

Securing Title VII's Purpose: Ensuring That We Have All of the Puzzle Pieces to

Solve Employment Discrimination Claims

I. Introduction

In his song “Never Let Me Down,” Kanye West raps “Racism’s still alive, they just be concealing it.”¹ These lyrics articulate that although overt racism is not as prevalent as it was in decades past, particularly before the Civil Rights Movement,² it still exists.³ What is lacking from these lyrics is a definition of “concealing” and an explanation of why/ how people conceal racism. The most obvious interpretation of West’s lyrics is that people harbor racist views but do not want to be seen as racists, so they acknowledge their biases in thought and private conversation only. Exhibit A for this theory: Donald Sterling, the infamous former Los Angeles Clippers owner. In 2014, Sterling dominated national news when a recorded conversation with his girlfriend emerged in which he instructed her to avoid being seen with black people.⁴ This is a man who had previously received an NAACP Lifetime Achievement Award,⁵ meaning his racist attitudes must have been largely kept private. But this essay is not about Donald Sterling or other folks who know they are racist but hide it. This essay is about the other racism that West

¹ Kanye West, *Never Let Me Down*, The College Dropout, Roc-a-Fella Records (2004).

² “Over the course of almost sixty years, Title VII has effectively reduced and limited instances of overt and invidious employment discrimination through a flexible interpretation by the courts and a willingness to amend Title VII when new employment discrimination scenarios arise.” Christopher Cerullo, *Everyone’s a Little Bit Racist? Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 128 (2013).

³ Less conscious racism in society does not mean unconscious or covert racism has disappeared. “[S]urveys, when more closely examined, demonstrate a consistently high level of general racial prejudice held by whites against African Americans. Although the surveys show that the percentage of whites openly supporting discrimination against African Americans has dropped considerably, surveys on the implementation of civil rights, and more sophisticated surveys attempting to measure white stereotypes about African Americans, demonstrate extremely high levels of covert racism.” David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 903 (1993).

⁴ Ramona Shelburne and The Associate Press, *Donald Sterling Receives Lifetime Ban*, ESPN.COM, Apr. 30, 2014, http://espn.go.com/los-angeles/nba/story/_/id/10857580/donald-sterling-los-angeles-clippers-owner-receives-life-ban-nba.

⁵ Angel Jennings et al., *Donald Sterling's Ties to NAACP under Scrutiny after Race Recording*, L.A. TIMES, Apr. 28, 2014, available at <http://www.latimes.com/local/la-me-donald-sterling-naacp-20140429-story.html>.

may be referring to, racism or bias that is unconscious but that pervades the general population. Specifically, it is about how such unconscious biases influence employment decisions, and the ways in which current law must change to remedy the problem.

At the federal level, the statute that governs most employment discrimination claims is Title VII of the Civil Rights Act of 1964 (“Title VII”).⁶ Title VII bars employers from taking adverse employment actions⁷ (or “adverse actions”) against employees because of their race, color, sex, religion, or national origin.⁸ There are two theories by which a plaintiff can bring a Title VII claim: disparate treatment⁹ and disparate impact. In disparate treatment claims, a member of a protected class brings suit when he or she received less favorable treatment than others similarly situated because of membership in the protected class.¹⁰ As I will later discuss, disparate treatment may be rooted in conscious, intentional discrimination, but need not be. In disparate impact claims, members of a protected class bring suit because employment “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, operate to ‘freeze’ the status quo of prior discriminatory employment practices.”¹¹

⁶ Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e to 2000e-17 (1982)).

⁷ Adverse employment action means failure or refusal “to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.” 42 U.S.C. § 2000e-2.

⁸ Id. § 2000e-2.

⁹ Mixed motive claims fall within disparate treatment theory but involve a separate analysis. A plaintiff brings a mixed motive claim when “the evidence is sufficient to allow the factfinder to conclude, as a matter of fact, that an employer’s employment decision was motivated by both lawful and unlawful reasons.” Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 652 (2000). Under the mixed motive framework, the defendant has a limited affirmative defense to prove by a preponderance of the evidence that, given that both lawful and unlawful motives contributed to the adverse decision, he or she would have made the same decision even if the unlawful motive did not play a role. 42 U.S.C. § 2000e-2(m).

¹⁰ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

¹¹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

The purpose of Title VII is to end employment discrimination based on race, color, sex, religion, and national origin.¹² Many courts do not accept evidence of unconscious discrimination, even though such discrimination pervades the general population¹³ and leads to disparate treatment based on protected statuses. Thus, when courts do not accept evidence of unconscious bias as a basis for these claims, they thwart the purpose of Title VII. Moreover, the *McDonnell Douglas* prima facie case, which is the vehicle for establishing federal employment discrimination disparate treatment claims based on circumstantial evidence,¹⁴ is not readily amenable to unconscious bias evidence because it does not allow for all types of circumstantial evidence to prove the claim.¹⁵ The *McDonnell Douglas* prima facie case applies to Title VII, Americans with Disabilities Act (ADA),¹⁶ and Age Discrimination in Employment Act (ADEA)¹⁷ disparate treatment claims. The majority of federal employment discrimination claims

¹² See Damon Ritenhouse, *A Primer on Title VII: Part One*, ABA GPSOLO (Jan. 2013), http://www.americanbar.org/publications/gpsolo_ereport/2013/january_2013/primer_title_vi_i_part_one.html (“[T]he central focus of Title VII became to dismantle tangible barriers that operate to disadvantage minority employees.”).

¹³ “A growing body of social science recognizes the pervasiveness of unconscious racial and ethnic stereotyping and group bias.” *Chin v. Runnels*, 343 F.Supp.2d 891, 906 (N.D. Cal. 2004).

¹⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁵ The fourth element of the *McDonnell Douglas* prima facie case is that the employer continued seeking to hire someone with the plaintiff’s qualifications or similarly situated employees not of the protected class did not face adverse action. *Sharma v. Ohio State University*, 25 Fed.Appx. 243, 247 (6th Cir. 2001). But there are times when unconscious bias resulted in adverse employment actions, and there are no similarly situated people to use as a comparison. Moreover, even if there are similarly situated people to use as a comparison, the sample size might be so small that unconscious bias might have affected this particular action, though it did not noticeably differ from other actions.

¹⁶ The protected class in ADA claims is “person with a disability within the meaning of the ADA.” *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir. 1998). The ADA defines a person with a disability as “a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.” *A Guide to Disability Rights Laws*, ADA.GOV (July 2009), <http://www.ada.gov/cguide.htm>.

¹⁷ Like Title VII claims, plaintiffs in Age Discrimination in Employment Act (ADEA) disparate treatment cases also use the *McDonnell Douglas* prima facie case to bring disparate treatment claims; the difference is that the protected class is “those over forty years old” instead of the Title VII protected classes. *Smith v. City of Allentown*, 589 F.3d 684, 689 (3rd Cir. 2009).

are Title VII claims,¹⁸ and thus for the purpose of conciseness in this essay, “Title VII claims” will serve as a stand-in for “federal employment discrimination claims.”

