The Limitations on Implicit Bias Testimony Post-Dukes

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The U.S. Supreme Court’s decision in Wal-Mart Stores, Inc. v. Dukes highlights the critical role that implicit bias social science testimony can play in proving or disproving the commonality required for class certification in employment discrimination cases. See Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).

The term “implicit bias” (also known as “unconscious bias” or “unconscious stereotyping”) refers to the role unconscious cognitive responses play in decision-making. See Elizabeth Tippet, Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices, 29 Hofstra Lab. & Emp. L.J. 433, 437 (2012). Plaintiffs alleging employment discrimination often attempt to use implicit bias testimony to challenge subjective employment practices that adversely affect members of an identified protected class. 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. See Audrey J. Lee, Unconscious Bias Theory in Employment Discrimination Litigation, 40 Harv. C.R.-C.L. L. Rev. 481 (Summer 2005).

The Equal Employment Opportunity Commission (“EEOC”) indicated its intent to focus upon the role implicit bias plays in the workplace pursuant to its Eradicating Racism and Colorism from Employment (“E-RACE”) Initiative. See Equal Employment Opportunity Commission, Eradicating Racism and Colorism from Employment Initiative, http://www.eeoc.gov/eeoc/initiatives/e-race/index.cfm (last visited Feb. 13, 2013).1 Under the E-RACE Initiative, the EEOC developed a series of goals and objectives to be achieved within a five-year timeframe from FY 2008 - FY 2013 to specifically target implicit bias and other subtle forms of discrimination. 2 While that initiative did not produce substantive results over those years, the role implicit bias plays in employment decisions has been raised in recent EEOC

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1 The E-RACE Initiative is designed to identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims, and enhance public awareness of race and color discrimination in employment. Id


While generalized implicit bias research may be highly regarded in academia, courts have been less receptive, especially following Wal-Mart Stores, Inc. v. Dukes. See e.g. Peterson v. Seagate US LLC, 809 F.Supp.2d 996 (D.Minn. 2011) (granting employer’s motion to exclude implicit bias expert testimony that age stereotyping was a factor in employer’s decision to terminate employees because expert did not analyze whether age stereotypes existed at employer); Pippen v. Iowa, No. LACL 107038, slip op. (Iowa Dist. Ct. Polk Cnty Apr. 17, 2012) (granting judgment in favor of the employer on employees’ disparate impact claims with respect to hiring and promotion decisions based in part on the fact that employees’ implicit bias expert testimony failed to prove causation); but see Ellis v. Costco Wholesale Corp., 285 F.R.D. 492 (2012) (granting employees’ motion for class certification based in part upon implicit bias expert testimony that employer’s culture fostered and reinforced stereotyped thinking, which permitted gender bias to infect the promotion process from the top down). Pursuant to Rule 23, it is essential for plaintiffs to prove the existence of questions of law or fact common to the particular proposed class. See Fed. R. Civ. P. 23(a). In addition, any social science testimony must generally be predicated on data specific to the particular employees and employers at issue. See Dukes, 131 S.Ct. at 2553-2554; see Fed. R. Evid. 702.

As discussed more fully below, the Supreme Court in Dukes held that plaintiffs’ implicit bias testimony failed to establish that Wal-Mart utilized a common discriminatory practice across the alleged class. Dukes, 131 S.Ct. at 2555-2556. The court’s unwillingness to consider the Plaintiffs’ expert testimony, in part allowed Wal-Mart to defend against what would have been the largest potential class of employees in history. But while the Supreme Court in Dukes refused to accept the generalized implicit bias testimony plaintiffs offered, both Dukes and its progeny can assist lawyers in understanding how properly tailored implicit bias testimony can possibly be used in employment discrimination cases going forward. .

Dukes

In Dukes, plaintiffs represented a class of 1.5 million female Wal-Mart 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). Specifically, plaintiffs alleged that Wal-Mart knowingly permitted its 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). Plaintiffs alleged that this was the product of Wal-Mart’s “strong and uniform ‘corporate culture’ [that] permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each
The United States District Court for the Northern District of California initially granted plaintiffs’ motion for class certification based in part upon the implicit bias expert testimony of Dr. William Bielby, a sociologist. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 152-154 (N.D. Cal. 2004). Dr. Bielby offered opinions concerning the role Wal-Mart’s strong corporate culture and the role gender stereotyping might play in the subjective decisionmaking process. Id. The United States Court of Appeals for the Ninth Circuit affirmed the District Court’s certification order. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 601 (9th Cir. 2010). In doing so, it held that the District Court was correct in considering only whether Dr. Bielby’s testimony raised a question “of corporate unanimity and gender stereotyping that is common to all class members,” at the class certification stage and not determining which parties’ evidence was most persuasive. Id. at 602 (internal citations omitted). The Supreme Court reversed the Ninth Circuit and rejected Dr. Bielby’s testimony. Dukes, 131 S.Ct. at 2551. The Supreme Court found that plaintiffs’ claims, which potentially encompassed thousands of individual employment decisions made by thousands of managers each of whom exercised discretion in thousands of Wal-Mart stores, causing thousands of individual harms, lacked the common questions of law and fact required to satisfy Rule 23(a)(2). Id. As a result, in spite of the substantial implicit bias social science testimony presented by plaintiffs to the District Court, the Supreme Court found that plaintiffs could not sufficiently allege a single common reason for those employment decisions. Id. at 2552.

