

Is Using Implicit Bias to Prove Discrimination Under Title VII and Other Antidiscrimination Statutes a Viable Option?

Compilation of Relevant Written Materials

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Implicit Bias – State of the Law

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Summary

Anti-discrimination statutes are generally directed at preventing intentional discrimination. In the employment context, plaintiffs bringing claims under such statutes generally rely on evidence of overt actions (or “disparate treatment”) in the workplace. That said, plaintiffs bringing “disparate impact” claims are by definition challenging facially neutral practices and may not rely upon evidence of allegedly overt discriminatory actions to support their claims.

In recent years, plaintiffs have increasingly attempted to use evidence of latent discriminatory biases and those biases’ allegedly deleterious effects to support their disparate treatment and impact claims. Apart from a few notable exceptions, courts have not thus far been particularly receptive to this sort of evidence. Even where implicit bias evidence has been allowed it has not necessarily been particularly impactful.

A court’s receptiveness can depend on the purpose for which the evidence is being offered. And it can also be influenced by the type of and stage of the litigation. But the unpredictability of the outcomes in these cases suggests that just as often an individual judge’s personal predilections are determinative.

This paper will first summarize the two types of implicit bias evidence and the purported scientific basis for such evidence. The article will then summarize case law on the topic, looking at various factors impacting its admissibility and probative value.

Overview of Implicit Bias Evidence

Two Types of Implicit Bias Evidence

Implicit bias evidence is admitted—if at all—through expert testimony and accompanying expert witness reports. Accordingly, such evidence must satisfy the Federal Rules of Evidence. *Daubert v. Merrell Dow Pharmaceutical* and *Kumho Tire v. Carmichael*.¹ Federal Rule of Evidence 702 requires that expert testimony: (1) be “based on sufficient facts or data”; (2) be “the product of reliable principles and methods”; and (3) “reliably appl[y] the principles and methods to the facts of the case.”² Additionally, a Committee Note to Rule 702 allows for “generalized” expert testimony to “educate the factfinder on general principles.”³ Generalized expert testimony must: (1) come from a “qualified” expert; (2) “address a subject matter on which the factfinder can be assisted by an expert”; (3) “be reliable”; and (4) “‘fit’ the facts of the case.”⁴

¹ FED. R. EVID. 702; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

² FED. R. EVID. 702.

³ FED. R. EVID. 702 advisory committee’s note to the 2000 amendment.

⁴ *Id.*

Implicit bias evidence can thus theoretically be presented in two ways: as general or specific evidence. “General” implicit bias testimony is the presentation of empirical research to explain the idea of “implicit bias” with the goal of the fact finder better understanding the potential consequences of that bias.⁵ “Specific” implicit bias testimony is the presentation of empirical research on implicit bias *and* application of that research to specific policies and practices at issue in the litigation.⁶ General evidence is admissible if it satisfies the Committee Note to Rule 702, whereas specific evidence is admissible only if it satisfies Rule 702’s standard reliability and relevance analysis.

Implicit Association Test

Both general and specific implicit bias evidence often incorporates the leading method of measuring implicit bias: the Implicit Association Test (the “IAT”). The IAT requires participants to classify rapidly certain stimuli with reaction time as the main measurement of bias. For example, in one race-based IAT, a participant uses two keys to categorize faces as European American or African American. The participant then does the same for words, categorizing each as “Good” or “Bad.” One key is then assigned to “European American”/“Good” and the other to “African American”/“Bad” and a mixture of the categorized faces and the words then appears, with the participant categorizing each. Finally, the designations flip, with one key representing “African American”/“Good” and the other “European American”/“Bad”. The difference in reaction time between the final two rounds is used to measure implicit bias, under the theory that a participant with a negative implicit attitude towards African Americans would respond quicker when African American and Bad shared a key than when African American and Good shared a key.⁷ Though other tests exist, the IAT is the most respected and peer-reviewed, and the most common test that appears in case law regarding implicit bias evidence.⁸ As shown below, the IAT’s creator, Dr. Anthony Greenwald, is a frequent expert witness and plaintiffs often attempt to use his research and reports as implicit bias evidence.

Implicit Bias Evidence in Practice

Courts treat implicit bias evidence differently based on *when* it is presented to the fact finder and *how* it is presented to the fact finder. What follows is a summary of the current case law analyzing how those two factors affect the admissibility and effectiveness of implicit bias evidence in the context of discrimination litigation. With some notable exceptions, courts have not been receptive to implicit bias evidence in the employment context.

⁵ Jones, Annika L., *Implicit Bias as Social-Framework Evidence in Employment Discrimination*, 165 U. Pa. L. Rev. 1221, 1233 (2017).

⁶ *Id.* at 1234.

⁷ The IAT is publicly available at PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> [<https://perma.cc/VD6A-J4V9>], along with a description of the test and other related information.

⁸ Kang, Jerry and Lane, Kristin, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 472-473 (2010).

Admitting Implicit Bias Evidence – General v. Specific

As discussed above, in theory, Plaintiffs have two approaches to presenting implicit bias evidence: general, and specific. The approach taken should theoretically impact which standard for admissibility the court applies and the likelihood that the evidence is admitted. In practice, however, even “general” evidence is often rejected under the more strict Rule 702/*Daubert* analysis.

In at least one instance, by being clear that implicit bias evidence was being offered only for “general” purposes, the plaintiff was successful in having it admitted:

- *Samaha v. Washington State Department of Transportation*, No. CV-10-175, 2012 U.S. Dist. LEXIS 190352 (E.D. Wash. Jan. 3, 2012). In *Samaha*, an Arab employee brought a discrimination claim against the Washington State Department of Transportation alleging that he was held to higher standards than his co-workers because of his national origin. Plaintiff attempted to introduce testimony from Dr. Greenwald, and defendant moved to exclude under Rule 702. The Court allowed the evidence. *Samaha*’s attorneys were explicit in the purpose of the evidence. They clearly explained that the evidence was intended only as a general framework to help fact finders better understand implicit biases. Dr. Greenwald was careful not to apply his findings to the facts of the case.⁹ The Court accepted this characterization, applied the more lenient Rule 702 Committee Note standard, and admitted the implicit bias evidence.¹⁰

However, mere clarity in this regard, does not guarantee that the evidence will be admitted:

- *Jones v. National Council of Young Men’s Christian Associations of the United States (Jones I)*, No. 09-C-6437, 2013 WL 7046374 (N.D. Ill. Sept. 5, 2013). In this putative class action, a group of black YMCA employees claimed discrimination with regards to numerous internal practices and policies and tried to use Dr. Greenwald as an expert witness at the class certification stage.¹¹ Plaintiffs’ attempted use of implicit bias was almost identical to *Samaha*’s. Dr. Greenwald was explicit that his testimony and report were intended to be general and refrained from application to the facts of the case.¹² Yet in *Jones I*, defendants specifically attacked whether the generalized implicit bias evidence was sufficiently applicable to workplace discrimination.¹³ Though the Court declined to rule that implicit bias evidence could never be helpful, in this instance it sided with defendants, finding that Dr. Greenwald’s work was not reliable and therefore failed, even

⁹ *Samaha*, at *1–3.

¹⁰ *Id.* at *10–11.

¹¹ *Jones I*, at *1.

¹² *Id.* at *6.

¹³ *Id.* at *7.

under the more lenient Committee Note to Rule 702.¹⁴

- *Jones v. National Council of Young Men's Christian Associations of the United States (Jones II)*, 34 F. Supp. 3d 896 (N.D. Ill. 2014). The district court adopted the *Jones I*'s stance that Dr. Greenwald's testimony was unreliable and added that the evidence also did not sufficiently fit the facts of the case.¹⁵ The opinion highlights that the distinction between general and specific evidence—and the theoretically attendant distinct standards—is unpredictable in application. In *Jones II*, just stating that implicit bias makes it “more likely than not” that unintended discrimination occurs, was sufficient to categorize the implicit bias evidence as specific and not general.¹⁶
- *Karlo v. Pittsburgh Glass Works, LLC*, 849 F. 3d 61 (3d Cir. 2017), *rev'g in part* No. 2:10-cv-1283, 2015 WL 423600 (W.D. Pa. July 13, 2015). In 2017, the Third Circuit followed *Jones I* and *Jones II* and questioned whether implicit bias evidence could be helpful in any scenario. The decision in question was a lower court's exclusion of Dr. Greenwald's testimony and report in a multi-plaintiff ADEA discrimination claim. Dr. Greenwald again attempted to provide general implicit bias evidence: explaining IAT, introducing implicit bias as a theory, and summarizing other experts' research.¹⁷ The district court believed that Dr. Greenwald was attempting to apply the evidence to the facts of the case, followed Rule 702, and excluded the evidence. Here Dr. Greenwald did mention some of the defendant's specific employment practices and stated that his research applied to the case.¹⁸

Class Certification

Apart from the general/specific distinction, courts have analyzed implicit bias evidence differently in various litigation postures. In 2011, the Supreme Court reversed a Ninth Circuit decision and found that plaintiffs could not rely on “social framework” evidence to sustain their theory of commonality.

- *Wal-Mart v. Dukes*, 564 U.S. 338 (2011). Plaintiffs brought class action discrimination claims on behalf of 1.5 million current or former female Wal-Mart employees alleging that Wal-Mart's policy of allowing local managers to make pay and promotion decisions was discriminatory.¹⁹ To support class certification (specifically, commonality under Rule 23(a)(2), plaintiffs relied on purported expert

¹⁴ *Id.* at *9.

¹⁵ *Jones II*, F. Supp. 3d 896, 898–901.

¹⁶ *Id.* at 899.

¹⁷ *Karlo v. Pittsburgh Glass Works, LLC (Karlo II)*, No. 2:10-cv-1283, 2015 WL 4232600, at *8 (W.D. Pa. July 13, 2015), *vacated*, 849 F.3d 61 (3d Cir. 2017).

¹⁸ *Id.* at *7.

¹⁹ *Wal-Mart v. Dukes*, 564 U.S. 343, 359-60 (2011).

testimony as to “social framework analysis.” Specifically, the proffered expert testimony was that Wal-Mart had a “‘strong corporate culture’ that makes it ‘vulnerable’ to ‘gender bias.’” While the trial court and Ninth Circuit had agreed with plaintiffs’ position and certified the class, the Supreme Court reversed, finding that the proffered evidence was insufficient to establish that Wal-Mart maintained a “general policy of discrimination.”²⁰ Specifically, the Court found the testimony flawed in that it drew conclusions about Wal-Mart’s policies with insufficient knowledge or analysis of those policies in practice.²¹ The Court specifically pointed to the expert’s inability to “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart.”

- *Valerino v. Holder*, 283 F.R.D. 302 (E.D. Va. 2012). A Virginia district court’s application of *Dukes* illustrates the case’s impact on the use of implicit bias evidence at the class certification stage. In *Valerino*, a group of female employees of the United States Marshal Service (USMS) brought a Title VII claim against United States Attorney General Eric Holder, Jr. alleging that the USMS’s promotion policies discriminated against women because of the discretion granted to Marshals and Assistant Directors. Plaintiffs’ proposed class consisted of all current and former female USMS employees affected by the policies in question.

As in *Dukes*, the plaintiffs in *Valerino* alleged that a general implicit bias against women “infect[ed] the discretionary decision making.”²² The Court rejected this argument and stated that discretionary practices without “significant proof that the USMS Marshals and Assistant Directors operated under the general policy of discrimination” were insufficient to show commonality, regardless of claimed implicit biases.²³ They concluded that “the ‘policy’ of allowing discretion by local supervisors over employment matters was on its face just the opposite of a uniform employment practice that would provide the commonality needed for a class action.”²⁴

Merits Stage of Class Actions

Though *Dukes* is in theory limited to the class certification stage of class actions, at least one court has applied the case to the merits stage of a class action discrimination suit.

- *Pippen v. Iowa*, No. LACL 107038 (Iowa Dist. Ct. Apr. 17, 2012), *aff’d*, 854 N.W.2d 1 (Iowa 2014). In *Pippen*, plaintiffs were a class seeking employment with or promotion within the State of Iowa merit-based employment system. They claimed

²⁰ *Dukes*, 564 U.S. at 354–55.

²¹ *Id.* at 354 n.8.

²² *Valerino v. Holder*, 283 F.R.D. 302, 313 (E.D. Va. 2012).

²³ *Id.* at 314.

²⁴ *Id.* (internal citation and punctuation omitted).

that the state's system for promotions as designed failed to account for unconscious implicit biases and as a result discriminated against African-Americans. Though the trial court admitted implicit bias evidence from multiple experts, including Dr. Greenwald, it ultimately concluded that the evidence was not sufficiently tailored to the facts in the case and not sufficiently representative of Iowans.²⁵

As with *Dukes*, the realities of a class action lawsuit weighed against the effectiveness of implicit bias evidence. The Court concluded, “[t]his case, much like *Wal-Mart*, involves Plaintiffs and a ‘multitude of different jobs,’ at different levels, held ‘for variable lengths of time,’ in numerous different departments, with a ‘kaleidoscope of supervisors (male and female),’ subject to a variety of hiring approaches contingent upon the goals and duties of various agencies.”²⁶ With that much variation within the class, the Court bristled at applying what it saw as the general theory of implicit bias and found that there was no disparate impact or adverse impact discrimination.²⁷ This result shows that even where Plaintiffs clear the admissibility hurdle, courts can still be skeptical as to the persuasiveness of implicit bias evidence.

Summary Judgment – Non-Class Action

Two First Circuit decisions suggest that at least one appeals court is open to implicit bias evidence at the summary judgment stage.