Determining whether illicit employment discrimination occurred based on circumstantial evidence is like solving a puzzle. Since there is no direct evidence, the trier of fact must weigh all of the facts and circumstances to determine whether illicit employment discrimination occurred. The puzzle is solved when the trier of fact can make that determination. In order to best solve the puzzle, we want the ability to use all of the available puzzle pieces. This essay seeks to establish that the *McDonnell Douglas* prima facie case is insufficient in combatting employment discrimination, Title VII’s goal, because it is not readily amenable to unconscious bias evidence, which constitutes available puzzle pieces. Thus the courts should amend the *McDonnell Douglas* prima facie case to incorporate a totality of the circumstances test.¹⁹ In this essay, I will first explain what unconscious bias is, the science behind it, its prevalence, and why courts need to accept its evidence in Title VII claims. Second, I will explain why the *McDonnell*

¹⁸ The Equal Employment Opportunity Commission (EEOC), the federal agency charged with litigating employment discrimination claims, annually brings many more Title VII claims than ADA and ADEA claims combined. EEOC Litigation Statistics, FY 1997 through FY 2015, <https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

¹⁹ This essay will not focus on unconscious bias in disparate impact claims. As stated earlier, plaintiffs bring disparate impact claims when employment practices, procedures, or tests, neutral on their face, disparately impact a protected class. It may be true that such practices and rules can be rooted in unconscious biases. For example, let’s say a police chief sets a rule that anyone who joins the force must be able to run a six minute mile, and vastly more male applicants can do that than female applicants. When the police chief sets the rule, he doesn’t realize that he associates being male with being fast and being female with being slow. In this case, the rule would both produce a disparate impact and be rooted in unconscious bias. However, the plaintiff need only demonstrate that the rule produced a disparate impact, so the unconscious bias is immaterial to the claim. Sometimes, employment discrimination plaintiffs challenge subjective decision-making via disparate impact claims. *Pippen v. State*, 854 N.W.2d 1 (Iowa 2014) (Example of a time when parties agreed to certify a class based on a subjective decision-making disparate impact claim, and the disparate treatment claim was brought separately.) But this is rare because courts routinely fail to certify subjective decision-making classes “alleging exclusively disparate impact discrimination” because when subjective decision-making results in different treatment of protected classes, it involves disparate treatment. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 784 (2005). Regardless, when subjective decisions adversely affect one protected class versus another, it raises an inference that those people were treated differently because of their class status. Those are the types of wrongs that disparate treatment theory seeks to redress.

Douglas prima facie case is insufficient in redressing Title VII claims that stem from unconscious bias. Third, I will discuss how plaintiffs may use evidence of unconscious bias to prove disparate treatment claims.

II. Unconscious Bias

A. What is Unconscious Bias?

Unconscious bias refers to “hidden or unconscious mental processes that have substantial bearing on discrimination.”²⁰ Unconscious bias is often also referred to as implicit bias, hidden bias, subtle bias, or cognitive bias. In this essay, I will simply use the term “unconscious bias” because using one term eliminates confusion and because “unconscious” best encapsulates the notion that people truly aren’t aware the bias exists. To understand unconscious bias and its deep impact on our daily lives, it will be helpful to give some real-life examples.

Here’s an anecdotal instance of unconscious bias. I have a family member who is a cop; we’ll call him Uncle John. John and I have discussed both the Tamir Rice²¹, and Laquan McDonald²² shootings at length. Regardless of the facts the cases, he sides with the cops. His response to every argument: “You just don’t know what was going on in the cop’s head at the time. If you aren’t in the situation, and you don’t realize that you can die at that moment, you just don’t know.” Now in each of these situations, black youths were shot to death by white police officers. While Rice was carrying a toy gun and McDonald was carrying a knife, neither held a

²⁰ Keiko Krahnke & Michael Martin, *Implicit Bias and Appearance Discrimination in the Workplace*, EUROPEAN J. MGMT. 12, no. 3 (Sept. 22, 2012), <http://www.freepatentsonline.com/article/European-Journal-Management/312171932.html>.

²¹ Teddy Cahill et al., *Calls for Calm after Grand Jury Declines to Indict Officers in Death of Tamir Rice*, WASH. POST, Dec. 29, 2015, available at <https://www.washingtonpost.com/news/post-nation/wp/2015/12/28/tamir-rice-grand-jury-announcement-expected-monday/>.

²² Jason Meisner & Anne Sweeney, *A Moment-by-Moment Account of What the Laquan McDonald Video Shows*, CHICAGO TRIBUNE, Nov. 15, 2015, available at <http://www.chicagotribune.com/news/ct-chicago-cop-shooting-video-release-laquan-mcdonald-20151124-story.html>.

real gun and neither threatened any officer. In Rice's case, the officers heard that a boy was playing with a gun at a park, and they drove up to him and shot him.²³ In McDonald's case, the young man was walking away from several policemen while holding a knife, and from a distance, one cop shot him repeatedly.²⁴ In neither situation did the black youths pose a credible threat to the officers or any bystanders, but in both situations the officers killed them. My uncle's repeated response was "When you're in that situation, you just don't know." When pressed for what he would do in a situation with a white youth with a knife or a toy gun, he says he "can't imagine that situation."

Uncle John does not believe he is racist and is explicitly for equal opportunity. What my uncle doesn't know is that he unconsciously associates black men with danger and weapons and white or fairer skinned people with peace or positive traits. Many Americans do.²⁵ This reflexive association is unconscious bias. Unconscious bias is not necessarily a bad thing.²⁶ We all have unconscious biases.²⁷ If I am at the grocery store and instinctively choose Tropicana orange juice over Simply Orange because I like Tropicana's logo better, and I do not consciously know that

²³ The officer "opened fire within seconds of arriving at the park." Timothy Williams and Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES, Dec. 28, 2015, available at http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?_r=0.

²⁴ "The dashcam video shows McDonald walking down South Pulaski Road with a knife in his hand, but strolling away from officers when Van Dyke jumps out of his vehicle and pulls his gun. Van Dyke began firing six seconds after arriving on scene and took 15 seconds to fire 16 shots." Wayne Drash, *The Killing of Laquan McDonald: The Dashcam Video vs. Police Accounts*, CNN, Dec. 9, 2015, <http://www.cnn.com/2015/12/17/us/laquan-mcdonald-video-records-comparison/>.

²⁵ James Gentry et al., *Race and Weapons: An IAT Experiment*, HANOVER COLLEGE (2008), <http://psychlab1.hanover.edu/Classes/Cognition/Presentations/2008%20winter/DietzGentryHuntingtonSchubert.pdf>.

²⁶ Unconscious biases help us make snap decisions, some of which can be useful. "The ability to discriminate is a fundamental skill in human development. We learn early on that some objects are dangerous and some are safe. We also are taught to distinguish good from bad, preferable from not preferable, and beautiful from ugly. In this way, we learn to categorize items and label them. These perceptual skills are honed as we mature, and we extend these skills to decisions about people we encounter... We use categorizations such as stereotyping to make sense of the world around us, but automatic and unconscious reliance on stereotypes often results in bias, which can lead to discriminatory practices." Krahnke and Martin, *supra* note 20.

²⁷ There is "increasing recognition of the natural human tendency to categorize information and engage in generalizations, of which stereotyping is a part, as a means of processing the huge amount of information confronting individuals on a daily basis." *Chin v. Runnels*, 343 F.Supp.2d 891, 906 (N.D. Cal. 2004).

that is the reason for my decision, then an unconscious bias influenced my decision. Or let's say I saw someone I don't like drinking Simply Orange, and that thought is stored somewhere in the back of my head. If I am not consciously thinking of the person I dislike at the time of the purchase but it subconsciously influences me, an unconscious bias affected my decision.