The Supreme Court in Dukes looked back to its earlier decision in Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147 (1982) and noted the type of proof necessary for the Plaintiffs to establish commonality. In Falcon, the Court noted: “Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.” Id. at 159, n. 15. The Supreme Court recognized that the plaintiffs in Dukes attempted to establish that Wal-Mart “operated under a general policy of discrimination” using Dr. Bielby’s generalized implicit bias testimony. Dukes, 131 S.Ct at 2553. Dr. Bielby had posited that Wal-Mart’s “strong corporate culture” made it “vulnerable to” gender bias. See Dukes, 222 F.R.D. at 153. Unlike the lower courts, however, the Supreme Court criticized Dr. Bielby’s testimony on the basis that he was unable to “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart.” Dukes, 131 S.Ct. at 2553. The Court noted that plaintiffs could not prove the existence of commonality because 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., citing Dukes 222 F.R.D. at 192. Answering this question was central to proving commonality, and the Court recognized that Dr. Bielby’s testimony was thus “worlds away from ‘significant proof’ that Wal-Mart ‘operated under a general policy of discrimination.’” Dukes, 131 S.Ct. at 2554.
In reaching this conclusion, the Court acknowledged the serious methodological flaws in Dr. Bielby’s social framework analysis. Id., at 2554, n. 8, citing John Monahan, Laurens Walker & Gregory Mitchell, \textit{Contextual Evidence of Gender Discrimination}, 94 VA. L. REV. 1715, 1747-1748 (2008). In particular, the Court pointed to the fact that Dr. Bielby reached his conclusion by improperly linking generalized research to specific facts. Id. The Court therefore held, consistent with others who reviewed the research, that Dr. Bielby’s testimony “did not meet the standards expected of social science research into stereotyping and discrimination.” Id. Indeed, as noted by the Court, Dr. 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.

The Supreme Court concluded that the only Wal-Mart corporate policy plaintiffs’ implicit bias testimony established, if any, was a policy of permitting discretion by local supervisors over employment. Id. This was the opposite of a uniform employment practice required to prove the commonality necessary for a class action. The Court further noted that such a discretionary policy was “a very common and presumptively reasonable way of doing business -- one that we have said ‘should itself raise no inference of discriminatory conduct.’” Id. Moreover, Court recognized that the mere fact that a Title VII claim \textit{could} exist under a discretionary system did not mean that every employee necessarily \textit{had} a common disparate impact claim, such that their claims would in fact depend on the answers to common questions. Id. The Supreme Court thus rejected Dr. Bielby’s implicit bias testimony, as well as plaintiffs’ other statistical and anecdotal evidence concluding that “[i]n a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without common direction.” \textit{Wal-Mart Stores, Inc. v. Dukes}, 131 S.Ct. 2541, 2555 (2011).

As shown below, there have been very few decisions post \textit{Dukes} which have addressed generalized implicit bias testimony. Clearly, however, under \textit{Dukes} and those cases which followed \textit{Dukes}, the testimony must be tailored to the specific parties, claims, and subjective employment practices and policies at issue.

\textbf{Peterson}

Following \textit{Wal-Mart Stores, Inc. v. Dukes}, the United States District Court for the District of Minnesota was required to evaluate implicit bias testimony when Seagate US LLC (“Seagate”) filed a motion seeking to exclude implicit bias expert opinion testimony proffered by plaintiffs and to decertify a class of terminated employees. See \textit{Peterson v. Seagate US LLC}, 809 F.Supp.2d 996, 998 (D.Minn. 2011). The employees, all of whom were over age 40, were selected for termination pursuant to a companywide reduction in force (“RIF”) or pursuant to a Special Incentive Retirement Plan (“SIRP”). Id.

Plaintiffs alleged Seagate discriminated against them on the basis of age in violation of the Age Discrimination in Employment Act (“ADEA”). They contended that the employment
decisions associated with the RIF and SIRP 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, that had an adverse impact on employees over age 40. Id. at 1001. Plaintiffs proffered the expert report of Dr. Marc Bendick, an economist specializing in employment and related issues. Dr Bendick performed a statistical analysis of termination rates associated with Seagate’s RIF and SIRP. He concluded that Seagate discriminated on the basis of age in this process, but more relevantly here, he also concluded that his analysis was consistent with statistical patterns that resulted when ageist stereotypes were applied. Id. at 1008. Seagate argued that Dr. Bendick’s 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. Id. Instead, Dr. Bendick simply concluded that because ageist stereotypes might lead to adverse employment actions, then Seagate must have taken action against plaintiffs because it too embraced these negative stereotypes. Id.