- *Thomas v. Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999), *cert denied*, 528 U.S. 1611 (2000). Reversing the lower court's decision to grant the employer's motion for summary judgment in a race discrimination case, the circuit court explicitly stated that disparate treatment can be the result of the employer basing evaluation on race “because of unthinking stereotypes or bias.”²⁸ The opinion went on to cite extensive scholarship on the existence of implicit bias and its possible effects on decision making.²⁹
- *Ahmed v. Johnson*, 752 F.3d 490 (1st Cir. 2014). In *Ahmed*, a single plaintiff alleged race, national origin, and religion discrimination.³⁰ Though less explicitly supportive of implicit bias evidence, *Ahmed* again saw the First Circuit reverse a lower court's decision to grant an employer's motion for summary judgment, noting that discrimination can be proven on less than “[o]utright admissions” as discrimination

²⁵ *Pippen*, slip op. at 53.

²⁶ *Id.* at 55–56.

²⁷ *Id.* at 56.

²⁸ *Thomas*, 183 F.3d at 58.

²⁹ *Id.* at 59–61.

³⁰ *Ahmed*, 752 F.3d at 503.

can be caused by “stereotypes and other types of cognitive biases.”³¹

Bench Trials – Non-Class Action

The subject of implicit bias evidence has been addressed in the context of bench trials.

- *Kimble v. Wisconsin Department of Workforce Development*, 690 F. Supp. 2d 765 (E.D. Wis. 2010). In *Kimble*, a black employee brought a Title VII intentional discrimination claim against his employer. The Court never made a decision on the admissibility of implicit bias evidence because the plaintiff did not present any. Instead, the judge took it upon herself to use implicit bias theory and Dr. Greenwald’s work to inform her decision.³² The judge specifically discussed how subjective practices can lead to implicit bias and how stereotypes can inform employment decisions.³³ Still, *Kimble* does not suggest that implicit bias evidence alone can sustain a workplace discrimination claim. The Judge was clear that she rejected the defendants’ explanation and that that alone was sufficient to justify her decision.³⁴ Substantial documentary evidence showed that the employer’s explanation for the disputed employment actions was pretextual and the judge was not convinced by the defendant’s “maddeningly evasive” testimony.³⁵
- *Martin v. F.E. Moran, Inc.*, No. 13 C 03526, 2017 U.S. Dist. LEXIS 42974 (N.D. Ill. March 24, 2017). In *Martin*, a race discrimination case, the judge admitted implicit bias testimony. The decision was at least in part motivated by the realities of a bench trial, specifically that a judge would decide the value of the evidence rather than “the untrained ear of a juror.”³⁶ Although the court admitted the implicit bias evidence, it found it unconvincing, determining that the “Plaintiffs failed to tie [the expert’s] opinion regarding implicit bias to the individual circumstances surrounding their employment ... as required to prove intentional discrimination actually occurred.”³⁷ The decision again underscores the limitations of general implicit bias evidence once it has been admitted.

³¹ *Id.*

³² *Kimble*, 690 F. Supp. 2d 765, 776–77.

³³ *Id.*

³⁴ *Id.* 775–78.

³⁵ *Id.* 774–75.

³⁶ *Martin*, 2017 U.S. Dist. LEXIS 42974, at *11.

³⁷ *Martin v. F.E. Moran, Inc.*, No. 13 C 03526, 2018 U.S. Dist. LEXIS 54179, at *100 (N.D. Ill. March 30, 2018).

Conclusion

Implicit bias evidence in employment discrimination cases is still a relatively novel concept. While there are only a handful of published decisions available, some patterns emerge. First and foremost, there is a healthy skepticism among courts about the usefulness and persuasiveness of implicit bias evidence in this employment discrimination. The first hurdle plaintiffs face is getting the evidence admitted at all. To that end, though there exists in theory an easier pathway to admissibility—the Committee Note to Rule 702—in practice, courts remain fundamentally hostile to the idea of “general” implicit bias evidence. Instead, they are far more likely to apply the more restrictive Rule 702 analysis and more often than not exclude such testimony and expert reports. When courts *do* admit implicit bias evidence, there is no support in the cases for the proposition that such evidence *alone* is sufficient to sustain a discrimination claim. While *Dukes* was in theory limited to the class certification context, courts in cases like *Pippen* and *Martin* extended the Supreme Court’s skepticism regarding implicit bias evidence to other stages of litigation.

Implicit Bias in the Courtroom

The Honorable J. Michele Childs
United States District Court for the District of South Carolina

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According to The Kirwan Institute for the Study of Race and Ethnicity, implicit bias refers to “the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.” *State of the Science: Implicit Bias Review* (2015). Moreover, these biases are “harbored in our subconscious and cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance.” *Id.* A solid understanding of how and where implicit biases operate within the justice system is crucial in the effort to develop policies, practices, and strategies aimed at identifying and reducing their effects in the legal context.

Implicit biases are pervasive, meaning that they are held by everyone. They are held by liberals and conservatives; they are also held by the young, the middle-aged, the elderly, and by everyday citizens from all regions of the United States. Implicit biases often co-exist, unbeknownst to the holder, alongside more overtly displayed so called “politically-correct” views. Given the inherent high-stakes nature of the United States’ Justice System—in both civil and criminal proceedings—it is particularly important to understand and discuss how implicit biases affect the decisions of those within the justice system. Indeed, judges, lawyers, and the average “citizen-turned juror” all play vital, albeit differing, roles in the administration of equal justice. Therefore, impartiality is critical to the decision-making process. This section is designed to discuss the various ways in which implicit biases seep into courtrooms, and ways in which key decision-makers attempt to limit their unintended effects.

Voir Dire

Even in a society that values racial, gender, and other forms of equality as evidenced by a myriad of civil rights protections, implicit biases can manifest in our courtrooms—especially in jurors. Research suggests that implicit bias affects jurors’ perceptions of witnesses and the parties to the case. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1145-46 (2012). The entire jury process is susceptible to the influence of implicit bias, from the weighing of testimony and other evidence to the culmination of the jury’s deliberations in the verdict. *See* Justin D. Levinson et al., *Implicit Bias: A Social Science Overview*, in *Enhancing Justice: Reducing Bias* 43, 55-57 (Sarah E. Redfield ed., 2017). To maintain impartiality in the jury’s deliberation process, judges must understand how to address the problems associated with implicit bias. One tool that judges utilize to reduce the effects of implicit bias in jurors is voir dire. Literally French for “speak the truth”, voir dire is the process by which the court attempts “to identify jurors who will be able to objectively judge the evidence and render a fair and impartial verdict.” 3 Criminal Law Advocacy § 56.02 (2019). Despite the efforts made to reduce bias during voir dire, implicit bias may still linger in jurors who have otherwise been deemed impartial. Jill Huntley Taylor, Dana M. Binder, *Bias: Challenges to Seating a Truly Impartial Jury*.

During voir dire, judges and attorneys may collaborate to ensure that implicit bias does not taint a jury. The balance of involvement between the attorneys and the judge varies depending on the judge. In many jurisdictions, with the exception of death penalty cases, judges control the majority of voir dire while ceding little control to the attorneys. If the judge decides to control voir dire, he or she should accept and review proposed voir dire by the parties and conduct an examination of the jurors as to any potential biases related to the claims and defenses in the litigation. These questions tend to seek information regarding the jurors’ experiences with the factual scenario of the particular case.

For example, in a race discrimination case, a judge may ask potential jurors whether they have ever filed a complaint of discrimination or grievance in connection with employment. The judge may then delve into more sensitive matters that may reflect juror attitudes toward the particular information to be relayed at trial. For further illustration, in a sex discrimination trial, the judge could ask potential jurors whether they believe that someone claiming sex discrimination is being overly sensitive or promoting a political agenda. Jurors responding to these kinds of sensitive questions should be allowed to present their answers at the bench with the judge, and alongside the parties' counsel. Conducting voir dire in this manner—away from other potential jurors—ensures that individual jurors can be open and honest with the court. When this happens, the judge and attorneys are able to more easily conduct follow-up voir dire with the juror.

Judge-dominated voir dire, however, can be counterproductive in preventing implicit bias on juries. *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 160 (2010). Judges must be mindful of the impact of removing control of voir dire from attorneys. Because attorneys have a superior knowledge of the case and greater access to outside experts and resources, they are in a better position to root out implicit bias in jury selection. *Id.* When conducting voir dire themselves, judges are not usually able to focus on implicit bias with the specificity that attorneys may be able to do during questioning. *See id.* Furthermore, research suggests that jurors are less likely to give candid answers to judges than lawyers and tend to give answers that are more “socially desirable.” *See id.*

Peremptory Strikes and Batson Challenges

The exercise of peremptory strikes is another method of reducing the effects of implicit bias in jurors. Peremptory strikes may be made for any reason as long as it is not discriminatory.

See 3 Criminal Constitutional Law § 14.08 (2019). Attorneys can exercise peremptory strikes to remove jurors that they perceive as biased toward or against a party. See *id.* In *Holland v. Illinois*, Justice Scalia opines that peremptory strikes “enabl[e] each side to exclude those jurors it believes will be most partial toward the other side,” *Holland*, 493 U.S. 474, 484 (1990) (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965)), and “eliminat[e] extremes of partiality on both sides, thereby ‘assuring the selection of a qualified and unbiased jury.’” *Id.* (quoting *Batson v. Kentucky*, 476 U.S. 79, 91 (1986)).

Peremptory strikes may, however, work against efforts at eliminating implicit bias of a jury. Judge Mark W. Bennett, former United States District Judge for the Northern District of Iowa, opines that the elimination of peremptory strikes would reduce implicit bias—when implemented in tandem with increased attorney participation. See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol’y Rev. 149, 166-68 (2010). This, he posits, is due to the ineffectiveness of *Batson* challenges to peremptory strikes at reducing jury biases. See *id.* When peremptory strikes are challenged under the *Batson* framework, the court must determine whether the strike was based on a prosecutor’s purposeful discrimination. See 1 Federal Trial Guide § 10.80[2][d][i] (2018); 3 Criminal Constitutional Law § 14.08 (2019). Specifically, *Batson* provides a test when examining whether a strike is purportedly discriminatory; three steps must be satisfied: (1) the defendant must raise an inference that the strike was discriminatory; (2) the plaintiff or prosecution must give a race-neutral reason for the strike; and (3) after the reason has been provided, the judge must decide whether the reason offered sufficiently shows that the purpose of the strike was not discriminatory. See Bennett, *Implicit Bias in Jury Selection* at 161.

Judges should be careful in determining the outcome of *Batson* challenges. Judge Bennett concludes that trial court judges only grant *Batson* challenges in “extreme situations.” *See id.* First, he contends that trial judges are reluctant to reject the purportedly race-neutral reasons offered by the prosecution or plaintiff. *See id.* Second, he opines that appellate courts give deferential treatment to the decisions of trial court judges. *See id.*

Flowers v. Mississippi is instructive on the current state of *Batson* challenges. 139 S. Ct. 2228, 204 L. Ed. 2d 638 (2019). In *Flowers*, Curtis Flowers, a black man, was tried six times for allegedly murdering four people in Winona, Mississippi. *Id.* The first five trials ended in mistrials, but Flowers was convicted in the sixth trial, which was the case at issue before the Court. During jury selection, the State prosecutors struck five of the six black prospective jurors for ostensibly non-discriminatory reasons. *Id.* The Court, in reversing the Supreme Court of Mississippi, found that the prosecutor’s reasons for striking the prospective jurors were “motivated in substantial part by discriminatory intent.” *Id.* at 2244. While there are differing opinions on the effectiveness of *Batson* challenges, *Flowers* re-affirms that these challenges are alive and well and remain a powerful tool in, at least, attempting to ensure that jury panels are as fair and impartial as possible.

Jury Instructions

Judges can use jury instructions to counter implicit bias. Jury instructions are, by definition, “intended to guide courts in giving instructions in law to jurors.” *See* N.C. Gen. Stat. § 15A-1231 *et seq.* (2019). Moreover, jury instructions “satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case.” *State v. Tili*, 139 Wash. 2d 107, 126, 985 P. 2d 365 (1999). While attorneys for the parties may submit proposed instructions, the final wording of jury instructions is left to the discretion of the trial court. *See Douglas v. Freeman*, 117 Wash. 2d 242,

256, 814 P. 2d 1160 (1991). Nonetheless, claimed errors of law in jury instructions are reviewed *de novo*, and an instruction containing an erroneous statement of the applicable law is reversible error where it causes prejudice. *See Hue v. Farmboy Spray Co., Inc.*, 127 Wash. 2d 67, 92, 896 P. 2d 682 (1995); *State v. Walker*, 136 Wash. 2d 767, 772, 966 P. 2d 883 (1998).

Case law in the federal courts has yet to embrace jury instructions on implicit bias. Only three circuit courts of appeals have directly examined the propriety of addressing implicit bias in jury instructions. In *United States v. Ray*, 803 F.3d 244 (2015), the Sixth Circuit noted “the proven impact of implicit biases on individuals’ behavior and decision making” as it related to racial bias. *Ray*, 803 F.3d at 259-60. In *Ray*, the defendant appealed his conviction for one count of felon in possession of a firearm, arguing that the use of the word “felon” in the jury instructions was “highly prejudicial . . . because of the societal stigma associated with being a felon.” *Ray*, 803 F.3d 244, 252, 258. The Sixth Circuit held that “there is no reason a court could not use alternative language” in its jury charge to address deeply held concerns of implicit bias if something in the wording of the instructions was “unfairly prejudicial.” *See id.* at 260.

In *United States v. Graham*, 680 F. App’x. 489 (8th Cir. 2017), the defendant argued before the Eighth Circuit that the jury that convicted him of being a felon in possession of a firearm should have been given an instruction “direct[ing] the jurors to reach their verdict ‘without discrimination’ and without ‘consider[ing his] race, color, religious beliefs, national origin, or sex.’” *Graham*, 680 F. App’x. at 490, 491. The defendant argued that the instructions “were intended to counteract the jurors’ implicit bias and ‘unconscious racial attitudes.’” *Id.* at 491. The Eighth Circuit, while not expressly forbidding jury instructions regarding implicit bias, found that a district court had not abused its discretion by declining to give the defendant’s proposed instructions intended to address implicit racial bias. *See id.* at 492-93.

