Implicit Bias in Employment Litigation

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Every employment discrimination lawsuit tells at least two stories – stories that are about judgment, discretion, and even bias. One story starts long before litigation, with workplace relationships and decisions. The parties end up in court only after one of the actors, the defendant, decided that the other, the plaintiff, will be fired or not hired, demoted, or not given a raise. Those decisions invariably involve personal judgments – even biases that are explicit or implicit. Once an adverse employment action is challenged in court, however, a new story, with yet another set of decision-makers takes over. Even then, the decisions that judges must make about how to interpret the information presented in court leave room for discretion, judgment, and a new opportunity for bias.

Judges rarely recognize the part they play in this second storyline. A few years ago at an annual event held in Massachusetts, a plaintiff’s attorney asked a panel of district court judges, “Why are federal judges so hostile to employment discrimination claims?” Most of the judges protested that they were not personally biased against these claims; they were merely applying the law. However, U.S. District Judge Nancy Gertner (one of the authors) agreed with the lawyer, rather than
her colleagues, holding that both the law and often those applying it reflect a deep skepticism about claims of discrimination that necessarily affects litigation outcomes.

Judges exercise enormous discretion in civil litigation in general, a discretion that has only increased with recent decisions of the Supreme Court. The Court has directed that a judge considering a motion to dismiss should exercise “common sense” in evaluating the plaintiff’s claim in light of other “plausible” explanations for a defendant’s conduct.¹ The trial court’s “common sense” view of what is or is not “plausible” affects employment litigation perhaps more than any other type of litigation. Studies have shown that judicial biases significantly influence summary judgment outcomes in such cases. Indeed, many commentators have noted that employment discrimination plaintiffs face an unusually difficult uphill battle. As a general matter, doctrinal developments in the past two decades have quite consistently made it more difficult for plaintiffs to assert their claims of discrimination. In addition, many of these doctrines have increased the role of judicial judgment – and the possibility of the court’s implicit bias – in the life cycle of an employment discrimination case.

This chapter explores the range of discretion and the possibility of bias not in the workplace, but in the courtroom. We examine how the development of employment discrimination law, particularly in recent years, has made the finding and the remediation of bias – of all kinds – ever more difficult. Both the legal doctrine and its application by trial and appellate judges reflect the often unrealistic search for a rogue, guilty decision-maker in the workplace, whose biases are overt.
Anything short of that – any more subtle form of discrimination – will not pass muster. If you believe that the battle for equality is largely over, if you cannot imagine that discrimination can masquerade behind ostensibly neutral words or that even sexist or racist remarks reflect the actor’s true discriminatory intent, you will rarely find claims of discrimination to be plausible. Your “common sense” will always tell you otherwise.

Part I begins by examining the persistence of gender and racial disparity in the workplace despite the fact that laws prohibiting discrimination have been on the books for decades. Social science offers an explanation in the form of studies that describe the role implicit bias plays in those continuing inequities just as the legal system seems especially resistant to integrating their insights. Part II explores the ways that doctrinal developments for assessing evidence in employment discrimination cases – the procedural mechanisms that guide the cases through the system – are a one-way ratchet that makes it harder and harder to prove that discrimination occurred and that enables the judge to enact his or her biases.

I. The persistence of workplace discrimination, the role of implicit bias, and the insights offered by social science

Federal law has prohibited race discrimination in employment for more than forty-five years, yet evidence from multiple sources reveals significant continuing racial and gender disparities in workplace opportunity. Recent studies confirm that these disparities are substantially attributable to bias on the part of decision-makers. Indeed, the more recent studies build on the decades-old consensus among social
scientists about the cognitive processes that produce bias and stereotyping and the ways that workplace policies operate to make these biases more or less significant in the allocation of opportunity. Yet just as litigants have sought to incorporate the insights of social science into their litigation strategy, the distance between legal analysis and social scientific analysis has widened.

