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Employment Law
Proving Racial and Gender Bias Under Title VII

Joan C. Williams¹

Introduction

Law professors have proclaimed that implicit bias is the most prominent form of bias today, and that Title VII is ill-equipped to address it. Drawing on deep research in social science, this Chapter shows that conceptualizing bias as unconscious or implicit is not helpful in the legal context, and that Title VII is up to the challenge of addressing bias.

Hundreds of experimental studies in the past forty years have documented five basic patterns of racial and gender bias. The Achilles' heel in these studies, however, is that many experiments occur in social-psychology labs. Do they describe what actually goes on at work? My research shows that they do. The Workplace Experiences Survey, which has now been taken by over 18,000 people in different industries, shows that the same five patterns of racial and gender bias documented in experimental studies are reported in workplaces. Once the focus shifts from the inner workings of cognitive processing to what actually happens on the ground, well-established legal theories under Title VII can be applied in a straightforward way.

This Chapter describes the five basic patterns of bias and argues that expert testimony should not be required to prove them in court. Any reasonable jury will be able to recognize if they have occurred because each pattern has been widely disseminated in popular culture. Extensive examples are given.

The Chapter also explores the implications of *Bostock v. Clayton County*² for so-called "intersectional plaintiffs," such as women of color, who experience bias based on both race and gender. *Bostock* loosened Title VII's causation requirement, holding that a plaintiff's sex or race need not "be the sole or

¹ Excerpted and adapted from Joan C. Williams, Rachel M. Korn & Sky Mihaylo, *Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data from the Workplace Experiences Survey*, 72 HASTINGS L.J. 337 (2020).

² 140 S. Ct. 1731 (2020).

primary cause of an adverse employment action for Title VII liability to follow.”³ This language, combined with data from the Workplace Experiences Survey, provides a clear path for analyzing Title VII cases involving women of color and other intersectional plaintiffs. *Bostock* also provides important precedent in cases involving discrimination against mothers.

Finally, the Chapter surveys forty years of social science to provide important insight into two common employer defenses in Title VII cases: the same-actor defense and the personal-animosity defense. The same-actor defense posits that the same person who hired the plaintiff would not then discriminate against them. Social science shows why this assumption often is factually incorrect. Social science also undermines the validity of the personal-animosity defense—that an adverse employment action stems not from bias but from personal dislike; in fact, prescriptive bias is often expressed as dislike.

The Five Patterns of Racial and Gender Bias

The field of social psychology has literally hundreds of bias studies that place people in workplace scenarios. In addition, many social psychologists and behavioral economists have conducted experiments in actual workplaces.⁴ These experiments provide overwhelming evidence of five basic patterns of workplace bias. The Workplace Experiences Survey shows that workers report these same five patterns of bias occurring in their actual workplaces today. The five basic patterns are these:

1. *Prove It Again.*⁵ In predominantly white workplaces, people of color don’t seem a natural fit, so they often need to prove

³ *Id.* at 405.

⁴ *E.g.*, Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIO. 1297, 1333 (2007); John A. List & Andreas Leibbrandt, *Do Women Avoid Salary Negotiations? Evidence From a Large-Scale Natural Field Experiment*, 61 MGMT. SCI. 2016 (2014); Corinne A. Moss-Racusin, John F. Dovidio, Victoria L. Brescoll, Mark J. Graham & Jo Handelsman, *Science Faculty’s Subtle Gender Biases Favor Male Students*, 109 PROC. NAT’L ACAD. SCI. 16474 (2012).

⁵ The technical names for the types of bias that feed the prove-it-again effect include in-group favoritism, descriptive stereotyping, leniency

themselves more than white people do. In workplaces where men predominate in positions of power, women don't seem as natural a fit, so they need to prove themselves more than men do. Prove-it-again bias has been documented repeatedly since at least the 1950s.⁶ Data from the Workplace Experiences Survey show that prove-it-again bias is pervasive for both women and people of color, and that women of color report it more often than any other group.⁷ Prove-it-again bias shows up most commonly as follows:

- Equally competent women or people of color are less likely to be hired, less likely to be promoted, and generally held to higher standards than their white male peers; their work may be more scrutinized.
- The mistakes of white men are treated more leniently (“it could happen to anyone”) while mistakes made by women and people of color are noticed more, remembered longer, and prove costlier in terms of career trajectory.
- The successes of white men are more likely to be noticed, remembered longer, and attributed to stable internal causes like skill, while the successes of women and people of color are less likely to be noticed and more often attributed to unstable external causes like luck.

bias, attribution bias, and confirmation bias. For a thorough review of the literature on prove-it-again bias, see Williams et al., *supra* note 1.

