THE BOUNDARIES OF LITIGATING UNCONSCIOUS DISCRIMINATION: FIRM-BASED REMEDIES IN RESPONSE TO A HOSTILE JUDICIARY

BY FRANITA TOLSON*

ABSTRACT

In answering the question of how judges should approach unconscious discrimination claims, scholars ignore a practical solution to this problem: by putting the burden on the firm to reduce the incidence of unconscious bias ex ante, as opposed to putting the burden on the employee of proving it in court ex post. The means of accomplishing this is multifaceted, whereby firms that have been previously exposed to extensive employment discrimination litigation use their market power to force their smaller competitors to adopt a new diversity norm. Delaware law then steps in and memorializes the new norm in the case law, transitioning the norm into a rule of law enforceable through the duty to monitor (a species of the duties of care and loyalty). While this may sound a little unusual, this article will show that it is a meaningful alternative to combating discrimination primarily addressed through Title VII of the Civil Rights Act of 1964 (Title VII) by forcing firms incorporated within the state to create an environment amenable to diversity. Such initiatives could address overt discrimination and also unconscious discrimination, which is more prevalent and the focus of this study. While unconscious discrimination is actionable under Title VII (presumably), scholars are in agreement that court regulation of it has failed. Contrary to the alternatives suggested in the literature, placing the burden on the firm to regulate discrimination ex ante is more likely to minimize unconscious, discriminatory behavior, at least more than tinkering with the ex post remedies available for those few violations that can be proven through Title VII.

This article first explains why courts have failed to address unconscious discrimination, a failure that has emerged largely out of respect for employment at will and an unwillingness to infer differential treatment where other explanations are possible. Courts can address

*Visiting Assistant Professor, Northwestern University School of Law. J.D., The University of Chicago Law School, 2005. The author thanks Lisa Bernstein, Jim Lindgren, Michael Waterstone, Ruqaiijah Yearby, Jonathan Yi, Neel Sukhatme, Kristy Johnson, Goldburn Maynard, Julia Bennett, and the student participants of the Legal Scholarship Workshop at the University of Chicago Law School for their helpful comments and suggestions on earlier versions of this article. Special thanks to the editors for all of their outstanding work on this piece. Any errors are, of course, my own.
only the most extreme cases of unconscious discrimination, which require the presence of certain factors that will allow the court to isolate the bias. Second, this article proposes other mechanisms for addressing unconscious discrimination that account for its peculiar nature, mainly firm-based remedies that will be more successful than the courts have been in addressing this problem. The difficulty comes in giving the Delaware courts an incentive to become involved in the controversy over unconscious discrimination, or in the alternative, convincing firms to address unconscious discrimination without the impetus of litigation. This article demonstrates that such incentive can come from an unlikely blend of the duties of care and loyalty, corporate norms, and economic pressure from corporate giants like Wal-Mart.

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th></th>
<th></th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>INTRODUCTION</td>
<td>349</td>
</tr>
<tr>
<td>II</td>
<td>THE NEW GENERATION OF DISCRIMINATION</td>
<td>355</td>
</tr>
<tr>
<td>III</td>
<td>EMPHASIZING THE IMPORTANCE OF THE FIRM: UNCONSCIOUS DISCRIMINATION AS A LOSING PROPOSITION</td>
<td>366</td>
</tr>
<tr>
<td></td>
<td>A. The Sorry Plight of Title VII Plaintiffs</td>
<td>366</td>
</tr>
<tr>
<td></td>
<td>B. Thomas v. Eastman Kodak: Isolating the Bias</td>
<td>374</td>
</tr>
<tr>
<td></td>
<td>1. Employment at Will and Hicks: Eliminating All Nondiscriminatory Reasons from the Record</td>
<td>378</td>
</tr>
<tr>
<td></td>
<td>2. Reasonableness</td>
<td>388</td>
</tr>
<tr>
<td>IV</td>
<td>USING THE FIRM TO SOLVE THE CONUNDRUM OF UNCONSCIOUS DISCRIMINATION</td>
<td>396</td>
</tr>
<tr>
<td></td>
<td>A. What Incentives Does the Firm Have to Act?: Reputation and Speculative Harms</td>
<td>397</td>
</tr>
<tr>
<td></td>
<td>B. Avoiding the Scandal: Should the Delaware Judiciary Induce Firms to Act</td>
<td>402</td>
</tr>
<tr>
<td></td>
<td>C. Solving the Collective Action Problem: And the Answer Is . . . Wal-Mart</td>
<td>413</td>
</tr>
<tr>
<td></td>
<td>D. Conceptualizing the Diversity Norm: A Few Suggestions</td>
<td>415</td>
</tr>
<tr>
<td>V</td>
<td>CONCLUSION</td>
<td>420</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

In Glass v. Philadelphia Electric Co., the majority concluded that the district court abused its discretion by barring the plaintiff from introducing evidence at trial that the defendant created a hostile work environment based on unconscious discrimination that contributed to the plaintiff's negative work performance and subsequent poor work evaluations. In dissent, then-Judge Alito put aside "the question of whether, as a matter of law, a plaintiff in a disparate treatment case may prevail based on evidence of 'unconscious' discrimination" and stated that the plaintiff's reliance on such an "unconventional theory substantially diminished the probative value of the evidence of harassment" by the defendant.

The idea that unconscious discrimination is viewed by a sitting United States Supreme Court Justice as "unconventional" and that it diminishes the credibility of the plaintiff's case stands in stark contrast to admonitions by scholars that Title VII reaches such discrimination. While commentators never tire of discussing racism and sexism in all of their varied forms, courts appear to be tired of talking about them. Perhaps this fatigue explains the perceived novelty of unconscious discrimination and the overwhelming failure of courts to address its prevalence in the workplace. Maybe such fatigue can be lessened if we rename or recharacterize the problem. This article argues that the time has come to recraft the remedy.

Unconscious discrimination is based on a subconscious aversion to minorities, women, and other individuals protected by antidiscrimination statutes, such as older workers and those with disabilities. There is considerable disagreement about which term is appropriate—subtle bias or unconscious discrimination. The definition of "subtle bias" could be read to involve a certain level of intent on the part of the

1 34 F.3d 188 (3d Cir. 1994).
2 Id. at 195.
3 Id. at 200 (Alito, J., dissenting).
employer, or the term could refer to the act of discrimination, rather than
the employer's intent, as being covert. However, for purposes of this
article, the terms "unconscious discrimination," "unconscious bias," "implicit bias," and "subtle bias" are used interchangeably to refer to the
fact that the employer is not aware that any impermissible motivation
influenced the employment decision. This definition credits the em-
ployer's testimony that he did not have any racial or gender-based
animosity, which is common in these cases. Unlike conscious discrimi-
nation, the perpetrator, and in some cases the victim, may not be aware
of its presence, although its effects are still felt.

Unconscious discrimination is a challenge for the current Title VII
framework because the law does not give judges the tools to police
behavior that does not mimic the traditional prejudices that most are
familiar with such as racial epithets, off-color jokes, or patterns reflecting
the lack of minority advancement that can be easily explained by racial
or gender animus. As a result, many judges apply the burden-shifting
framework of McDonnell Douglas Corporation v. Green, which allows
plaintiffs to raise an inference of discrimination based on circumstantial
evidence. Yet these judges still anticipate some type of dispositive
smoking gun evidence that would illustrate that the protected
characteristic is the motivating factor behind the employment decision.

6Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) ("The ultimate
question is whether the employee has been treated disparately 'because of race.' This is so
regardless of whether the employer consciously intended to base the evaluations on race, or
simply did so because of unthinking stereotypes or bias."). See also Chad Derum & Karen
Engle, The Rise of the Personal Anomosity Presumption in Title VII and the Return to "No
Cause" Employment, 81 TEX. L. REV. 1177, 1196 n.88 (2003) (using the term "unconscious
discrimination because that is the terminology employed by unconscious bias critics").
"Implicit bias" is the term used in the social psychology literature when referring to this
phenomenon. See infra Parts III.A and IV.D. Many legal scholars use the term "subtle bias"
when referring to unconscious discrimination. See infra Part III.A.
7See Wright v. Southland Corp., 187 F.3d 1287, 1290 (11th Cir. 1999) ("A discrimi-
nation suit (unlike, for instance, an action for negligence or breach of contract) puts the
plaintiff in the difficult position of having to prove the state of mind of the person making the
employment decision."); Susan Sturm, Second Generation Employment Discrimination: A
Structural Approach, 101 COLUM. L. REV. 458 (2001). Professor Sturm has aptly described
the demise of more formal policies of discrimination:

Smoking guns—the sign on the door that "Irish need not apply" or the
rejection explained by the comment that "this is no job for a woman"—are
largely things of the past. Many employers now have formal policies
prohibiting race and sex discrimination, and procedures to enforce those
policies. Cognitive bias, structures of decisionmaking, and patterns of
interaction have replaced deliberate racism and sexism as the frontier of much
continued inequality.

Id. at 459-60. The downside is that discrimination is now harder for courts to police.
8411 U.S. 792, 802-03 (1973).
9See, e.g., Johnson v. Louisiana, 351 F.3d 616, 624 (5th Cir. 2003) (reversing the
district court's grant of summary judgment in favor of the employer where the district court
Consequently, plaintiffs alleging unconscious discrimination have limited options. Class action suits alleging disparate impact or systemic disparate treatment may cause such embarrassing publicity and extensive liability exposure that firms are forced to adopt diversity initiatives to appease shareholders.\textsuperscript{10} While this is one way of addressing unconscious discrimination, such widespread class action litigation is rare.\textsuperscript{11} In fact, found that the plaintiffs did not meet the employer's objective requirements for the position despite evidence that the objective requirements were not applied to the employees who were actually hired for the position). The district court judge in \textit{Johnson} decided that the qualifications of the hires were irrelevant at the prima facie case stage, despite the fact that plaintiffs presented proof that the objective criteria was being applied in a disparate manner, and disparate treatment is the hallmark of any discrimination claim. \textit{See Johnson v. Med. Cir. of La.}, No. 01-0191, 2002 U.S. Dist. LEXIS 24065, at *19-20 (E.D. La. Dec. 12, 2002) ("At the prima facie stage of inquiry, the qualifications, or lack thereof of the hires, is not pertinent."). \textit{rev'd in part, aff'd in part}, 351 F.3d 616 (5th Cir. 2003). The judge attempted to limit the plaintiffs' claim through a formalistic application of the \textit{McDonnell Douglas} framework, which is the problem for many alleging unconscious bias because their claims do not fit the same mold as traditional employment discrimination cases. The lack of smoking gun evidence dooms many discrimination claims at the trial level, although plaintiffs are occasionally successful in getting the decision reversed on appeal. \textit{See, e.g., White v. Baxter Healthcare Corp.}, No. 07-1626, 2008 U.S. App. LEXIS 14188, at *31 (6th Cir. July 3, 2008) (finding that a jury could reasonably infer that race was a motivating factor in the decision not to promote the plaintiff because "any evaluation of [the plaintiff's] interview performance is an inherently subjective determination, and thus easily susceptible to manipulation in order to mask the interviewer's true reasons for making the promotion decision" and "it would be highly inappropriate for us to assume, as [the dissent] does, that [the defendant's] own subjective perceptions of [the plaintiff] were accurate"); \textit{see also} Tademy v. Union Pac. Corp.}, 520 F.3d 1149, 1158-59 (10th Cir. 2008) (finding that a hostile work environment existed where an employee hung a noose on a wall clock given that it is "deeply a part of this country's collective consciousness and history, any [further] explanation of how one could infer a racial motive appears quite unnecessary"); the district court originally found that "the alleged noose could not be evidence of racial discrimination because it was merely 'an industrial rope with a slip knot tied in it').

\textsuperscript{10}In \textit{Griggs v. Duke Power Company}, the Supreme Court held that Title VII prohibits "practices that are fair in form, but discriminatory in operation." \textit{Griggs v. Duke Power Co.}, 401 U.S. 424, 431 (1971). This theory of disparate impact does not require the same "smoking gun" evidence of intent that judges look for in individual disparate treatment cases. Furthermore, in individual disparate treatment cases, the burden of persuasion is always on the plaintiff whereas in disparate impact, the defendant must persuade the court that the challenged practice is job related. \textit{Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), Stat. 1071, 1074-75 (codified at 42 U.S.C. § 2000e-2(k) (2000))}. The other category of cases involve systematic disparate treatment claims, which are not as commonly litigated, and arise when "discrimination [is] the company's standard operating procedure—the regular rather than the unusual practice." \textit{Int'l Bhd. of Teamsters v. United States}, 431 U.S. 324, 336 (1977). Section 707 of Title VII allows the federal government to bring a lawsuit alleging that an employer has "a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII]," a section which allows the government to challenge the disparate treatment of individuals or the application of neutral factors that have a disparate impact on a certain group. 42 U.S.C. § 2000e-6a (2000).

most litigation under Title VII will not have the same deterrent effect as class action suits despite the statute’s potential to address this problem.\textsuperscript{12} Unconscious discrimination claims are usually brought by individual plaintiffs, suing based on facts that obscure rather than reveal the existence of any potential bias, thus leaving the court in the position of trying to craft a remedy that is necessarily limited to the facts of the particular case before it.

However, two factors have emerged from the case law that reveal when judges can successfully resolve these claims: (1) by eliminating every nondiscriminatory reason from the record, and (2) finding that the plaintiff’s behavior is more reasonable than that of the employer. The best example of these two factors at work is a First Circuit case, \textit{Thomas v. Eastman Kodak Company}.\textsuperscript{13} There, the court denied summary judgment on the grounds that the plaintiff had raised an issue of material fact as to whether her performance evaluations were motivated by unconscious racial animus and therefore constituted unlawful discrimination in violation of Title VII.\textsuperscript{14} Both of these factors were integral to the plaintiff’s success because they allowed the court to isolate the unconscious bias in the record as a viable motivation for the allegedly discriminatory employment actions.

The \textit{Thomas} decision indicates that unconscious discrimination can be actionable pursuant to Title VII. Consistent with then-Judge Alito’s skeptical remarks in \textit{Glass}, however, such suits have limited potential because of the unwillingness of courts to abrogate the doctrine of employment at will. Because of employment at will, courts are able to provide relief to unconscious discrimination plaintiffs in only the most extreme cases. Furthermore, courts are ill-equipped to resolve employment disputes, and are more likely to defer to the employer. When applying the \textit{McDonnell Douglas} framework, the courts’ deference to employment at will explains why the employer only has to provide a legitimate business reason for its action, without the corresponding

\textsuperscript{12}See County of Washington v. Gunther, 452 U.S. 161, 180 (1981) (stating that Title VII prohibits “all practices in whatever form which create inequality in employment opportunity due to discrimination . . . [including] the \textit{entire spectrum} of disparate treatment of men and women resulting from sex stereotypes”) (quoting Franks v. Bowman Trans. Co., 424 U.S. 747, 763 (1976)); \textit{McDonnell Douglas}, 411 U.S. at 801 (stating that “Title VII tolerates no racial discrimination, subtle or otherwise”); Hopkins v. Price Waterhouse, 825 F.2d 458, 469 (D.C. Cir. 1987), \textit{aff’d in part}, 490 U.S. 228, 250-52 (1989) (stating that if the plaintiff has shown that she was treated less favorably because of her gender, “the fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it”). \textit{See also} Thomas v. Eastman Kodak Co., 183 F.3d 38, 59 (1st Cir. 1999) (“The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus.”).

\textsuperscript{13}183 F.3d 38 (1st Cir. 1999).

\textsuperscript{14}Id. at 42.
burden of persuasion. This "legitimate business" reason functions as a complete bar to recovery unless the plaintiff can meet the very difficult burden of proving that the employer's proffered reason is a pretext for discrimination.

