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LEGAL AFFAIRS

White Men Can't Help It

Courts have been buying the idea that they have innate biases

Winning a big employment lawsuit these days often requires a bit of magic. After all, companies are awash in diversity training, equal opportunity policies, and 800 numbers aimed at rooting out bias. Managers have been well trained to keep their discriminatory thoughts to themselves, edit all hints of racism and sexism out of e-mail, and couch pay and promotion decisions in legally defensible language. So how do plaintiffs' lawyers prove their cases?

Enter the magician. Sociologist William T. Bielby is the leading courtroom proponent of a simple but powerful theory: "unconscious bias." He contends that white men will inevitably slight women and minorities because they just can't help themselves. So he tries to convince judges that no evidence of overt discrimination -- no smoking gun memo, for instance -- is needed to prove a case. As Allen G. King, an employment defense attorney at the Dallas office of Littler Mendelson, puts it: "I just have to leave you to your own devices, and because you are a white male," you will discriminate.

King and other defense attorneys have gotten to know Bielby well, having encountered him as an expert witness in dozens of major cases, including those currently pending against Wal-Mart ([WMT](#)), FedEx ([FDX](#)), Johnson & Johnson ([JNJ](#)), and Cargill. For plaintiffs, Bielby's fees -- now \$450 an hour, and totaling \$30,000 or more per case -- are often worth it. Numerous lawsuits in which he has been involved have ended in big dollar settlements, including suits against Merrill Lynch ([MER](#)), Morgan Stanley ([MS](#)), and Home Depot ([HD](#)). In 2004 a federal judge in San Francisco cited Bielby's testimony when he agreed to let the largest-ever employment class action go forward against Wal-Mart Stores Inc. The company is appealing but could face gender bias claims on behalf of more than 1 million women.

Sitting in his quiet, dimly lit office at the University of Pennsylvania, Bielby, 58, explains his opinions and parries criticisms in a way that makes the provocative sound almost prosaic. An electric guitar propped in a stand on the floor hints at his other preoccupation: rock 'n' roll. A longtime guitar player, he's also made studying bands in the "post-Elvis, pre-Beatles" era part of his academic work. Every year, he joins colleagues to perform at the American Sociological Assn. convention.

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Bielby's rock star turn, though, has been in the litigation arena. Now if an employer is faced with a class action based on gender or race, there is at least a 50% chance that plaintiffs will cite unconscious bias theory, says David A. Copus at Ogletree Deakins in Morristown, N.J. When corporations conduct "beauty contests" to hire law firms to represent them in these lawsuits, "if you can't go in and say how you're going to deal with an expert like Bielby, you can't get the case," says Littler Mendelson's King.

The key flaw that Bielby typically finds in the companies he testifies against is that they give managers too much discretion and let them rely on too many subjective factors in hiring, promotion, and pay. In that kind of unfettered atmosphere, he says, all people (not just white men) unknowingly revert to stereotypes in making decisions. "The tendency to invoke gender stereotypes in making judgments about people is rapid and automatic," Bielby wrote in a 2003 report on Wal-Mart that was filed with the court. "As a result, people are often unaware of how stereotypes affect their perceptions and behavior," including "individuals whose personal beliefs are relatively free of prejudice."

Bielby faulted Wal-Mart for the way it identifies candidates for management positions that often require a move. Without a "systematic mechanism" for determining who might be interested, he wrote in his report, managers may automatically assume women don't want jobs that require them to relocate.

Job postings are one way around this problem. But Bielby, citing deposition testimony of Wal-Mart executives, noted that store managers had authority to bypass the retailer's posting system and "informally approach" candidates. That can result in what

he calls "tap-on-the-shoulder" promotions, typically favoring men. In its appeal, Wal-Mart says Bielby's testimony is unscientific and unreliable.

Certainly the idea that we all engage in stereotyping is well established among social psychologists, and it is percolating into the broader culture. In his 2005 book *Blink*, author Malcolm Gladwell discussed how stereotypes can influence the kind of split-second decision-making that takes place in police shootings. Business is also paying attention. The Implicit Assumption Test is a tool researchers have used to measure unconscious bias, and corporations, including BP PLC ([BP](#)) and Becton Dickinson & Co. ([BDX](#)), are incorporating it into diversity training for managers. The February cover story of *HR Magazine*, published by the Society for Human Resource Management, was titled "Detecting Hidden Bias."

But Bielby's critics argue that stereotypes come into play primarily in interactions among strangers. When a supervisor has known an employee for months or years, "individuating information" takes over, allowing the manager to base decisions on specific traits he has come to know, not implicit assumptions, says Neal D. Mollen, an attorney in the Washington (D.C.) office of Paul, Hastings, Janofsky & Walker LLP, one of Wal-Mart's law firms.

Mark S. Dichter, an attorney at Morgan Lewis & Bockius LLP in Philadelphia, says that Bielby engages in the very practice that he finds so troublesome. "At the heart of his analysis is a stereotype statement that men are going to act in a certain way, without any analysis that men in [a] particular company are in fact acting that way," says Dichter. Adds Christopher Winship, a sociologist at Harvard University, who has opposed Bielby in seven cases. "If anybody came in and did that about women and blacks, all hell would break loose."

By Michael Orey

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