⁶ GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

⁷ See, e.g., JOAN C. WILLIAMS, SU LI, ROBERTA RINCON & PETER FINN, *CLIMATE CONTROL: GENDER AND RACIAL BIAS IN ENGINEERING?* 112 (WorkLife Law 2016) (study of engineers); JOAN C. WILLIAMS, KATHERINE W. PHILLIPS & ERIKA V. HALL, *DOUBLE JEOPARDY? GENDER BIAS AGAINST WOMEN IN SCIENCE* 53 (WorkLife Law 2014) (study of science professors); JOAN C. WILLIAMS, MARINA MULTHAUP, SU LI & RACHEL KORN, *YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION* (ABA 2018) (lawyers study); JOAN C. WILLIAMS & RACHEL KORN, *THE ELEPHANT IN THE (WELL-DESIGNED) ROOM: A STUDY OF GENDER AND RACIAL BIAS IN THE PROFESSION OF ARCHITECTURE* (forthcoming 2021) (study of architects); JOAN C. WILLIAMS, RACHEL M. KORN & RACHEL MAAS, *PINNING DOWN THE JELLYFISH: WOMEN OF COLOR IN TECH* (working paper studying tech).

- Women and people of color are much more likely than white men to report that others get credit for ideas they originally offered, a.k.a. “the stolen idea.”

2. *Tightrope*.⁸ Workplaces typically reward people who are authoritative and ambitious, but women who behave that way often are seen as difficult, abrasive, and not team player. Behavior that would be seen as a mere quirk or a career-enhancing passion for the business in a white man may be seen as angry if the individual is Black, emotional if Hispanic, or sly and untrustworthy if Asian. Asian-American women are most likely to report backlash for authoritative behavior. Tightrope bias commonly shows up in the following situations:

- In hiring and performance evaluations, women and people of color are more likely to be faulted for personality problems than white men are. In some workplaces, people of color do not thrive unless they are non-threatening and well-liked, a.k.a. the teddy-bear effect, while white men’s foibles and personalities are given broad rein.⁹
- Anger and self-promotion are much more readily accepted from white men than from any other group. So is expertise: female experts may be disliked unless they present their opinions in a warm and deferential way.¹⁰
- Data from the Workplace Experiences Survey shows that white men report, at extraordinarily high levels (between 80% and 90%), fair access to career-enhancing assignments. Women and people of color are often expected to be worker bees, not ambitious go-getters, and report much lower rates of access to career-enhancing

⁸ The technical name for tightrope bias is prescriptive stereotyping. It has been documented since the 1970s chiefly in the gender context, although there are some studies on race, too. For a thorough review of the literature on tightrope bias, see Williams et al., *supra* note 1.

⁹ Robert W. Livingston & Nicholas A. Pearce, *The Teddy-Bear Effect: Does Having a Baby Face Benefit Black Chief Executive Officers?*, 20 PSYCH. SCI. 1229, 1232 (2009).

¹⁰ Melissa C. Thomas-Hunt & Katherine W. Phillips, *When What You Know Is Not Enough: Expertise and Gender Dynamics in Task Groups*, 30 PERSONALITY & SOC. PSYCH. BULL. 1585, 1594 (2004).

assignments. Women of all races report doing much more administrative work (planning parties, cleaning up the cups, taking notes at a meeting, finding a time to meet, sending the follow-up email), emotional work (being the peacemaker), and undervalued work (making the PowerPoint for someone else to present, doing the task list for a litigator, coordinating signatures for a corporate lawyer) than men do.¹¹

- Women and people of color are interrupted far more than white men are and are given fewer speaking turns.

3. *Maternal Wall*.¹² Bias against mothers is the strongest and most pervasive form of gender discrimination. Maternal-wall bias has been documented for nearly 20 years. Latinas and white women are the most likely to report it. Maternal-wall bias commonly shows up as follows:

- Mothers are assumed to be no longer committed to their jobs.
- Mothers are not given career-enhancing work.
- Mothers are assumed to be less capable at their jobs, e.g., “pregnancy brain.”
- Mothers who are competent are disliked and held to higher performance standards.
- Fathers who play an active role in family care are treated as no longer competent or committed; research shows that this “flexibility stigma” is in fact a “femininity stigma”—which means that it is sex discrimination.¹³

¹¹ Linda Babcock, Maria P. Recalde, Lise Vesterlund & Laurie Weingart, *Gender Differences in Accepting and Receiving Requests for Tasks with Low Promotability*, 107 AM. ECON. REV. 714, 744 (2017).