The Ninth Circuit came to a similar conclusion, finding that a district court did not abuse its discretion in declining to give a jury instruction on implicit bias. *See United States v. Sawyers*, 740 F. App'x. 585 (9th Cir. 2018); *White v. BNSF Ry. Co.*, 726 F. App'x 603 (9th Cir. 2018), *aff'g White v. Burlington N. Santa Fe R.R. Co.*, No. C15-5145 RBL, 2017 WL 750112, at *3 (W.D. Wash. Feb. 27, 2017). In *White*, the plaintiff, a minority, was involved in an altercation with a co-worker. *White v. Burlington N. Santa Fe R.R. Co.*, 2017 WL 750112, at *5. The employer terminated both employees in response to the altercation. *Id.* The unions for both employees later filed grievances, seeking reinstatement for the terminated employees. *Id.* The plaintiff's coworker was later reinstated; however, the plaintiff was not. *Id.* at 5-6. The plaintiff, a minority, claimed that race was the employer's motivation for not reinstating him. *Id.* The plaintiff appealed the jury verdict against him in this disparate treatment discrimination action, arguing that the court should have given an instruction on implicit bias. *White v. BNSF Ry.*, 726 F. App'x. at 604. The Ninth Circuit concluded that the plaintiff could not establish prejudice because he could not show why the instructions given were inadequate. *Id.* at 604-05.

In *Sawyers*, the defendant appealed a conviction of two counts of distribution of cocaine base, arguing that the court abused discretion when it declined to give the jury an instruction on implicit bias. *See Sawyers* 740 F. App'x. at 585. The Ninth Circuit concluded that there was no abuse of discretion and noted that the defendant "cites no authority requiring such an instruction, nor does he cite any evidence of jury bias in this case." *Id.*

Iowa and North Carolina courts are the only courts at the state level to address jury instructions on implicit bias. Like federal courts, state courts do not mandate that courts include jury instructions on implicit bias. The Supreme Court of Iowa concluded that "Iowa law permits – but does not require – cautionary instructions that mitigate the danger of unfair prejudice." *State*

v. Plain, 898 N.W. 2d 801, 816, Iowa (2017). However, Iowa Supreme Court Justice Appel, deviating from the majority, stated that “a criminal defendant is entitled to an accurate, properly worded implicit-bias jury instruction to assist the jury in reaching a fair and unbiased verdict.” *Id.* at 830. In *State v. Roseboro*, 528 S.E.2d 1 N.C. (2000), the defendant, convicted of first-degree murder and sentenced to death, argued before the North Carolina Supreme Court that he was constitutionally entitled to his proposed jury instruction addressing race and “subtle, less conscious racial attitudes.” *See Roseboro*, 528 S.E. 2d at 4, 13. The court concluded that the trial court was not required to address racial factors in the jury instruction. *See id.* at 13.

Judge Bennett suggests the following jury instruction, tailored to counter the effects of implicit bias on jurors:

Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of the evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. at 1180.

The first strategy for using the jury instruction to counter implicit bias is to make the jurors doubt their own objectivity. In the article *Implicit Bias in the Courtroom*, Judge Bennett and the co-authors pontificate that “when a person believes himself to be objective, such belief licenses him to act on his biases.” *Id.* at 1173. Judge Bennett’s implicit bias jury instruction casts doubt on objectivity by making jurors aware of the “hidden thoughts” that may affect the outcome of their deliberations. The model jury instruction states that “you must not be influenced by any personal

likes or dislikes, opinions, prejudices or sympathy.” See Judicial Council of California, California Civil Jury Instructions (CACI) 113 (2017). While the model instruction may mitigate some issues associated with explicit biases, it does not make the jurors aware of the biases they unconsciously act out.

Another strategy for countering implicit bias is to make the jurors aware of social categories. Research has shown that white jurors show racial bias when a case is not viewed as “racially charged.” Kang et al., *Implicit Bias in the Courtroom* at 1184. However, in the same studies, white jurors’ bias disappeared when race was made a central topic in the case. *Id.* Although the model jury instruction refers to “personal likes or dislikes, opinions, prejudices or sympathy,” it does not go far enough in outlining the social categories that may be subject to implicit bias in the jury’s deliberations.

Going a step further than an implicit bias jury instruction in outlining social categories, jury instructions should actively discourage colorblindness and promote jurors’ discussion of social categories. Colorblindness can lead to more implicit bias. See Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 Colo. Law. 45, 45 (2016). A jury instruction should encourage jurors to acknowledge social categories in their deliberations and not shy away from discussing those biases as they pertain to the case. See *id.* at 49. Judges should encourage discourse on implicit bias in their instructions to prevent attitudes of colorblindness that may lead to further implicit bias.

Conclusion

While implicit bias continues to influence the justice system, the courts are now in a better position to counter its effects. Case law relating to implicit bias has been sparse, but through cooperation between judges and attorneys, courts can set examples in case law for how to

implement strategies to reduce implicit bias. Armed with knowledge about implicit bias and its effects, courts can anticipate implicit bias and take steps to counter it. Voir dire and jury instructions are both tools that can be fashioned to reduce implicit bias in jurors, though the courts should seek more ways of eliminating implicit bias. As understanding of implicit bias continues to evolve, courts should be ready to modify their approach to ensure that jurors are truly impartial.

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Employment

PLAINTIFF,

Plaintiff,

v.

State of Minnesota, Minnesota Department
of Employment and Economic Development,

Defendant.

**PLAINTIFF’S MEMORANDUM IN
OPPOSITION TO DEFENDANT’S
MOTION TO EXCLUDE THE
TESTIMONY OF
DR. EUGENE BORGIDA**

INTRODUCTION

*[I]ssues of race are coming to the fore in a . . . long-overdue manner. The impacts of our shameful racial history, pervasive implicit bias, and institutionalized racism are now part of any meaningful discussion on social or institutional responsibility in America today. Norms . . . are in flux in dramatic ways[.]*¹

At trial, PLAINTIFF will establish that Defendant State of Minnesota, Minnesota Department of Employment and Economic Development (“DEED”), discriminated against him based on his race, color, and national origin. PLAINTIFF seeks to use evidence of implicit bias to support his case. Dr. Eugene Borgida is one of the nation’s leading experts on the impacts of implicit bias and stereotyping and is frequently retained as an expert by both plaintiff and defense counsel. (*See* Expert Report of Dr. Eugene Borgida (“Borgida Rep.”) at pp. 75-77.²)

¹ *Pavel v. University of Oregon*, No. 6:16-cv-00819-AA, 2018 WL 1352150, *4 (D. Ore. Mar. 13, 2018).

² The Borgida Rep. is attached to the Deposition of Eugene Borgida as Exhibit 1. Dr. Borgida’s Deposition is attached as Exhibit F to the Affidavit of Julianna Passe.

DEED would have the court believe that PLAINTIFF seeks to rely upon an unreliable expert whose past testimony and alleged weak methodology has made him an inadmissible pariah. This is simply not the case. Dr. Borgida is a reputable expert with an impressive curriculum vitae, and is part of an elite group of social framework scholars whose opinions on implicit bias and stereotyping have been accepted by courts across the nation. Despite efforts to exclude experts in this arena, Dr. Borgida continues to be retained in legal settings as a reputable tool to educate factfinders on the pervasive effects of implicit bias and stereotyping.

Dr. Borgida's testimony, backed by adequate foundational reliability, will play a helpful, explanatory role in assisting the jury in understanding the often subtle ways in which implicit racial bias impacts decision-making to the disadvantage of Latino individuals of color. Implicit bias is a real phenomenon, one that every deponent in this case admits exists. It is well-established that one's implicit biases impact nearly every decision he or she makes. *See, e.g.,* Justin D. Levinsohn *et al., Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 79-82 (Jan. 2017). While jurors may have a basic understanding of what they believe the term to mean, Dr. Borgida's testimony will help educate jurors on the nuances of *how* an individual's implicit biases permeate through his or her decision making, and what patterns to look for, especially when alleged "colorblindness" and commonly-recognized Midwestern passiveness is in play. Accordingly, this Court should allow Dr. Borgida to testify.

FACTUAL BACKGROUND

I. Dr. Borgida's Qualifications and Testimonial History

Dr. Borgida holds a Ph.D. in Psychology from the University of Michigan, and currently serves on the faculty at the University of Minnesota as a Professor of Psychology and a Professor of Psychology and Law. (Borgida Rep. at p. 28.) Throughout his decades-long career, Dr. Borgida has been published in numerous journals and books, with a large portion of his scholarship devoted

to discrimination, stereotyping, and implicit bias. (*See generally id.* at pp. 36-50.) Dr. Borgida has been retained as an expert in over 20 legal matters and, though he has primarily worked for plaintiffs, he has provided services for defendants as well. (*See generally id.* at 75-77.) Notably, Dr. Borgida was the plaintiffs’ expert and testified at trial in *Jenson v. Eveleth Taconite Co.*, 824 F.Supp. 847 (D. Minn. 1993), the first class action sexual harassment lawsuit filed in the United States. Dr. Borgida also served as a defense consultant and expert witness in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). Dr. Borgida co-authored the American Psychological Association’s (“APA”) amicus brief submitted to the United States Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the seminal case recognizing that an employer who acts on the basis of gender stereotypes engages in intentional discrimination.

II. A Brief Overview of Social Framework and Implicit Bias Expert Testimony in Legal Settings

In social framework testimony, “general research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case.” Annika L. Jones, *Implicit Bias as Social-Framework Evidence in Employment Discrimination*, 165 U. PA. L. REV. 1221, 1231 (2017) (hereinafter Jones, *Implicit Bias*) (quoting Laura Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987)). *Price Waterhouse*, 490 U.S. at 236, is an early example of a plaintiff using social framework testimony to contextualize bias and stereotyping in the workplace.

Implicit bias expert testimony takes one of two basic forms: general and specific. Jones, *Implicit Bias* at 1233. An expert testifying under the “general” strand of implicit bias testimony “uses empirical social science research to explain the phenomenon of implicit bias – what it is, how it operates, and its prevalence.” *Id.* Although general, “providing a social framework with detailed implicit-bias research would provide the fact finder with a vehicle for better understanding

how facial race neutrality can yield racial disparity.’ This strand is admissible per the 2000 Committee Notes [to the Federal Rules of Evidence] regarding generalized testimony.” *Id.* (quoting Tanya Kateri Hernandez, “*One Path for Post-Racial*” *Employment Discrimination Cases –The Implicit Associate Test Research as Social Framework Evidence*, 32 L. & INEQ. 309, 311 (2014)). Expert testimony relying on research on how implicit bias operates within a workplace also falls under this category. *Id.*³ As manifestations of discrimination in workplaces become more subtle and less overt, “an expert’s role is to educate the factfinder on what the effects of implicit bias might look like so the factfinder has more information to make a conclusion.” *Id.* at 1235.

Many courts have allowed experts comparable to Dr. Borgida to testify. *See, e.g., Martin v. F.E. Moran, Inc.*, No. 13 C 03526, 2017 WL 1105388 (N.D. Ill. Mar. 24, 2018) (noting that the testimony of plaintiff’s implicit bias expert, who did not offer an ultimate opinion of whether plaintiff was intentionally discriminated against, was admissible); *Pippen v. State*, No. LACL107038, 2012 WL 1388902 (Iowa Dist. Apr. 17, 2012) (trial order) (referencing implicit bias experts that were allowed to testify at trial). *Cf. White v. BNSF Railway Co.*, 726 Fed. Appx. 603, 604 (Mem) (9th Cir. June 8, 2018) (excluding expert testimony because the expert’s initial report was not based on a significant review of the facts and the plaintiff never explained how testimony regarding implicit bias would be helpful) *with* Borgida Rep. 10-12 *and infra* Argument Section I(b).

³ As an example, “an expert might testify that policies relying on subjective, discretionary decisionmaking at the mid-manager level tend to be infected with implicit bias[.]” *Id.*

ARGUMENT

DEFENDANT’S MOTION TO EXCLUDE SHOULD BE DENIED

Admission of expert testimony falls within the broad discretion of the district court. *See State v. Burrell*, 697 N.W.2d 579, 601 (Minn. 2005). The value of expert testimony “is to be tested by cross-examination and ultimately weighed by the jury.” *Hagen v. Swanson*, 236 N.W.2d 161 (Minn. 1975); *Christy v. Saliterman*, 179 N.W.2d 288, 303 (Minn. 1970). *See also Behlke v. Conwed Corp.*, 474 N.W.2d 351, 357 (Minn. Ct. App. 1991) (finding an abuse of discretion where the trial court excluded expert testimony on causation). In other words, when an expert is qualified and the expert’s opinion has a relevant basis, the testimony should be admitted and presented to the jury, allowing jurors to evaluate the credibility of the expert and weigh the testimony accordingly. *Id.* Dr. Borgida’s testimony on implicit bias is backed by recognized scientific principals, will be helpful to the jury, is relevant to issues in this matter, and is not unfairly prejudicial. As such, the court must not exclude Dr. Borgida’s expert opinion.