Thus, the focus of the current debate should shift to how we can avoid lawsuits that are, at best, inefficient and costly and, at worst, losing propositions. This article proposes that adopting internal firm compliance standards that increase diversity, in inter-group cooperation, and awareness among employees ex ante have the potential to do far more towards addressing the problem of unconscious discrimination than bringing a lawsuit pursuant to Title VII ex post. Given the courts' overwhelming failure to address this issue, firm-based remedies are necessary to address this problem. And if the firm fails to implement programs and standards that address unconscious bias, stereotypes, and other covert means that result in disparate treatment across employees, it may be more effective to view this, not as a Title VII problem, but as a breach of the duty of care.

As the Delaware Court of Chancery held in *In re Caremark International, Incorporated Derivative Litigation*, in order for corporate boards to satisfy their obligation to be reasonably informed concerning the corporation, they have to make sure:

> that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.

Thus, noncompliance with the mandates of Title VII, where an employee has complained to management about disparate treatment, could be actionable as a breach of the duty of care if high level management and the board of directors fail to adequately address these concerns by ensuring that there are regulations within the firm that promote the type of debiasing and diversity needed to address both conscious and unconscious discrimination. It is, however, not clear if, outside of a desire to

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15698 A.2d 959 (Del. Ch. 1996).
16Id. at 970.
17Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would
self-policing, corporate boards can be otherwise induced to adopt these initiatives or if Delaware courts have an incentive to force them to do so. An alternative proposal is for firms that already have been subject to extensive Title VII litigation and have modified their behavior accordingly to force their business partners to adopt similar initiatives by applying economic pressure. One firm in particular, Wal-Mart, has faced extensive Title VII liability and has initiated diversity initiatives in response to this litigation. Because of their considerable sway in the business world, Wal-Mart can induce other firms, including its suppliers, to do the same.

This proposal is novel in many ways, and it is also timely. Legal scholarship has not focused specifically on the issue of when and under what circumstances unconscious discrimination claims are successful, knowledge which helps to develop viable alternatives to solve the problem, i.e., that the firm could be successful in remediying unconscious discrimination.

The article proceeds in four parts. Part II provides background information on the nature of unconscious discrimination and describes how scholars have approached this issue. Part III discusses the limitations on courts in greater detail. In seeking to deconstruct unconscious discrimination claims, Part III answers two questions: first, when are unconscious discrimination claims successful? Second, why is their success so limited if Title VII is designed to reach unconscious discrimination? From the case law, it is clear that unconscious discrimination claims are successful only where the employee can dispel every nondiscriminatory reason from the record and also has behaved reasonably in the face of the employer's discriminatory behavior. The idea is that the court must be able to successfully isolate unconscious bias in the absence of any direct evidence of discrimination. While it is difficult for a court to justify deferring to employment at will when an employment decision is clearly discriminatory, a court is unlikely to find for the plaintiff where the discrimination is based on the plaintiff's subjective perception and if other reasons exist that may explain the allegedly discriminatory action. By recognizing that, courts are laboring within a framework that focuses on intent and defers to employment at will. Part III sheds new light on when an unconscious discrimination claim can actually survive summary judgment, rather than simply concluding, as much of the literature does, that liability is possible.

Part IV answers the normative question: why the firm, as opposed to the judicial system, should have the responsibility of addressing unconscious discrimination. First, it asks what obligations firms have to

\[\text{\small effect Congress' intention to promote conciliation rather than litigation in the Title VII context \ldots .}\]
their shareholders to reduce the incidence of unconscious discrimination by focusing on the reputational harms caused by Title VII litigation. Next, Part IV focuses on whether firms should be required under Delaware law to address this issue, and what incentives Delaware courts have to enforce Title VII through the duty to monitor. Last, this section discusses how, if Delaware courts are not incentivized to act, firms that have already been subjected to Title VII litigation and/or sanctions could put economic pressure on their business partners to force them to adopt diversity initiatives. Part IV also discusses the cost and benefits of such initiatives, a relevant consideration for both Delaware courts and firms, and concludes that the firm would be at least marginally better in ensuring Title VII compliance than the courts.

II. THE NEW GENERATION OF DISCRIMINATION

Placing the burden on the firm to address unconscious discrimination is, in some ways, an unremarkable suggestion. It is undisputed that courts have failed to address both unconscious and overt discrimination, despite a statutory mandate that gives them power to counteract various types of discriminatory behavior. What is extraordinary is the means by which this can be accomplished. First, it is useful to start with the statute and how unconscious discrimination fits within this framework. Title VII prohibits employers from treating employees differently on the basis of race, sex, religion, or national origin, and from retaliating against an employee if the employee opposes any practice deemed unlawful under Title VII.\(^{18}\) By enacting Title VII, Congress partially abrogated the doctrine of employment at will, which allowed an employer to discharge an employee for any reason or for no reason, by specifically rejecting an employer's right to discriminate on the basis of certain protected characteristics. There is no language within the statute limiting Title VII to conscious discrimination. Additionally, no court has explicitly stated that unconscious discrimination claims cannot be brought pursuant to Title VII, and indeed, a few courts have found that the statute encompasses such claims.\(^{19}\) Yet most courts focus their

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\(^{19}\)See, e.g., Thomas v. Cal. State Dept' of Corr., No. 91-15870, 1992 U.S. App. LEXIS 20346, at *8-9 (9th Cir. Aug. 18, 1992) ("Were we to hold that the unsupported claim that a particular candidate was a 'superior' interviewee was sufficient without more to require summary judgment for an employer, we would immunize from effective review all sorts of conscious and unconscious discrimination."); Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1064 (8th Cir. 1988) ("Age discrimination is often subtle and 'may simply arise from an unconscious application of stereotyped notions of ability . . . .'") (quoting Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 154-55 (7th Cir. 1981)); Pite v. W. Elec. Co., 843 F.2d 1262, 1273 (10th Cir. 1988) ("One familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than
inquiry on "intentional" discrimination, which severely limits the success of unconscious discrimination claims.\textsuperscript{20} The persistence of unconscious discrimination in the workplace has been documented in numerous studies.\textsuperscript{21} This form of discrimination are applied to their male counterparts." (quoting Sweeney v. Bd. of Trs. of Keene State Coll., 604 F.2d 106, 114 (1st Cir. 1979)); Namenwirth v. Bd. of Regents, 769 F.2d 1235, 1243 (7th Cir. 1985) (alleging discrimination in a tenure decision, the court noted that "faculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars"); EEOC v. Inland Marine Indus., 729 F.2d 1229, 1235-36 (9th Cir. 1984) (holding disparate treatment occurs where decision maker applies subjective wage-setting policy in racially discriminatory and subtle manner even absent malevolent); Robinson v. Union Carbide Corp., 538 F.2d 652, 662 (5th Cir. 1976) (finding that an employee's evaluation forms were potentially constitutionally defective because they were potentially "vulnerable to conscious or unconscious discrimination by the evaluating supervisors") (quoting Wade v. Miss. Coop. Extension Serv., 528 F.2d 508, 518 (5th Cir. 1976)); Sperling v. Hoffman-La Roche, Inc., 924 F. Supp. 1346, 1362 (D.N.J. 1996) ("Disparate impact analysis addresses the effects of unconscious discrimination in addition to conscious or intentional discrimination."); Green v. U.S. Steel Corp., 570 F. Supp. 254, 276 (E.D. Pa. 1983) (finding that the defendant's hiring process "masked subtle and perhaps unconscious discrimination against black applicants" where after the implementation of an affirmative action program, the amount of blacks in the apprenticeship program increased, but the quality of the applicants did not change).\textsuperscript{22}