The District Court granted Seagate’s motion to strike Dr. Bendick’s expert opinion and concluded it was not supported by the evidence, and it was not relevant or reliable. Id. The District Court specifically noted that Dr. Bendick did not perform an analysis as to whether age-based stereotypes actually existed at Seagate. Id. at 1009. Instead, in claiming his statistical analysis was consistent with employers that used stereotypes, Dr. Bendick simply relied on studies and behaviors of other employers that generally found people had negative, ageist stereotypes. Id. This research did not lead to the conclusion that Seagate’s adverse actions against the plaintiffs resulted from negative stereotypes, particularly where Seagate offered legitimate, nondiscriminatory reasons for their terminations. Id.

Accordingly, the District Court granted Seagate’s motion to exclude Dr. Bendick’s expert opinion that age stereotyping played a role in plaintiffs’ terminations from Seagate. The court did however, allow Dr. Bendick to opine that age stereotyping generally existed among employers. Id.

Pippen

While Iowa state court decisions may not be universally accepted as authority outside of the state, an Iowa state court’s 2012 opinion embracing *Wal-Mart Stores, Inc. v. Dukes’* criticism of generalized implicit bias social science testimony has garnered national attention. Following a multi-week trial, the court roundly rejected the implicit bias theory of discrimination in entering final judgment in favor of the State of Iowa and against a class of African-American employees. *Pippen v. Iowa*, No. LACL 107038, slip op. (Iowa Dist. Ct. Polk Cnty Apr. 17, 2012).

In *Pippen*, the employees alleged that thirty-seven departments within the executive branch of the State of Iowa systemically engaged in discretionary merit-based hiring and promotion practices. Id. at 1-3. They alleged these practices caused a disparate impact and disparate treatment on the basis of race, and denied the class members equal opportunity for employment in violation of Title VII and the Iowa Civil Rights Act. Id. Plaintiffs did not identify a single employment practice that caused the disparate impact or disparate treatment.
Rather, plaintiffs presented implicit bias social science testimony in support of their claim. This testimony concluded that based upon the data collected from the meta-analysis of results of the Implicit Association Test (“IAT”){3} all persons have some degree of “automatic preference” for one race or another which is unknown to them, which in turn leads to discrimination in subjective decision-making. Id. at 28-29.

Plaintiffs presented generalized implicit bias testimony from two social science experts. Plaintiffs’ expert, Dr. Anthony Greenwald, a psychology professor specializing in the study of “implicit social cognition,” concluded that all persons to some degree had an automatic preference for one race or another that was unknown to them, and that unconscious bias led to discrimination particularly in subjective decision-making. Pippen v. Iowa, No. LACL 107038, slip op., at 28-29 (Iowa Dist. Ct. Polk Cnty Apr. 17, 2012). However, Dr. Greenwald did not examine any data concerning employment decisions by Iowa state employment managers or decision-makers, or any specific acts of decision-making. Id. at 29. Dr. Greenwald also conceded that a person’s preference for one race over another on the IAT would not necessarily result in prejudicial behavior. Notably, Dr. Greenwald refused to offer any opinion as to whether implicit bias of Iowa managers caused any difference in the hiring of whites and blacks in Iowa state government. Thus, while Dr. Greenwald claimed the “evidence is strongly presumptive” that Iowa managers and decision-makers made implicitly biased decisions based upon his “meta-analysis,”{4} he conceded there was no “actual empirical data that could establish it.” Id. at 30. Moreover, Dr. Greenwald conceded he did not review any of the hiring files in the case or any discrete specific employment decisions relating to any class members. Id.

Plaintiffs’ second social science expert was Dr. Cheryl Kaiser, a psychology professor who studied “stereotyping and prejudice” and their effects on decision-making. Id. Dr. Kaiser testified that implicit bias was so pervasive that any merit-based employment system would only serve to legitimize inequality. Id. at 31. Specifically, she testified that a decision-maker in a subjective context would rely on criteria more commonly associated with the race toward whom they had implicit bias. Id. In turn, the decision-maker would rely less on criteria associated with the race against whom they had an implicit bias. Id. By way of example, if a decision-maker was implicitly biased in favor of Caucasians and against African-Americans, she would rely more on criteria associated with Caucasians to make her decision, and less on criteria associated with African-Americans.