A. Evidence of continued discrimination at work

The persistence of discrimination in employment is reflected not only in the ever-growing number of charges of discrimination filed with the Equal Employment Opportunity Commission (EEOC) – almost 36,000 charges of race discrimination filed in 2010 – but also in statistics that show disparities in income and opportunity. Indeed “[e]very measure of economic success reveals significant racial inequality in the U.S. labor market.” The most recent EEOC data, for example, show that people of color make up 34 percent of the private sector workforce, but hold only 11 percent of senior or executive positions. In large law firms, people of color constitute 12.4 percent of the associate pool, but only 6 percent of partners. And on the federal bench, 84 percent of the judges are white, and a significant percentage of the ninety-four federal district courts in the country have never had a judge who was a person of color.

In 2010, the median weekly earnings for full-time employees varied significantly by race and gender: for white men, the average was $850 a week, whereas for Black men that number dropped to $633 and Hispanic men earned an
average $560 each week. Among women, the median weekly earnings were $684 for white women, $592 for black women, and $508 for Hispanic women.

In 2009, the Bureau of Labor Statistics reported that the unemployment rate for black male college graduates 25 and older was nearly twice that of white male college graduates – 8.4 percent compared with 4.4 percent.

Social psychologists, organizational behavioralists, and labor economists offer a range of possible explanations for these continuing disparities. Central to these explanations is the conclusion, supported by empirical evidence, that racial and gender bias – whether implicit or otherwise – continues to play a significant role in the allocation of job opportunities. Two recent studies that focused specifically on the role played by race in employment decisions found that it was a significant factor. In one study, researchers sent out sets of resumes with identical qualifications, giving half of the “applicants” names traditionally associated with African Americans – “Lakisha” and “Jamal” – and half names without a specific ethnic association, such as “Greg” and “Emily.” They found a 50 percent gap in callback rates between the white and black resumes. This gap – which meant that a white candidate received one callback for every ten resumes submitted, whereas a black candidates had to send out fifteen resumes for the single callback – existed across occupations and industries. The researchers estimated that “a white name yields as many more callbacks as an additional eight years of experience.”

In another study, a group of labor economists found that the race of the hiring manager has a significant effect on the race of new hires. This study used data from
a large U.S. retailer to examine how a change in the race of a manager affects the likelihood of black employees being hired. “The estimates suggest that when a black manager is replaced by a non-black manager in a typical store, the share of new hires that is black falls roughly from 21 to 17 percent, and the share that is white rises from 60 to 64 percent.” The researchers isolated other common traits in supervisors and employees and found that racial bias was by far the most likely explanation for the decision patterns.

**B. Insights from social science about the relationship between workplace policies and intrusion of bias**

In addition to studies that specifically identify racial dynamics in work decisions, there is a long history of social science analyses focused on explaining how organizational culture and structure relate to the extent of bias in a workplace. Extensive research on the formation of corporate cultures has identified the ways in which organizations reflect both formal and informal cultures, some created very explicitly and some generated more organically. Corporate cultures provide a context within which supervisors and employees determine what is permissible and what is not. “Case study research on workplaces shows that internal policies and practices play a significant role in shaping the culture of the workplace, and that workplace cultures may in turn help to sustain or minimize bias.” Although cultural contexts may not control individual decision-makers, researchers have found that they have a considerable influence in shaping decisions.
Of particular importance to the role implicit bias plays in employment discrimination, case studies have shown that corporate cultures that include unguided managerial discretion tend to permit greater consideration of irrelevant factors such as race and gender in the allocation of workplace benefits and opportunities. In contrast, employers with more formalized and transparent decision-making practices and more oversight have less disparity and less bias in workplace decisions.