\textsuperscript{20}See EEOC v. Century Broad. Corp., 957 F.2d 1446, 1466 (7th Cir. 1992) ("[A] plaintiff who proves only . . . subde and unconscious discrimination has not shown willful discrimination.") (quoting Brown v. M & M/Mars, 883 F.2d 505, 514 (7th Cir. 1989)). For more on the intent requirement, see Costa v. Desert Palace, Inc., 299 F.3d 838, 854 (9th Cir. 2002) ("Disparate impact claims require the plaintiff to prove that the employer acted with conscious intent to discriminate."); aff'd, 593 U.S. 90 (2003); Oest v. Ill. Dept of Corr., 240 F.3d 605, 611 (7th Cir. 2001) ("To prevail on a Title VII disparate treatment claim, a plaintiff must establish that she is the victim of intentional discrimination."); Sorensen v. Aurora, 984 F.2d 349, 351 (10th Cir. 1993) ("When alleging disparate treatment on the basis of sex, the plaintiff must prove by a preponderance of the evidence that the defendant had a discriminatory motive or intent.") (internal citations omitted). See also Merrierweather v. Ala. Dep't of Pub. Safety, 17 F. Supp. 2d 1260, 1267 (M.D. Ala. 1998) ("A plaintiff bringing a claim under Title VII must establish that the employer's actions were the result of intentional discrimination."); Siam v. Potter, No. C04-0129MHP, 2005 U.S. Dist. LEXIS 11893, at *29 (N.D. Cal. May 17, 2005) ("In cases alleging disparate treatment on basis of gender, Title VII requires a plaintiff to prove that the employer acted with a conscious intent to discriminate."); Hopkins v. Elizabeth Bd. of Educ., No. 03-5418, 2005 U.S. Dist. LEXIS 17031, at *8 (D.N.J. Aug. 5, 2005) (requiring plaintiff to carry the burden of proving intentional discrimination).

\textsuperscript{21}Claudia Goldin & Cecilia Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, 90 AM. ECON. REV. 715, 736-38 (2000) (stating that blind auditions of new orchestra hires led to a one-third increase in the proportion of new female hires in major symphony orchestras); David Neumark, Sex Discrimination in Restaurant Hiring: An Audit Study, 111 Q.J. ECON. 915, 925, 936 (1996) (explaining a study where identical resumes with male/female names were sent to high end restaurants, 61% of male resumes received callback interviews as compared to 26% of women); Carol Rapaport, Apparent Wage Discrimination When Wages are Determined by Nondiscriminatory Contracts, 85 AM. ECON. REV. 1263, 1266, 1273-74 (1995) (describing a study of wage discrimination against black teachers). For more on the psychology behind unconscious discrimination, see Susan T. Fiske et al., Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049, 1051 (1991) (noting that employees are often evaluated based on the stereotypes of the employee's racial or gender
can also be more harmful than overt discrimination in some situations. In fact, one can safely argue that society's rejection of the aversive racist, or "a person whose ambivalent racial attitudes leads him or her to deny his or her prejudice and express it indirectly, covertly, and often unconsciously[,]" has made unconscious discrimination more common

GROUP); Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 CAL. L. REV. 945 (2006). As Professors Greenwald and Krieger have noted:
  [A] substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans. Consequently, when racially neutral causes and explicit bias can be rejected as causal explanations for racially disparate outcomes, implicit race bias must be regarded as a probable, even if not definitively established, cause.

Id. at 966-67; McGinley, supra note 4. There is considerable disagreement, however, about the prevalence of unconscious discrimination and how it should be defined—a debate that is beyond the scope of this study. See Anthony G. Greenwald, Unconscious Cognition Reclaimed, 47 AM. PSYCHOLOGIST 766 (1992); Michael Selmi, Response to Professor Wax Discrimination as Accident: Old Whine, New Bottle, 74 IND. L.J. 1233, 1240 (1999); Wax, supra note 4, at 1136-41. See also Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1245-46 (1995) (agreeing that a negligence approach would further Title VII's purposes and reach unconscious discrimination but ultimately rejecting the idea due to a lack of empirical testing).

22John F. Dovidio et al., Why Can't We Just Get Along? Interpersonal Biases and Interracial Distrust, 8 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 88 (2002). These commentators point out that:
  The different and potentially divergent impressions that Blacks and Whites may form during interracial interactions can have significant impact on their coordination and thus their effectiveness in task-oriented situations . . . . Besides manifesting itself in terms of different impressions and perceptions, contemporary bias can therefore also influence personal relations and group processes in ways that unintentionally but adversely affect outcomes for Blacks.

Id. at 97.

23Foster v. State, 614 So. 2d 455, 466 (Fla. 1992) (Overton, J., concurring) (quoting Sherri Lynn Johnson, Comment, Unconscious Racism and the Criminal Law, 73 CORNELL L. REV. 1016, 1027-28 (1988)). See also Lawrence, supra note 4, at 322-23 (describing the aversive racist); Timothy Davies, Racism in Athletics: Subtle Yet Persistent, 21 U. ARK. LITTLE ROCK L. REV. 881 (1999). In discussing the role of aversive racism in explaining the pay and promotion disparities in professional and amateur sports, Professor Davies notes that aversive racism act based on emotions other than hate or ill will:
  [A]versive racism represents a subtle, often unintentional, form of bias that characterizes many white Americans who possess strong egalitarian values and who believe that they are nonprejudiced. Aversive racists also possess negative racial feelings and beliefs of which they are unaware or that they try to dissociate from their nonprejudiced self-images. The negative feelings that aversive racists have for blacks do not reflect open hostility or hate. Instead, their reactions involve discomfort, uneasiness, disgust, and sometime fear. That is, they find blacks "aversive," while, at the same time, they find any suggestion that they might be prejudiced aversive as well.

than conscious discrimination in today's workplace.24 According to Professor Fiske, "[E]ven among relatively unprejudiced people, racial category labels automatically prime (increase the accessibility of) stereotypes."25 In one study, for example, participants were asked to evaluate candidates for a peer counseling program at their university.26 In situations where the black candidate was qualified for the position, or in the alternative, clearly unqualified, there was no discrimination—the black candidate was chosen 91% of the time in the former category and 13% in the latter.27 Where the candidates' qualifications were more moderate, thereby allowing more discretion from the decision maker in whether to hire the individual, the black candidate was recommended significantly less often than the white candidate (45% to 75%).28 According to Professors Dovidio, Gaertner, Kawakami, and Hodson, these findings support the general proposition that:

[b]ecause aversive racists consciously endorse egalitarian values and deny their negative feelings about Blacks, they will not discriminate directly and openly in ways that can be attributed to racism. However, because of their negative feelings, they will discriminate, often unintentionally, when their behavior can be justified on the basis of some factor other than race (e.g., questionable qualifications for a position).29

Because unconscious discrimination often falls in a gray area in which the decision could be based on the impermissible motivation or some other neutral criteria, this makes it hard to detect and difficult to remedy.

24See Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, 94 AM. ECON. REV. 991 (2004) (discussing a study in which 5,000 identical resumes sent out to different employers, applicants with "Caucasian" names received 50% more callback interviews than those applicants with "African American" names); EEOC Initiative Highlights Persistence, Changing Forms of Race Bias in Workplace, 75 U.S.L.W. 2519, at 1 (Mar. 6, 2007) (discussing new national initiative launched by the EEOC to raise public awareness about the more subtle biases that continue to permeate the workplace because "bias based on race and color 'has changed form' as more subtle bias supplants the blatant practices that originally spurred the enactment of Title VII of the 1964 Civil Rights Act"); Audrey J. Lee, Unconscious Bias Theory in Employment Discrimination Litigation, 40 HARV. C.R.-C.L. L. REV. 481, 483-86 (2005) (summarizing several empirical studies that show that "unconscious bias is quite prevalent, often in sharp contrast to individuals' self-professed identity").
25Susan T. Fiske, What We Know Now About Bias and Intergroup Conflict, the Problem of the Century, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 123, 124 (2002).
26Dovidio et al., supra note 22, at 90, 92.
27Id. at 92.
28Id.
29Id. at 90.
The elusiveness of unconscious discrimination is the biggest hurdle to a judicially crafted remedy, despite the legislative mandate of Title VII. Much of the difficulty is definitional. Conscious racism is based on "an instinctive, unexplained distaste at the thought of associating with the out-group as equals[,] or . . . reasons that are not based on established fact and are often contradicted by personal experience." The manifestations of conscious discrimination through, for example, inappropriate remarks or racial epithets, make it easier to detect and define than unconscious discrimination. In contrast, unconscious discrimination is based largely on cultural, emotional, and motivational factors that might be unknown to the perpetrator, a premise that has been thoroughly explored in cognitive psychology literature, but has resulted in little agreement among scholars about how to define and address the problem. While what follows is, by no means, an exhaustive literature review, a brief survey of the scholarship is required in order to understand how unconscious discrimination works. Much of the social psychology and unconscious bias literature indicates that human beings categorize individuals to maintain a sense of order. When people are categorized into groups, "actual differences between members of the same category tend to be perceptually minimized and often ignored" while the groups' differences from members of other categories (also referred to as individuals in the "outgroup") "tend to become exaggerated and overgeneralized." Furthermore, people feel personally and emotionally invested in the categorization process because they insert themselves into a group, which "increases the emotional significance of group differences and thus leads to further perceptual distortion and to