I. Dr. Borgida’s Testimony Possesses Requisite Foundational Reliability.

Dr. Borgida’s testimony has “foundational reliability” because it is a product of reliable principles and methodology. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 167-68 (Minn. 2012). As explained in his report, Dr. Borgida used a social framework approach, a type of analysis accepted by experts in the field of social psychology. (Borgida Rep. at pp. 6-9; *see also Price Waterhouse*, 490 U.S. at 236 (Dr. Fiske, a social framework expert, describes the methodology as “commonly accepted practice for social psychologists”).) Through this method, Dr. Borgida draws upon his knowledge of social psychology and established, peer-reviewed scientific literature on implicit bias, prejudice, and discrimination to review and analyze case-specific documents. (Borgida Rep. at p. 7; *see also* pp. 20-26 (citing sources).) Dr. Borgida reviewed seven transcripts

of testimony from current and former DEED employees, representing all of the depositions taken in this case apart from his own. (*Id.* at pp. 10-12; *see also* Deposition of Eugene Borgida, attached to the Affidavit of Julianna F. Passe as Exhibit F (“Borgida Dep.”) at 5:16-22.) Dr. Borgida utilized specific examples from the case materials to highlight the relevant scientific principles drawn from the abundance of social scientific research literature on this topic. (*See generally Borgida Rep.*) Furthermore, DEED does not contest Dr. Borgida’s qualifications as an expert, nor does DEED directly challenge the validity of implicit bias theory.

At best, DEED’s objections to Dr. Borgida’s report address the weight of the evidence, which is the function of the fact-finder and do not affect the admissibility of report or his testimony at trial. *See McPherson v. Buege*, 360 N.W.2d 344, 348 (Minn. Ct. App. 1984) (holding that, if adequate foundation exists, any alleged deficiencies in the factual basis go more to weight than admissibility). When deciding whether to admit expert testimony, the court must determine whether the expert has been proven competent to provide an opinion on the matter at hand and “whether the opinion [is] based on facts sufficient to form an adequate foundation.” *Law v. Essick Mfg. Co.*, 396 N.W.2d 883, 887 (Minn. App. 1986). Dr. Borgida’s testimony meets these requirements.⁴

DEED argues that Dr. Borgida did not ensure that the materials from PLAINTIFF’s counsel were a representative sample. DEED also asserts that Dr. Borgida did not make any effort to personally interview any witnesses, visit SSB’s workplace, or take a “more methodical approach[.]” (Def. Mem. at 18, 19.) *First*, as noted above, Dr. Borgida reviewed every deposition

⁴ DEED criticizes Dr. Borgida because he “did not include facts that would weigh against the presence of implicit bias,” (Def. Mem. at 10); however, notably, when asked at his deposition if he would have included in his report “possible facts that [he] may have come across that were absolutely contradictory,” he answered affirmatively. (Borgida Dep. at 126:14-20; *see also, e.g., id.* at 78 -82 (discussing confirming and disconfirming evidence in the record).)

taken in this case. *Second*, as DEED’s counsel knows, experts retained for litigation do not receive unfettered access to every document in the case, a defendant’s company data, or a defendant’s employees. Experts do not generally have license to design an experiment with a defendant’s employees to make specific determinations about individual motives and actions, nor would such an experiment likely be sound. (*See Borgida Rep. at p. 6; Borgida Dep. at 48:14-49:12.*) Realistically, it is unlikely that DEED would grant Dr. Borgida unrestricted access to SSB’s employees or workplace to assist PLAINTIFF with his litigation. *See Int’l Healthcare Exch., Inc. v. Global Healthcare Exch., LLC*, 470 F. Supp. 2d 345, 355 (S.D.N.Y. 2007) (rejecting arguments that Dr. Borgida’s report was unreliable because he did not review pertinent record evidence and neglected to consider alternative explanations for defendants’ actions, because such arguments went to the weight of and propriety of Dr. Borgida’s conclusions and should instead be raised at trial). Furthermore, an examination of the documents Dr. Borgida received indicates that the scope of his review encompassed nearly all of the documents creating this case’s summary judgment record. In Dr. Borgida’s professional opinion, based on his “knowledge and experience [] and conversations or discussions [] with other professionals,” doing an empirical scientific social framework study when litigation is active is not standard practice. (*Borgida Dep. at 127.*)

It is the practice of social scientists to analyze and draw conclusions based on a review of case-specific documents and the relevant social science principles (drawn from the wealth of peer reviewed scientific literature and studies). (*Borgida Rep. at p. 7; see also Price Waterhouse*, 490 U.S. at 236.) This was precisely the approach taken by the authors of the American Psychological Association’s amicus brief submitted in *Price Waterhouse*. (*Id.*)

DEED is free to make its arguments about the weight of Dr. Borgida’s testimony to the jury. The jury determines credibility; the Court determines admissibility. *See Lewin v. Proehl*,

300 N.W. 814, 816 (Minn. 1941). Dr. Borgida's testimony possesses foundational reliability and should not be excluded.

a. Dr. Borgida's Testimony on Implicit Bias Will Be Helpful to the Jury.

Dr. Borgida's expert testimony meets the requirements articulated in Minn. R. Evid. 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The relevant inquiry is whether Dr. Borgida's testimony will help the jurors understand the evidence, not whether the jury would be unable to reach a correct judgment but for Dr. Borgida's testimony. To determine whether expert testimony is helpful, a court should consider whether the members of the jury, having knowledge and general experience common to every member of the community, would be aided in the consideration of the issues by the offered testimony. *Clark v. Rental Equipment Co.*, 220 N.W.2d 507, 512 (Minn. 1974).

DEED places undue weight on one distinguishable case which excluded Dr. Borgida's expert testimony concerning gender stereotyping because "gender stereotypes are the stuff of countless television situation comedies," and not "the type of evidence without which laypersons are incapable of forming a correct judgment." *Ray v. Miller Meester Adver., Inc.*, 664 N.W.2d 355, 366 (Minn. Ct. App. 2003). While DEED correctly points out that Dr. Borgida's testimony was excluded in *Ray*, Dr. Borgida's testimony was remarkably different in that case. There, Dr. Borgida provided an ultimate opinion during his testimony in *Ray*. See 664 N.W. 2d at 365 ("[Dr. Borgida] noted that, in his opinion, 'gender prejudice and gender stereotyping played a role in understanding the termination of [plaintiff]."). Here, in stark contrast, Dr. Borgida has repeatedly disclaimed any intention to provide an ultimate opinion about whether Plaintiff's treatment was the result of the

decisionmaker's implicit racial bias. (Borgida Rep. at p. 9 (“ . . . I provide *no ultimate opinion* about whether or not PLAINTIFF was the victim of race-based discriminatory treatment because the courts tend to view this ultimate judgment to be the responsibility of the trial decision-makers, not the social framework expert.” (emphasis added)).)⁵

The court in *Ray* also held, without citation, that Dr. Borgida's testimony “was hardly the type of evidence without which laypersons are incapable of forming a correct judgment.” 664 N.W. 2d at 366. The facts in *Ray*, however, are significantly different than the facts here. The *Ray* trial court found “numerous facts demonstrating bias,” which contributed to the finding that the plaintiff was the victim of intentional discrimination. *Ray v. Miller Meester Adver., Inc.*, No. EM 98-017380, 2001 WL 34690582, at *22 (Minn. Dist. Ct. June 7, 2001). This undoubtedly contributed to the court's opinion that the *Ray* case was “straightforward and within the realm of ordinary understanding and comprehension.” 664 N.W. 2d at 366. The Court of Appeals distinguished *Ray* from other discrimination cases involving “some insidious scheme or pattern of gender discrimination that can be uncovered only with the help of expert analysis . . .” *Id.* Here, PLAINTIFF's race, color, and national origin discrimination claim is unquestionably more complex. Because of the Radio Talking Book (“RTB”) Supervisor position hiring process, and

⁵ The Advisory Committee Notes to the 2000 Amendments to the Fed. R. Evid. 702 contemplated this type of expert opinion:

Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or blood clotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles.

PLAINTIFF's lack of everyday interaction with the decisionmaker, PLAINTIFF must prove his discrimination claim through circumstantial evidence. There is sufficient evidence to permit a reasonable jury to conclude that PLAINTIFF's race, color, and national origin was a motivating factor in DEED's decision—facilitated by Holeman—not to hire him. But simply because such evidence exists, does not mean PLAINTIFF is precluded from using an expert to assist in proving his claims. Indeed, experts are regularly used in employment discrimination cases.

Finally, social framework testimony has been widely recognized by courts around the country and applied in a variety of litigation contexts, a point which *Ray* completely failed to address. See e.g., *Price Waterhouse*, 490 U.S. at 250-51; *Apilado v. North American Gay Amateur Athletic Alliance*, No. C10-0682, 2011 WL 13100729 (W.D. Wash. Jul. 1, 2011); *Tuli v. Brigham & Women's Hosp., Inc.*, 592 F.Supp.2d 208 (D. Mass. 2009); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1262-65 (N.D. Cal. 1997); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991). In *Ray*, not only did the court conspicuously fail to mention *Price Waterhouse* and its progeny admitting expert testimony of this kind in all types of employment discrimination cases, the court did not cite any authority for its determination that Dr. Borgida's testimony was not sufficiently helpful to jurors.⁶ In a motion to exclude Dr. Borgida's testimony, the Southern District of New York concluded that although “few jurors w[ould] be surprised at the basic outlines of the testimony [] [t]hat does not mean that the testimony adds nothing to ordinary experience: expert testimony grounded in academic study and practical experience not available to the average layperson can be helpful to the jury.” *Id.* at *2, *4.

⁶ When a similar motion to exclude Dr. Borgida's testimony came before the Southern District of New York in *Hnot v. Willis Grp. Holdings Ltd.*, the court strongly rebuked defendants for only citing cases where Dr. Borgida's testimony was excluded. No. 01 CIV 6558 GEL, 2007 WL 1599154, *4 (S.D.N.Y. Jun. 1, 2007). As with defendants in *Hnot*, DEED does not include any cases where Dr. Borgida's testimony has been admitted in its brief.

As stated in Dr. Borgida's report, "The goal of this social framework use of social science evidence is to educate factfinders about the conditions under which implicit bias and prejudice are likely to influence impressions, evaluations, and behavior in social and organizational settings." *Id.* at p. 7. This framework will help jurors interpret witness testimony about PLAINTIFF's qualifications, evaluate Holeman's decisions regarding the interview process, and compare witnesses' characterizations of PLAINTIFF's qualifications and performance in the RTB Supervisor interviews to those of the White candidate who was ultimately selected. Dr. Borgida's testimony will help the jury as they weigh the evidence to determine whether, for example, the negative characterizations of PLAINTIFF's qualifications and interview performance are consistent with patterns observed in research on discriminatory biases, and can reasonably be interpreted as backlash towards PLAINTIFF due to his race, color, and national origin, or whether the characterizations were justified due to PLAINTIFF's conduct and experience.

b. Dr. Borgida's Testimony is Relevant to the Matters at Issue in this Lawsuit.

Under Minn. R. Evid. 401, relevant evidence is evidence "having *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (emphasis added). Here, PLAINTIFF can succeed on his discrimination claim by proving that his race, color, or national origin motivated, at least in part, DEED's decision not to hire him for the RTB Supervisor position. Therefore, any evidence concerning factors that may have influenced or motivated the decision makers' behavior is relevant to the case and acceptable material for Dr. Borgida's testimony. "Testimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee." *Samaha v. Washington State Dept. of Transp.*, No. CV-10-175-RMP, 2012 WL 11091843, *4 (E.D. Wash. Jan. 3, 2012) (citing *Price*

Waterhouse, 490 U.S. at 250-51). *See also Lynn v. Regents of the Univ. of California*, 656 F.2d 1337, 1343 n.5 (9th Cir. 1981) (explaining that, while some employer decisions “reflect a discriminatory attitude more subtly; the subtlety does not, however make the impact less significant or less unlawful.”) *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58-60 (1st Cir. 1999) (stating that, in making the determination of whether an employer acted because of an employee’s protected characteristic, it does not matter “whether the employer consciously intended to base the evaluation on race, or simply did so because of unthinking stereotypes or bias”). Dr. Borgida’s testimony is relevant to whether race, color, or national origin, at least on some level, motivated DEED’s decision to select a White candidate instead of PLAINTIFF for the RTB Supervisor position.

c. Dr. Borgida’s Testimony is Not Unfairly Prejudicial.

Contrary to DEED’s assertions, Dr. Borgida’s testimony will not confuse the jury and is not unfairly prejudicial. Instead, the probative value of Dr. Borgida’s scientifically-backed testimony substantially outweighs the danger of unfair prejudice and confusion, which, in any event, could be remedied by an appropriate jury instruction. *See Minn. R. Evid.* 403. Furthermore, DEED claims that Dr. Borgida’s testimony is prejudicial as it “accounts for only one of numerous contributors to human behavior” (Def. Mem. At 22). However, it is well established that a plaintiff need only show that discrimination played a factor in an employment decision under the MHRA. *See LaPoint v. Family Orthodontics, P.A.*, 892 N.W.2d 506, 513 (Minn. 2017) (rejecting “but-for” causation). Here, Dr. Borgida’s proffered social framework testimony will allow the jury to make an educated determination about whether this particular “contributor[] to human behavior” unlawfully impacted DEED’s hiring decision.

In sum, Dr. Borgida’s expert testimony prejudices DEED only in the sense that it damages its position that discriminatory animus played no role in the decision not to hire PLAINTIFF for

the RTB Supervisor position. DEED simply does not want the jury to hear testimony that allows jurors to conclude that its employees may have harbored racial bias.

CONCLUSION

Dr. Borgida's testimony is reliable and will assist the jurors in understanding the evidence in this case. Social framework testimony has been widely recognized and applied in a variety of litigation contexts, and will be helpful to the jury as they weigh the evidence to determine whether DEED's conduct fits patterns observed in relevant research on implicit bias and can therefore be interpreted as backlash towards PLAINTIFF due to his race, color, and national origin. For the foregoing reasons, DEED's motion to exclude the expert testimony of Dr. Eugene Borgida should be denied.

Dated: August 3, 2018

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Comment

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IMPLICIT BIAS AS SOCIAL-FRAMEWORK EVIDENCE IN EMPLOYMENT DISCRIMINATION

The role of implicit bias as evidence in employment discrimination claims continues to evolve, as does research attempting to explain and quantify the concept of implicit bias. In Walmart Stores, Inc. v. Dukes, the Supreme Court curbed plaintiffs' use of implicit bias as evidence in support of the commonality requirement of Rule 23. Post-Dukes, plaintiffs have looked for creative ways to leverage scientific developments in implicit bias within the legal framework of employment discrimination law.

