Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# Could Diversity Pledge Lead To Unintended Consequences?

By **Anthony Oncidi and Seth Victor** (August 23, 2018, 2:16 PM EDT)


Anthony Oncidi

In the past year, the #MeToo movement has motivated employers throughout the country to review and improve their internal policies and practices regarding diversity and inclusion. There has been increased attention not only to their plans for dealing with harassment and discrimination, but also with respect to their efforts to hire and promote employees from traditionally underrepresented groups. Relatedly, some companies have begun volunteering more information about their diversity and inclusion policies and the results of their efforts to increase diversity.

In 1998, Anthony Greenwald, Ph.D., a social psychologist and professor of psychology at the University of Washington, and his colleagues created the Implicit Association Test, or IAT, which is available on the internet.[1] The IAT purports to measure implicit bias lurking in the test-taker's unconscious mind. There are different tests for a wide variety of purported implicit biases, including race, religion, age, skin-tone, sexual orientation and disability.

**The CEO Action Pledge**

Dr. Greenwald and other proponents of the implicit bias concept contend that these biases are unconscious stereotypes that everyone possesses. In a well-meaning effort to combat discrimination and a lack of diversity in the workplace, hundreds of CEOs have signed the CEO Action for Diversity & Inclusion, or the pledge.[2] The pledge is an initiative designed to promote diversity in the workplace. Signatories publicly pledge to:

1. Continue to make their workplaces "trusting places to have complex, and sometimes difficult, conversations about diversity and inclusion";

2. Implement and expand unconscious bias education; and

3. Share best — and successful — practices with the use of "accountability systems" designed to "track progress."

The number and pedigree of companies that already have signed the pledge is impressive. More than 450 CEOs and presidents across 85 industries have signed on and have thus committed to these three steps. Some of the nation's largest and most well-known companies are represented here as are some

of the world's foremost institutions of higher learning. The list also includes leading technology companies and financial institutions, major retailers, airlines and accounting firms, insurance companies, large international law firms, and high-profile nonprofit organizations, among others.

**Implications of the Pledge in Employment Litigation**

The pledge requires CEOs to commit "to implementing all of the elements within the pledge," so there is no picking and choosing which elements to implement. Further, because the announcement is public, companies that commit themselves to the pledge should anticipate that they will be held to the commitment and possibly will have it used against them if they fail to implement any of the elements. Since the elements of the pledge are extremely broad, the lack of specificity about precisely what it is the company is committing itself to do could be problematic in a litigation context — in other words, no matter what the company does, an aggressive plaintiffs lawyer will tell the jury the company was noncompliant or its efforts were simply inadequate.

Plaintiffs in most employment discrimination cases assert and seek to prove "disparate treatment" by the employer. Disparate treatment claims require proof of discriminatory intent on the part of the employer or management. However, because direct evidence of discriminatory intent is rare, the suggestion of "implicit bias" could be used by an enterprising plaintiffs lawyer to create an inference of discriminatory intent that might otherwise be lacking.

Plaintiffs also may be able to use an employer's failed commitment to institute implicit bias training against the company. For example, some courts have ruled that while an employer's failure to follow its own affirmative action plan is not necessarily a violation of Title VII, evidence of same may be relevant to the question of discriminatory intent.[3]

One thing is for sure: It is simple for a plaintiffs lawyer to figure out which companies have signed the pledge — the list of signatories is publicly available and easily accessed on the web. (Anecdotally, we are aware that some leading plaintiffs lawyers already are reviewing the pledge website in search of the names of employers who have signed it for use in their litigation plans.) Moreover, there already is a significant amount of implicit bias research in circulation, which means it is not difficult for a plaintiffs lawyer to find an expert witness to testify in an employment discrimination case about the existence and purported effect of implicit bias.

**Some Courts Have Admitted Expert Opinion About Implicit Bias**

Signatories to the pledge should expect plaintiffs lawyers to routinely seek discovery about the company's efforts to implement each of its elements; they also may seek to designate expert witnesses to testify at trial on the topic of implicit bias. Once it becomes known to the plaintiffs lawyer that the employer has signed the pledge (along with the commitment to "implement and expand unconscious bias education"), the employer's trial counsel may be at a disadvantage in seeking to exclude expert testimony about implicit bias. Indeed, there is a risk that a court could rule that the jury should be permitted to hear expert testimony about implicit bias after the CEO has publicly committed to "implementing and expanding" internal training on that very subject.

Even in the absence of the pledge, some plaintiffs have succeeded in getting this type of testimony in front of a jury. For example, in Samaha v. Washington State Department of Transportation,[4] a federal district court denied the employer's motion to exclude the testimony of Dr. Greenwald in which the employer argued he had not identified any particular bias that related to the plaintiff's race, color,

national origin or ethnicity nor had he determined whether implicit bias played any role in any particular employment decision made by the employer.