30Lawrence, supra note 4, at 332.
31Id. at 337. Professor Lawrence posits that:
All humans tend to categorize in order to make sense of experience . . . .
When a category—for example, the category of a black person or a white
person—correlates with a continuous dimension—for example, the range of
human intelligence or the propensity to violence—there is a tendency to
exaggerate the differences between categories on that dimension and to
minimize the differences within each category.
Id. See also Krieger, supra note 21, at 1217 (noting that even "a self-professed 'colorblind'
decisionmaker will fall prey to the various sources of cognitive bias [because] . . . [i]n a culture
in which race, gender, and ethnicity are salient, even the well-intentioned will inexorably
categorize along racial, gender, and ethnic lines. And once these categorical structures are in
place, they can be expected to distort social perception and judgment."); McGinley, supra note
4, at 423 ("Cognitive theory identifies common human information processing mechanisms as
responsible for creating stereotypes and the resulting discrimination . . . [by] theoriz[ing] that
stereotypes and discriminatory attitudes result from humans' natural cognitive processing
system which allows persons to know the world through categorization.") (footnote omitted).
32Samuel L. Gaertner et al., Reducing Intergroup Conflict: From Superordinate Goals to
Decategorization, Recategorization, and Mutual Differentiation, 4 GROUP DYNAMICS:
evaluative biases that reflect favorably on the in-group . . . . ” 33 It is this categorization, combining stereotypes and societal programming about racial constructs gives rise to unconscious discrimination. 34 In other words, "Subtle prejudice comes from people's internal conflict between ideals and biases, both acquired from [conflict with] . . . culture." 35

There is considerable disagreement in the social psychiatry literature about the nature and origins of unconscious discrimination, specifically whether it is an inevitable byproduct of the categorization process. 36 As evidence of the automaticity of stereotypes, commentators point to "[a]wkward social interactions, embarrassing slips of the tongue, unchecked assumptions, stereotypic judgments, and spontaneous neglect . . . [that] creates a subtly hostile environment for out-group members." 37 Much of the disagreement, however, lies in whether the impulse to stereotype can be controlled and if so, in what ways. 38 Professor Devine, for example, argues that "nonprejudiced responses require both the inhibition of the automatically activated stereotype [because of its long history of activation and greater frequency of occurrence] and the intentional activation of nonprejudiced beliefs[.]") 39 both of which involve

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33 Id. at 100 (discussing the "social identity perspective").
34 Lawrence, supra note 4, at 339 (stating that stereotyping makes individuals interpret and remember events in ways that "bolster and support" the stereotyped beliefs).
35 Fiske, supra note 25, at 126.
37 Fiske, supra note 25, at 124. See also Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489, 1503, 1506 (2005) (arguing that individuals "think through schemas generally, and through racial schemas specifically, which operate automatically when primed, sometimes even by subliminal stimuli" and "[o]nce activated, the racial meanings embedded within the racial schema influence interaction").
the use of controlled processes. Some commentators contend that the impulse to control stereotyping depends very heavily on the idea that such behavior may not be unconditionally automatic because it depends on "short-term motivations, which include immediate threats to self-esteem and focused efforts toward accurate understanding." However, many agree that individuals "can compensate for their automatic associations with subsequent conscious effort," efforts that can be advanced through the legal system.

Professor Charles Lawrence was one of the first legal scholars to probe the courts' treatment of subconsciously held biases, although his study focuses on unconscious discrimination in equal protection jurisprudence rather than Title VII. He argued that courts must acknowledge the cultural roots of racism and veer from a theory of discrimination that relies on the conscious animus of the discriminator. Scholars have built on the psychological foundations laid by Professor Lawrence to explain the roots of unconscious racism and its effect on the legal system. Professors Christine Jolls and Cass Sunstein argue that the variation between conscious and unconscious racism is based on two systems of cognitive operations that test how individuals react to different proxies for race and gender. "System I is rapid, intuitive, and error-prone;" while "System II is more deliberative, calculative, slower, and often more likely to be error-free." Conscious racism is most closely aligned to System II where the decision to discriminate is

group member in an unintended fashion, outside of a perceiver's awareness.

40 Fiske, supra note 25, at 124.
41 Id. See also Gaertner et al., supra note 38, at 397 (noting that interaction between groups with a common fate can reduce bias).
42 Lawrence, supra note 4.
43 Id. at 325-26 ("Understanding the cultural source of our racism obviates the need for fault, as traditionally conceived, without denying our collective responsibility for racism's eradication."). Professor Lawrence argues that heightened scrutiny should apply where the court can determine that the complained of action conveys a cultural meaning. Based on this approach, the court:

would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance. The court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated. If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers. As a result, it would apply heightened scrutiny.

Id. at 356.
45 Id. at 974.
Unconscious racism correlates to System I, where individuals make quick deductions based on limited information. As a result, these deductions are usually erroneous because they are based on cognitive shortcuts such as stereotypes. By using cognitive shortcuts that rely on previously formed stereotypes or encounters with members of the protected group, employers attempt to predict an individual's future behavior based on the protected characteristic.

In another study, Professor McGinley discusses the role of attitude in influencing the creation of unconsciously held biases, indicating that individuals with a happy or positive disposition are more likely to rely on previously formed stereotypes than individuals who have a neutral affect. Early childhood experiences, cultural biases, and personal disposition all influence an individual's reliance on stereotypes. Furthermore, once the initial erroneous determination is made about a person in the out-group, the bias becomes more and more pronounced at each subsequent interaction between the two individuals. The need for

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46 Id.
47 Id. at 975 (noting that when it comes to implicit bias, System I is likely the culprit in a scenario where an employer chooses a white employee over a black one on the grounds that customers will be more "comfortable" with the white employee because "the employer has no conscious awareness of the role race played in its decision").
48 Michelle Travis, Perceived Disabilities, Social Cognition, and "Innocent Mistakes," 55 VAND. L. REV. 481, 488-89 (2002) (noting that "[s]ocial scientists have discovered that our predictions of future performance and behavior are efficiently--but imperfectly--based on cognitive shortcuts that rely too heavily on prior causal theories and that systematically bias predictions in identifiable ways" and arguing that these cognitive shortcuts cause employers to commit errors when they try to evaluate the future impact of non-disabling impairments based on their past impressions).
49 McGinley, supra note 4, at 424-25. The finding that individuals who have a pleasant disposition are more likely to rely on stereotyping indicates that, contrary to popular belief, individuals who engage in unconscious discrimination are not necessarily "bad" people. See Lu-in Wang, Race As Proxy: Situational Racism and Self-Fulfilling Stereotypes, 53 DEPAUL L. REV. 1013, 1018 (2004). As Professor Wang observes:

We tend to see someone else's conduct as being mostly or even exclusively determined by character (the kind of person she is) while overlooking the context in which the person is acting. This . . . causes us to attribute another person's behavior to his or her enduring dispositional qualities (such as personality, beliefs, or attitudes) while overlooking the influence of situational factors (such as constraints or expectations introduced by the social context).