Over the past several decades, social scientists have testified as expert witnesses in employment discrimination cases, offering to explain to judges and juries how these phenomena operate to permit bias to infiltrate workplace decisions. One of the earliest and most famous cases was a sex discrimination case, *Price Waterhouse v. Hopkins*. Ann Hopkins was a candidate for partnership at Price Waterhouse in 1982. At the time she was considered, the company had 7 female and 655 male partners, and Hopkins was the only woman being considered for partnership that year. Although she had an extremely successful business record at the firm, some described her as abrasive and as particularly hard on staff members. Her lack of interpersonal skills was of major concern to many evaluating her candidacy. In discussions among the men considering Hopkins’ candidacy, she was described as “macho,” advised to take “a course at charm school,” and to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

After examining the decision-making process used for partner selection at Price Waterhouse, psychologist Susan Fiske, Hopkins’ expert witness, reviewed the
extensive literature on sex stereotyping and analyzed the aspects of the Price-Waterhouse’ partnership process that permitted sex stereotyping to influence the decision not to award Hopkins a partnership. Fiske focused particularly on Hopkins’ status as the only woman in the pool of candidates, the subjectivity of the evaluation process, and the language – both explicitly discriminatory and more subtly biased – used to describe her.

Although similar testimony has been offered in harassment cases and in class action litigation in recent years, its appropriateness has become a topic of increasing academic and litigation controversy. The debate came to a head in the Supreme Court’s 2011 decision in Wal-Mart v. Dukes, in which the Court’s majority was highly critical of the expert testimony offered by plaintiffs to show how excessively subjective decision-making can lead to impermissible disparities in pay and promotions.

The Wal-Mart decision highlighted the differences between the conclusions reached in court decisions and the kinds of conclusions reached by social scientists. In Wal-Mart, organizational behavioralist Dr. William Bielby testified about the structural dynamics of workplace decision-making and the social science evidence demonstrating how the kinds of policies adopted by Wal-Mart made the company vulnerable to the intrusion of significant bias in workplace decisions. Indeed, Dr. Bielby’s testimony was similar to that offered decades earlier by Dr. Fiske in Price Waterhouse, applying the insights of social science to the ways in which both organizations and individuals contributed to biased decision-making.
The Supreme Court rejected Dr. Bielby’s testimony, asserting that it “does nothing to advance [plaintiffs’] case.” Dr. Bielby had acknowledged at his deposition that his expertise allowed him to offer information about the risks presented by the policies Wal-Mart had adopted, but that he could not specifically “calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” In the view of the Supreme Court majority, that was “the essential question on which respondents’ theory of commonality [in its class certification motion] depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from significant proof that Wal-Mart operated under a general policy of discrimination.”

The Court’s observations are troubling, to say the least. Human behavior – and surely proof of discriminatory intent – cannot be reduced to numerical percentages. To suggest that nothing short of mathematical precision justifies this kind of testimony fundamentally underestimates its considerable value. As one court held in admitting social frameworks evidence, such testimony “does not tell the jury what to decide in any given case; it only tells them what to consider.”

Moreover, the search for the “general policy of discrimination” is perhaps even more troubling. It reflects the view that redressing discrimination in the twenty-first century is about ferreting out overt discrimination, the offending policy, or the overt discriminator. For those willing to listen, the social science research has been explaining for years that discrimination is much more complicated than that.
Future courts considering expert evidence from social scientists may choose to limit *Wal-Mart* to its particular facts. After all, the Court did not broadly condemn the use of social science testimony, but rather criticized the use of that specific testimony to justify class action treatment. Undoubtedly, defendants will argue that the Court’s criticisms can be generalized to all employment discrimination cases, that the insights of social science just do not answer the same question that a lawsuit seeks to resolve. If employment discrimination law continues in its present direction, it is likely that many courts will agree with those arguments.

II. Legal developments that exclude claims of implicit bias in the workplace, all the while permitting its intrusion in courts

Although there is a great deal of consensus among social psychologists and organizational behavioralists about the role implicit bias plays in decision-making, there is no similar consensus among legal scholars or courts about the extent to which employment law should reflect this phenomenon.

The scholarly debate has focused predominantly on Title VII’s prohibition against discrimination “because of” race or some other protected characteristic as it applies in individual discrimination claims. Many scholars have argued that current law does prohibit such acts of discrimination, observing that the question of whether bias is conscious or unconscious is irrelevant to the question whether the evidence demonstrates discrimination.31 The law prohibits acts taken “because of” discrimination without specifying whether that discrimination must be conscious or explicit. Others assert that the law prohibits – and should prohibit – only conscious
discriminatory animus. These scholars argue that plaintiffs overreach when they seek to hold employers accountable for stereotyping they do not know they are engaged in and that, in any event, the operation of implicit bias in the workplace is far from certain.  

