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Overt Stereotype Biases and Discrimination in the Workplace: Why Haven't We Fixed This by Now?

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Abstract A substantial amount of research exists on identifying and combating stereotypes and related biases that may improperly influence employment staffing decisions. Yet, evidence of such biases continues to appear in the reported discrimination cases and poses ongoing liability risks for employers. This paper examines various kinds of workplace stereotype biases, including those related to gender, parenthood, use of family leave, age, disability, and perceived disability, which may improperly influence performance evaluations or employment decisions based upon them. Although the behavioral science in this area has focused largely on combating implicit biases, recent U.S. appellate court cases present direct evidence of more overt biases whose effects should be readily identified and addressed. Possible explanations for the persistence of such biases in the workplace and corresponding actions to reduce or eliminate them are explored.

Keywords Overt bias · Stereotype discrimination

Consider the following quote from a law review article published a decade ago:

> "As employers become more aware of the statutory protections afforded members of protected classes, smoking gun statements [reflecting direct evidence of illegal bias] have become largely a remnant of the past" (Lee 2005: 482).

Now consider the following excerpts from recent court cases adverse to the employer:

- A female engineer is terminated as part of a Reduction in Force (RIF) by a male supervisor who stated, among other things, that he "didn't want women around," that women "were not worth a shit," and that his ex-wife, also an employee at the company, "should be at home, not working;"

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- A highly-rated insurance specialist with four children is passed over for promotion in favor of a lower-rated candidate after being told by her immediate supervisor that "it was nothing you did or didn't do. It was just that … you have kids and you just have a lot on your plate right now;"
- An otherwise capable director of an assisted living facility is terminated at age 53 after being told by her supervisor that she "dressed like an old lady" and comments by the facility's CEO that they were "missing the boat by not hiring more younger, vibrant people because they would last longer and they would have more energy and be willing to work more hours;"
- A woman undergoing chemotherapy for breast cancer is laid off, despite outstanding appraisals, promotions, raises, and bonuses, after requesting accommodation for short-term memory loss and thereafter having her previously high retention score changed to among the lowest of any of the employer's RIF candidates.

Each of these scenarios reflects explicit biases about an individual's non-suitability for a particular job based on stereotypes regarding gender, parenthood, family leave use, age, or perceived disability. After decades of litigation that have "heightened employers' awareness of the legal ramifications for discriminatory transgressions" (Lee 2005: 488), why do such biases and their overt expression still persist in the workplace?

A substantial amount of both behavioral and legal research exists on identifying and combating stereotype biases that may improperly impact employment decisions (e.g., Lee 2005; Macan and Merritt 2011; Pedersen 2010; Roberson et al. 2007; Tetlock and Mitchell 2009). Yet, such issues continue to appear in the case law and pose ongoing liability risks for employers. This paper identifies stereotypes that stand out in recent appellate cases adverse to the employer. After a brief review of the research on stereotype biases and their sources, those specifically involving gender, parenthood, FMLA leave use, age, disability, and perceived disability are considered, as are illustrative examples of each. Possible explanations for the persistence of such biases and ways to address them are explored.

Research on Stereotypes and Related Biases

Much of the behavioral research on stereotypes and related biases has been directed toward uncovering and regulating the results of implicit or unconscious biases (see, e.g., Fiske et al. 2002; Huntsinger et al. 2009; Tetlock and Mitchell 2009; Wheeler and Petty 2001). Indeed, some legal commentators appear to have concluded that more overt or explicit biases (or at least direct evidence of them) have largely been eliminated due to experience with the various civil rights laws. For example, Lee (2005: 488) suggests that "employers' heightened awareness of the legal ramifications for discriminatory transgressions—learned through litigation, among other means—suggests that employers will be increasingly savvy in not documenting, outwardly expressing, or retaining anything that is potentially damaging." Given these developments, Pedersen (2010) has proposed a framework for uncovering implicit biases that might afford discrimination litigants a better opportunity to have their cases heard notwithstanding the lack of direct evidence of more overt stereotypic effects. However, while it may be true generally that "[d]iscrimination claims, lawsuits, and court decisions continue to send the message that formal, blatant discrimination will not be tolerated" (Macan and Merritt 2011:1), the factual vignettes presented at the beginning of this

paper make clear that "smoking gun" statements reflecting overt stereotype biases are all too prominent in recent appellate cases. In such situations, the appropriate remedy may have little to do with getting decision makers to become aware of previously unidentified biases. As Pedersen (2010:148) acknowledges, the sorts of remedies found in cognitive behavioral research "may have little effect on the knowingly biased manager."