Id. at 1023 (footnotes omitted). Consequently, Title VII's focus on the "bad actor" undermines attempts at addressing unconscious discrimination.
50 Greenwald & Krieger, supra note 21, at 959.
51 Lee, supra note 24, at 482. See also Gary Blasi, Advocacy Against the Stereotype: Lessons From Cognitive Psychology, 39 UCLA L. REV. 1241, 1257-58 (2002) (discussing "cognitive dissonance," which is a psychological need to unconsciously adjust our principles to whatever stance we have been conditioned to take); Wang, supra note 49, at 1018-19 ("[S]tereotypes do not just influence how individuals categorize and perceive others based on race, but also can play a role in elicting from the target objective 'evidence' to simultaneously confirm the stereotype and obscure its influence.").
coherence between the stereotype and the individual's actual perceptions of the minority explains the individual's continuing reliance on his or her first impressions. This phenomenon can be partly explained by the connectivist models most recently advanced by scholars. According to this theory, "when people encounter conceptual combinations they find incoherent, they tend to invent causal stories that restore a sense of coherence, narratives with new information that 'explains away' the apparent inconsistency between the components of the concept." Thus, individuals will explain away behavior that is inconsistent with a previously formed stereotype, thereby making the stereotype difficult to dispel.

The underlying premises regarding the nature and prevalence of unconscious discrimination are bolstered by the widespread use of the Implicit Association Test (IAT), which is available on the Internet and measures implicit attitudes toward blacks and whites. More than three million people have taken this test. Respondents answer questions that help filter out any biases they have towards blacks, or in the alternative, preferences for whites, which is gauged by the individual's response speed when asked to associate certain words to a particular race. Respondents were more likely to associate pleasant words with whites and negative words with blacks; the only exception was blacks, who did not show a substantial pro-white bias. Scholars have used the IAT to measure discriminatory behavior and detect the pervasiveness of implicit bias in our society. While the IAT has been used to unearth discriminatory attitudes among the public at large, many scholars question what, if anything, the test is actually measuring and argue that it

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53Blasi, supra note 51, at 1261.
54Id.
57Greenwald & Krieger, supra note 21, at 952.
58Id. at 956. Twenty-seven percent of test takers have a strong automatic preference for white; 27% have a moderate automatic preference for white; 16% of a slight automatic preference for white; and 17% have little or no preference for white. The remaining 12% of test takers have a strong automatic preference for black (2%); a moderate preference (4%) and a slight preference (6%). Id. at 958.
59Blasi, supra note 51, at 1247-50 (describing experiments that test for the same variables as the IAT and noting the prevalence of implicit bias); Greenwald & Krieger, supra note 21, at 961-62 (discussing studies). See also Theodore Eisenberg & Sheri Lynn Johnson, Implicit Racial Attitudes of Death Penalty Lawyers, 53 DePaul L. Rev. 1539, 1552 n.29 (2004) (citing Brian A. Nosek et al., Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site, 6 GROUP DYNAMICS: THEORY RES. & PRACT. 101, 101-15 (2002)).
is deeply flawed.\textsuperscript{60} Thus, any use of the IAT as a potential means of addressing the problem has to account for the limited use of such testing.

This brief review of the literature reveals, not surprisingly, that unconscious discrimination presents difficulties for the legal system because of its unique cognitive and psychological components.\textsuperscript{61} To understand this point, it is important to put the problem in the context of employment litigation. To establish a race discrimination claim under the circumstantial method of proof outlined in \textit{McDonnell Douglas}, a plaintiff alleging employment discrimination under Title VII must establish:

(i) that he belongs to a racial [or gender] minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.\textsuperscript{62}

The burden of production, not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment

\textsuperscript{60}See, e.g., Hart Blanton & James Jaccard, Arbitrary Metrics in Psychology, 61 AM. PSYCHOLOGIST 27, 29, 38 (2006); Nilanjana Dasgupta et al., The First Ontological Challenge to the IAT: Attitude or Mere Familiarity?, 14 PSYCHOL. INQUIRY 238, 239 (2003); Michael A. Olson & Russell H. Fazio, Reducing the Influence of Extrapersonal Associations on the Implicit Association Test: Personalizing the IAT, 86 J. PERSONALITY & SOC. PSYCHOL. 653, 665 (2004). See also, Gregory Mitchell & Philip E. Tetlock, Antidiscrimination Law and the Perils of Mindreading, 67 OHIO ST. L.J. 1023, 1033 (2006) (arguing that the IAT has "serious psychometric flaws and an alarmingly high false alarm rate"). These commentators question the effectiveness of the IAT because:

- variations in the mere familiarity of the group categories activated by the IAT can lead to scores indistinguishable from those motivated by animus toward those groups; so too can egalitarian empathy for disadvantaged social groups; so too can performance anxiety linked to the fear of being labeled a bigot; so too can mere awareness of cultural stereotypes and depressing sociodemographic facts.


\textsuperscript{61}Note, however, that not everyone is convinced that the findings of social psychologists and legal scholars regarding unconscious bias mandate change within the legal system. \textit{See} Mitchell & Tetlock, \textit{supra} note 60, at 1030-34 (criticizing implicit prejudice scholarship not only for overlooking the flaws of the IAT but also for "ignore[ing] alternative explanations for alleged discriminatory behavior" and "suspend[ing] disbelief in judging the real-world implications of laboratory results on implicit prejudice").

action. The plaintiff then must prove that the employer's articulated reason is a pretext for discrimination.

In considering the employer's burden at stage two of the McDonnell Douglas burden-shifting formula, one must account for the fact that the employer might not know that his decision has been tainted by racial or gender bias, or that his bias might not be clear to the plaintiff or explicit from the record. Unconscious discrimination, therefore, does not lack the "harm" that stage two of the McDonnell Douglas test is designed to uncover, but the test has difficulty eliciting any of the motivations that social psychologists and legal scholars have attributed to promoting unconscious bias. As one scholar has noted, "[M]ere social categorization can influence differential thinking, feeling, and behaving toward in-group and out-group members ... [with the result being] people favor in-group members in reward allocations, in esteem, and in the evaluation of the products of their labor." Nevertheless, the employee will fail at the third stage of the McDonnell Douglas test because of the difficulty in proving what the employer himself might not have even known.

It is clear that unconscious discrimination claims, with their obvious proof problems, undoubtedly have a higher rate of failure than traditional employment discrimination claims. Employees face an often insurmountable task of proving that an employer acted with

63 Id. at 802.
64 Id. at 804.
65 Fiske, supra note 25, at 124-25.
66 Gaertner et al., supra note 32, at 100 (finding that people are less likely to cooperate with out-group members when it comes to the allocation of scarce common resources; that people retain more information about in-group members and remember less positive information about out-group members; and that people are more forgiving of behaviors of in-group members while ascribing negating outcomes to out-group members).
67 See Jerry Kang & Mahzarin R. Banaji, Fair Measures: A Behavioral Realist Revision of Affirmative Action, 94 CAL. L. REV. 1063, 1079 (2006) ("Ex post rights to sue have additional difficulties that can render them useless in the face of discrimination caused by implicit bias. Most obviously, they require the victim to perceive the discrimination ... even when a victim suspects discrimination, high transaction costs and difficult evidentiary burdens make litigation unlikely."). See also Krieger, supra note 21, at 1167.
[D]isparate treatment jurisprudence ... is based on an assumption that decisionmakers possess "transparency of mind," that they can accurately identify why they are about to make, or have already made, a particular decision ... Equipped with conscious self-awareness, well-intentioned employers become capable of complying with the law's proscriptive injunction not to discriminate.
Id. See also McGinley, supra note 4, at 419 (noting that courts applying McDonnell Douglas erroneously assume that the proof mechanism serves the role of determining conscious intent when in reality it is designed to determine causation, regardless of the employer's conscious awareness); Wang, supra note 49, at 1018 ("[I]ndividuals are most likely to discriminate in situations in which their behavior is least likely to be viewed as discriminatory ... ").
discriminatory intent. These difficulties, as well as the diverging positions among scholars regarding employer liability for unconscious discrimination, reflect the possible futility of exposing employers to more liability by amending or expanding the reach of the statute or current doctrine.