To a large extent, this debate misses the mark. It ignores the legal doctrines that do exist and that target workplace policies whose net effect is to enable implicit bias to operate in job decisions; namely, disparate impact and pattern and practice claims. To be sure, recent decisions of the Supreme Court may be interpreted as undermining or at least narrowing such claims. In this environment, the individual disparate treatment claim may well be the most viable route for employment discrimination plaintiffs. Yet the same questions persist even in the individual cases – whether the law prohibits implicit bias at work or requires a search for the overt discriminator, and what kind of evidence can be used to show how bias operates in the workplace at issue.

In any event, whatever standard applies, the critical question is how is it applied by this important decision-maker – the judge. “Plaintiffs’ attempts to convey their stories fall on deaf ears as courts find ways of rationalizing any of the various challenges made to an employers’ business justification.” Implicit bias not only plays a role in the underlying story that gives rise to an employment discrimination claim. Even more troubling, an examination of the doctrines courts have developed to evaluate the evidence suggests that it plays at least as significant a role in the second story – the story of the way the claims fare in litigation.
It has been widely noted that employment discrimination plaintiffs do not do well in federal courts.\textsuperscript{35} In fact, very few employment discrimination cases make it to trial. Some claims never make it past the initial stages of litigation, when defendants ask judges to dismiss because the facts pled by the plaintiff do not state a claim for legal relief. Others make it past that first stage, but are dismissed at summary judgment. The cases are fact intensive, and in that setting, the judge has considerable discretion. The outcome will rest on how he or she perceives the facts and the overall narrative, and these perceptions can spell the difference between defeat for a plaintiff or the case moving forward to a jury.\textsuperscript{36} Indeed, research on national jury verdicts suggests that, if an employment discrimination plaintiff can get past judicial dismissal and make it to a jury, the plaintiff has a significant chance of winning a verdict.\textsuperscript{37}

\textbf{A. Plausibility pleading and judicial “common sense”}

The Supreme Court’s 2009 decision in \textit{Ashcroft v. Iqbal} directed district courts evaluating motions to dismiss to “draw on [their] judicial experience and common sense” in assessing whether a plaintiff’s allegations met the threshold of stating a “plausible claim for relief.”\textsuperscript{38} The Court observed that this plausibility requirement demands something more than pleadings that are “merely consistent with” liability.\textsuperscript{39} Instead, when a judge evaluates a complaint, she or he should ask – as the Court itself did in \textit{Iqbal} – whether alternative explanations for the events complained of are more likely than the allegations made by the plaintiff.\textsuperscript{40}
The *Iqbal* standard is most likely to influence outcomes in cases that turn on allegations of discriminatory intent. Because intent is typically proven by circumstantial evidence, the judge is obliged to draw inferences about the meaning of the evidence and, in particular, about the likelihood that bias was a motivating factor in the defendant’s actions. Specifically, a judge is supposed to consider whether discrimination or some other explanation more “plausibly” explains the facts.

By placing the judge’s own “common sense” at the heart of the decision whether to dismiss a discrimination claim at an early stage of litigation, the *Iqbal* standard risks increasing the impact of a judge’s implicit biases on the outcome of employment disputes. Indeed, there is little difference between judicial “common sense” and the very cognitive processes that social scientists have identified as producing stereotyping and bias. When the legal standard itself incorporates reliance on that kind of judgment, it places corresponding importance on the identities of the judges themselves.