But instead of a harmless example like orange juice selection, let's talk about employee selection. Let's say a man named Mike has a preconceived notion that black people are less skilled than white people. Mike may believe this without knowing he believes it. This may be because the news presents black children dropping out of school, or it may be because Mike formerly had a black co-worker who did not work hard. For whatever reason, Mike now associates black people with inability or other negative traits, but he isn't aware of it. He doesn't think about it and certainly never says it. But when deciding between two equally qualified job applicants, one black and one white, Mike chooses the white one because he is unconsciously associates the black one with a negative trait. The rest of this essay is about the science behind a situation like this and what Title VII law can do to better address it.

B. Is Unconscious Bias a Reliable Science?

Even if we are aware that unconscious bias exists, in order to admit unconscious bias evidence in a lawsuit, we must demonstrate that it is a reliable science that could be applied in particular cases. In order for a witness to testify that unconscious bias affected a particular discriminatory action, the witness must be an expert defined by Federal Rule of Evidence 702 and the science must meet the *Daubert* test, which comes from the Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁸ Federal Rule of Evidence 702 governs expert witnesses

²⁸ 509 U.S. 579 (1993).

and states that “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.”²⁹ This means that if a witness is to testify about scientific or technical knowledge, such as statistical evidence of unconscious bias and how it applies to the case at hand, the witness must be an expert qualified by the above listed.

Daubert determined when a court may admit scientific evidence. In *Daubert*, the Supreme Court held that a federal court will find that scientific evidence is reliable based on “whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community.”³⁰ This is a flexible test and each factor is considered, though none is controlling.³¹ Even when scientific evidence is reliable, the evidence must be relevant or “fit” the particular facts of the case, meaning the science in question must illuminate the particular issue in the case.³² Fit just means that the expert opinion must be “connected to the facts and law at issue.”³³ When scientific evidence passes the *Daubert* test and the evidence “fits” the facts of the case, the evidence is admissible. And if there is an expert qualified under Federal Rule of Evidence 702, the expert can testify about that evidence.

²⁹ Fed. R. Evid. 702.

³⁰ *Daubert*, 509 U.S. at 580.

³¹ *Daubert* overruled the *Frye* test and governs all federal cases. *Frye*, which still applies in many states, holds that admissible scientific evidence “must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye v. United States*, 54 App.D.C. 46, 47 (1923). Thus, for purposes of Title VII claims, only *Daubert* applies. But for discrimination claims based on state law, *Frye* may apply depending on the state.

³² *Daubert*, at 591.

³³ Christopher J. Hefferman et al., *Defending and Asserting Daubert Challenges in Construction Disputes*, 32 THE CONSTRUCTION LAWYER 6 (Spring 2012), available at http://files.dorsey.com/files/upload/Evidence_Experts_Knoll_Weisenberger.pdf.

Much of the science behind unconscious bias comes from the Implicit Association Test (IAT),³⁴ a computer exam administered by Project Implicit³⁵ that allows test takers to discover their unconscious biases. The IAT detects unconscious biases by testing how strongly users associate different demographics (such as gender, sexuality, race, and religion) with evaluative terms (such as good, bad, violent, and peaceful).³⁶ When test takers more quickly associate a particular demographic with a particular evaluative term, it demonstrates a bias for or against that demographic.³⁷ For instance, when test takers quickly associate white people with terms like peace and stumble or take longer to associate black people with peace but quickly associate black people with violence or guns, it demonstrates a bias that black people are violent or dangerous.³⁸ After each test, the test taker receives results detailing the strength of preference for a particular demographic.³⁹ The test may reveal that the test taker has a “slight”, “mild”, or “strong” preference for a particular demographic versus another, or no preference at all.⁴⁰

To be sure, the IAT has its share of detractors. There are those who argue that people can decrease their biases (as dictated by their test scores) by simply taking the test again.⁴¹ The argument is that if people can simply get different results soon after their first results, then their

³⁴ Reshma M. Saujani, “*The Implicit Association Test*”: *A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395 (2003).

³⁵ Project Implicit, <https://implicit.harvard.edu/implicit/aboutus.html>.

³⁶ Natalie Bucciarelli Pederson, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 106 (2011).

³⁷ “Implicit bias against African-Americans is defined as faster responses when the “black” and “unpleasant” categories are paired than when the “black” and “pleasant” categories are paired.” Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971 (2006).

³⁸ “The IAT is rooted in the very simple hypothesis that people will find it easier to associate pleasant words with white faces and names than with African American faces and names—and that the same pattern will be found for other traditionally disadvantaged groups.” *Id.* at 971.

³⁹ Project Implicit, <https://implicit.harvard.edu/implicit/aboutus.html>.

⁴⁰ *Id.*

⁴¹ John Tierney, *In Bias Test, Shades of Gray*, N.Y. TIMES, Nov. 17, 2008, available at <http://www.nytimes.com/2008/11/18/science/18tier.html>.

first results may not be too significant. This argument fails because once people have received their initial test scores, people become aware of their biases and are better able to control them.⁴²

Some detractors also argue that the IAT's categorizations of "slight", "moderate", and "strong" unconscious biases are misleading because someone with a strong unconscious bias on one test could produce no unconscious bias the next time they take that test.⁴³ This argument fails for two reasons. First, regardless of the categorization of the unconscious bias, even a slight bias indicates that some bias exists. So fluctuations in results don't disprove the unconscious bias the IAT measured the first time the participant took the test. Second, as stated earlier, when someone takes a test after he or she gets the unconscious bias results from the first test, the bias becomes known to the participant and the participant can take active steps to control it.

A further critique of unconscious bias science based on IAT results is that "There's no way to determine whether [the IAT is] measuring unconscious attitudes or simply associations picked up from the environment."⁴⁴ This argument fails to account for the fact that unconscious attitudes often *are* associations picked up from the environment.⁴⁵ If unconscious bias science is to combat unconscious biases learned from one's social environment, then critiquing unconscious bias science because it might demonstrate societal biases is a tenuous argument. In fact, Project Implicit even addresses this point in the "Frequently Asked Questions" segment of its website, stating that "Automatic White preference may be common among Americans because of the

⁴² Deana A. Pollard, *Unconscious Bias And Self-Critical Analysis: The Case For A Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH L. REV. 913, 924 (1999).

⁴³ Tierney, *supra* note 41.

⁴⁴ This critique comes from Russell Fazio, a social psychologist at Ohio State University. Beth Azar, *IAT: Fad Or Fabulous?*, 39 MONITOR ON PSYCHOL. 44 (July/ Aug. 2008), available at <http://www.apa.org/monitor/2008/07-08/psychometric.aspx>.

