

IMPLICIT BIAS, DIVERSITY AND INCLUSION

Discrimination and harassment charges and civil rights cases are rising as these issues become the focus of national discourse. Building a culture of respect can prevent many of these incidents. Learn how to recognize biases and use diversity to foster a healthy experience.

SUBCONSCIOUS THOUGHTS AND THEIR IMPACT ON THE WORKPLACE

By Patice Holland and Leah Stiegler

The CEO walked into the packed conference room, pivoted to face 12 nervous department directors. Twenty-four eyes were glued to the pristine, tailored-fit suit in front of them. Putting a coffee mug on the table, “Good morning. Let’s begin,” she said.

Okay, be honest—were you taken a bit off guard when you found out the CEO was a woman? Don’t feel bad. If you are like most American workers, you were picturing the CEO as a man. It was not intentional, and, in fact, it was not a conscious thought. Instead, it is what we refer to as an “implicit bias” (also known as an “unconscious bias”).

An implicit bias is something that everybody has. It is an unconscious and unintentional thought that underlies much of our decision-making. It applies generally to how we perceive other people and things based on physical appearances. And, because it affects our perceptions, it consequently affects our conduct. Take a simple example: You are walking down the sidewalk and you see someone walking toward you with a large pit bull. What is your immediate thought? It likely isn’t, “Oh look, a cute puppy!”

In reality, you are probably thinking you should cross to the opposite side of the street because that dog looks dangerous. In this situation, you perceived the dog’s physical appearance, associated it with danger—perhaps from some societal stereotype or childhood experience—and chose to cross the street.

So, what is the big problem? Sounds like this whole implicit bias thing helps us make safer choices!

Unfortunately, implicit biases don’t always help us make safer or positive choices. In fact, many implicit biases are disparate impacts that negatively affect or treat certain persons differently based on physical characteristics. Replace the pit bull with a dark-skinned person. If you still cross the street, you may have an implicit bias in that you are associating dark-skinned people with danger.

While your conduct in crossing the street may not have lifelong impacts on the dark-skinned sidewalk pedestrian, it certainly may in the business world.

These biases become quite harmful when they creep up on us in employment contexts.

Consider these occurrences:

- Let’s say you are a white HR director interviewing applicants for an opening in your company: If you decide to hire a light-

skinned applicant over an equally qualified dark-skinned applicant, your creeping bias may have just led you to discriminate.

- Let’s go back to the CEO example: People commonly associate CEOs with descriptors such as “leader, strong, in charge, and powerful.” If people also unconsciously perceive CEOs as men, they are automatically associating those descriptors with men. If these people are hiring a CEO or simply choosing a department director to serve as a project manager, they may be giving the male applicants/employees an unconscious “leg up” against the females.
- Let’s also note this thought pattern goes beyond hiring and promotions and affects everyday interactions between employees: Consider an employee who has an implicit bias where he associates Muslims with terrorism. Should this employee act on his bias, the company now may have a harassment case on its hands.

The unintended consequence is that implicit biases may cause us to discriminate, even unintentionally, which ultimately hinders the diversity and civility of our workforce.

So, what can we do about it?

First, recognize it. Nothing is truly unconscious if you can think about it. Take time to think about the reasons you engage in certain conduct. Ask yourself, “Did I act by gut-reaction? And, if yes, why did I do that?” The more you think about harmful perceptions and associations (even after the fact), the better you can fight them. And, we must fight them because every time we ignore a biased thought, the bias becomes more ingrained in our conscience and continues to exist and persist in our daily conduct.

Second, employers should start to add implicit bias and civility segments to their annual harassment trainings. It is not only essential for human resources professionals and hiring managers, but for all employees.

Training on recognizing these biases is the first step to improve civility amongst employees and create a comfortable working environment.

If harmful perceptions, barriers, and associations in your business are eliminated, you most certainly will see increased productivity from your employees and an overall happier workplace.

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Sample Diversity and Inclusion Statements

THE UNIVERSITY OF VIRGINIA'S COMMITMENT TO DIVERSITY

Diversity stands with ethics, integrity, and academic excellence, as a cornerstone of University culture. The University promotes an inclusive and welcoming environment that embraces the full spectrum of human attributes, perspectives, and disciplines. When people of different backgrounds come together, they exchange ideas, question assumptions (including their own), and broaden the horizons for us all. A University of Virginia community rich in diversity affords every member equal respect and provides a forum for understanding our differences as well as our commonalities.

