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PRACTICE POINTS

Warning: Court Bars Expert Testimony on Implicit Bias

The court believed that introducing the concept of unconscious bias based on inadequate data and analysis ran the risk of unfairly tilting the scales.

by Michael R. Lied

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Abdullah Haydar was terminated from his job at Amazon Corporate, LLC. Haydar claimed he was fired because he is a Muslim of Syrian descent and that the head of Amazon's marketplace division made references to "you people", such as "you people need to learn how to treat your wives better".

The case was headed to trial. Haydar hoped to introduce expert opinions from Donna Marie Blancero, Ph.D, who would testify about bias against Muslims, unconscious bias, the difference between diversity and inclusion in the workplace, proper procedures for investigating an employee's complaint, and the pitfalls of using "360 feedback" to evaluate an employee.

The court limited the scope of Blancero's testimony under Federal Rule of Evidence 702.

In the Diversity and Inclusion section of her expert report, Blancero had defined stereotyping and confirmation bias. However, in the court's view, the concept of stereotypes described in the report was within the knowledge of the typical juror. Blancero's application of the theory of confirmation bias to the case was not based on an adequate factual foundation. Therefore, Blancero would not be permitted to testify to the findings in the "Diversity and Inclusion" section.

"Unconscious bias" is the concept that a person holds a bias (positive or negative) toward a group of people but is unaware that he holds that bias. Blancero opined that unconscious bias played a role in Haydar's treatment and attempted to establish that there was a "climate for discrimination" or bias against Haydar. The court rejected this testimony, finding that there were "broken links" in the expert's chain of reasoning. For example, the expert's proposed testimony was based on her

review of the treatment of only two employees, which the court found insufficient to allow an inference that the supervisor perpetuated a white-male culture.

Even setting aside the specific reasoning set out in the report, the court was not convinced that the concept of unconscious bias would help the jury decide the key issue of intentional discrimination given the evidence of discrimination that was expected to be introduced at trial. The jury would hear about the head of the marketplace division's "you people" comments.

Worse, the court believed, introducing the concept of unconscious bias based on inadequate data and analysis ran the risk of unfairly tilting the scales in Haydar's favor. If the jury were to hear that every person holds some type of unconscious bias, it might well leap to the conclusion that Haydar's negative feedback was tainted by an unconscious bias against Muslims or Syrians. Given the weak foundation, that would be an undue advantage.

The case is *Abdullah Haydar v. Amazon Corporate LLC*, 2019 U.S. Dist. LEXIS 110956 (E.D. Mich., Oct. 10, 2019).

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