III. EMPHASIZING THE IMPORTANCE OF THE FIRM:
UNCONSCIOUS DISCRIMINATION AS A LOSING PROPOSITION

A. The Sorry Plight of Title VII Plaintiffs

This article argues that courts will not acknowledge the covert role that discrimination can play when the adverse employment action can be otherwise explained; the success of these claims is premised on the court being able to view the alleged unconscious discrimination as the equivalent of a claim based on intentional discrimination. Much of this thesis is derived from the fact that employment discrimination plaintiffs asserting the more traditional Title VII discrimination claims overwhelmingly lose. There is little to be gained, therefore, from

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68Michael Selmi, Why are Employment Discrimination Cases So Hard to Win?, 61 L.A. L. REV. 555, 556 (2001) (arguing that employment discrimination cases are hard to win because of misperceptions that courts have about plaintiffs that stem from a "popular anti-employment discrimination rhetoric often financed by conservative interest groups"); see also Krieger, supra note 21, at 1212-13 (concluding that under the Supreme Court's decision in Furco Construction Corp. v. Waters, 438 U.S. 567 (1978), an employer must be a "systematic" information processor when making hiring decisions).

69See Selmi, supra note 5, at 662-63. As Professor Selmi noted:

The doctrinal reality is that subtle discrimination can be a form of intentional discrimination, so long as it can be proved. The problem with subtle discrimination is that it is difficult to prove, not that it is inconsistent with existing doctrine. By the same measure, the difficulty of proving subtle discrimination does not stem principally from its unconscious nature, but rather from the gap in perspectives that exists between African Americans and whites over the continued relevance of discrimination.

Id.

70Kevin M. Clermont et al., How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals, 7 EMP. RTS. & EMP. POL'Y J. 547, 557-58 (2003) (noting that the reversal rate after a plaintiff win is the second highest in employment discrimination cases than in any other class of cases, while the plaintiff reversal rate after a defendant win is the third lowest); Michael J. Zimmer, The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?, 53 EMORY L.J. 1887, 1944 (2004) ("The 5.8 percent reversal rate of defendant trial victories is smaller in employment discrimination cases than any other category of cases except prisoner habeas corpus trials."). See also Ruth Colker, The Americans With Disabilities Act: A Windfall for Defendants, 34 HARV. C.R.-C.L.L. REV. 99, 100 (1999) (looking at reported decisions from 1992-1998 and finding that defendants prevailed in more than 93% of the cases decided at the trial court level and were more likely to be affirmed on appeal); Theodore Eisenberg, Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases, 77 GEO. L.J. 1567, 1567 (1989) (noting that only claims filed by prisoners have a lower success rate than that of employment discrimination plaintiffs).
asserting a claim that is considered more "unconventional" and novel than the more customary Title VII claims.

Many scholars argue that the dismal success rates of Title VII claims result from a judicial bias against Title VII plaintiffs, a bias that is illustrated by empirical evidence showing the low success rate of these claims. For example, Professors Kevin Clermont and Stewart Schwab determined that most Title VII plaintiffs have to pursue their claims all the way through trial in order to prevail, and even then most lose. Such plaintiffs also disproportionately lose more on appeal than defendants.

71McGinley, supra note 4, at 480 (noting that judges do not believe that discrimination is prevalent in today's workplace and that Title VII's purpose has become penal, aimed at punishing employers for conscious animus); Selmi, supra note 5, at 674 (describing social dominance theory in which "group inequality is seen as natural or at least inevitable, and many of our actions and beliefs can best be understood as an effort to justify and maintain the existing hierarchies"). Consistent with this theory, Professor Selmi notes that:

[judges comprise a paradigmatic high status, high intellectual, and high power group, one that has a clear interest in preserving existing inequality through legitimating myths. Therefore, social dominance theory would suggest that judges are likely to think of themselves as products of a meritocratic system where individual talent is rewarded, and where inequality of opportunity does not significantly undermine the system.

Id. at 675. In my view, the social dominance theory is an inadequate explanation for the behavior of judges, for judges are more likely to ensure equality of opportunity than they are equality of results. See infra Part III.B.

72Kevin M. Clermont & Stewart J. Schwab, How Employment Discrimination Plaintiffs Fare in Federal Court, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (claiming that employment discrimination plaintiffs (unlike many other plaintiffs) have always done substantially worse in judge trials than in jury trials). Professor Selmi also notes the dismal success rates of employment discrimination plaintiffs. From 1995-1997, plaintiffs in employment cases succeeded in only 18.7% of cases tried before a judge, whereas the success rates for plaintiffs in judge tried insurance cases and personal injury cases was 43.6% and 41.8%, respectively. Selmi, supra note 68, at 560-61.

73Clermont & Schwab, supra note 72, at 429. Professors Clermont and Schwab note that:

[e]mployment discrimination plaintiffs ... manage many fewer happy resolutions early in litigation, and so they have to proceed toward trial more often. They win a lower proportion of cases during pretrial and at trial. Then, more of their successful cases are appealed. On appeal, they have a harder time upholding their successes and reversing adverse outcomes.

Id.

74Clermont et al., supra note 70, at 564. In trying to determine why appellate courts are heavily pro-defendant, Professors Clermont and Eisenberg thoughtfully opined:

The appellate judges may act on their perceptions of the trial courts' being pro-plaintiff. The appellate court consequently would be more favorably disposed to the defendant than are the trial judge and the jury.

This appellate favoritism would be appropriate if the trial courts were in fact biased in favor of the plaintiff .... Indeed, as empirical evidence accumulates in refutation of trial court ... on the plaintiff/defendant axis, [any such judicial perceptions at the appellate level] appear increasingly to be misperceptions.

Alternatively, unconscious biases may be at work. Perhaps appellate judges' greater distance from the trial process creates an environment in which
Professor Wendy Parker conducted an empirical study of 659 racial discrimination cases and concluded that the current perception of judges ignoring subtle discrimination and deferring to defendants is "a little too optimistic" and the current status of employment discrimination is "actually worse than previously told" because judges assume that most of these claims are unmeritorious.\textsuperscript{75}

The presumption that racial discrimination claims are unmeritorious stems from the general consensus that employment discrimination cases are too easy to file and too easy to win, when, in reality, the opposite is true.\textsuperscript{76} Based on these studies, one could argue that there is a bias against employment discrimination plaintiffs that is especially damaging to those alleging unconscious discrimination.\textsuperscript{77} Most scholars

\textsuperscript{75}Wendy Parker, \textit{Lessons in Losing: Race Discrimination in Employment}, 81 NOTRE DAME L. REV. 889, 893 (2006). \textit{See also} Selmi, supra note 68, at 556-57. According to Professor Selmi:

When it comes to race cases, which are generally the most difficult claim for a plaintiff to succeed on, courts often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way. These biases, as well as others, inevitably influence courts' treatment of discrimination cases, and help explain why the cases are so difficult to win.

\textsuperscript{76}Selmi, supra note 68, at 556-57 (arguing that employment discrimination cases are hard to win because of misperceptions that the courts have about plaintiffs that stem from a "popular anti-employment discrimination rhetoric often financed by conservative interest groups"). Professor Selmi also attributes this bias towards race discrimination claims to the anti-affirmative action mindset of the judiciary, which causes courts to view both the persistence of discrimination and the merits of the underlying claim with deep skepticism. \textit{Id.} at 562-63 (stating that this skepticism makes "courts hesitant to draw inferences of racial discrimination based on circumstantial evidence"). Moreover, he also notes how Supreme Court rhetoric has a skeptical, anti-employment discrimination aura that promotes the belief that "many observed racial disparities represent the natural order of things."\textit{ Id.} at 563. \textit{See also} Michael Selmi, \textit{Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric}, 86 GEO. L.J. 279 (1997). Courts have a similar attitude toward gender discrimination, an area where it has created an affirmative defense for employers subject to sex discrimination claims "out of whole cloth, as there was very little precedent for the defense . . . [and] may signal a shift in judicial attitudes that portends more difficulty for plaintiffs to recover in cases of sexual harassment . . . ." Selmi, supra note 68, at 569.