Much recent legal scholarship has sought to assess whether the *Iqbal* standard has in fact increased the number of employment discrimination cases that are dismissed on the pleadings. Several studies have found that courts applying *Iqbal* are more likely to grant a motion to dismiss in a civil rights case than they were under the old pleading standards. Even when cases are not dismissed outright, *Iqbal*’s command that judges use their “common sense” in evaluating plaintiffs’ claims puts a judge’s own perspective front and center in the analysis from the outset. Although the judge was always part of the story, this standard legitimizes an even larger role.
B. Summary judgment and the meaning of evidence

A case thrown out on the pleadings will not go through any of the factual development permitted by discovery in civil litigation. Even those cases that make it through discovery are more likely to be rejected by a judge at summary judgment than to get to a jury. Recent studies show that more than 70 percent of summary judgment motions in employment discrimination cases are granted. Once again, the attitudes of judges considering these cases – the biases and assumptions they bring to their analysis – may be determinative.

In one of its earliest cases interpreting Title VII, the Supreme Court set out a structure for the presentation of evidence that would, ideally, help uncover impermissible motivations for employment actions. Initially, the plaintiff must meet the basic requirements of a prima facie case designed to eliminate some obvious nondiscriminatory explanations for an adverse action. The defendant is then responsible for offering some legitimate, nondiscriminatory explanation for the events at issue. Finally, the plaintiff carries the ultimate burden of proving that the adverse action took place under circumstances suggesting discrimination. A plaintiff can meet this ultimate burden in a variety of ways. He or she may find “direct” evidence of discrimination in the form of a statement by the employer that the decision was made for discriminatory reasons, a very rare occurrence. Instead, most evidence is circumstantial evidence demonstrating that the defendant’s proffered explanation for the decision is dishonest by pointing to similarly situated workers who were treated differently under similar circumstances, identifying
discriminatory comments or behavior in the workplace, or pointing to the plaintiff’s qualifications in relation to his or her coworkers. This skeletal proof structure is fleshed out in each individual case with the particular facts of the challenged employment decision.

Although every case is as unique as the facts that underlie it, numerous doctrines have developed to address some of the more typical types of evidence that plaintiffs and defendants offer in litigation. These judicially created doctrines are simply shorthand descriptive tools that judges use to characterize their understanding of the evidence presented by the parties. In many cases, they provide new opportunities for the stereotypes and assumptions of judges to filter cases out of litigation at early stages. Moreover, these doctrines often run counter to the insights of social science about how workplace dynamics actually operate. Three tools for evaluating evidence in particular – “stray remarks,” “honest belief,” and “same decision-maker” – all discount or ignore the way that cognitive processes operate.

1. Stray remarks
The doctrine most likely to exclude evidence that may show bias – implicit or explicit – on the part of the decision-maker is the “stray remarks” doctrine. The notion that stray remarks in the workplace might not themselves prove discrimination derives from Justice Sandra Day O’Connor’s concurring opinion in Price Waterhouse v. Hopkins. In that case, which addressed “mixed-motive” discrimination in Title VII jurisprudence, Justice O’Connor was concerned that “stray remarks,” as she defined them, should not be considered “direct evidence” of
discrimination for the purpose of applying the “mixed-motive” approach, which was a more forgiving standard for discrimination claims.

The doctrine has unfortunately morphed over the years from its original use to distinguish direct from circumstantial evidence in mixed-motive cases into a tool for discounting, and even excluding, evidence that a judge determines to be more prejudicial than probative.\textsuperscript{49} For example, in \textit{Straughn v. Delta Air Lines}, the First Circuit characterized its stray remarks analysis as follows:

\begin{quote}
\textbf{EXT} Although statements directly related to the challenged employment action may be highly probative in the pretext inquiry. .. mere generalized “stray remarks,” arguably probative of \textit{bias} against a protected class, normally are not \textit{probative of pretext} absent some discernible evidentiary basis for assessing their temporal and contextual relevance.\textsuperscript{50}
\end{quote}

Under this approach, comments that are “arguably probative of bias” may now not be “probative of pretext” unless they were (a) related to the employment, (b) made close in time to the employment decision, (c) uttered by decision makers or those in a position to influence the decision maker, and (d) unambiguous. Other courts have drawn similar conclusions.\textsuperscript{51}