As in Wal-Mart Stores, Inc. v. Dukes, the Iowa trial court recognized that while discretion accorded to lower-level supervisors could be the basis for a disparate impact claim, the mere fact that a discretionary system creates a racial disparity alone was not enough to prove it was the basis for such a claim. Pippen v. Iowa, No. LACL 107038, slip op., at 52. The Iowa

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3 The IAT is a computer-based test that requires a subject to associate a verbal or visual stimulus viewed on a monitor with either “pleasant” or “unpleasant” words. The computer then measures the relative response time to complete the associations. Id. at 28.

4 Meta-analysis is the practice whereby one combines a collection of studies testing a similar hypothesis and aggregates the results in drawing the ultimate conclusion, while ignoring the differences between the various studies. Id. at 29.
trial court thus agreed with the Supreme Court in *Dukes* finding that subjective discretion in decision-making was “a very common and presumptively reasonable way of doing business - one that we have said ‘should itself raise no inference of discriminatory conduct.’” *Id.* at 53, citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2544 (2011).

In so ruling, the Iowa court was sharply critical of the social science testimony offered. It noted that “Dr. Greenwald conceded that he would not use the phrase ‘implicit bias’ in writing a scientific article,” and rhetorically asked “How, then, should it import more gravamen in a court of law?” *Pippen v. Iowa*, No. LACL 107038, slip op., at 52. The Court discounted the testimony because it did not use data relevant to the case to determine any connection between alleged implicit bias and the discretionary subjective employment decisions at issue. The Court recognized that the social scientists’ implicit bias testimony was simply an “opinion of conjecture, not proof of causation.” *Id.* at 54.

Accordingly, the Iowa court concluded that the plaintiffs failed to prove that the subjective, discretionary decision-making in employment decisions caused a disparate impact under Title VII or the Iowa Civil Rights Act. Plaintiffs are appealing this decision.

**Ellis**

Despite the employer-friendly holdings in the foregoing cases, the Northern District of California’s recent decision in *Ellis v. Costco Wholesale Corp.*, on remand from the Ninth Circuit Court of Appeals, granting class certification, suggests that at least in the Ninth Circuit, plaintiffs can use narrowly-tailored, factually-supported implicit bias testimony to prove commonality under certain circumstances. See *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (2012).

In *Ellis*, plaintiffs were current and former employees of Costco Wholesale Corp. (“Costco”) who claimed that Costco’s promotion and management practices discriminated against women with respect to certain promotions, and that its promotion system on the whole had a disparate impact on female employees. *Id.* at 496. With the support of their expert, Dr. Barbara Reskin, 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. Like Dr. Bielby in the *Dukes* litigation, Dr. Reskin conducted a “social framework” analysis to determine whether unconscious bias existed at Costco. *Id.* Dr. Reskin examined Costco’s personnel and promotion policies and practices in the context of social science literature. She also had expertise in conscious and unconscious bias, stereotyping, and discrimination in the workplace. *Id.* Dr. Reskin 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 Dr. Reskin’s testimony that Costco had a culture of “gender stereotyping and paternalism,” to be “persuasive” and “consistent with and provides further support for Plaintiffs’ claim that Costco operates under a common, companywide promotion system.” Id. It also found that evidence concerning Costco’s corporate culture underscored the fact that the plaintiffs’ claims would require answering common questions with respect to the class as a whole. Id. The Court cited in particular substantial evidence concerning the strong role Costco’s corporate culture played in influencing its promotion practices. Id., at 520. The Court found plaintiffs’ evidence of culture to be persuasive in light of 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. Id. Accordingly, the Court granted class certification. Id., at 521.

In doing so, the Court noted the marked differences between Ellis and Dukes. First, the putative classes were dramatically smaller in Ellis, thus making it more likely that the plaintiffs would be able to show a common mode of exercising discretion. Second, the classes in Ellis were more limited in scope and focus than the proposed class in Dukes. Id., at 521. Significantly, the two classes in Ellis were targeted to a specific position and Costco’s failure to promote women from that position, as opposed to a broad class of all women in all positions in thousands of stores for claims concerning both compensation and promotion. Id. Finally, the plaintiffs in Ellis identified a specific employment practice that Costco allegedly implemented companywide under the influence and control of top management which from the court’s perspective was sufficient to establish commonality. Id.

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. There is no doubt that this is an area that will continue to evolve and develop as courts determine what role, if any, implicit bias can play in discrimination cases of the future.

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5 In contrast, the Court found Costco’s expert’s attack on the plaintiffs’ expert to be unpersuasive because it did not focus on the discrete promotion process at issue and because it did not negate the commonality shown in Costco’s corporate culture and decision-making process. Id. The Court noted that neither the plaintiffs’ expert nor Costco’s expert disputed there were policies and practices common to the class as a whole, but rather only the merits and impacts of Costco’s promotion policies. Id.