Sources of Stereotype Biases

Over the years, two main sources of stereotype biases in staffing processes have emerged in the literature: biases based on differential relational demography between the rater and the ratee, and biases based on lack of perceived fit between the ratee's demography and the job or role for which he or she is being considered (see Macan and Merritt 2011; Roberson et al. 2007).

In examining relational demography, Buckley et al. (2007) found significant differences in panel interview ratings based on the differential race of the rater versus the ratee, and it may be these types of biases that commentators argue have been largely dealt with by employers in response to litigation. On the other hand, the perceived job-fit stereotype analysis (Dipboye 1985) typically has not been applied in the context of race (Roberson et al. 2007: 622). It has been reflected, however, in the context of gender as well as age and disability, and continues to be found in these and the other types of cases presented here.

In the gender context, Heilman (2012) and her colleagues (e.g., Heilman and Eagly 2008; Heilman and Okimoto 2008; Lyness and Heilman 2006) have documented significant effects for perceived differences in the gender or family status of the applicant (e.g., pregnancy or motherhood) and their fit with gender role stereotypes about the particular job for which they are considered. Such biases may be driven by general discomfort with placing a candidate in a job in which their demography is inconsistent with that most commonly seen there, or by explicit concerns about the possible need for time off due to family obligations or medical burdens believed to pertain more to one gender or family status than another (VonBergen et al. 2008). These cases—those involving job-fit stereotyping—arguably are the most perplexing in the recently reported discrimination cases.

Gender, "Gender-Plus," and Family Leave Use Stereotype Cases

Ever since the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins* (1989), gender stereotyping has been recognized as a form of illegal discrimination "because of sex" under Title VII of the Civil Rights Act of 1964. In that case, male partners had commented that the plaintiff should wear more makeup, act more feminine, and that she "overcompensated for being a woman" by behaving too aggressively. In holding that an employer may not force employees to conform to a gender stereotype as a condition of employment, the Supreme Court made clear that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." The Court went on to hold that Price Waterhouse's alleged failure to promote because of nonconformance with a traditional feminine stereotype was indeed actionable as discriminatory under Title VII.

As the saying goes, that was then; this is now. In *Lewis v. Heartland Inns* (2010), a long-time employee of a regional hotel chain with a history of good performance and no prior disciplinary record was let go by an operations director who felt she was not a "good fit" for a

front desk position based on her tomboyish "Ellen DeGeneres kind of look," including short hair and wearing men's button-down shirts and slacks. Lewis was replaced by someone who exhibited a more stereotypical feminine manner as part of the "pretty, Midwestern girl look" desired by the operations director. Not surprisingly, because such language by its very nature would be expected to apply only to women, a majority of the Eighth Circuit panel deciding the case found such conduct, if proven, to be prohibited as illegal sex stereotyping under *Price Waterhouse*. Although now recognized as a prohibited pattern of discriminatory conduct for over 20 years, apparently a highly placed *female* executive at Heartland Inns did not get the memo.

In a related context sometimes referred to as "gender-plus" discrimination (Bennett-Alexander and Hartman 2012), the Supreme Court in *Phillips v. Martin-Marietta Corp.* (1971) long ago struck down a company policy of not hiring women with pre-school age children even though no such policy applied to men with children of that age. Despite the even greater passage of time since this pre-*Hopkins* case was decided, recent cases involving analogous patterns of stereotype discrimination persist in almost eerily similar factual circumstances.

In *Chadwick v. Wellpoint Inc.* (2009), a high performing woman was denied a promotion to team lead despite being significantly more qualified and more highly rated (4.4 versus 3.8 on a five-point scale, along with greater experience) than the candidate who received the position. Chadwick, a mother of 6-year old triplets and one older child, was presumed to be so burdened with child care responsibilities that she would not be successful if promoted (ironically, Chadwick's husband, a stay-at-home dad, had primary child care responsibilities for the family). In addition to the comments already highlighted in the opening section of this paper ("you have kids and you just have a lot on your plate right now"), numerous other references to Chadwick's gender/family role that might come into conflict with expected performance on the job also led a First Circuit panel to find that summary judgment in favor of Wellpoint had been inappropriate. The Court thus reinstated the case so that Chadwick could have her day in court.

Closely related to gender-plus stereotyping is the improper consideration of Family and Medical Leave Act [FMLA] use in employment staffing decisions. As Malone (2011) explains, the FMLA "was designed to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men" (quoting from the U.S. Supreme Court's decision in *Nevada Department of Human Resources v. Hibbs* 2003). Yet, it appears that discrimination based on stereotypical expectations about productivity, performance, or commitment to the job based on leave use has not been entirely displaced.