Yet Justice O’Connor’s passing reference in her concurrence to “stray remarks” hardly justifies this approach. Indeed, the Supreme Court made it clear more than a decade ago that courts must consider \textit{all} of the evidence in evaluating a claim of discrimination.\textsuperscript{52} Further, weighing the evidence – including its temporal
proximity to the employment decision and the speaker of the remark – is the job of the jury, not a judge. A remark that may seem “stray” to a judge may strike the jury as evidence that the decision-maker harbored biases that influenced the employment decision. More broadly, it may reflect a culture in the organization, a culture that privileges negative remarks about minorities or women. Just because a remark appears “ambiguous” to the judge from his or her exalted perch does not mean that it did not have a clearer resonance in the context of the workplace give and take.

Indeed, it is ironic that at a time when social scientists are identifying implicit biases in the way evaluators deal with “Lakisha” or “Tyrone,” courts are discounting or, worse, excluding evidence of explicit bias.

2. Honest belief
In some employment discrimination cases, a defendant offers an explanation for the adverse employment decision that the plaintiff then demonstrates is utterly lacking any factual basis. Imagine, for example, a black employee who is fired for theft, but who can demonstrate that she did not in fact steal a thing. In a majority of the federal circuits, a plaintiff in an employment discrimination case will not survive summary judgment when the employer articulates reasons for the plaintiff’s termination and “the company honestly believe[s] in those reasons…even if the reasons are foolish or trivial or baseless.” Courts adhering to this version of the honest belief rule apply it aggressively at the summary judgment stage of employment discrimination cases, resulting in the dismissal of scores of cases without juror consideration of whether
biases implicit or not may have played a role in the decision-makers’ thought processes.

The doctrine is “plainly inconsistent with what empirical social psychologists have learned over the past twenty years about the manner in which stereotypes, functioning not as consciously held beliefs but as implicit expectancies, can cause a decision maker to discriminate against members of the stereotyped group.”^56 A court that was taking seriously the possibility that implicit bias infects workplace decision-making would allow the jury to consider whether the defendant believed the plaintiff stole because of assumptions that it made about the trustworthiness of African American employees. Indeed, a small number of federal courts have recognized that there may be circumstances in which an employer acts honestly but “without awareness of the extent to which [its] judgments are influenced by ingrained discriminatory attitudes.”^57

3. Same decision-maker
Another doctrine that is sometimes used to dismiss a plaintiff’s case at summary judgment is the “same decision-maker” or “same actor” defense. As first articulated by the Fourth Circuit in a 1991 decision, the doctrine developed because “[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.”^58 The assumption behind this doctrine is that whatever bias a person has will manifest itself the same way at every stage of the employment relationship. That
assumption is flawed; in fact, cognitive bias does not necessarily operate consistently, but instead may vary depending on circumstances.59

A majority of federal circuits have adopted some version of the same decision-maker defense.60 However, some courts have recognized that the psychological assumption behind the theory may be an unreasonable one in many circumstances. As the Seventh Circuit observed, “a manager might hire a person of a certain race expecting [him] not to rise to a position in the company where daily contact with the manager would be necessary…. Similarly, if an employee were the first African-American hired, an employer might be unaware of his own stereotypical views of African-Americans at the time of hiring.”61 Like the “honest belief” and “stray remarks” doctrines, the creation of a general rule that assumes a plaintiff’s case is less valid when the same decision-maker was involved in both the hiring and the firing plainly makes it harder for an employment discrimination plaintiff to pursue the claim.

All three doctrines rest on flawed assumptions about human behavior that make them particularly inappropriate as general rules for evaluating evidence. The very fact that these doctrines gained a foothold in employment discrimination reflects a reluctance on the part of the federal judiciary to take seriously the role that implicit bias plays in discrimination.

