that cause unlawful discrimination, whatever their mechanism. Employment discrimination can result from objective sources, such as biased, unvalidated tests, or from subjective sources, such as the unrestrained application of

³ Sociologist Barbara Reskin, in expert work in various cases, has summarized and discussed the research showing that people tend to interpret ambiguous information and stereotype consistent ways and use stereotypes to continue to affect predictions about future behavior.

negative stereotypes. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971) (“[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.... [G]ood intent or absence of discriminatory intent does not redeem employment procedures ... that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”). Regardless of whether the source is objective or subjective, its application to a large number of members of a protected class by the same mechanism – *e.g.*, a policy requiring people to take a particular test, or a policy allowing managers to evaluate people by a particular set of factors without using techniques to restrict negative stereotypes – violates Title VII and is appropriate for classwide resolution. In such instances, the class action is the most efficient, fairest, and often the only feasible procedural mechanism for vindication of Title VII rights.

Indeed, for thirty years, the Supreme Court has acknowledged that Title VII provides a remedy for subjective decisionmaking. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 302 (1977) (recognizing that highly subjective hiring process in which decisionmakers were told to consider “personality, disposition, appearance, poise, voice, articulation, and ability to deal with people,” was conducive to subtle discrimination); *General Tele. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982). In *Falcon*, the plaintiff asserted that “the subjective rather than objective manner in which recommendations for raises and transfers and promotions are handled” constituted common facts. *Id.* at 152 n.4. The Court noted two types of common proof that would satisfy commonality and typicality: an objective biased testing procedure and subjective decisionmaking processes. *Id.* at 157 n.15. These two “demonstrative examples” showed the Court’s willingness to find subjective practices, like objective practices, susceptible to class treatment. *Staton v. Boeing Co.*, 327 F.3d 938, 955 (9th Cir. 2003).

The Court reinforced the viability of classwide subjectivity challenges in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1007 n.5 (1988). There, the defendant “had not developed precise and formal criteria for evaluating candidates for the [relevant] positions,” but “relied instead on the subjective judgment of supervisors.” 487 U.S. at 982. *Watson* held that “[h]owever one might distinguish ‘subjective’ from ‘objective’ criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature.” *Id.* at 989. Thus, Title VII applies to practices “based on the exercise of personal judgment or the application of inherently subjective criteria, including “an employer’s undisciplined system of subjective decisionmaking.”⁴ *Id.* at 988, 990.

In *Watson*, the Court held that “disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests.” *Id.* at 990. The Court sought to ensure that Title VII could remedy “the problem of subconscious stereotypes and prejudices” given effect through a “facially neutral practice, adopted without discriminatory intent.” *Id.* “If an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply.” *Id.* at 990-91.⁵

⁴ Psychologists agree that because “test” includes any employment practice used to collect information to be “used as a basis for making an employment decision,” it embraces both objective and subjective forms alike. B. Schneider & N. Schmitt, *Staffing Organizations 14* (2d ed. 1986) (quoted in Brief for Amicus Curiae American Psychological Association, 1987 WL 881423 (“APA Brief”), at *9) (“So, interviews are tests, as are . . . performance appraisals used as a basis for making promotions . . . , and any other kind of information used for making employment decisions.”); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1007 n.5 (1988) (citing APA Brief for the principle that “subjective-assessment devices are, in fact, amenable to the same ‘psychometric scrutiny’ as more objective screening devices, such as written tests”) (Blackmun, J., concurring). Therefore, “[s]ubjective selection devices *can* be scientifically validated for the assessment of individuals for hiring, promotion, or other selection decisions in the employment context.” APA Brief, at *2.

⁵ The next year, the Court reaffirmed this principle. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234-36 (1989) (allowing social psychologist’s testimony that defendant was “likely influenced by sex stereotyping,” even though

Have courts permitted classwide challenges to systems allowing excessive unchecked subjectivity?

Yes. The First, Second, Third, Fifth, Ninth and Eleventh Circuits have held that class certification is appropriate where: (1) the defendant maintains a common practice permitting subjective or discretionary decisionmaking in roughly the same manner across the class, and (2) the plaintiffs have proffered statistical and/or anecdotal evidence to support a reasonable inference of classwide discrimination. *See, e.g., Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 152 (N.D. Cal. 2004), *aff'd*, 509 F.3d 1168, 1179 *et seq.* (9th Cir. 2007); *Green v. USX Corp.*, 843 F.2d 1511 (3d Cir. 1988); *Staton v. Boeing*, 327 F.3d 938, 954-56 (9th Cir. 2003); *Caridad v. Metro North Commuter R.R.*, 191 F.3d 283, 291-93 (2d Cir. 1999); *Shipes v. Trinity Industries*, 987 F.2d 311, 316-17 (5th Cir. 1993); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986).⁶