WOODS ROGERS DIVERSITY STATEMENT

We know many things make each person unique and we strive to provide a welcoming and great environment for people to grow and excel in their roles at the firm. Woods Rogers is fortunate to have a diverse workforce in compliance with federal, state, and local laws. The law, however, does not define our efforts.

As a leading law firm in the Commonwealth of Virginia, Woods Rogers knows having a wide and diverse talent pool enables our firm to offer clients the best combination of legal talent and differing perspectives. Accepting both the value and challenge of attracting and retaining diverse employees, the firm consistently seeks ways to attract top talent to serve clients from our offices in Roanoke, Lynchburg, Charlottesville, and Richmond.

Our commitment to diversity is reflected in our Board of Directors, leadership positions, and throughout our administrative staff. We have lawyers who are sought as speakers and trainers on issues of Diversity and Implicit Bias and other topics that help companies build better workplaces. Two attorneys presented an Implicit Bias session at the 2018 Virginia Women's Conference, which is sponsored by Virginia Senator Mark Warner.

Additionally, the Roanoke, Virginia Chapter of the Southern Christian Leadership Conference recognized two of our attorneys as "Drum Majors for Justice" and awarded another the Dr. Perneller Chubb-Wilson Justice Award. These awards are given annually in honor of the legacy and spirit of Dr. Martin Luther King, Jr.

To Woods Rogers, "diversity and inclusion" are more than simply words on paper. The firm recognizes a diverse and inclusive workplace creates an environment where everyone is working towards a common goal. The benefit is how everyone sees the path forward differently. This approach allows us to collaborate, build the best team to serve a client, and foster good employee relationships.

EFFECTS OF EXPLICIT BIAS: INCIVILITY, DISCRIMINATION, HARASSMENT AND LITIGATION

EFFECTS OF EXPLICIT BIAS: INCIVILITY

Perceived Incivility varies by:

- Culture, Race or National Origin
- Generation
- Gender, Age
- Organization
- Even by individuals

Includes:

- Being consistently rude or impolite—can be mild, but it's still discourteous
- Slurs and offensive jokes
- Sudden outburst, anger or sarcasm
- Treating employees unfairly
- Bullying

A. EEOC Task Force on Respectful Workplaces

Key Points:

- Conduct or behaviors perhaps not “legally actionable” yet left unchecked, could set stage for unlawful harassment.
- Leadership and accountability are tied together.
- Action must be reported or corrective measures can't happen.

B. Why Address Incivility?

- Employer is liable for the injuries caused by an employee who is working within the scope of his employment relationship.
- Employees may fail to report it because they're afraid of retaliation or being called a complainer.
- Reflects poorly on the company and may make customers take their business elsewhere.
- Researchers have found:
 - Strong links between incivility and sexual harassment.
 - Escalation of uncivil behavior into harassing behavior.

EFFECTS OF EXPLICIT BIAS: HARASSMENT (IT'S NOT JUST SEXUAL)

Harassment is both real and perceived.

While it may not be real, a person only needs to perceive harassment to file a lawsuit.

A. How does harassment affect the workplace environment?

Individually

- Self-blame, loss of confidence
- Sleep loss
- Appetite loss
- Anxiety or panic attacks
- Humiliation
- Misplaced anger
- Inability to concentrate

Organizationally

- Reduced productivity
- Increased absenteeism and disengagement
- Turnover
- Negative reputation
- Lawsuits and/or agency involvement

B. Preventing Harassment

Effective prevention programs have:

- Explicit policy
- Training
- Complaint procedure
- Investigation procedure
- Prompt and effective action
- Bullying Policy Guidelines
- No tolerance for actions that match bullying definitions
- Strong and clear statements:
 - Commitment to providing work environment that promotes civility and a team atmosphere
 - Any violation of policy will be subject to disciplinary action, up to and including termination

C. Take Complaints Seriously

- Do not assume complaint is “trivial”
- Do not assume “time heals all wounds”
- Do not delay in responding or reporting
- Don't Wait for a Complaint
- Intervene proactively
- Anticipate problems and head them off

- Do not put your head in the sand
- Problems don't go away just because you ignore them
- Report Concerns
- To any supervisor, manager, or HR
- All concerns should eventually go to HR

D. What Should Employers Do Now?

EEOC Guidance

- Assess your workplace culture for possible incivility (issue spotting).
- Create (if you don't already have one) an effective anti-harassment policy.
 - Ensure the policy is Zero Tolerance.
- Develop and schedule regular training.
- Implement complaint & investigation procedures.
- Ensure employees of all levels are held accountable.