The most promising answer to the “Dukes problem” looks to implicit bias as substantive, rather than procedural, evidence. By repackaging implicit bias as social-framework evidence, plaintiffs can persuasively contextualize for factfinders the ways in which differential treatment plays out in a workplace, even in the absence of overtly discriminatory attitudes or stereotypes. Whether courts will adapt to this use of implicit bias is increasingly important, as modern workplace discrimination is becoming more subtle and often is the result of unconscious biases.

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***1222 INTRODUCTION**

The “discovery” of implicit bias¹ has influenced conversations around race, gender, age, socioeconomic status, and sexual orientation. The role of unconscious mental processes in nondeliberate discriminatory behaviors has become a hot topic in mainstream culture and both legal and nonlegal academia. Scientists have explored the implications of implicit bias in a diverse range of contexts--from the criminal justice system to video games.² Moderators questioned candidates about implicit bias during a 2016 presidential debate,³ and researchers have assessed implicit bias across voter demographics.⁴ Courts, to varying degrees, have recognized implicit bias and its impact on ***1223** human behavior

inside and outside the courtroom.⁵ The legal relevance of implicit bias is a particularly charged issue in the employment context.⁶ Studies of decisionmaking in employment contexts have been a main driver of the implicit-bias dialogue.⁷ And some claim evidence of pervasive implicit bias in the workplace justifies “reforming the doctrinal contours and standards of employment discrimination claims.”⁸ In this way, conversations around implicit bias both affect and are affected by employment discrimination law.

Within this context, this Comment considers how implicit bias might be used as “social framework” evidence to substantiate an employee's disparate impact discrimination claim. Part I summarizes the history and development of employment discrimination law. First, it tracks the shift from first-generation to second-generation employment discrimination--and evaluates how implicit bias fits within this shift. Second, it considers the legal landscape after the landmark Supreme Court case *Wal-Mart v. Dukes*. Part II introduces social-framework evidence. This Part catalogs plaintiffs' successful and unsuccessful invocations of implicit bias as social-framework evidence to contextualize second-generation employment discrimination. Finally, Part III proposes how expert testimony on implicit bias can be admissible as social-framework evidence and responds to likely objections.

I. THE DEVELOPMENT OF EMPLOYMENT DISCRIMINATION LAWS

A. Moving to Disparate Impact Claims

Modern employment discrimination law has its origins in the Civil Rights Act of 1964, which banned discrimination in public accommodations and federally funded programs.⁹ Title VII of this Act “answered the call for equal *1224 opportunity in the nation's workplaces”¹⁰ by making it illegal for employers to discriminate on the basis of race, color, religion, national origin, and sex.¹¹ While scholars argue the goals and effects of Title VII, most agree that its primary purpose was to “stamp out” facially discriminatory policies¹² and “smoke out” employers' discriminatory animus against protected classes.¹³ Regarding the latter purpose, the Supreme Court eventually expounded the *McDonnell Douglas* burden-shifting framework, which allows plaintiffs to prove claims of hidden (but conscious) bias if the only legitimate explanation for an adverse employment decision is discrimination on the basis of a protected characteristic.¹⁴

As early as 1966, the Equal Employment Opportunity Commission (EEOC) took the position that Title VII prohibited not only intentional discrimination, but also neutral employment practices that had disproportionate adverse effects on protected groups.¹⁵ In 1971, the Supreme Court agreed with that position in *Griggs v. Power Dukes Co.*¹⁶ *Griggs* expanded the reach of Title VII by holding that “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups.”¹⁷ “Disparate impact” theory opened the doors to discrimination claims that existed independent from any proof of animus toward the protected class. That class of cases was deemed “a lingering form of the problem that Title VII was enacted to combat.”¹⁸

*1225 Soon after *Griggs*, Congress revisited Title VII and tacitly ratified disparate impact as grounds for employer liability.¹⁹ Nearly twenty years later, in 1991, Congress provided an affirmative statutory basis for disparate impact liability.²⁰ Since passage of the 1991 amendment, plaintiffs have established a *prima facie* disparate impact claim by demonstrating that an employer uses a “particular employment practice that causes a disparate impact” on a protected class.²¹ Employers can defend with proof that the employment practice is “job related for the position in question and consistent with business necessity.”²² If an employer demonstrates business necessity, a plaintiff can still prevail by showing that the employer refuses to adopt an alternative employment practice that does not have the same adverse impact.²³

B. Disparate Impact Claims and Second-Generation Discrimination

The development of disparate impact liability coincided with the shift from overt, hostile workplace discrimination--“first generation” discrimination--to patterns and policies that operate more subtly to exclude protected classes-- “second generation” discrimination.²⁴ Though the vast majority of employers today would not openly discriminate in the way of years gone by (such as “Irish need not apply,” or “This is no job for a woman”), workplace discrimination persists. One author defined modern discrimination as follows:

“Second generation” claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate. Structures of decisionmaking, opportunity, and power fail to surface these patterns of exclusion, and themselves produce differential access and opportunity.²⁵

Advocates for protected groups emphasize that while second-generation discrimination may look and sound less dramatic, its impact is not: “Although *1226 in many parts of the country race discrimination has become increasingly subtle over time, the effects of discrimination on victims and society remain as powerful as ever.”²⁶

Disparate impact liability opened the door for second-generation discrimination claims. If a plaintiff-employee cannot demonstrate discriminatory animus because the bias is either well-hidden or unconscious, claims against employers are cognizable.²⁷ Justice Ginsburg recognized the importance of this change several years after the Civil Rights Act of 1991: “Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become the country's law and practice.”²⁸ As biases have moved beneath the surface, the continuing viability of disparate impact liability depends upon plaintiffs' ability to identify and prove implicit bias.

Whether the effects of unconscious discriminatory attitudes should provide a basis for employer liability is both a legal and normative question.²⁹ The existence of disparate impact liability seemingly gives an affirmative answer to the legal question, yet courts' resistance to implicit-bias evidence suggests an unwillingness to recognize unconscious bias as a sufficient basis for liability. Some object, claiming that implicit bias does not exist.³⁰ Yet scientific evidence largely refutes this claim. Social psychologists have created one well-known instrument for quantifying implicit bias called the Implicit Association Test (IAT).³¹ The IAT does not ask participants to state any beliefs or opinions.³² Instead, it purports to measure implicit bias by subjecting participants to rapid categorization tasks--and then computes scores based *1227 on their performance that are “interpreted as reflecting an implicit attitude.”³³ Social scientists and legal scholars have exhaustively analyzed the validity and reliability of the IAT.³⁴ By now, even courts resistant to implicit-bias expert testimony tend to acknowledge implicit bias may exist in some fashion.³⁵

A second objection is the claim that implicit bias may exist in the workplace, but it should not introduce liability. In other words, the argument is that “unconscious discrimination” is an oxymoron--without the intent to discriminate, there is not legally actionable discrimination.³⁶ But, as noted above, the existence of disparate impact liability refutes that argument.

Finally, courts have expressed concerns regarding the evidentiary weight to assign to implicit-bias research. Essentially, the argument is that expert testimony on implicit-bias research does not fit within the evidentiary framework of the Federal Rules of Evidence and cannot survive a *Daubert* analysis. Parts II and III of this Comment address this concern.

II. IMPLICIT BIAS AS SOCIAL-FRAMEWORK EVIDENCE

A. Wal-Mart Stores, Inc. v. Dukes

Prior to 2011, implicit-bias evidence was regularly used in employment discrimination claims. Most commonly, implicit-bias evidence was presented in the form of expert testimony on behalf of class action plaintiffs arguing their *1228 commonality under Federal Rule of Civil Procedure Rule 23(a).³⁷ Courts generally accepted this theory, permitting the use of even generalized evidence of implicit bias to supply the “glue holding the class theory together.”³⁸

In 2007, for example, a class of 62,000 female employees was successfully certified using implicit-bias research to demonstrate commonality in *Velez v. Novartis Pharmaceuticals Corp.*³⁹ In support of commonality, the plaintiffs claimed the employer's “personnel evaluation and management system [wa]s overly subjective, and that this subjectivity [led] to discrimination.”⁴⁰ Plaintiffs offered the opinion of an expert, David Martin, who analyzed the employer's policies for “vulnerab[ility] to bias in decisionmaking.”⁴¹ The employer challenged the report on the grounds that Martin did not evaluate the actual employment decisions in question.⁴² The court disagreed, finding the report both relevant and supportive of class certification because

Martin did not purport to offer evidence that the system at NPC actually causes disparate treatment or has a disparate impact; he merely offered to show how the system makes discrimination possible. Whether his report and testimony do so successfully is ultimately a question for the jury. The report is sufficiently persuasive, however, to permit a conclusion, at this preliminary stage, that plaintiffs have raised a common question about whether NPC's system is structured in a way that facilitates discrimination, and not merely a collection of individual claims of particular unfair evaluations.⁴³

This strategy for meeting the commonality requirement came under fire, however, in *Wal-Mart Stores, Inc. v. Dukes*.⁴⁴ In *Dukes*, the Supreme Court rejected plaintiffs' proposed class of 1.5 million current or former female Wal-Mart employees across the country.⁴⁵ Plaintiffs brought disparate treatment and disparate impact claims, asserting that Wal-Mart's policy of granting discretion over pay and promotion decisions to local managers had a disparate impact on female employees.⁴⁶ To meet the commonality requirement, plaintiffs *1229 claimed Wal-Mart had a “strong and uniform ‘corporate culture’ [which] permitted bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers--thereby making every woman at the company the victim of one common discriminatory practice.”⁴⁷ Expert Dr. William Bielby provided a social-framework analysis of Wal-Mart stores for plaintiffs, concluding that Wal-Mart's corporate culture made it vulnerable to gender bias.⁴⁸ Dr. Bielby analyzed Wal-Mart's employment policies and practices in forming his conclusion, but also “conceded that he could not calculate whether 0.5 or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.”⁴⁹ The trial court approved the “corporate culture” theory as sufficient to support commonality, thus certifying the class;⁵⁰ the Ninth Circuit affirmed.⁵¹

The Supreme Court reversed, rejecting Dr. Bielby's report as failing to support a theory of commonality under Rule 23(a) (2) and expressing doubt that Dr. Bielby's methodology would survive a *Daubert* analysis.⁵² Dr. Bielby's testimony,

in the Court's view, was “worlds away from [s]ignificant proof that Wal-Mart operated under a general policy of discrimination,” even as *1230 supported by statistical and anecdotal evidence.⁵³ In a footnote, the Court quoted a law review article criticizing Dr. Bielby's report for “not meet[ing] the standards expected of social scientific research into stereotyping and discrimination.”⁵⁴ The methodology in the report was flawed, the Court found, because it went too far by “testif[ying] about social facts specific to Wal-Mart” with “no verifiable method for measuring and testing any of the variables that were crucial to his conclusions.”⁵⁵

Despite its strong criticism, *Dukes* did not amount to a “doomsday” blow to Title VII claims that rely on a theory of implicit bias.⁵⁶ Outside class certification, plaintiffs continue to draw upon implicit-bias social-framework evidence as substantive proof to contextualize discrimination where traditional indicators (such as overt animus) are absent. However, as discussed in the next Section, this type of testimony has been subject to an overly strict application of evidentiary rules.

B. Social-Framework Evidence

Social science research has long played a role in litigation, but Laurens Walker and John Monahan first coined the term “social framework” in 1987.⁵⁷ Social-framework testimony differs from “social fact” testimony and “social *1231 authority” testimony--the two other types of social science expert testimony.⁵⁸ Social-fact testimony is specific to the case and describes research conducted to answer specific factual questions;⁵⁹ it presents findings from general social science research unassociated with any party.⁶⁰ Social-framework testimony has elements of both categories: “general research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case.”⁶¹ In other words, experts use social science research to persuade a factfinder that the law should be applied “in a particular way to the facts of a particular case.”⁶²

Like any other form of expert testimony, social-framework evidence must be reliable and relevant per the Federal Rules of Evidence and the landmark cases *Daubert v. Merrell Dow Pharmaceutical* and *Kumho Tire v. Carmichael*.⁶³ *Daubert* appoints judges to a “gatekeeping” function for scientific expert testimony, determining whether the proffered research is sufficiently valid to support the expert's legal conclusions.⁶⁴ *Kumho* extended *Daubert*'s gatekeeping role to all expert testimony, not just those “based on ‘scientific’ knowledge.”⁶⁵ In 2000, Federal Rule of Evidence 702 was amended to incorporate *Daubert* and *Kumho*, requiring expert testimony to be “based on sufficient facts or data” and “the product of reliable principles and methods,” and to “reliably appl[y] the principles and methods to the facts of the case.”⁶⁶

*1232 Rule 702 also provides for “generalized” expert testimony under a separate standard. A Committee Note accompanying the 2000 amendment states,

[I]t might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony “fit” the facts of the case.⁶⁷

Thus, the rules permit two types of expert testimony regarding social science framework research: testimony reliably applying social science research to the facts of the case, and testimony presenting purely “generalized” research as background context that “fits” the facts of the case. Both are considered “social framework evidence.”⁶⁸

For decades, plaintiffs have used social-framework evidence to contextualize bias and stereotyping in the workplace. *Price Waterhouse v. Hopkins* is an early example. There, Dr. Susan Fiske's expert testimony outlined scientific research on sex stereotyping and analyzed aspects of Price Waterhouse's policies that perpetuated sex stereotyping in the employee evaluation process.⁶⁹ She concluded that “Hopkins' uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks ... were the product of sex stereotyping.”⁷⁰ Plaintiffs have also used social-framework evidence in sexual harassment cases to explain to factfinders how seemingly isolated adverse employment actions were actually connected to broader, pervasively hostile work environments.⁷¹ Moreover, prior to *Dukes*, social-framework testimony was frequently used in employment discrimination class actions to describe how particular employment policies might make discrimination common to all plaintiffs.⁷²

***1233** In disparate impact claims, plaintiffs generally seek to use social-framework evidence to demonstrate causation--to show that a “particular employment practice ... *cause[d]* a disparate impact” on a protected class.⁷³ The expert's testimony on implicit bias presents a factfinder with information and context necessary to accurately assess the reasonableness of the plaintiff's theory linking workplace disparity to a specific employment policy. An expert might, for example, summarize brain cognition research on how and why individuals revert to implicit biases when making decisions,⁷⁴ describe how scientists assess implicit bias (most often through the IAT),⁷⁵ or explain studies demonstrating the pervasiveness of implicit biases.⁷⁶ This testimony can provide a framework to understand how implicit bias might creep into hiring decisions where the hiring policy incorporates a manager's subjective preferences. An expert would provide a basis in research which makes the link between discretionary hiring policies and the operation of implicit bias credible to the factfinder.