In *Dukes*, the Ninth Circuit affirmed class certification of Title VII claims premised on excessive unchecked subjectivity, noting that courts have “long accepted” social science data that is “properly analyzed.” *Id.* at 1179. In *Caridad*, the Second Circuit found that the district court’s refusal to certify a Title VII class based on the defendant’s delegation of decisionmaking authority to its supervisors was an abuse of discretion, and reversed. *Id.* at 291. The court held that this subjectivity, without sufficient oversight, was a policy that, in conjunction with

expert “admitted that she could not say with certainty whether any particular comment was the result of stereotyping”).

⁶ The Eleventh Circuit in *Cooper v. Southern Co.*, 390 F.3d 695, 716 (11th Cir. 2004) held that commonality did not exist because the employment decisions at issue were made by different managers implementing different policies. To the extent that the Eleventh Circuit was suggesting that subjective practices inherently involve individual rather than class-wide decisions, that decision is contrary to its ruling in *Cox v. American Cast Iron Pipe Co.* and inconsistent with the Supreme Court in *Watson* and the Third Circuit in *Green*.

statistical and anecdotal evidence presented by the plaintiffs, satisfied the plaintiffs' burden of demonstrating commonality. *Id.* at 293.

In *Thomas*, the First Circuit held that disparate treatment includes "employer decisions that are based on stereotyped thinking or other forms of less conscious bias." *Id.* at 42. There, the plaintiff alleged that her employer's decision to terminate her, based in part on bad performance evaluations (despite a strong sales record), was influenced by unconscious bias and stereotypes. *Id.* at 42. "[I]f an employer evaluates employees of one race less favorably than employees of another race who have performed equivalently, and if race, rather than some other factor, is the basis for the difference in evaluations, then the disfavored employees have been subjected to 'discriminat[ion] ... because of ... race.'" *Id.* at 58. The court appropriately focused on whether the employee had suffered disparate treatment "because of race," regardless of whether the employer "consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias." *Id.* at 58 (noting that in *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984), the court had held that disparate treatment plaintiffs may challenge "subjective evaluations which could easily mask covert or unconscious race discrimination on the part of predominantly white managers").

Many district courts have agreed that subjective practices are amenable to class certification. *See, e.g., Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 638-40 (N.D. Cal. 2007) (on appeal); *Nelson v. Wal-Mart Stores, Inc.*, -- F.R.D. --, 2007 WL 1443114, at *6-*9 (E.D. Ark. May 16, 2007); *Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243, 256-57 (S.D.N.Y. 2007); *Hnot v. Willis Group Holdings Ltd.*, 228 F.R.D. 476, 482-83 (S.D.N.Y. 2005), *upheld on reconsideration*, 241 F.R.D. 204, 210-11 (S.D.N.Y. 2007); *Warren v. Xerox Corp.*, 01-CV-2909, 2004 WL 1562884, at *11 (E.D.N.Y. Jan. 26, 2004); *Bates v. UPS*, 204 F.R.D.

440, 446 (N.D. Cal. 2001); *Orlowski v. Dominick's Finer Foods*, 172 F.R.D. 370, 373 (N.D. Ill. 1997); *Stender v. Lucky Stores*, 803 F. Supp. 259, 331 (N.D. Cal. 1992).⁷ Larger still is the list of cases finding defendants

⁷ Even courts denying class certification consistently follow these principles, explicitly recognizing that class certification of subjectivity claims can be appropriate. *See, e.g., Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 677 (N.D. Ga. 2001) (acknowledging correctness of ruling granting certification in *Morgan v. United Parcel Service of America, Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996), where challenged excessive subjectivity was delegated in common written policy followed in each of the different districts, unlike in *Reid*); *Rhodes v. Cracker Barrel Old Country Store, Inc.*, No. 99 Civ. 217, 2002 WL 32058462, at *57 & n.75 (N.D. Ga. Dec. 31, 2002) (acknowledging *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999) and other cases certifying class actions challenging excessive subjectivity, but distinguishing the facts of *Cracker Barrel* from those in *Caridad*), *report and recommendation adopted by* 213 F.R.D. 619, 680 (N.D. Ga. 2003).

ultimately liable for subjective employment practices. *See, e.g., Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985) (subjective assessments by white supervisors provide a “ready mechanism” for discrimination); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978) (class action); *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1010-11 (2d Cir. 1980) (class action); *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984) (class action).

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In conclusion, employers should be mindful of the potential hazards of using excessive subjectivity as a hiring or promotional device – cabining subjectivity is the right thing to do, and is good business practice.