¹² For a thorough review of the literature on maternal-wall bias, see Williams et al., *supra* note 1.

¹³ Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, 69 J. SOC. ISSUES 322, 329 (2013).

4. *Tug of War*.¹⁴ Some bias against a group fuels conflicts within it. Tug-of-war bias has been studied since for at least 15 years. Common examples of tug-of-war bias include the following:

- Women or people of color undercut each other for the one “diversity slot.”
- Women join the “boys club” and align with the men against other women, or people of color align with white colleagues against colleagues of their own group, in order to be accepted by the majority.
- Women or people of color do not advocate for others of their group due to fear that it will look like favoritism.
- Women or people of color hold members of their group to higher standards due to fear that poor performance by another member of their group will reflect poorly on them.
- Women professionals report that they have trouble getting administrative staff to do for them the kind of things that they readily do for men.

5. *Racial Stereotypes*. Some bias is specific to race:

- Asians are seen as good at technical skills but not suited to leadership.¹⁵
- Latino/as are seen as “hot-blooded,” prone to theft or violence, or lazy.¹⁶
- Black people are seen as “intimidating” or “threatening” and are treated with startling disrespect.¹⁷

¹⁴ For a thorough review of the literature on tug-of-war bias, see Williams et al., *supra* note 1.

¹⁵ Lei Lai & Linda C. Babcock, *Asian Americans and Workplace Discrimination: The Interplay Between Sex of Evaluators and the Perception of Social Skills*, 34 J. ORG. BEHAV. 310, 312 (2013).

¹⁶ WILLIAMS ET AL., *DOUBLE JEOPARDY*, *supra* note 7, at 208.

¹⁷ Ashleigh Shelby Rosette, Christy Zhou Koval, Anyi Ma & Robert Livingston, *Race Matters for Women Leaders: Intersectional Effects on Agentic Deficiencies and Penalties*, 27 LEADERSHIP Q. 429, 439 (2016).

Title VII Applies to These Patterns.

These contemporary forms of racial and gender discrimination fit into Title VII. Tightrope bias was the type of bias at issue in *Price Waterhouse v. Hopkins*: a hard-driving woman was seen as unqualified for partnership because she was insufficiently feminine.¹⁸ Subsequent courts have followed suit.¹⁹

Stereotyping evidence typically relies on comparators (similarly situated members of an unprotected group) and has been used to establish tightrope bias,²⁰ especially when women and people of color have less access to desirable work assignments;²¹ to establish prove-it-again bias, when women and people of color are presumed incompetent;²² and maternal-wall bias,²³ although the Supreme Court has clarified that discrimination against mothers is straightforward sex discrimination.²⁴ Stereotyping evidence typically—but not necessarily—involves comments.²⁵

Other evidence can be used to establish tug-of-war bias. For example, *Twymon v. Well Fargo* involved a Black Director of Employee Relations counseling another employee to develop a deferential persona as a “good Black” who “would be accepted by

¹⁸ 490 U.S. 228, 235 (1989).

¹⁹ *Margolis v. Tektronix, Inc.*, 44 F. App'x 138, 141–42 (9th Cir. 2002); *Casella v. MBNA Mktg. Sys.*, 2009 WL 1621411, at *14 n. 24 (D. Me. 2009); *Collins v. Cohen Pontani Lieberman & Pavane*, 2008 WL 2971668, at *10 n.24 (S.D.N.Y. 2008); *Kahn v. Fairfield Univ.*, 357 F. Supp. 2d 496, 498–99 (D. Conn. 2005).

²⁰ *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999); *Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 771 (E.D. Wis. 2010).

²¹ *EEOC v. Schott N. Am., Inc.*, 2009 WL 310897, at *2–3 (M.D. Pa. 2009); *Collins*, 2008 WL 2971668, at *10 n.24, *16.

²² *Thomas*, 183 F.3d at 59; *Kimble*, 690 F. Supp. 2d at 771.

²³ *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004).

²⁴ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737, 1743 (2020).

²⁵ *E.g.*, *EEOC v. Bob Evans Farms*, 275 F. Supp. 3d 635, 640 (W.D. Pa. 2017) (awarding summary judgment to the plaintiff, despite the lack of explicit statements, because the employer had given the pregnant employee zero hours).

the Caucasians at Wells Fargo.”²⁶ The plaintiff responded by asking if she should act like an Uncle Tom.²⁷

Expert Testimony is Not Required to Establish Bias.