EFFECTS OF EXPLICIT BIAS: LITIGATION

Case Synopsis 1:

In April 2013, Black Network Television Ad Agency, LLC (“the Business”), a minority-owned television network, was granted and then subsequently denied a \$300,000 economic development loan from the City of Greensboro, North Carolina prompting the Business to file an action asserting a claim, among others, for racial discrimination pursuant to 42 U.S.C. § 1981. *Woods v. City of Greensboro*, 855 F.3d 639, 641 (4th Cir. 2017). In 2015, the United States District Court for the Middle District of North Carolina granted the city's motion to dismiss for failure to state claim. Business appealed to the Fourth Circuit Court of Appeals. *Id.* The Court of Appeals held that: (1) the business was not required to allege that it was certified as minority business enterprise under state law in order to establish imputed racial identity, and (2) the business stated a race discrimination claim against city. *Id.* Specifically, the Court recognized that:

I understand that avoiding the effects of racial stigmas and stereotyping is not always easy because **many studies have shown that most people harbor implicit biases and even well-intentioned people unknowingly act on racist attitudes.** However, this merely confirms that we alone cannot carry the burden of ameliorating racism in our country. This responsibility must be assumed by all good people without regard to race, sex, and ethnicity.

***Woods v. City of Greensboro*, 855 F.3d 639 (4th Cir. 2017).**

Case Synopsis 2:

Plaintiff, who is of Arab descent, asserted a race-based employment discrimination action against defendants, Washington State Department of Transportation and three individuals (“Defendants”), under 42 U.S.C. § 1981 (racial/national origin discrimination) and 42 U.S.C. § 1983 (equal protection), among other claims. *Samaha v. Washington State Dep’t of Transp.*, No. CV-10-175-RMP, 2012 WL 11091843, at *1 (E.D. Wash. Jan. 3, 2012). Defendants filed a motion *in limine* to exclude plaintiff's expert witness, Dr. Anthony Greenwald. *Id.* Plaintiff intended to have Dr. Greenwald testify on the subject of implicit bias. *Id.*

Specifically, Dr. Greenwald's findings include the following: “(1) seventy percent of Americans “hold implicit prejudiced views” based on race, color, national origin and ethnicity; (2) implicit bias is prevalent in the employment context; (3) job performance evaluations conducted by personnel using subjective criterion permit implicit biases to affect the outcome; (4) “significant majorities of Americans prefer lighter skin tone over darker and European–American relative to Arab ethnicity”; (5) awareness of potential or actual implicit biases helps diminish the effect of these biases; and (6) members of a decision-maker's in-group those people who share common demographic characteristics are more likely than those in the out-group to receive more favorable treatment.” *Id.* Defendant moved to exclude this testimony on the grounds that this testimony is irrelevant, is unfairly prejudicial and fails to “appl[y] the principles and methods of reliability to the facts of the case.” *Id.*

Plaintiff argued that Dr. Greenwald's testimony about implicit bias is relevant to the fact of intentional discrimination and helpful to the jury to understand how implicit bias functions in the employment setting. *Id.* Plaintiff also argued that Dr. Greenwald's testimony will aid the jury by providing background about one of several factors that comprise discriminatory intent, without arguing that implicit bias is the only factor that comprises discriminatory intent. *Id.* The Court agreed with Plaintiff and permitted Dr. Greenwald to testify at trial regarding implicit bias and its function and effects in the employment setting. *Id.*

***Samaha v. Washington State Dep’t of Transp.*, No. CV-10-175-RMP, 2012 WL 11091843 (E.D. Wash. Jan. 3, 2012).**