The FMLA provides leave for those with a serious health condition that prevents them from working or for those caring for a family member with such a condition, and prohibits the employer from retaliating against an employee for using such leave. In *Marez v. Saint-Gobain Containers, Inc*. (2012), the Eighth Circuit upheld a jury verdict in favor of Kathleen Marez, a production supervisor, who was terminated 2 days after notifying the employer that she would need to take FMLA leave due to her husband's upcoming surgery. Despite acceptable overall performance ratings, Marez was let go allegedly due to quality control infractions also committed by other production supervisors who were not terminated or otherwise disciplined. While noting that temporal proximity between an adverse employment decision and protected conduct alone was not sufficient to infer causality, the Court found evidence that the termination occurred less than 48 h after notification that she would be taking FMLA leave sufficient to support the jury's verdict ("rarely have we been faced with two events so close in time").

For another case upholding a terminated employee's claim for FMLA retaliation, this time against a man, see *Daugherty v. Sajar Plastics, Inc*., 2008. There, the Sixth Circuit found evidence that Daugherty was told by his supervisor that if he took extended FMLA leave, "there would not be a job waiting for him when he returned" sufficient to overturn summary dismissal of his FMLA claim.

Finally, in perhaps one of the more overt examples of evaluating employees poorly due to perceived lack of fit with the sex-role stereotype of a job (in this case, electrical engineering), *EEOC vs. Boeing* (2009) presents a case in which two female candidates for retention during a RIF were terminated based on low retention scores despite the fact that men with similarly low scores were retained. Coupled with the sexist comments (digested earlier) by a male supervisor that he "didn't want women around," that women "were not worth a shit," and that his ex-wife "should be at home, not working," a panel of the Ninth Circuit determined that the evidence was sufficient to overturn summary judgment in favor of Boeing. More specifically, the panel held that the EEOC should be entitled to prove at trial that Boeing's asserted reliance on low retention ratings were in fact pretextual under the U.S. Supreme Court's burden-shifting process set forth in *McDonnell-Douglas Corp. v. Green* (1973).

To recap, if employers have become "increasingly savvy in not documenting, outwardly expressing, or retaining anything that is potentially damaging" in the 40+ years since *McDonnell-Douglas*, then the general observation is belied by counter-examples in the recent cases. Perhaps yet more time is needed before qualified female and minority candidates are readily accepted in positions such as engineering or manufacturing—particularly in large aircraft companies.

Age Stereotype Cases

The purpose of the Age Discrimination in Employment Act [ADEA] differs somewhat from that underlying Title VII of the Civil Rights Act of 1964; whereas the latter seeks to address invidious discrimination because of race, color, religion, national origin, or sex, the ADEA was passed to address the possible underlying assumption that performance necessarily declines with age (Bennett-Alexander and Hartman 2012: 520–523). Because of this distinction, one might expect to see more instances of implicit rather than explicit stereotype biases in the age area. As discussed below, however, that does not necessarily seem to be the case.

Various reviews of behavioral research in the area of age discrimination have highlighted, and largely debunked, assumptions that older workers may lag on dimensions such as motivation or productivity, ability to change or adapt to new situational demands, occupational health, vulnerability to work-family conflict, or likely longevity on the job (see generally Ng and Feldman 2012; Posthuma et al. 2012; Wood et al. 2008). Nonetheless, instances of overt age bias continue to appear in the cases, particularly in jobs or industry contexts such as high technology or consultancies where younger workers may be presumed to possess more relevant skills or abilities related to successful performance on the job.

For example, in the highly publicized Silicon Valley case of *Reid v. Google, Inc*. (2010), a 54-year old terminated former vice president of engineering for the company and associate professor of electrical engineering at Stanford University sued Google for age discrimination based on overt stereotypic statements. These included comments that Reid was "too old to matter," was not a "cultural fit" with the youthful orientation of the company, that his ideas were obsolete, that he lacked energy, was slow and lethargic, was "an old fuddy-duddy," and other such stereotypic

utterings almost literally too numerous to mention. The trial court had granted Google's motion for summary judgment to dismiss the case, accepting the argument that such statements were merely "stray remarks" and were not necessarily indicative of age bias as the reason for his termination. An intermediate state court of appeals reversed, and the California Supreme Court upheld its decision; even assuming that such comments were indeed "stray" remarks (about which the Court expressed considerable doubt), the Court found that to uphold the stray remarks doctrine under such circumstances would lead to categorical exclusion of evidence potentially probative of age bias and thus grossly unfair results in any number of cases.