⁴⁵ Unconscious biases are often learned from or reinforced by social environments. Adam Hoffman, *Can Science Help People Unlearn Their Unconscious Biases?*, SMITHSONIAN (July 2, 2015), available at <http://www.smithsonianmag.com/science-nature/can-science-help-people-unlearn-their-unconscious-biases-180955789/?no-ist>.

deep learning of negative associations to the group Black in this society. High levels of negative references to Black Americans in American culture and mass media may contribute to this learning.”⁴⁶

Studies and data surrounding the IAT reveal that unconscious bias is pervasive as “[i]mplicit and explicit comparative preferences and stereotypes [are] widespread across gender, ethnicity, age, political orientation, and region.”⁴⁷ This widespread unconscious bias permeates many areas of society as “evidence of continued racial stereotyping in employment, housing, insurance, and many other areas makes that apparent.”⁴⁸ Moreover, the results of unconscious bias studies demonstrate that “socially dominant groups have implicit bias against subordinate groups (White over non-White, for example).”⁴⁹ This is significant as socially dominant groups are overwhelmingly in positions of power in work environments.⁵⁰ And in fact, unconscious bias has a vastly disproportionate effect on people with minority status.⁵¹

So is unconscious bias science reliable? Yes.⁵² Let’s look at it under the *Daubert* factors. First, unconscious bias can be tested, and in fact has been tested many times. Most notably, unconscious bias science has been tested via the IAT, which has been taken by millions of

⁴⁶ “Such negative references may themselves be more the residue of the long history of racial discrimination in the United States than the result of deliberate efforts to discriminate in media treatments.” Project Implicit, <https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq22>.

⁴⁷ Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument For Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. FOR SOC. JUST. 139, 146 (2010).

⁴⁸ *United States vs. Stephens*, 421 F.3d 503, 515 (7th Cir. 2005).

⁴⁹ Larson, *supra* note 47, at 146, 147.

⁵⁰ Labor Force Statistics from the Current Population Survey, Bureau of Labor Statistics (2015), available at <http://www.bls.gov/cps/cpsaat11.htm>.

⁵¹ Howard Ross, *Exploring Unconscious Bias*, CDO INSIGHTS Vol. 2, Issue 5, p. 14 (Aug. 2008), available at <http://www.cookross.com/docs/UnconsciousBias.pdf>.

⁵² “Results from the IAT confirm the existence of implicit bias. Researchers have found that a majority of Americans who took the IAT demonstrate negative implicit attitudes and stereotypes toward certain groups, including the elderly, overweight individuals, and dark-skinned people.” Justice Michael B. Hyman, *Implicit Bias In The Courts*, 102 ILL. B. J. 40, 41 (2014).

people in over twenty countries.⁵³ The IAT has certainly been subject to peer review and publication. A quick Westlaw or Google search of “unconscious bias” or “implicit bias” proves that, and many of those peer reviews and publications are cited in this article here.⁵⁴ As of December 8, 2014, over two million people have taken the IAT,⁵⁵ and the test has a known error rate of less than 5%.⁵⁶ Standards and controls exist for the maintenance of the test insofar as everyone takes the same test using the same pictures and is timed in the same manner. As for general acceptance, even courts that reject unconscious bias evidence for not fitting the facts of the case admit that “[t]here exists near unanimous agreement among social psychologists as to the validity of the IAT as a method for implicit measurement of attitudes and stereotypes.”⁵⁷

III. The Problem: Unconscious Bias, the Courts, and *McDonnell Douglas*

A. The Courts

Courts have been ambivalent about accepting unconscious bias evidence in Title VII disparate treatment claims. The Supreme Court has never ruled on the issue. Nor have most lower courts. To be sure, some courts recognize that unconscious bias can result in disparate treatment within the current framework.⁵⁸ The highest federal court to rule on the issue was the

⁵³ Ross, *supra* note 51, at 1.

⁵⁴ “Social scientists have examined extensively the theory of implicit bias in recent decades, especially as it relates to racial bias.” *United States v. Ray*, 803 F.3d 244, 260 (6th Cir. 2015).

⁵⁵ Chris Mooney, *Across America, Whites Are Biased And They Don’t Even Know It*, WASH. POST, Dec. 8, 2014, available at <https://www.washingtonpost.com/news/wonk/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/>.

⁵⁶ Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. Personality & Soc. Psychol. 1464, 1467 (1998).

⁵⁷ *Karlo v. Pittsburgh Glass Workers LLC*, 2015 WL 4232600 at *8 (W.D. Penn. 2015).

⁵⁸ See *Samaha v. Washington State Dept. of Trans.*, 2012 WL 11091843 (E.D. Wash 2012) (note that this case was brought under 42 U.S.C. § 1981 and 42 U.S.C. § 1983, not Title VII, but that each of those statutes provide vehicles for remedying employment discrimination); *Kimble v. Wisconsin Dept. of Workforce Development*, 690 F.Supp.2d 765, 768 (E.D. Wis. 2010) (holding that in Title VII disparate treatment cases, “[A] trier of fact need not decide whether a decision-maker acted purposively or based on stereotypical attitudes of which he or she was partially or entirely unaware.”)

First Circuit in *Thomas v. Eastman Kodak Co.*⁵⁹ In *Thomas*, the plaintiff, who was the only black employee at one of defendant's stores, was laid off.⁶⁰ The plaintiff brought a disparate treatment claim arguing that her layoff was due to a ranking process that relied on racially biased appraisals.⁶¹ The First Circuit rejected the defendant's argument that Title VII disparate treatment requires conscious animus. Instead, it held that "Title VII's prohibition against 'disparate treatment because of race' extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias."⁶² But given that few courts have ruled on the issue and that most courts that have ruled on the issue have been lower courts, the admissibility of unconscious bias evidence remains unclear in most jurisdictions.

Many courts bar unconscious bias evidence in disparate treatment claims. In *Jones v. Nat'l Council of Young Men's Christian Ass'ns of United States of Am.*,⁶³ the court barred unconscious bias evidence in a Title VII claim.⁶⁴ In this case, black employees at a YMCA brought suit for Title VII race discrimination and retaliation in salary and promotion decisions.⁶⁵ First, the court held that unconscious bias evidence did not fit the facts of the case because Dr. Greenwald's⁶⁶ testimony was based on a general principle of pervasive unconscious bias and was disconnected from the facts of the case.⁶⁷ The court further held that the plaintiffs could not bring in unconscious bias evidence to support their disparate treatment claims because of the narrative

⁵⁹ 183 F.3d 38 (1st Cir. 1999).

⁶⁰ *Id.* at 42.

⁶¹ *Id.*

⁶² *Id.*

⁶³ 34 F.Supp.3d 896 (N.D. Ill. 2014).

⁶⁴ This case also centered on the merits of the defendants' motion to bar the expert testimony of Dr. Greenwald, and so the particular facts of the case are not detailed. *Jones*, 34 F.Supp.3d at 896.

⁶⁵ *Id.* at 900.

⁶⁶ Dr. Greenwald, one of Project Implicit's scientists, developed the Implicit Association Test along with Brian Nosek and Mahzarin Banaji. <https://implicit.harvard.edu/implicit/demo/background/thescientists.html>.

⁶⁷ *Jones*, at 901.

that disparate treatment theory requires intent, and intentional acts cannot be unconscious. The notions that disparate treatment requires intent and that intentional acts cannot be unconscious are incorrect, as I will later explain.