III. Conclusion
Perceptions of the pervasiveness of employment discrimination as a continuing workplace problem vary widely. One survey of U.S. workers concluded that “race is
the most significant determinant in how people perceive and experience
discrimination in the workplace, as well as what they believe employers should do to
address such incidents and attitudes." In describing this racial divide in how
Americans view the problem of discrimination, Professor Russell Robinson points to,
among other evidence, polls taken between 1996 and 2003 showing dramatic
"perceptual segregation." These studies consistently found that half or more than
half of African American respondents see significant continuing discrimination in the
workplace, in contrast to only a small percentage of whites. A 2003 Gallup poll
found that “two-thirds of non-blacks say they are satisfied with the way blacks are
treated,” but almost the same percentage (59%) of blacks feel that black people are
not treated well. In 2011, researchers conducted a national survey and found that a
significant percentage of white people believe not only that anti-black bias is no
longer a serious problem in the United States but also that anti-white bias has become
the more serious problem.

Perhaps not surprisingly, in light of these surveys, research has also shown
that a judge’s race is likely to have an impact on his or her perceptions of the
significance of racial harassment; similarly, a judge’s gender will affect her or his
understanding of the significance of allegations in gender discrimination claims. In
short, the identity of the judge resolving a dispute matters. Ideally, the federal courts
should include judges with a broad range of experiences and who understand how
different their experiences likely are from those of most of the plaintiffs or
defendants appearing before them. Even more essential is that judges recognize that their “common sense” is neither neutral nor objective.

Judges like to think they are “free of bias, even-handed, and open-minded.” Yet research on implicit bias and cognitive processes teaches that they cannot be entirely free of bias any more than any other person can be. The biases – implicit and otherwise – of judges reviewing discrimination claims may well play as much a role in the story of employment discrimination litigation as the biases that triggered the lawsuit.

Footnotes


9 Bertrand & Mullainathan, *supra* note 3.

10 *Id.*

11 *Id.*


18 490 U.S. 228 (1989).
19 Id. at 233.
20 Id. at 233–35.
21 Id. at 235.
23 Id. at 235–36.
25 Id. at 51–66
27 Id. at 2562.
29 Wal-Mart, 131 S.Ct. at 2563.


*Id.* at 1949.

*Id.* at 1951–52.


*Id.*


490 U.S. 228 (1989).

250 F.3d 23, 36 (1st Cir. 2001) (internal citations omitted) (emphasis in original).


Reeves, 530 U.S. 133 (2000).

Id. at 152–53.


Kariotis v. Navistar Int’l Transp. Corp., 131 F.3d 672, 676 (7th Cir. 1997) (internal citation omitted). See also Ruiz v. Posadas de San Juan Assocs., 124 F.3d 243, 248 (1st Cir. 1997); Hawkins v. PepsiCo, Inc., 203 F.3d 274, 279–80 (4th Cir. 2000); Deines v. Tex. Dep’t of Protective & Regulatory Servs., 164 F.3d 277, 280–81 (5th Cir. 1999); Eurlle-Wehle v. United Parcel Serv., Inc., 181 F.3d 898, 900 (8th Cir. 1999); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1063 (9th Cir. 2002); Piercey v. Maketa, 480 F.3d 1192, 1200–01 (10th Cir. 2007); Jones v. Gerwens, 874 F.2d 1534, 1540 (11th Cir. 1989); Woodruff v. Peters, 482 F.3d 521, 531 (D.C. Cir. 2007). The Sixth Circuit has departed from the majority approach, adopting a formulation of the honest belief rule that requires the employer to establish “its reasonable reliance on particularized facts that were before it at the time the decision was made” for the honest belief rule to defeat a plaintiff’s discrimination claims. Smith v. Chrysler Corp., 155 F.3d 799, 807 (6th Cir. 1998).


61 See, e.g., Johnson v. Zema Sys. Corp., 170 F.3d 734, 745 (7th Cir. 1999). See also Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 (10th Cir. 2006) (noting that the jury should be permitted to decide the significance of the fact that the same person hired and fired a plaintiff); Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1443 (11th Cir. 1998) (same).


64 The percentage of whites seeing discrimination against African Americans varied, depending on the question asked, between 4 and 43%. Id.


66 Michael Norton & Samuel Sommers, Whites See Racism as a Zero-Sum Game that They are Now Losing, 6 PERSPECTIVES SOC. SCI. 215 (2011).