C. The Two Strands of Implicit-Bias Testimony

Expert testimony on implicit bias in the employment discrimination context essentially consists of two strands: the general and the specific. Defined broadly, an expert testifying under the “general” strand uses empirical social science research to explain the phenomenon of implicit bias--what it is, how it operates, and its prevalence. Even at this generalized level, “providing a social framework with detailed implicit-bias research would provide the fact finder with a vehicle for better understanding how facial race neutrality can yield racial disparity.”⁷⁷ This strand is admissible per the 2000 Committee Note regarding generalized testimony.

Expert testimony describing research on how implicit bias operates in the workplace also fits under this umbrella. For example, an expert might testify that policies relying on subjective, discretionary decisionmaking at the mid-manager level tend to be infected with implicit bias; these policies thus lead to preferential treatment for one class over another. At this generalized level, the expert makes no conclusions about the particular workplace or decisions at issue in the case. It is the “purest” form of social-framework evidence; it merely provides a research-based framework with which a factfinder can then approach the facts of the case.

***1234** In *Samaha v. Washington State Department of Transportation*, the Eastern District of Washington permitted this strand of generalized expert testimony in a racial discrimination claim under the Committee Note to Rule 702.⁷⁸ The expert did not review case-specific materials but provided findings based on general research; the court found these general findings both reliable and helpful.⁷⁹ The court looked at the expert's testimony, which was based on IAT, and found it to be sufficiently “ground[ed] in the methods and procedures of science,” as well as relevant and helpful--even

though it did not make conclusions based on the facts of the case.⁸⁰ Citing the Committee Note to Rule 702, the court concluded that the testimony was “likely to provide the jury with information that it will be able to use to draw its own conclusions.”⁸¹

Under the second, more controversial strand of implicit-bias expert testimony, the expert comments on the likelihood that implicit bias operated within a specific workplace. In this strand, the expert uses two sets of data: generalized research findings on implicit bias and data about the workplace itself, such as specific policies and decisionmaking processes.⁸² The expert connects the two sets of data; she thus extrapolates general research findings about implicit bias and applies them to a specific workplace. For example, an expert might use research to describe best practices in eliminating discretion and then underscore how an employer's actual practices open the door for implicit bias to infect decisionmaking.⁸³ Because this type of testimony applies research findings to the facts of a case, it must meet the standards of Rule 702.

Courts and legal scholars raise two primary challenges to the admissibility of the second strand of “applied research” testimony. The first challenge is that when an expert comments on a specific workplace, but declines to comment on which decisions were infected by implicit bias, the testimony risks being “not certain enough.”⁸⁴ The evidentiary concern is that the testimony is not sufficiently helpful for the factfinder to be admissible. The second challenge is that when an expert *does* comment on a particular decision or set of decisions, opining on the likelihood they were infected by implicit bias, the testimony risks being “too certain.”⁸⁵ The evidentiary concern under this condition centers around whether the expert's opinion, by arriving at a conclusion specific to the case, has reliably applied implicit-bias research.

Considered together, these concerns seem to leave an impossibly narrow path to admission for “second strand” implicit-bias testimony: the expert must say something concrete and helpful about the challenged employment decision but cannot reliably apply implicit-bias research to the facts of a case with too much certainty. However, from an evidentiary standpoint, both concerns can be addressed by clearly defining the scope of an expert's testimony.

1. Not Certain Enough

Some argue that expert testimony that refrains from commenting on whether implicit bias affected any particular employment decision is “not certain enough.” However, this type of testimony does not categorically fail Rule 702's helpfulness requirement. In fact, it provides important context for understanding disparate impact claims, and its utility is independent from an expert's assessment of particular decisions. Expert testimony on employment policies and implicit bias in general--testimony that avoids direct conclusions regarding the particular employment circumstance at issue--may provide a framework in which a factfinder can better understand the operation of unconscious discrimination in the workplace.

Creating an implicit-bias framework is necessary because of the shift from first-generation to second-generation discrimination in the workplace. Unlike first-generation discrimination, the discriminatory manifestations of implicit biases may not be visible with a passing glance. An expert's role is to educate the factfinder on what the effects of implicit bias might look like so the factfinder has more information to make a conclusion. An expert can serve this educational function without commenting on whether implicit biases were implicated in any particular decision or set of decisions.

As discussed above, the Court in *Dukes* rejected Dr. Bielby's testimony, criticizing the report's failure to assign a concrete percentage to the number of employment decisions that were infected by implicit bias.⁸⁶ While *Dukes* changed the analysis in the class certification stage, concerns over *Dukes*'s “disparate impact” in the substantive stage are misplaced. The legal posture of that case limits its applicability in other cases. In *Dukes*, the question was whether implicit bias was “common to the class”; that is quite different from whether a disparate impact was “caused” by discrimination in the form of implicit bias. The former requires a judge to decide whether implicit bias impacted most or all of the disputed

decisions. Post-*Dukes*, an expert's inability or unwillingness to quantify the actual impact of implicit bias on a set of employment decisions is potentially fatal to the question of commonality because the uncertainty leaves plaintiffs without the "glue" necessary to bind their claims together. However, at the substantive stage of a claim, the factfinder plays a more nuanced analytical role in assessing a claim in light of the implicit-bias framework laid out by the expert. While generalized information about implicit bias may not be certain enough to generate a question common to the class, it is much better suited to provide valuable context so that a factfinder can better understand the circumstances surrounding a plaintiff's substantive claim.

In *Pippen v. Iowa*, an Iowa state court applied the *Dukes* analysis to a merits-stage decision.⁸⁷ The court rejected a Title VII disparate impact claim brought by a class of black employees.⁸⁸ Plaintiffs claimed that the state of Iowa, through discretionary merit-based hiring and promotion practices, systematically discriminated against black employees.⁸⁹ Several experts testified in support of the claims. The first expert testified that it was possible that implicit bias affected decisionmakers in Iowa's government but "specifically refused to offer any opinion that implicit bias of Iowa managers caused any difference in the hiring of whites and blacks in the hiring system of the State of Iowa."⁹⁰ A second expert testified, as the court described, "that implicit bias is so pervasive that any merit-based employment system merely serves to legitimize inequality."⁹¹ This expert gave examples of policies which, if used by Iowa, would have "a positive effect on reducing the implicit bias in the State system."⁹² Neither expert expressed an opinion about any specific employment decision by Iowa officials.⁹³

In *Pippen*, the expert testimony was admitted into evidence. However, the trial court misunderstood the purpose of the evidence and thus weighed it inappropriately. The trial court rejected plaintiffs' attempt to "bridge the gap between disparate racial outcomes and discretionary subjective decision-making *1237 through reliance on implicit bias."⁹⁴ From the court's perspective, neither expert's testimony came close enough to the facts of the case to be useful.⁹⁵ The judge underscored that neither expert proffered a concrete percentage of decisions that they believed were the result of implicit bias,⁹⁶ and that the implicit-bias data collected from the national population was not necessarily representative of Iowans or Iowa's government employees.⁹⁷

However, the evidentiary concerns in *Pippen* are misplaced. Testimony need not touch on the facts of the case to arm factfinders with a framework to assess plaintiffs' claims. Social-framework testimony supplies the context in which factfinders can address specific employment decisions--not proof that specific employment decisions were discriminatory.

2. Too Certain

As discussed, the "too certain" concern attaches to the idea that the expert speaks too closely to the facts of a particular case in a manner not adequately supported by social science.⁹⁸ However, so long as the expert speaks in terms of possibilities and probabilities--rather than of causation--this type of testimony about implicit bias and its operation within a workplace meets *Daubert*'s reliability and fit requirements.

To some degree, caution regarding this type of expert testimony is warranted. There are real limitations on the use of implicit-bias research to accurately predict or explain the reasons behind any particular decision.⁹⁹ The IAT and other tools measure automatic preferences; researchers then design studies to determine whether and to what degree these preferences implicitly bias people's decisions in different settings.¹⁰⁰ Researchers do not claim that these tools permit concrete predictions or "post-dictions" about what motivated particular decisions.¹⁰¹

Even if expressing an opinion about a particular decision is outside the scope of current research, a well-qualified expert can still reliably opine on *1238 the *likelihood* that implicit bias played a role in an employer's decisionmaking process. This level of extrapolation is used in other contexts, where experts explain general science and suggest the likelihood that the explained phenomenon operated in a specific case. For example, scientific research on the (un)reliability of cross-racial eyewitness identification is almost always permitted as reliable social-framework evidence.¹⁰² Like implicit-bias research, this evidence educates factfinders that cross-racial identifications are less reliable--but it does not answer whether a particular cross-racial identification was accurate.¹⁰³

Is it possible that if the expert examines the employer's workplace and policies closely enough, she could legitimately provide an opinion as to whether a disparity was ultimately caused by implicit bias? Some have suggested plaintiffs use Rule 35 of the Federal Rules of Civil Procedure¹⁰⁴ to compel decisionmakers to submit to implicit-bias testing, effectively linking general research to the specific workplace.¹⁰⁵ However, even examining the decisionmaker would not permit an expert to say whether any particular prior decision was the result of implicit bias. The nature of implicit bias simply does not permit this level of precision.

Moreover, harboring implicit bias does not mean that the bias would necessarily affect an employment decision--or even a series of employment decisions. Generalized research on implicit bias may suggest that implicit bias likely affected the decisionmaking process. However, regardless of how closely an expert examines a workplace or decision, expert testimony cannot directly prove that employment decisions resulted from individuals' implicit biases. The testimony must still be given in terms of possibilities.

III. FINDING AWAY FOR IMPLICIT-BIAS TESTIMONY

A. *An Impossible Standard: Jones and Karlo*

Both the "too certain" and "not certain enough" concerns can be alleviated by clearly defining the scope of an expert's testimony. However, in at least two cases, the courts have critiqued testimony as being simultaneously overly and insufficiently certain, setting an impossibly high standard for implicit-bias testimony under *Daubert*.

*1239 In *Jones v. National Council of Young Men's Christian Ass'ns of the United States*, the Northern District of Illinois applied a full *Daubert* analysis to implicit-bias testimony and found the testimony inadmissible on several grounds.¹⁰⁶ Plaintiffs submitted expert testimony on implicit bias under the generalized framework from the Committee Note to Rule 702 to educate the factfinder that "unconscious bias ... poses greater risk of manifesting itself in conjunction with subjective criteria."¹⁰⁷ The court rejected the testimony under that theory.¹⁰⁸ But it did not stop there. The court scrutinized two of the expert's statements that made his testimony inadmissible under any theory. First, he stated that implicit biases "*are now established as causes of adverse impact.*"¹⁰⁹ Second, he stated that absent clear evidence of overt bias or nondiscriminatory explanations, "*it is more likely than not that adverse impact is a consequence of unintended discrimination.*"¹¹⁰ This testimony treaded too closely to the issue of causation to be considered generalized testimony under the Committee Note.

The court failed to explain why generalized testimony could not support causation, nor how the expert's statements connecting the general principle to an adverse impact exceeded the bounds of generalized testimony. The alternative justifications exposed the weakness of the court's position that the testimony, if purely generalized, did not sufficiently fit the facts of the case. Because the expert based his opinion primarily on the IAT, it was not "logically related to the factual context" of an employment discrimination claim.¹¹¹ In other words, the court found the testimony inadmissible as social-framework evidence because it was both too close--and not close enough-- to the facts of the case.

Next, the *Jones* court went on to find the testimony inadmissible under traditional 702 standards as “applied” framework evidence, even though the plaintiffs had not submitted the evidence for this reason. Insofar as the testimony applied general principles of implicit bias to workplace policies, the court questioned whether the testimony could help a jury because the court viewed implicit bias as “little more than a truism” and “not a concept outside the ken of the average juror.”¹¹² Moreover, the expert provided no “reliable basis” to support an opinion about whether implicit bias caused a disparity in employer decisions.¹¹³ The court left no available role for implicit-bias social-framework evidence: it was too obvious to be helpful, yet too close to the facts to be reliable.

***1240** Recently, in *Karlo v. Pittsburgh Glass Works, LLC*, the Third Circuit approved a lower court's decision to exclude Dr. Greenwald's testimony on implicit bias using reasoning similar to *Jones*.¹¹⁴ Plaintiffs brought various discrimination claims against their employer, PGW, under the Age Discrimination in Employment Act. In support of their claims, plaintiffs relied upon Dr. Greenwald's expert report to provide “a framework that can aid a judge or jury in evaluating the facts of this case.”¹¹⁵ In his report, Dr. Greenwald first described “implicit social cognition and implicit bias,” as well as the methodology and findings of the IAT.¹¹⁶ In the bulk of the report, he summarized a collection of research findings from economists, organizational psychologists, and legal scholars regarding age-based implicit bias, its operation in subjective personnel evaluations, and “the distinction between subjective and objective measures in personnel evaluation.”¹¹⁷

According to the district court, Dr. Greenwald then “attempt[ed] to apply his research to the facts of th[e] case.”¹¹⁸ In fact, Dr. Greenwald noted, in one paragraph of his thirty-paragraph report, an absence of objective measures in the employer's termination procedures during the reduction in force.¹¹⁹ The report neither purported to conclude that the termination decisions were the result of implicit bias, nor connected the research on age-based implicit bias to the specific facts of the case.