For similar reasons, courts have barred unconscious bias evidence in other employment discrimination contexts. In *Karlo v. Pittsburgh Glass Workers LLC*,⁶⁸ a group of plaintiffs attempted to use unconscious bias evidence to prove both disparate treatment and disparate impact in an Age Discrimination in Employment Act (ADEA) suit rather than a Title VII suit.⁶⁹ Like Title VII claims, plaintiffs in ADEA disparate treatment cases use the *McDonnell Douglas* prima facie case to bring disparate treatment claims.⁷⁰ In *Karlo*, the plaintiffs sued over allegedly discriminatory terminations that in some instances kept younger employees in their jobs.⁷¹ The court barred Dr. Anthony Greenwald's⁷² expert testimony on unconscious bias science.⁷³ Instead, it held that such evidence was based on an unreliable science and the subject of testimony did not "fit" the facts of the case.⁷⁴ The court held that Dr. Greenwald's methodology was unreliable despite the "near unanimous agreement among social psychologists as to the validity of the IAT as a method for implicit measurement of attitudes and stereotypes."⁷⁵ After disregarding this "near unanimous agreement,"⁷⁶ the court said the methodology was unreliable because research

⁶⁸ 2014 WL 1317595 (W.D. Penn. 2014).

⁶⁹ *Karlo*, 2014 WL 1317595 at *10.

⁷⁰ *Smith v. City of Allentown*, 589 F.3d 684, 689 (3rd Cir. 2009).

⁷¹ *Karlo*, at *5-9.

⁷² Dr. Anthony Greenwald testifies in many Title VII cases that seek to admit unconscious bias evidence because of his central role in creating the Implicit Association Test and his expertise in the area of unconscious bias.

⁷³ This actually pertains to a different holding than the abovementioned *Karlo* case. The 2014 decision detailed the facts of the case and centered on the defendant's motion for decertification of class status. The 2015 decision centered on the defendant's motion to exclude expert testimony. *Karlo v. Pittsburgh Glass Workers LLC*, 2015 WL 4232600 (W.D. Penn. 2015).

⁷⁴ *Karlo*, 2015 WL 4232600, at *8.

⁷⁵ *Id.*

⁷⁶ Widespread acceptance is actually one of the *Daubert* admissibility factors and is the only criterion of the *Frye* test.

demonstrates nothing about the Pittsburgh Glass Works employees.⁷⁷ It further held that the abstract principle of pervasive unconscious bias was disconnected from the facts of the case because Dr. Greenwald did not visit the plant or “or speak with any current or former employee, interview the managers who took part in the [terminations], or subject any of those individuals to his self-invented IAT.”⁷⁸ Thus, the court focused on ensuring there was a way to find that the individual decision-makers involved in the adverse action were actually motivated by a relevant unconscious bias at the time they took such action.

B. Unconscious Bias and *McDonnell Douglas*

In *McDonnell Douglas Corp. v. Green*, the Supreme Court outlined the prima facie test for Title VII disparate treatment claims lacking direct evidence⁷⁹ of discrimination.⁸⁰ The test is summarized as follows: The plaintiff (1) belonged to a protected class, (2) was qualified for the job, (3) an adverse employment action was taken against the plaintiff, and (4) the employer continued seeking to hire someone with the plaintiff’s qualifications⁸¹ or similarly situated

⁷⁷ *Karlo*, at *8.

⁷⁸ *Id.*

⁷⁹ Direct evidence in Title VII suits “consists of statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision.” *Febres v. Challenger Carribean Corp.*, 214 F.3d 57, 60 (1st Cir. 2000). For instance, statements such as “We don’t hire Mexicans” or “Women can’t handle the job” would constitute direct evidence for purposes of a Title VII disparate treatment case.

⁸⁰ *McDonnell Douglas*, at 792-3. In *McDonnell Douglas*, the plaintiff was an African American civil rights activist, “engaged in disruptive and illegal activity against petitioner as part of his protest that his discharge as an employee of petitioner’s and the firm’s general hiring practices were racially motivated.” *Id.* at 792. The plaintiff brought suit after his re-employment application was rejected, and the employer continued seeking qualified individuals for that position. *Id.*

⁸¹ *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 527 (1993).

employees not of the protected class did not face adverse action.⁸² The fourth element is meant to serve as the circumstantial evidence of discrimination.⁸³

Ultimately, the plaintiff must show that the employer took the adverse action “because of” the protected status.⁸⁴ After a plaintiff successfully makes out the prima facie case, the burden shifts to the defendant to “articulate some legitimate, nondiscriminatory reason for the employee's rejection.”⁸⁵ The burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the defendant’s stated reason was pretextual, in other words, that defendant’s articulated reason was a lie.⁸⁶ This essay does not seek to amend the entire *McDonnell Douglas* burden-shifting framework. Rather, it only seeks to ensure that all evidence of discrimination be admissible to prove a Title VII disparate treatment claim. Such insurance requires modifying only the fourth element of the *McDonnell Douglas* prima facie case.

There are two reasons that the courts in *Jones* and *Karlo* barred unconscious bias evidence: reliability of methodology and fit. Fit is a stronger argument than reliability for opponents of unconscious bias evidence because of the sheer magnitude of evidence that unconscious biases exist and the general acceptance of unconscious bias science among scientists

⁸² *Sharma v. Ohio State University*, 25 Fed.Appx. 243, 247 (6th Cir. 2001). The Supreme Court in *McDonnell Douglas* introduced the “similarly situated” requirement as part of the plaintiff’s duty to show pretext, as described later in this essay. *McDonnell Douglas*, at 793. However, like the Sixth Circuit, “a number of courts have required the plaintiff to prove, as part of her prima facie case, that she was treated differently than similarly situated employees who were not members of the protected group.” See *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1398 (7th Cir. 1997) (“What is true is that if a plaintiff has only the McDonnell Douglas formula to stave off summary judgment—if he has no other evidence of discrimination—he must show that another, and similarly situated, employee . . . was treated more favorably than he.”) (emphasis added). See also Ernest F. Lidge, III, *The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 832 (2002).

⁸³ *Sharma*, 25 Fed.Appx. at 247.

⁸⁴ *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015).

⁸⁵ *McDonnell Douglas*, at 802.

⁸⁶ *Id.* at 793.

and psychologists in the field.⁸⁷ Fit, on the other hand, is more difficult to deal with because it does not fit so easily within the *McDonnell Douglas* framework. *Jones* and *Karlo* held that unconscious bias evidence did not fit the facts of their cases because even if the unconscious bias science is reliable, the plaintiffs did not show that the decision-makers⁸⁸ in their cases actually relied on the unconscious biases in question at the time of the adverse actions.⁸⁹ But if a plaintiff is able to demonstrate that the decision-maker had an unconscious bias at the time of the adverse action and that such bias was relevant to the Title VII claim, then a plaintiff should be able to cite that evidence in her Title VII disparate treatment case. The current *McDonnell Douglas* prima facie case is not readily amenable to this evidence.

The *McDonnell Douglas* prima facie case does not account for every act of discrimination that Title VII seeks to redress. There are times when an adverse action is taken because of discrimination, and the employer did not continue to seek job applicants.⁹⁰ For instance, this can occur in the context of “initial grade assignments, salary, work assignments, evaluations, discipline, and promotions.”⁹¹ Discrimination in each of these contexts can stem from unconscious bias, as in when two equally qualified employees of different races are up for a single job promotion, and one employee does not get the job because of an unconscious racial bias.