Similarly, in *Barnett v. PA Consulting Group* (2012), Judith Barnett, a 57-year old woman, was terminated during a restructuring allegedly because she was "not a good fit" with the new business focus of the company that sought to align it more closely with the changing needs of its clients in the aviation industry. In overturning the trial court's summary dismissal of the case, the D.C. Circuit noted that Barnett was the only consultant dismissed for lack of "fit," and that the company retained a 41-year old man with substantially similar qualifications and consulting practice areas as those of Barnett. Material to the Court's decision was direct evidence from a spreadsheet used to justify who would be retained which actually *showed the age of each candidate* along with their asserted productivity. Inclusion of this information raised a possible inference of pretext as to the real reason for Barnett's termination.

For another case involving alleged pretext as to the reasons for an employee's termination in the age context, see *Earl v. Nielsen Media Research, Inc*. (2011). In that case, retention of employees younger than Earl despite their alleged violation of the same company policies led the Ninth Circuit to reinstate the plaintiff's previously dismissed age claim.

Finally here, we return to the case of *Baker v. Silver Oak Senior Living Management Co., Inc*., (2009), digested briefly above, in which the well-performing director of an assisted living facility for the elderly was terminated at age 53 after being told that she "dressed like an old lady," and comments by the employer's CEO that they "needed people who were not old and slow" and "were missing the boat by not hiring more younger, vibrant people because they would last longer and they would have more energy and be willing to work more hours." Once again, a trial court's rather curious dismissal of the plaintiff's claims on summary judgment was reversed, this time by the Eighth Circuit, in a factual scenario right out of the core of illustrative age stereotypes seemingly debunked in prior research.

Disability and "Regarded as Disabled" Stereotype Cases

Much like the situation with biases regarding age, biases regarding mental or physical disabilities also can operate to negatively impact employment opportunities for otherwise capable workers (Keller and Siegrist 2010; Lengnick-Hall et al. 2008). The Americans with Disabilities Act [ADA] prohibits employment discrimination against otherwise qualified individuals who can perform the essential functions of a job with or without a reasonable accommodation, and also protects those with a record or history of disability as well as those who may be "regarded as" disabled (see generally Findley et al. 2004). Given the passage of time since enactment of the ADA, one might expect that employers have had ample opportunity to become more sensitive to issues surrounding disability stereotypes and the need to consider reasonable accommodations for capable but disabled individuals. While this may be true to some extent for more observable physical disabilities (cf. Keller and Siegrist 2010), counterexamples continue to arise.

For instance, in the case of *Keith v. County of Oakland* (2013), the Sixth Circuit overturned the District Court's grant of summary judgment in favor of the County, which had failed to hire Keith as a lifeguard at a local swimming pool because he was deaf. In finding the existence of genuine issues of fact as to violation of both the ADA and the Rehabilitation Act (which applies to government entities), the Court considered evidence that Keith could perform essential lifeguard functions such as visually monitoring different sectors of the pool, detecting and rescuing distressed swimmers, enforcing pool rules, activating an emergency action plan, and administering CPR, all with a reasonable accommodation. Under the circumstances, the Court found improper the County's abject refusal to engage in the required interactive process to explore possible accommodations. Quoting *Holiday v. City of Chattanooga* (2000), the Court explained that "[t]he ADA requires employers to act, not based on stereotypes and generalizations about a disability, but based on the actual disability and the effect that disability has on the particular individual's ability to perform the job." The County's failure to conduct an individualized inquiry as to Keith's ability to perform the essential functions of the job if reasonably accommodated therefore precluded summary dismissal.

As for perceived or "regarded as" disability cases, *Eshelman v. Agere Systems, Inc.* (2005; also partially digested earlier) presents a situation where the employer ran afoul of the ADA's prohibition against assuming that an otherwise capable person is unable to perform a broad range of jobs based on difficulty with a minor or non-essential part of their duties. After returning from a medical leave related to breast cancer, Joan Eshelman advised her employer that she suffered from a cognitive dysfunction related to chemotherapy that left her with a condition colloquially known as "chemo brain" and which led to some short term memory loss. Eshelman generally excelled at her job and was in fact promoted subsequent to her return, but had occasional difficulties when driving to unfamiliar locations as sometimes required. After financial difficulties led it to conduct a RIF, the employer changed Eshelman's retention rating from one of the highest to one of the lowest, and selected her for termination. Although her high performance ratings precluded a finding of *actual* disability based on working, the Third Circuit upheld a jury verdict based on "regarded as disabled" discrimination. The Court found that the employer erroneously viewed her memory issues limiting her ability to work and think as rendering her unfit for *any* job, and relied on her record of that mental impairment in deciding to terminate her. The case stands as a classic instance of so-called "horns" error, where an individual's negative rating on one performance dimension can infect ratings on others, as expressly proscribed by the ADA's "regarded as" provisions and related interpretive case law.[1]

Discussion and Recommendations

Over the years, employers may well have become somewhat savvier in avoiding liability based on direct evidence of stereotype discrimination through experience and the passage of time.