Nevertheless, the district court in *Karlo* strongly criticized the report, finding it both unreliable and unhelpful to a factfinder.¹²⁰ The court first pointed out Dr. Greenwald's unfamiliarity with the employer's workplace and his lack of “independent, objective analysis on whether implicit biases played any role in the decisions to terminate the remaining Plaintiffs.”¹²¹ Without further analysis of the workplace, Dr. Greenwald's report was merely “the say-so of an academic who assumes that his general conclusions from the IAT would ***1241** also apply to PGW.”¹²² Further, the court pointed out that the IAT, even if a valid measure of implicit bias, “says nothing about those who work(ed) at PGW.”¹²³ As in *Jones*, the *Karlo* court also found that Dr. Greenwald's testimony also did not “fit” the facts of the case: providing minimal reasoning and no case support (besides *Jones*), the court simply pointed out that Dr. Greenwald's report illustrated a “substantial disconnect” between the general principles of implicit bias and the facts of the case.¹²⁴ Finally, the court found evidence of implicit bias unhelpful in deciding the disparate impact claims because “a plaintiff need not show motive.”¹²⁵

The court's reasoning illustrates a flawed understanding of the substance and purpose of the bulk of Dr. Greenwald's report. His review of implicit bias, the IAT, and the academic literature is “first strand” testimony that does not attempt to comment on the facts of the case. As such, it fit squarely within the 2000 Committee Note: its purpose is to “educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case.”¹²⁶ The fact that the IAT “says nothing about those who work(ed) at PGW”¹²⁷ is not grounds for *Daubert* inadmissibility, especially considering the fact that Dr. Greenwald did not extrapolate from the IAT to the PGW workplace or any particular decisions or decisionmakers. And while the report did comment on PGW policies in one paragraph, it did so in an extremely limited manner.¹²⁸ Dr. Greenwald did not state that the termination decisions were infected by implicit bias. In fact, he did not even comment on the likelihood that this would occur. Instead, the report merely pointed out the

absence of objective criteria in the decisionmaking process by underscoring scientific research that distinguished between objective and subjective procedures.

B. Just Right: The Path to Admissibility

Some concerns over the use of implicit-bias expert testimony are valid. Others, however, reflect a misunderstanding of the testimony's purpose and scope. For plaintiffs who experience second-generation discrimination in the workplace, finding a way to present social-framework testimony regarding implicit bias may be crucial to their claims. To make it more likely that expert testimony will be admitted, it should be used as either "first strand" or "second strand" social-framework testimony.

***1242** *Generalized "first strand" social-framework testimony:* Plaintiffs using expert testimony for this purpose should make it clear that the expert presents only a framework. They should further note that this type of evidence is admissible under Rule 702. The expert should not discuss the facts of the case--any "application" would bring the evidence under the traditional standards of Rule 702 and might be fatal to its admissibility.¹²⁹ The testimony must avoid the "unhelpfulness" trap, meaning counsel or the expert must communicate why the concepts described are not common sense or within the "ken of the average juror"¹³⁰ and why a factfinder would benefit from the additional context in making his or her determination.¹³¹

Applied "second strand" social-framework testimony: Plaintiffs using expert testimony for this purpose should ensure the expert speaks in terms of context--and not direct causation. The expert can do this by going no further than concluding that there was a likelihood that implicit bias played a role in a decision. But plaintiffs' counsel must take care to explain that the expert is not being used to answer causation.¹³² In addition, the expert should provide sufficient scientific backing to avoid a "fit" problem. The report should clearly demonstrate the social science community's backing of implicit-bias research and provide sufficient evidence demonstrating the effect of implicit bias in the workplace. The closer the expert gets to describing research that would logically help a factfinder in deciding the facts of the case, the better the "fit." For example, studies demonstrating the effect of implicit bias in discretionary promotion policies--or the prevalence of implicit bias within a certain industry or type of workplace--may be sufficiently applicable to the case to avoid the "substantial disconnect" finding in *Karlo*.

CONCLUSION

Workplace discrimination has changed dramatically since Title VII was enacted over fifty years ago. Discrimination today often operates in an invidious, subtle form. Much of today's discrimination is unconscious, leaving some plaintiffs "struggling to explain the unexplainable--the existence of [disparate] treatment without any overt employer references to [discriminatory] justifications or stereotypes."¹³³ Nonetheless, research on implicit bias continues to build.¹³⁴ ***1243** And even following the landmark *Dukes* decision, employment discrimination plaintiffs continue to draw from that body of research in presenting their cases. It is clear, however, that while implicit-bias research and employment law may develop simultaneously, they do not always do so in tandem. Post-*Dukes*, plaintiffs' attorneys must adapt to find new, creative ways to utilize scientific developments in implicit bias within the legal framework of employment discrimination law.

One promising strategy is to use implicit-bias testimony as social-framework evidence to explain disparities and contextualize differential treatment. Some courts resoundingly reject expert testimony on implicit bias under creative and sometimes unpersuasive reasoning. Nonetheless, this type of testimony is admissible under the Federal Rules of Evidence so long as the purpose and scope of the testimony are clearly defined.

Footnotes

- d1 Many thanks to Professor Alison Kehner for her insightful comments and invaluable guidance on this Comment, and to Professors Paul Evans and Serena Mayeri for setting the wheels in motion. I am grateful to Brian Ruocco, Jacob Boyer, and the editorial staff of the *University of Pennsylvania Law Review* for their very helpful feedback and edits. Finally, thank you to my parents--my first and best editors--and to Colby and Teagan, who are simply the best.
- 1 “Implicit bias” and “unconscious bias” are used interchangeably in research. This Comment relies primarily on the term “implicit bias.”
- 2 Theories of implicit bias have been applied to policing, criminal justice, and attorney and judicial decisionmaking. Some have pointed to the operation of implicit bias inside the courtroom as an explanation for disparities in legal outcomes. *See, e.g.,* Shawn C. Marsh, *The Lens of Implicit Bias*, JUV. & FAM. JUST. TODAY, Summer 2009, at 16, 18, <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias/IMPLICIT%20BIAS%20Marsh%20Summer%202009.ashx> [<https://perma.cc/ZFZ2-Y3NW>] (“[I]t is likely that implicit bias is operating at every single decision point as a person enters, moves through, and exits the [criminal justice] system.”). Studies have also examined implicit bias in professional sports, such as the accuracy of umpire calls toward white or black players, and video games. *See* CHERYL STAATS ET AL., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2015, at 7-8 (Kirwan Inst. ed., 2015), <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf> [<https://perma.cc/MA8M-RN2R>] [hereinafter IMPLICIT BIAS REVIEW 2015].
- 3 *See* John A. Powell, *Implicit Bias in the Presidential Debate*, HUFFINGTON POST (Sept. 28, 2016, 8:55 PM), http://www.huffingtonpost.com/john-a-powell/implicit-bias-in-the-pres_b_12226968.html [<https://perma.cc/9F8Q-WTB6>] (“[M]oderator Leslie Holt asked Secretary Clinton if she ‘believed that police are implicitly biased against black people’ and Clinton responded, ‘Implicit bias is a problem for everyone, not just police.’”).
- 4 *See Implicit and Emotional Bias in the Presidential Election*, HCD RES. (Oct. 26, 2016), <http://www.hcdi.net/implicit-and-emotional-bias-in-the-2016-presidential-election/> [<https://perma.cc/T7NN-6C5N>] (finding that “[i]mplicit bias has been a major piece of this election cycle”); *see also* Nancy Einhart, *Hillary Clinton Was Right: Implicit Bias Is a Problem for Everyone*, POPSUGAR (Oct. 27, 2016), <http://www.popsugar.com/news/Implicit-Bias-Among-Voters-2016-Election-42623078> [<https://perma.cc/3H7Y-UCLB>] (describing the findings of the HCD research study and using them to justify Hillary Clinton's comments on implicit bias).
- 5 *See, e.g.,* *United States v. Ray*, 803 F.3d 244, 259-60 (6th Cir. 2015) (considering the potentially prejudicial effect of permitting use of the term “felon” in a criminal case and recognizing “the proven impact of implicit biases on individuals' behavior and decision-making” (footnote omitted)); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 580 (S.D.N.Y. 2013) (discussing the “objectively measurable role” of unconscious racial bias in New York City's stop-and-frisk policy and suggesting “[i]t would not be surprising if many police officers share the latent biases that pervade our society”).
- 6 *See* CHERYL STAATS, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014, at 44-57 (Kirwan Inst. ed., 2014), <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf> [<https://perma.cc/P3J5-CW8W>] (discussing how implicit bias pervades the employment context, particularly in hiring decisions, perceptions of management, and performance reviews).
- 7 IMPLICIT BIAS REVIEW 2015, *supra* note 2, at 27. Implicit bias may be reviewed more frequently in the employment context because it is a space where equality of opportunity is most directly--and most often--examined. *Id.*
- 8 Tanya Katerí Hernández, *One Path for “Post-Racial” Employment Discrimination Cases--The Implicit Association Test Research as Social Framework Evidence*, 32 L. & INEQ. 309, 311 (2014).
- 9 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).
- 10 Jacqueline A. Berrien, *Statement on the 50th Anniversary of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (July 2, 2014), <https://www.eeoc.gov/eeoc/history/cra50th/> [<https://perma.cc/L5U5-G8C9>].

- 11 See 42 U.S.C. § 2000e-2 (2012) (“It shall be an unlawful employment practice for an employer [to discriminate] ... because of [an] individual’s race, color, religion, sex, or national origin”).
- 12 See, e.g., *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 796 (2d Cir. 1986) (“The Fair Labor Standards Act of 1938, Title VII of the Civil Rights Act of 1964, and the ADEA ... have a similar purpose--to stamp-out discrimination in various forms” (citations omitted)).
- 13 See, e.g., MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 203 (8th ed. 2013) (listing “smoking out” animus as a possible rationale underlying the disparate impact theory of employment discrimination).
- 14 See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (articulating the *McDonnell Douglas* burden-shifting framework for proving employment discrimination). See generally ZIMMER ET AL., *supra* note 13, at 20-27 (describing the *McDonnell Douglas* framework and various ways it has been applied by the courts--noting that “in 2011, [the framework] was cited 2,343 times”).
- 15 See *Shaping Employment Discrimination Law*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html> [<https://perma.cc/57MF-8EKK>] (discussing the EEOC’s 1966 Guidelines on Employment Testing Procedures, which were “the first public articulation of the principle that Title VII prohibited neutral policies and practices that adversely affected members of protected groups and could not be justified by business necessity”).
- 16 401 U.S. 424, 430 (1971); see *id.* (“Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).
- 17 *Id.* at 432.
- 18 *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 990 (1988).
- 19 See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 42 U.S.C.).
- 20 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A) (2012)).
- 21 42 U.S.C. § 2000e-2(k)(1)(A)(i); see, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009) (“Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses ‘a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.’” (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i))).
- 22 42 U.S.C. § 2000e-2(k)(1)(A)(i).
- 23 *Id.*
- 24 See generally Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (explaining the development of disparate impact liability).
- 25 *Id.* at 460.
- 26 Eva Paterson, *Litigating Implicit Bias*, in *AMERICA’S GROWING INEQUALITY: THE IMPACT OF POVERTY AND RACE* 63, 66 (Chester Hartman ed., 2014).
- 27 See, e.g., *Smith v. City of Boston*, 144 F. Supp. 3d 177, 182 (D. Mass. 2015) (“The law of disparate impact has become a powerful tool for ensuring equal opportunity.”). Redressing unequal treatment caused by unconscious bias is not the only rationale identified for disparate impact liability. See ZIMMER ET AL., *supra* note 13, at 203 (identifying additional rationales such as smoking out animus, remedying de jure discrimination, and protecting subordinated groups by removing unnecessary barriers to occupational advancement).
- 28 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting) (footnote omitted).
- 29 The normative aspect of this question is an interesting one, but it is beyond the scope of this Comment.

- 30 See William Saletan, *Implicit Bias Is Real. Don't Be So Defensive.*, SLATE (Oct. 5, 2016, 7:35 AM), http://www.slate.com/articles/news_and_politics/politics/2016/10/implicit_bias_is_real_don_t_be_so_defensive_mike_pence.html [https://perma.cc/2TTW-BK7W] (reporting now-Vice President Mike Pence's insistence, during a debate, that implicit bias does not exist).
- 31 To view or take the publicly available test, see PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> [https://perma.cc/VD6A-J4V9].
- 32 Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 472-73 (2010).
- 33 *Id.* at 473.
- 34 See, e.g., Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY AND SOC. PSYCHOL. 17 (2009) (summarizing the favorable results of hundreds of studies about the IAT's predictive validity); Kang & Lane, *supra* note 32, at 503-19 (documenting extensive critiques and responses to the IAT).
- 35 See generally David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2008). See also *id.* at 1430 (stating that the robust research on the existence of implicit bias “should give judges comfort regarding the robustness of the phenomenon”).
- 36 See ZIMMER ET AL., *supra* note 13, at 10 (noting that “[s]ome believe that ‘unconscious bias’ is an oxymoron”); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 992 (2006) (“No doubt the most obvious normative question raised by legal attempts to reduce people's implicit bias is whether such debiasing strategies amount to objectionable government ‘thought control.’”); Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 85 (2010) (raising and refuting arguments against employer liability for unconscious discrimination, including that “perceptions that such liability would be unfairly punitive could create a counterproductive backlash of resistance and negative attitudes toward the law, which could impede the internalization of antidiscrimination norms by workplace actors”); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 985 (2008) (“[W]hat matters is not the mental state, whether conscious or unconscious [W]e should only be concerned with unconscious bias--or conscious bias, for that matter--if it can be shown to produce real-world discrimination in the sense of disparate treatment”).
- 37 Allan G. King & Carole F. Wilder, *Dukes v. Wal-Mart: Some Closed Doors and Open Issues*, LITTLER REP., Feb. 2012, at 5-7, http://www.littler.com/files/The_Littler_Report_Dukes_vs_Wal-Mart_2-12.pdf [https://perma.cc/FW5A-Z2UN]; see also FED. R. CIV. P. 23(a).
- 38 King & Wilder, *supra* note 37, at 5.
- 39 See 244 F.R.D. 243, 258-59 (S.D.N.Y. 2007) (granting a motion for class certification based on common questions of bias and disparate treatment).
- 40 *Id.* at 258.
- 41 *Id.* at 259 (quoting the expert's report).
- 42 *Id.*
- 43 *Id.* The court also noted that the expert's finding of the potential for discrimination was not alone sufficient to support commonality, but was sufficient when combined with the plaintiff's statistical and anecdotal evidence of disparate impact. *Id.*
- 44 564 U.S. 338 (2011).
- 45 *Id.* at 343, 359-60.
- 46 *Id.* at 344-45.