The Supreme Court, in *Price Waterhouse*, was careful to signal that plaintiffs do not need expert testimony to introduce evidence of stereotyping:

Indeed, we are tempted to say that Doctor Fiske’s expert testimony was merely icing on Hopkins’ cake. It takes no special training to discern sex stereotyping and a description of an aggressive female employee as requiring “a course at charm school.” Nor . . . Require expertise and psychology to note that, if an employee’s flawed “interpersonal skills” can be corrected by a soft hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.²⁸

The same is true of all five patterns of bias. Each pattern has been widely recognized in popular culture, such that any reasonable jury can be expected to be able to recognize these patterns without the need for expert testimony. Assessing whether bias has occurred involves a series of judgments by the factfinder as to whether the plaintiff has been treated differently than the comparator, whether that treatment was because of sex/race or because of something else, and whether comments involve stereotyping.

Women of Color and Other “Intersectional Plaintiffs”

Women of color report high levels of prove-it-again bias, tightrope bias, and tug-of-war bias. They often spend time trying to figure out whether they are having to prove themselves over and over again because they are women or because they are people of color. Courts have sometimes struggled with cases involving

²⁶ *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 936 (8th Cir. 2006).

²⁷ *Id.* at 931.

²⁸ *Price Waterhouse*, 490 U.S. at 256.

women of color or other “intersectional plaintiffs” for fear of creating an infinite regression of protected categories.²⁹

Given that both racial and gender discrimination are illegal, this angels-on-the-head-of-a-pin inquiry is unnecessary. Evidence from the Workplace Experiences Survey shows that women of color are often treated differently from both men of color and white women. More to the point: the key comparator for women of color should be white men.

The Same-Actor Inference

The “same-actor inference” stems from the 1991 Fourth Circuit case of *Proud v. Stone*.³⁰ *Proud* involved the firing of an accountant, within 4½ months of the time he was hired, by the supervisor who hired him; the court reasoned that it would seem unlikely that the same person who hired the plaintiff would then have discriminated against him shortly after.³¹ Subsequent cases greatly expanded the doctrine. By 2008, the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits had held that the same-actor inference was an almost-irrebuttable presumption,³² often leading courts to grant employers’ motions for summary judgment even when people other than the discriminator had played a role in the plaintiff’s hiring.³³

This expanded same-actor inference suffers from several fallacies. First, when the hiring decision is made by a group different from the firing decision, no inference should lie. Second, the same-actor inference ought to be per se inapplicable in cases involving maternal-wall bias when the employee is hired prior to having children. Third, the tug-of-war bias indicates that people of color can take dramatically different approaches for

²⁹ See, e.g., *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

³⁰ 945 F.2d 796 (4th Cir. 1991).

³¹ *Id.* at 797.

³² See Andrea L. Miller, *The Use (and Misuse) of the Same-Actor Inference in Family Responsibilities Discrimination Litigation: Lessons from Social Psychology on Flexibility Stigma*, 41 WM. MITCHELL L. REV. 1032, 1073 (2015).

³³ *Id.* at 1066–67, 1070–71.

assimilating, or refusing to assimilate, into the white majority.³⁴ A supervisor of color could hire other persons of color but then discriminate against them because they are too deferential, or undeferential, to the white majority. The same goes for women and their relationship to the “boys club.”

The Personal-Animosity Defense

The personal-animosity defense is available when an adverse employment action stems not from discrimination but from personal animosity.³⁵ As the data reveal, the problem with this defense is that, often, personal animosity goes hand-in-hand with unlawful discrimination. White men get a pass for behavior that, for women, would be held against them as difficult, abrasive, lacking in social skills or polish, etc. This is classic gender bias of the type decried in the Supreme Court in *Price Waterhouse*. Similarly, tightrope bias means that people of color may be criticized as difficult, out of control, or threatening for behavior readily accepted in white men. In these situations, personal dislike is an expression of unlawful bias.

Conclusion

Five common patterns of bias are pervasive in practice and widely recognized in the social-science literature. Understanding those patterns can lead to better application of the Title VII and other antidiscrimination statutes in court.

³⁴ *Twyman*, 462 F.3d at 936.

³⁵ See Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177 (2003); Ann C. McGinley, *Viva La Evolucion!: Recognizing Unconscious Motives in Title VII*, CORNELL J.L. & PUB. POL’Y 415 (2000).