The Samaha court agreed with the plaintiff that Dr. Greenwald's testimony about implicit bias was relevant to the fact of intentional discrimination and could be helpful to the jury to understand how implicit bias functions in the employment setting. The court further held that it was satisfied that Dr. Greenwald's opinions are sufficiently "grounded in the methods and procedures of science" (quoting the Daubert standard for admitting expert testimony).

In another recent case, Martin v. F.E. Moran Inc, a federal district court allowed expert testimony from an assistant law professor with a Ph.D. in social psychology about implicit bias in a race discrimination case.[5] The judge admitted the expert testimony about implicit bias in this case in part because it was a bench trial, recognizing that "the court can hear the testimony at trial and determine the weight of the evidence at trial without a fear of prejudicing the untrained ear of a juror."

Still another court, in Karlo v. Pittsburgh Glass Works LLC, excluded expert testimony about implicit bias, including testimony from Dr. Greenwald himself, on the ground that his opinion "is not based on sufficient facts or data. It is not the product of reliable methods. And it would not assist the factfinder in resolving an issue in this case."[6] There was no evidence that the CEO of the employer in that case had signed the pledge or committed to "implement and expand" implicit bias education at the company.

**The Case Against the Admissibility of Implicit Bias Testimony**

In Wal-Mart Stores Inc. v. Dukes,[7] the U.S. Supreme Court expressly rejected the "social framework analysis" that was put forth in the form of expert testimony from a sociologist who testified that Wal-Mart had a "strong corporate culture" that made it vulnerable to gender bias. The court determined that the expert's testimony did nothing to advance the plaintiffs' case: "Whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking is the essential question on which respondents' theory of commonality depends. If [the expert] admittedly has no answer to that question, we can safely disregard what he has to say."[8] Expert testimony regarding implicit bias is vulnerable to similar challenges.

Further, a recent study conducted by researchers at the University of Wisconsin, Harvard University and the University of Virginia examined 499 studies over 20 years involving 80,859 participants who took the IAT and similar tests. These researchers discovered that the correlation between implicit bias and discriminatory behavior (which is, of course, what is relevant in an employment discrimination case) is weak and that the test does not reveal whether a person will tend to act in a biased manner.[9]

**Conclusion**

By signing the pledge, a company may be accused by a plaintiffs lawyer of having acknowledged the potential relevance of expert testimony about implicit bias — notwithstanding the fact that some courts have expressly rejected it and found it to be unreliable and inadmissible. At the very least, a plaintiffs lawyer may seek discovery of and offer evidence about the degree to which the company took the Pledge seriously (or not) after signing it. If the CEO signed the pledge and then failed to follow through, the opposing lawyer will want to argue to the jury that the company was more concerned about the public relations effect of signing the pledge without really caring about the employees and the degree to which they might be victims of this ostensible form of bias.

Expert testimony about implicit bias can be very powerful stuff; plaintiffs attorneys may try to rely on it to compensate for gaps in the evidence, especially regarding the employer's alleged intent to discriminate. But once that genie is out of the bottle in front of the jury, it will be very difficult for defense counsel to contain it. Arguing that there was no intent to discriminate by the employer after the jury hears detailed testimony from an expert witness about how everyone in the world possesses implicit or unconscious bias will be a Herculean task to say the least.

As the pledge increases in popularity, it is easy to imagine more judges allowing expert testimony on this subject. The greater number of household-name companies that sign the pledge, the likelier it is that even more courts will allow such testimony in employment discrimination cases. And by signing the pledge, the employer will make the judge's decision to admit such expert testimony easier still.

---

*Anthony J. Oncidi is a partner and chairman of the labor and employment department at Proskauer Rose LLP.*

*Seth Victor was a summer associate at Proskauer Rose and is currently a third-year law student at UCLA School of Law.*



[1] https://www.tolerance.org/professional-development/test-yourself-for-hidden-bias

[2] https://www.ceoaction.com/the-pledge/

[3] Stender v. Lucky Stores Inc., 803 F. Supp. 259, 330 (N.D. Cal. 1992).

[4] Samaha v. Washington State Dep't of Transp., 2012 WL 11091843 (E.D. Wash. 2012).

[5] Martin v. F.E. Moran Inc., 2017 WL 1105388 (N.D. Ill. 2017).

[6] Karlo v. Pittsburgh Glass Works LLC, 2015 WL 4232600 (W.D. Pa. 2015).

[7] Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338, 354-55 (2011).

[8] Id.

[9] See "Can We Really Measure Implicit Bias? Maybe Not," The Chronicle of Higher Education (Jan. 5, 2017) https://www.chronicle.com/article/Can-We-Really-Measure-Implicit/238807