- 47 *Id.* at 345.
- 48 *Id.* at 353-54.
- 49 *Id.* at 354.
- 50 *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 154 (N.D. Cal. 2004).
- 51 *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 602 (9th Cir. 2010).
- 52 *Dukes*, 564 U.S. at 354-55. The Court in *Dukes* expressed doubt in the lower court's holding that *Daubert* did not apply to the expert's unconscious-bias testimony at the class certification stage. *Id.* In *Comcast Corp. v. Behrend*, the Supreme Court similarly reversed a district court's class certification based on expert testimony and applied a *Daubert*-like test--demanding that an expert's testimony fit the facts of the case. 133 S. Ct. 1426, 1432-35 (2013); *see also* M. Joseph Winebrenner, *Expert Evidence at Class Certification and the Role of Daubert*, ABA (July 16, 2015), <http://apps.americanbar.org/litigation/committees/masstorts/articles/summer2015-0715-expert-evidence-class-certification-stage-role-daubert.html> [<https://perma.cc/9MGR-X526>] (finding that the Supreme Court has "strongly suggested" that *Daubert* applies at the class certification stage and that "most courts" agree). Some circuits require that all expert testimony used to prove Rule 23 class certification must satisfy the *Daubert* test. *See* Jerold S. Solovy et al., 5-23 MOORE'S FEDERAL PRACTICE--CIVIL § 23.84 (2016) (attributing that position to the Third and Seventh Circuits); *see also In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) ("We join certain of our sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*."). Other courts have a less demanding standard: Some require a full *Daubert* hearing only if the expert's testimony seems "fundamentally flawed" after a "sneak preview of the issues." *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 90 (D. Mass. 2005). Others hold that a "tailored" *Daubert* analysis, rather than an exhaustive analysis, is sufficient given the preliminary nature of class certification decisions. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 611-14 (8th Cir. 2011). There is also a split among states as to the applicability of *Daubert* at the class certification stage. *See* Thomas A. Dickerson, CLASS ACTIONS: THE LAW OF 50 STATES § 5.02 n.42 (2017) (summarizing the various state court approaches to the applicability of *Daubert* at the class certification stage).
- 53 *Dukes*, 564 U.S. at 355 (internal quotation marks omitted).
- 54 *Id.* at 354 n.8 (quoting John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks"*, 94 VA. L. REV. 1715, 1747 (2008)).
- 55 *Id.*; *see also id.* (referencing the district court's determination that the *Daubert* analysis did not apply at the class certification stage, the majority stated, "We doubt that is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case").
- 56 *See* Michael C. Harper, *Class-Based Adjudication of Title VII Claims in the Age of the Roberts Court*, 95 B.U. L. REV. 1099, 1101 (2015) (arguing that *Dukes*'s impact has been "exaggerated" and that "the importance of the *Wal-Mart* decision is also limited for Title VII class actions, as it is for other kinds of class actions," by other Supreme Court decisions). *But see* Roger W. Reinsch & Sonia Goltz, *You Can't Get There from Here: Implications of the Wal-Mart v. Dukes Decision for Addressing Second-Generation Discrimination*, 9 NW. J.L. & SOC. POL'Y 264, 274 (2014) ("Prior to *Dukes*, social framework testimony had been used in many types of discrimination cases, and social science experts were key in providing evidence of commonality for class certification. The Supreme Court's rejection of the social framework testimony was a big blow to the viability of class action discrimination suits. After *Dukes*, courts are less likely to accept general evidence of bias as a basis for fulfilling the commonality requirement mandated in Rule 23(a)(2)." (footnote omitted)). While the impact of *Dukes* continues to be debated, the decision will likely deter similar suits. *See* King & Wilder, *supra* note 37, at 5 ("There is no question that the [*Dukes*] decision will deter certification of employment discrimination class action lawsuits.").
- 57 *See generally* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987) [hereinafter Walker & Monahan, *Social Frameworks*]. Subsequently, the authors have identified areas in which expert testimony could provide a "social framework," including eyewitness identification, risk assessments of violence, battered

woman syndrome, and rape trauma syndrome. John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendancy of "Social Frameworks,"* 94 VA. L. REV. 1715, 1726 (2008) [hereinafter Monahan et al., *Contextual Evidence*].

Walker & Monahan, *Social Frameworks*, *supra* note 57, at 587-88.

Monahan et al., *Contextual Evidence*, *supra* note 57, at 1723-25.

Id. at 1720-23. Social-authority evidence is the general social science evidence used to address "the validity of a factual assumption underlying a legal standard, such as the question whether 'separate' educational systems are 'equal.'" Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 44 (2009).

Walker & Monahan, *Social Frameworks*, *supra* note 57, at 559.

Hart & Secunda, *supra* note 60, at 44.

See FED. R. EVID. 702 ("A witness who is qualified as an expert ... may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact ...; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-53 (1999) (recognizing that expert testimony is subject to the same *Daubert* standards as traditional scientific expert testimony); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585-91 (1993) (explaining that Rule 702's requirement to assist the factfinder "goes primarily to relevance," and that the expert is assumed to "have a reliable basis in the knowledge and experience of his discipline").

See Daubert, 509 U.S. at 592-93 ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." (internal footnotes omitted)).

Kumho, 526 U.S. at 141; *see id.* ("*Daubert's* general holding ... applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.").

FED. R. EVID. 702.

FED. R. EVID. 702 advisory committee's note to the 2000 amendment.

Hart & Secunda, *supra* note 60, at 44.

Price Waterhouse v. Hopkins, 490 U.S. 228, 235-36 (1989) (plurality opinion).

Id. at 236.

See, e.g., Andrea Doneff, *Social Framework Studies Such as Women Don't Ask and It Does Hurt to Ask Show Us The Next Step Toward Achieving Gender Equality--Eliminating The Long-Term Effects of Implicit Bias--But Are Not Likely to Get Cases Past Summary Judgment*, 20 WM. & MARY J. WOMEN & L. 573, 598-99 (2014) (describing how the expert in *Dukes* compared Wal-Mart's practices to the broad "circumstances that allow or encourage companies to engage in stereotyped thinking," which the expert used to assert that "WalMart's nationwide policy of giving managers broad discretion and little guidance makes the issue of discrimination common throughout WalMart").

See, e.g., *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 862-64 (D. Minn. 1993) (describing an expert's use of "comparative work-force data" to examine the specific workplace in the context of the broader labor market).

42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis added).

See, e.g., Expert Report of Steven L. Neuberg at 3-7, *Palgut v. City of Colo. Springs*, No. 06-cv-01142 (D. Colo. Mar. 31, 2010).

See, e.g., id. at 7-8.

- 76 See, e.g., Report of Anthony G. Greenwald on Implicit Bias in Treatment of Employees, *Garcia v. City of Everett*, No. 89-1 at *8 (W.D. Wash. Apr. 13, 2015).
- 77 Hernández, *supra* note 8, at 345.
- 78 See No. CV-10-175, 2012 U.S. Dist. LEXIS 190352, at *10-11 (E.D. Wash. Jan. 3, 2012) (finding that Dr. Greenwald's expert testimony on IAT research could be admitted under Federal Rule of Evidence 702).
- 79 *Id.* at *11.
- 80 *Id.* at *8 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993)).
- 81 *Id.* at *11.
- 82 See, e.g., Expert Report of Barbara F. Reskin at 26, *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450 (N.D. Ill. 2009) [hereinafter Reskin Report] (arguing that defendant company's practice of allowing its mostly male leadership to rely on their personal, subjective opinions in making personnel decisions was the kind of practice that “invites distorted appraisals both through automatic biases such as ingroup favoritism and sex stereotyping and through open favoritism”); see also Expert Report of Steven L. Neuberg at 13-17, *Palgut v. City of Colo. Springs*, No. 06-cv-01142 (D. Colo. Mar. 31, 2010) (describing practices that social science considers safeguards against sex stereotyping and suggesting that defendant did not employ these practices).
- 83 See Reskin Report, *supra* note 82, at 22-23 (describing experiments that “document[] the importance of accountability to prevent bias from affecting personnel decisions” and claiming that defendant company's practices were “inconsistent with ... accountability”).
- 84 See *infra* subsection II.C.1.
- 85 See *infra* subsection II.C.2.
- 86 See *supra* text accompanying notes 52-55.
- 87 *Pippen v. Iowa*, No. LACL 107038, slip op. at 55-56 (Iowa Dist. Ct. Apr. 17, 2012), *aff'd*, 854 N.W.2d 1 (Iowa 2014).
- 88 *Id.* at 1.
- 89 *Id.* at 3.
- 90 *Id.* at 29.
- 91 *Id.* at 31.
- 92 *Id.*
- 93 *Id.* at 34.
- 94 *Id.* at 52.
- 95 *Id.*
- 96 *Id.*
- 97 *Id.* at 53.
- 98 Faigman et al., *supra* note 35, at 1390.
- 99 See *id.* at 1431 (“[R]esearch does not support a claim that a particular test (a priming task, the IAT, or any other device) could accurately identify specific individuals who are motivated by implicit bias in their decision making.”).
- 100 See *id.* at 1410-11 (explaining that researchers build evidence about implicit biases and their effects by “utiliz[ing] multiple methods to rule out limitations of specific measurement tools”).

- 101 *Id.* at 1432; *see also* Anthony Greenwald et al., *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 557 (2015) (explaining why the IAT should not be used to “classify persons as likely to engage in discrimination” due to the risk of “undesirably high rates of erroneous classifications”).
- 102 Faigman et al., *supra* note 35, at 1402.
- 103 *Id.*
- 104 *See* FED. R. CIV. P. 35(a)(1) (“The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner.”).
- 105 *See, e.g.,* King & Wilder, *supra* note 37, at 6-7 (arguing that any party “whose mental condition is in controversy may be compelled to submit to a mental examination,” but that it is unclear whether implicit bias would be considered a mental condition in controversy).
- 106 34 F. Supp. 3d 896, 898-901 (N.D. Ill. 2014).
- 107 *Id.* at 899.
- 108 *Id.* at 899-900.
- 109 *Id.* at 899.
- 110 *Id.*
- 111 *Id.* at 900.
- 112 *Id.* at 901 n.3.
- 113 *Id.* at 900.
- 114 *Karlo v. Pittsburgh Glass Works, LLC*, No. 15-3435, 2017 WL 83385 (3d Cir. Jan. 10, 2017), *rev'g in part* No. 2:10-cv-1283, 2015 WL 4232600 (W.D. Pa. July 13, 2015). The Third Circuit phrased its decision on this point narrowly, finding the district court did abuse its discretion in excluding the report. *Id.* at *18. The appellate court recognized the concerns regarding “fit” but noted that “[c]ourts may, in their discretion, determine that [implicit-bias] testimony elucidates the kind of headwind disparate-impact liability is meant to redress.” *Id.* at *18.
- 115 *Karlo v. Pittsburgh Glass Works, LLC*, 2:10-cv-1283, 2015 WL 4232600, at *3 (W.D. Pa. July 13, 2015).
- 116 Report of Anthony G. Greenwald, Ph.D., on Implicit Age Bias During Reductions in Force ¶¶ 17-22, *Karlo v. Pittsburgh Glass Works, LLC*, No. 10-1283, 2015 WL 4232600 (W.D. Pa. June 28, 2013) [hereinafter Greenwald Report].
- 117 *Id.* ¶¶ 13-28.
- 118 *Karlo*, 2015 WL 4232600, at *5.
- 119 Greenwald Report, *supra* note 116, ¶ 29.
- 120 *Karlo*, 2015 WL 4232600, at *8.
- 121 *Id.* at *7.
- 122 *Id.*
- 123 *Id.* at *8.
- 124 *Id.*
- 125 *Id.* at *9.

- 126 FED. R. EVID. 702 advisory committee's note to the 2000 amendment.
- 127 *Karlo*, 2015 WL 4232600, at *8.
- 128 *See supra* text accompanying note 119.
- 129 *See supra* subsection II.C.2.
- 130 *Jones v. Nat'l Young Men's Christian Ass'ns of the United States*, 34 F. Supp. 3d 896, 901 n.3 (N.D. Ill. 2014).
- 131 *See supra* Section II.C.
- 132 *See supra* subsection II.C.2.
- 133 Hernández, *supra* note 8, at 346.
- 134 *See ZIMMER ET AL.*, *supra* note 13, at 9 (“No one seems to doubt that cognitive bias exists, but there is substantial debate about how pervasive it is and the extent to which it affects real-world decisionmaking.”).

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