⁸⁷ Unconscious bias research is so extensive, and it is so widely accepted that “courts have no excuse for continuing to turn a blind eye to present day violations of equal protection.” Eva Patterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence’s Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1195 (2008).

⁸⁸ Decision-maker refers to the manager, supervisor, or employee with the authority to hire, fire, promote, benefit, discipline, or otherwise significantly affect the employee’s working conditions and who did affect those conditions in the particular case.

⁸⁹ *Jones*, 34 F.Supp.3d at 901.

⁹⁰ Some courts include continuing to seek job applicants after the qualified plaintiff was rejected as part of the fourth element of the *McDonnell Douglas* prima facie case. *St. Mary’s Honor Center v. Hicks*, 509 U.S. at 527.

⁹¹ *Segar v. Smith*, 738 F.2d 1249, 1260 (D.C. Cir. 1984).

Furthermore, there are times when adverse action is taken because of discrimination, but there are no similarly situated people to use as a yardstick. Consider a case where a female employee was discharged because she was late to work, and the employer unconsciously tolerated female tardiness less than male tardiness. Here, the employer had never stated a zero-tardiness toleration rule, but no other employees, male or female, had ever been tardy. Thus, there are no similarly situated employees that the female employee can point to. If a male employee had been late, however, the employer would not have fired him, so there is discrimination based on an unconscious bias. Even if there are similarly situated employees to point to, there may not be enough to offer a meaningful sample size. These are situations when unconscious bias played a role in employment discrimination. In order to redress all employment discrimination based on membership in a protected class, we must alter the framework so as to encompass all evidence of discrimination. In other words, we must be able to use all of the relevant puzzle pieces to solve the employment discrimination puzzle. We should therefore replace the fourth element in the *McDonnell Douglas* prima facie case with a “totality of the circumstances” test.

C. Why Should Unconscious Bias Be Actionable?

Before delving into the strengths and weaknesses of the totality of the circumstances approach, it is important to ask why evidence of unconscious bias should be admissible at all. After all, if the bias is unconscious, then maybe people should not be penalized for actions not in their control. To this, there are three responses. First, as stated earlier, the purpose of Title VII is to combat employment discrimination as a whole. Employment discrimination can be conscious or unconscious, intentional or unintentional. Thus, if, through Title VII, Congress truly meant to

provide a vehicle for redressing employment discrimination, then that must encompass all employment discrimination, including unconscious discrimination.

Second, unconscious bias is not a static, inalienable trait, and people can take active steps to remedy their unconscious biases.⁹² Research demonstrates that people who recognize that they have unconscious biases and who are motivated to control their biases are able to do so.⁹³ Obviously, individuals first must be aware that they indeed have unconscious biases before they can control them. Yet, as unconscious biases pervade society, employers and workplace decision-makers should be acutely aware of the problem if they are to combat employment discrimination.⁹⁴ Furthermore, when individuals interact with a non-stereotypical members of a social group subject to unconscious biases, their biases tend to change as well.⁹⁵ For instance, if a white person unconsciously associates blacks with violence, and the white person becomes acquaintances with black people who don't meet the stereotype, the bias will start to dissipate. With more interaction comes less unconscious bias.⁹⁶

⁹² “[E]xposure to admired black individuals temporarily reduces prowhite bias.” Dr. Michelle van Ryn, M.D., Ph.D. & Dr. Somnath Saha, M.D., Ph.D., *Exploring Unconscious Bias in Disparities Research and Medical Education*, 306 J. AM. MED. ASSOCIATION 995, 996 (2011).

⁹³ Krahnke and Martin, *supra* note 20.

⁹⁴ And if these employers are aware of their unconscious biases and want to mitigate them, research demonstrates they have the ability to do so. “A person who truly wants to be fair and just in relations with others will be motivated to behave in more egalitarian ways upon discovering the discrepancy between her conscious beliefs and her unconscious bias... Indeed, conscious efforts to suppress stereotypically biased reactions may per se inhibit automatic activation of stereotypes over time. The greatest potential for creating a just society may lie in our individual willingness to recognize and work toward eradicating our own unconscious biases.” Pollard, *supra* note 42, at 924.

⁹⁵ Cerullo, *supra* note 2, at 82.

⁹⁶ “Most intergroup interactions that provide ‘opportunities for personal acquaintance and supportive egalitarian norms... [are effective at]... reducing intergroup bias and conflict’... Intergroup contact works by ‘reducing the salience of intergroup boundaries, that is, through decategorization.’ These contacts ‘can produce interactions in which people are seen as unique individuals . . . [especially when enhanced by]... the exchange of intimate information.’” Ronald Wheeler, *We All Do It: Unconscious Behavior, Bias, and Diversity*, 107 LAW LIBR. J. 325, 330 (2015).

Third, because Title VII charges employers with the duty to end employment discrimination, those who have power in making employment decisions have a duty to address their unconscious biases. The law recognizes many instances where people are liable for unintentional actions, most notably negligence. The reason that one is held liable for negligent conduct is because that person had a duty in those particular circumstances, the person breached that duty, and as a result, someone else suffered damages.⁹⁷ Title VII imposes on employers a duty to refrain from employment discrimination because of membership in a protected class. In fact, in his essay Negligent Discrimination, Professor D.B. Oppenheimer argues that discrimination based on unconscious bias amounts to negligence for which employers should be liable under Title VII.⁹⁸ This theory addresses a large hole in employment discrimination law because “[i]f whites are frequently unaware of their own racism, a theory of employment discrimination that focuses on an intent to discriminate provides no remedy for most discrimination. Yet the victims of unconscious discrimination have suffered the same economic damages, and often the same emotional damages, as the victims of knowing bigotry.”⁹⁹ Thus, unconscious bias evidence should be admissible in employment discrimination claims.

IV. Unconscious Bias and Disparate Treatment

A. Disparate Treatment Requires Causation, Not Intent

Title VII disparate treatment claims only require causal or ‘because of’ discrimination¹⁰⁰ and not intentional discrimination, though some courts erroneously hold otherwise.¹⁰¹ ‘Because

⁹⁷ *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928).

⁹⁸ Oppenheimer, *supra* note 3.

⁹⁹ *Id.* at 916.

¹⁰⁰ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1168 (1995).

¹⁰¹ *Serrano v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2012).

of discrimination, which is in the plain language of the statute,¹⁰² means that protected status membership caused the adverse action regardless of intent. In other words, “the critical inquiry is whether [the employer’s] decision was affected by the employee’s membership in a protected class. The trier of fact simply asks whether, based on the evidence presented, it is more probable than not that the employer committed a discriminatory act.”¹⁰³ This is significant because if disparate treatment merely requires causation instead of intent, then *McDonnell Douglas* is insufficient insofar as it does not encompass all aspects of causation, including unconscious bias. And if the trier of fact makes the determination “based on the evidence presented”, then we want all evidence, including unconscious bias evidence, to factor into that determination.

For instance, let’s say a large pool of people apply for a job as a TV anchor. The person making the hiring decisions has to make this decision quickly. When sorting through the applications, this person segregates the more Anglo-sounding names from the more non-Anglo-sounding names, unconsciously assuming that people with more Anglo-sounding names are more proficient English speakers and thus interviewing them will go more quickly. As a result, people from Eastern European, Asian, African, Latino, and other ethnic backgrounds are not hired. The decision-maker did not intend to discriminate against anyone on the basis of national origin. Rather, the decision-maker only sought to expedite the hiring process. However, perceived national origin was the cause of the decision-maker’s discrimination. If intent is a required element in the *McDonnell Douglas* prima facie case, then unconscious discrimination of this type cannot be redressed.