[1] The *Daugherty* case, discussed above in the context of FMLA retaliation, also presented a "regarded as" disabled claim, albeit an ultimately unsuccessful one. In that case, the Court agreed that the evidence presented showed at most that the employer believed Daugherty to be incapable of performing certain dangerous machine maintenance functions due to a back injury and related pain medication levels, but not that he was regarded as generally unable to perform a broad range of jobs in his field. The case might well have gone the other way, however, and illustrates the need to consider multiple sources of potential legal liability when an individual's condition may implicate both the definition of a "serious medical condition" under the FMLA and an actual or perceived disability under the ADA.

However, the cases reviewed here warrant at least some reexamination of organizational approaches to handling the matter. While much of the cognitive behavioral literature proposes methods for identifying and combating the activation of implicit biases (see, e.g., Huntsinger et al. 2009; Tetlock and Mitchell 2009; Wheeler and Petty 2001), it bears repeating that these methods "may have little effect on the knowingly biased manager."

Perhaps simpler, more straightforward organizational interventions are called for. Certainly, training to help managers better recognize the legal liability for stereotypic statements and staffing decisions may be useful and should not be abandoned. However, when considering recommendations, e.g., for more time, cognitive resources, and accountability in appraising performance (Arthur and Doverspike 2005), it may be that accountability is the overlooked or underemphasized factor. Performance management that includes disciplinary steps to reinforce training and eliminate offenders from the workplace would seem to be a more apt remedy than the subtler psychological approaches found in cognitive research.

These recommendations are particularly important in professions or industries such as engineering, hi-technology, or consultancies that may be especially amenable to improper gender or age job-fit stereotyping (e.g., *EEOC v. Boeing*; *Reid v. Google*; *Barnett v. PA Consulting Group*). Noteworthy in many of these cases was the application of subjective criteria such as "lack of fit." This is an amorphous factor difficult to validly operationalize in practice and one which explicitly conjures the negative connotations of job-*fit* stereotype analysis (Dipboye 1985). Greater emphasis on the systematic use of well-validated performance metrics based on job analysis, subject to review by HR and legal professionals, might therefore be in order.

In fact, given that attempted reliance on purported policy violations or other performance deficiencies were often found to be potentially pretextual in some of the cases cited (*Barnett*, *Earl*), greater reviewability and due process may be critical for avoiding staffing decisions that involve stereotypic language or other indications of overt bias (see generally Williamson et al. 1997). Some of these cases appear to involve attempted *post-hoc* justification of such decisions where the organization might have been better served by admitting its errors and correcting them, or attempting to settle disputed matters in advance. Review of such decisions by HR or legal practitioners might have avoided the need for victims of alleged stereotype discrimination to resort to litigation in order to seek any sort of redress.

Finally, given the senior management levels of many of the offenders that are central to the cases discussed—and the obvious inadvisability of expressing explicit biases even where they may be implicitly held—reviewability and accountability for the practical and legal detriments of stereotypic staffing decisions may be critical. In addressing the apparent ignorance or hubris on the part of highly positioned decision makers who may believe that antidiscrimination laws do not apply to them, little else may matter. Indeed, if their own jobs depended on it as much as those of their subordinates, top managers might be reminded that the rules do still apply, and might pay greater attention to ensuring that staffing decisions are made based on the unbiased application of valid performance metrics. Progress could then be made toward eliminating toxic stereotypic culture and its negative individual and organizational consequences (e.g., lost talent; damage to reputation and ability to recruit; costs and disruptions associated with litigation). Further, as Roberson et al. (2007) point out, "[w]here bias exists—where group identities matter—potential benefits of diversity for organizations cannot be fully realized and opportunities for individuals are limited."

Conclusion

Both the general climate and specific effectiveness of organizations could be improved by eliminating stereotypic staffing decisions and requiring greater emphasis on the valid appraisal of individual abilities. Focusing on generalities associated with gender, family status, leave use, age, disability, perceived disability, and other group membership irrelevant to job performance is no longer capable of characterization as implicit or subtle. Rather, it is explicit, overt, and obvious when it occurs. As such, it should no longer be tolerated in today's employment relationships.

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