¹⁰² 42 U.S.C. § 2000e-2.

¹⁰³ *Kimble*, 690 F.Supp.2d at 769.

Even if disparate treatment claims did require intent, intent could be either conscious or unconscious. Conscious intent means that someone deliberately took an action and is conscious that he or she took that action.¹⁰⁴ For instance, if an employer at Walmart consciously fails to promote an Indian woman deserving of the promotion because of her national origin, the employer consciously intends that action. However, intentional acts can also involve unconscious discrimination. If the same Walmart employer intentionally promotes someone besides the Indian employee because for some reason unknown to him (let's say the employer just had bad Indian food for lunch), the employer intentionally made a decision based on unconscious bias. Or in the orange juice selection example mentioned earlier in this essay, the person intentionally selects one type of orange juice versus another but isn't conscious of the reason for their decision.

B. Modifying the *McDonnell Douglas* Prima Facie Case

I propose that in order to best incorporate unconscious bias evidence in disparate treatment claims and redress all employment discrimination based on protected statuses, the courts modify the fourth element of the *McDonnell Douglas* prima facie case. That fourth element is currently “the employer continued seeking to hire someone with the plaintiff’s qualifications¹⁰⁵ or similarly situated employees not of the protected class did not face adverse employment action.”¹⁰⁶ Instead, the fourth element should be “the totality of the circumstances give rise to an inference of discrimination based on protected status.” Such a totality of the circumstances test would ensure that unconscious bias evidence is admissible in Title VII

¹⁰⁴ Patrick Haggard and Benjamin Libet, *Conscious Intention and Brain Activity*, 8 JOURNAL OF CONSCIOUSNESS STUDIES 47 (2001).

¹⁰⁵ *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 527 (1993).

¹⁰⁶ *Sharma v. Ohio State University*, 25 Fed.Appx. 243, 247 (6th Cir. 2001).

disparate treatment claims. For such evidence to fit the facts of the case, courts would require not only that unconscious bias evidence exist as an abstract principle, as *Jones*¹⁰⁷ and *Karlo*¹⁰⁸ discussed, but rather that the decision-maker actually had an unconscious bias that affected the adverse action. There are several ways a plaintiff can put forward such evidence.

Finding that a specific decision-maker had an unconscious bias affecting the adverse action would require a bit of discovery. Under Federal Rule of Civil Procedure 26(b):

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.¹⁰⁹

This means that as long as nonprivileged information is relevant and not too burdensome on the other party, the information is subject to discovery.

There are three discoverable items which are relevant and helpful in investigating whether unconscious bias discrimination occurred: 1) Whether the employer has ever offered unconscious bias training to its decision-makers, and if so, the dates and topics covered, 2) Whether the decision-maker has taken an IAT on the pertinent issue, and if so, when, what the score was, and whether the score changed over time, and 3) Whether the employer reminds its decision-makers to be aware of unconscious bias when they make their employment decisions.

¹⁰⁷ *Jones*, 34 F.Supp.3d at 901.

¹⁰⁸ *Karlo*, 2014 WL 1317595 at *8.

¹⁰⁹ Fed. R. Civ. P. 26(b).

None of these factors on their own, or even in conjunction, may be dispositive as to whether unconscious bias actually played a role in the case at hand. These factors are just pieces to the puzzle of whether illicit employment discrimination occurred, and the answer to the puzzle is based on a totality of the circumstances. Each piece of information would be relevant to an unconscious bias claim in that it would make it more or less likely that unconscious bias affected the adverse action.¹¹⁰ In other words, these pieces of evidence, taken together with other forms of circumstantial evidence, may sway the trier-of-fact in one direction or another. And because these factors pertain to individual decision-makers and employers, such evidence would fit the facts of the claim.¹¹¹

C. How the Three Factors Help Solve the Puzzle

First, many employers already offer unconscious bias training to their employees.¹¹² Some trainings that employers have found effective associate the dominant social group with negative traits and other social groups with positive traits. These trainings include educating participants about “their implicit prejudices and reinforc[ing] the association that black = good and white = bad, for example by making people imagine a black good Samaritan rescuing them from a violent white assailant, or playing in a dodge ball game where their black teammates help them while white opponents play dirty.”¹¹³ As noted earlier, when people become aware of their

¹¹⁰ Fed. R. Evid. 401.

¹¹¹ *Daubert*, 509 U.S. at 591.

¹¹² Google is just one of many employers having its employees undergo unconscious bias training sessions in order to establish a more diverse and accepting workforce. Richard Feloni, *Here's The Presentation Google Gives Employees On How to Spot Unconscious Bias At Work*, BUSINESS INSIDER, Feb. 11, 2015, available at <http://www.businessinsider.com/google-unconscious-bias-training-presentation-2015-12>. Other large companies instituting unconscious bias training sessions to root out workplace bias include BAE Systems, Exel, Genentech, T. Rowe Price, and Roche Diagnostics. Elizabeth G. Olson, *How Corporate America is Tackling Unconscious Bias*, FORTUNE, Jan. 15, 2015, available at <http://fortune.com/2015/01/15/how-corporate-america-is-tackling-unconscious-bias/>.

¹¹³ Sebastian Bailey, *Can You Overcome Inbuilt Bias?*, FORBES, Aug. 14, 2014, available at <http://www.forbes.com/sites/sebastianbailey/2014/08/14/can-you-overcome-inbuilt-bias/#740be0a4637e>.

own unconscious biases and are motivated to control them, studies show that they can.¹¹⁴ And studies confirm that unconscious bias trainings have been successful at rooting out unconscious bias.¹¹⁵ Thus, because unconscious bias is so pervasive in society, when employers do not have unconscious bias trainings, it raises the likelihood that decision-makers may have unconscious biases.

Of course, when the training sessions occurred and what the sessions covered would also be critically important to the determination of whether unconscious bias affected the adverse action. If the training occurred before the individual decision-maker joined the company or if the decision-maker did not attend the training session, it might make it more likely that unconscious bias played a role in the case. If the decision-maker only attended one training session several years ago and since then has worked to overcome unconscious biases, that may play a role in the employment discrimination determination. And if the training session was on gender discrimination or disability discrimination, and the particular lawsuit was about race discrimination, the fact that the employer had a training session would not be probative.

Second, we may surmise a particular decision-maker's proclivity towards unconscious bias if that decision-maker has actually taken a relevant IAT, and if so, how the decision-maker scored and whether the score changed over time. Since employers already institute unconscious bias training sessions, it would not be too difficult or tedious to require decision-makers to take the tests that unconscious bias science is based on. There are IATs on race, color, gender,

¹¹⁴ Pollard, *supra* note 42, at 924.

¹¹⁵ Unconscious bias trainings are particularly successful when trainees are forced to make positive associations with the social minority groups and negative associations with the socially dominant groups. Bailey, *supra* note 113.

national origin, religion, age, and disability,¹¹⁶ among other things.¹¹⁷ Each of these classes are within the purview of Title VII, the ADA, and ADEA. IATs take less than 10 minutes to complete and thus are not over burdensome on the employer or the decision-maker.¹¹⁸ Moreover, since federal and state laws already require employers not to discriminate on the basis of protected classes, it would not be too intrusive to have decision-makers take short tests to discover whether they have the tendency to discriminate on the basis of these protected classes. Results need not be public and may only be published to others subject to discovery rules. If a decision-maker's IAT demonstrated he or she did not have the relevant bias, the employer could even use such evidence to assist the defense that discrimination did not occur. And if the decision-maker has taken multiple tests, and the most recent IATs demonstrated the decision-maker became less biased over time, the employer could use that as well. Thus, employers have a stake in the totality of the circumstances approach as well. Again, such evidence is not dispositive but rather adds a piece to the puzzle.

Of course, test scores that demonstrate strong unconscious biases on the relevant trait do not necessarily mean the test taker had an unconscious bias that resulted in the particular adverse action. The sheer act of taking the test and learning one has an unconscious bias may actually be useful in determining that unconscious bias did not play a role in the adverse action.¹¹⁹ This is because “knowing that you have a bias for or against a group may cause you to compensate and more carefully consider your possible responses or actions. Acknowledging biases often opens

¹¹⁶ Project Implicit, available at <https://implicit.harvard.edu/implicit/selectatest.html>.

¹¹⁷ There are also IATs that test weight and political bias. Since these unconscious bias subjects are not protected by statute, employers need not have their decision-makers take these tests. Project Implicit, available at <https://implicit.harvard.edu/implicit/selectatest.html>.

¹¹⁸ Project Implicit, available at <https://implicit.harvard.edu/implicit/Study?jsessionid=5F2A1A5377D919452A5D9AA605FC58CE.dev2?tid=0>.

¹¹⁹ Jean Moole, *Understanding Unconscious Bias and Unintentional Racism*, 90 PHI DELTA KAPPAN 321, 322 (Jan. 2009), <http://people.uncw.edu/browna/documents/UnderstandingUnconsciousBiasUnintentionalRacism.pdf>.

doors for learning and allows people to consciously work for harmony.”¹²⁰ Thus, even test results that uncover unconscious biases toward the relevant class may be probative in determining that employment discrimination did not occur.

Third, whether the employer reminded decision-makers that unconscious biases exist before the time of the employment action is a helpful piece to the puzzle. Even people who have taken the IAT and are aware of their unconscious biases may not be thinking about their unconscious bias at the time of an employment decision. And even people whose IATs demonstrated no bias at all may develop unconscious biases at a later date.

Because awareness of your own unconscious biases may “cause you to compensate and more carefully consider your possible responses or actions,”¹²¹ decision-makers who see or hear reminders of their unconscious biases before making decisions are less likely to allow unconscious bias affect an employment decision. This is because “people are able to exert some control [of their biases] through simple compliance if told not to carry out a prejudiced act such as declining a job application.”¹²² Reminders can be visual or audible, such as posters in the decision-maker’s office, phrases or logos on the front page of job applications, or oral advisements of the need to be conscious of biases before or at the time of the employment action. If decision-makers are given such reminders, it might make it less likely that unconscious bias played a role in the claim. If decision-makers are not given such reminders, it might make it more likely that unconscious bias played a role in the claim.

¹²⁰ *Id.* at 322.

¹²¹ *Id.*

¹²² *Unconscious Bias*, Shire Professional Chartered Psychologists (2010), <http://www.cipd.co.uk/NR/rdonlyres/666D7059-8516-4F1A-863F-7FE9ABD76ECC/0/Reducingunconsciousbiasorganisationalresponses.pdf>

V. Conclusion

Unconscious biases exist, and we all have them. Project Implicit's Implicit Association Test provides reliable scientific evidence that unconscious bias is rampant among the general population. The study demonstrates that such prevalent biases pertain to race, color, sex, religion, national origin, disability, and age, all of which are protected statuses under federal employment discrimination law. Unconscious biases are not necessarily bad, but they are harmful when they result in unfair discrimination towards other people.¹²³ A workplace decision-maker's unconscious bias may cause him or her to promote a light-skinned employee over a dark-skinned employee or discipline female employees more often or more severely than male employees for the same transgressions. Yet, we don't always have a meaningful sample of similarly situated people to use as a yardstick, and so we cannot rely on treatment of similarly situated employees to determine whether unconscious bias played a role in employment discrimination. For that, we will need other pieces of circumstantial evidence.

The purpose of Title VII and other federal employment discrimination statutes is to end employment discrimination based on the statuses they protect. Finding whether employment discrimination occurred based on circumstantial evidence is like solving a puzzle. There is no direct evidence that is dispositive of the claim, so the trier of fact must weigh all of the facts and circumstances to make a determination. Each fact is a puzzle piece. If proving an employment discrimination claim based on circumstantial evidence is like solving a puzzle, and if the goal of

¹²³ "Unconscious processes can lead to biased perceptions and decision-making even in the absence of conscious animus or prejudice against any particular group." *Chin v. Runnels*, 343 F.Supp.2d 891, 906 (N.D. Cal. 2004).

Title VII and other federal statutes is to end employment discrimination, then we want all of the puzzle pieces we can get to solve the puzzle.

The *McDonnell Douglas* prima facie case seeks to establish disparate treatment claims through circumstantial evidence, but it is not readily amenable to unconscious bias evidence, and thus it is not readily amenable to all of the relevant puzzle pieces. The fourth element of the *McDonnell Douglas* prima facie case is currently “the employer continued seeking to hire someone with the plaintiff’s qualifications or similarly situated employees not of the protected class did not face adverse action.” Since not all employment discrimination claims are refusal to hire, and since there are not always similarly situated employees to use as a yardstick, *McDonnell Douglas* is insufficient in remediating all employment discrimination claims. In order to cover all employment discrimination claims, the fourth element of the *McDonnell Douglas* prima facie case should be “the totality of the circumstances give rise to an inference of discrimination based on protected status.” Such a totality of the circumstances test makes up for Title VII’s blind spots and allows for the admission of unconscious bias evidence, which accounts for significant missing puzzle pieces.

Unconscious bias evidence is scientific evidence, and thus it requires an expert to testify on it. The Federal Rules of Evidence require that expert testimony “fit” the facts of the case, or in other words be relevant to the particular claim. To ensure that we admit not just general statistics about the existence of unconscious bias but rather puzzle pieces demonstrating that unconscious bias may actually have played a role in the particular adverse employment action, I propose three circumstances that would be admissible in the new totality of the circumstances approach and would help the trier of fact determine whether unconscious bias played a role in the adverse action. The three factors are 1) Whether the employer has ever offered unconscious bias training

to its decision-makers, and if so, the dates and topics covered, 2) Whether the decision-maker has taken an IAT on the pertinent issue, and if so, when, what the score was, and whether the score changed over time, and 3) Whether the employer reminds its decision-makers to be aware of unconscious bias when they make their employment decisions. The existence of any of these factors by themselves, or even in conjunction, may not prove dispositive as to whether a decision-maker took an adverse action because of an unconscious bias. But each assists the trier of fact in gauging the situation and ensures that the parties can work with all of the pieces of the puzzle.