\textsuperscript{77}Parker, supra note 75, at 921. Professor Parker advances the "the defendants' settlement incentives theory" to explain why most race discrimination claims lose. Under this theory, plaintiffs alleging race discrimination in employment fare poorly when before federal district courts because their claims are weak. . . . [T]he defendants act on strong incentives to settle meritorious and even somewhat meritorious lawsuits. Defendants fear a trial, with its unpredictable outcome, and a public airing of their affairs. As a result, this theory contends, only particularly weak claims remain for federal court resolution, and this best explains plaintiffs' low win rate.
try to resolve this problem by manipulating aspects of existing doctrine in arguing that Title VII is more than capable of addressing unconscious discrimination. For example, Professor Terry Smith has argued that Title VII's retaliation provisions can be expanded to reach subtle discrimination.\footnote{78}{Terry Smith, Everyday Indignities: Race, Retaliation, and the Promise of Title VII, 34 COLUM. HUM. RTS. L. REV. 529, 533-34 (2003); see also Derum & Engle, supra note 6, at 1196 (noting that the legislative history of Title VII seems to endorse a definition of discrimination broad enough to encompass both overt and subtle forms of discrimination); Jessie Allen, Note, A Possible Remedy for Unthinking Discrimination, 61 BROOK. L. REV. 1299, 1301 (1995) (stating that intentional discrimination should be broadened "to include a person's reliance on racial stereotypes, conscious or not").}

In another study, Professor Melissa Hart maintains that the mixed motive approach provides a means to address unconscious discrimination because it creates:

a middle ground that will make courts comfortable with acknowledging the role that discrimination can play even in cases where employers can otherwise justify their decisions. And, by eliminating any argument that a finding of discrimination requires the conclusion that the employer is a liar, it reduces some of the "moral opprobrium" from a finding of Title VII liability in certain circumstances.\footnote{79}{Hart, supra note 4, at 762. See also Tristin K. Green, Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory, 38 Harv. C.R.-C.L. L. REV. 91, 145 (2003) (suggesting that workplace discrimination can be remedied through a legal regime that "requires employers to manage diversity within their organizations and to minimize the operation of discriminatory bias" by focusing "on the ways in which discriminatory bias, whether conscious or unconscious, operates in the larger context of group dynamics, organizational structure, and institutional practices rather than solely in isolated individual states of mind").}

Similarly, Professor Ann McGinley argues that Title VII reaches unconscious discrimination because "in most areas of Title VII the proof constructs already exist that make it possible to recognize as illegal at least some of the unconscious discrimination that is responsible for unequal treatment of women and minorities in the workplace."\footnote{80}{McGinley, supra note 4, at 446.} She notes that although a legislative solution "would be preferable," under the current framework, trial courts could use summary judgment standards and jury instructions that explicitly state that employers can be liable for disparate treatment based on unconscious discrimination.\footnote{81}{Id. at 480-81.}
Professor Michael Selmi makes a similar point to Professor McGinley's, arguing that traditional disparate treatment doctrine under McDonnell Douglas remains the best model for proving claims of discrimination, regardless of how the discrimination is characterized. The problem, from his perspective, is that scholars focus on the differences between subtle discrimination and intentional discrimination; engaging in an analysis that is based "on an outmoded definition of intentional discrimination, one that largely exonerates employers ... so long as they do not engage in acts of discrimination that do not depend on inferential determinations." This focus on the traditional definition of intent, however, reflects the reality of judicial decision making—i.e., the need for smoking gun evidence in order to be "convinced" of the plaintiff's position. Any theory that claims to shed light on how unconscious discrimination is treated has to consider this reality. This problem cannot be solved through theoretical compromises or by using evidentiary means to elicit unconscious discrimination; rather, the problem is the reluctance of judges to employ those means liberally to find in favor of this particular class of plaintiffs.

In contrast, there are those who argue that employers should not be liable for unconscious discrimination under Title VII. Professor Amy Wax suggests that, at the very least, there is "some doctrinal uncertainty as to whether 'intentional' discrimination encompasses unconscious as well as conscious 'motives" for an adverse employment action. Applying principles of accident law, she argues that employers should not be liable for unconscious discrimination because "it is unlikely to serve the principal goals of a liability scheme—deterrence, compensation, insurance—in a cost effective manner." Professor Wax believes that employers will respond to the increased threat of liability by overinvesting in measures that likely will have no impact on reducing implicit bias. The current proposal is similar to Professor Wax's thesis because it questions the ability of a Title VII liability scheme to address unconscious bias; however, rather than focusing on how increased liability could result in over-deterrence, this study relies on direct and

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82 See Selmi, supra note 5, at 661-63.
83 Id. at 672 (stating that "the Court in McDonnell Douglas Corp. v. Green created a process for establishing a case of individual discrimination based on an awareness of the changing nature of discrimination, but has failed to adopt this awareness with appropriate judicial sincerity, continuing instead to search for signs of overt discrimination").
84 Id. at 673.
85 See Wax, supra note 4, at 1134.
86 Id. at 1146.
87 Id. at 1152-33.
88 Id. at 1133.
indirect debiasing through diversity initiatives and affirmative action, as discussed in Part IV.\(^8^9\)

This scholarly debate, while interesting, is largely irrelevant to the extent that it focuses on whether Title VII should be amended or expanded to encompass claims of unconscious discrimination, a position that has failed to sway the courts. A legal system that reaches unconscious discrimination would, in theory, be able to elicit the illegal motivations in the employer's decisionmaking, but the plaintiff generally has to rely on inference, innuendo, and speculation, making these claims inherently problematic and difficult to win. Moreover, it is unlikely that an efficient legal rule can be designed under Title VII that will be able to address the harm experienced by every person who claims to have been subjected to unconscious discrimination, or in the alternative, provide a roadmap for employers seeking to avoid this type of liability.\(^9^0\) As Professor Sturm noted, even if the discriminating behavior is the same across employers, individuals "experience the same conduct quite differently, depending on their position in relation to the conduct, their power, their gender, their mobility, their support networks, and the degree of their cross-gender interaction."\(^9^1\) Thus, unconscious discrimi-

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\(^8^9\)Professor Wax argues that such proposals would be inefficient because "the amount expended on 'precautions' against liability will fall short of abating the targeted harm to a degree that justifies such expenditures." Wax, supra note 4, at 1133. However, treating unconscious discrimination as "accidental" has the obvious flaw of ignoring the harmfulness of this behavior. Moreover, as I point out in Part IV, such expenditures do not have to be costly, but can still be effective.

\(^9^0\)Sturm, supra note 7, at 475-76. Professor Sturm states that:

Any rule specific enough to guide behavior will inadequately account for the variability, change, and complexity characteristic of second generation [unconscious discrimination] problems. General rules, unless linked to local structures for their elaboration in context, provide inadequate direction to shape behavior. This is particularly true for more subtle and less familiar problems, such as second generation discrimination. Externally-imposed solutions also founder because they cannot be sufficiently sensitive to context or integrated into the day-to-day practice that shapes their implementation.

Id. See also Selmi, supra note 5, at 663 (highlighting that subtle discrimination claims are difficult to win because of the disconnect between blacks and whites over the pervasiveness and definition of discrimination).

\(^9^1\)Sturm, supra note 7, at 472. See also Russell K. Robinson, Perceptual Segregation, 108 COLUM. L. REV. 1093, 1108 (2008) (discussing a study in which 3,000 employees were interviewed on issues relating to workplace equality and concluding that "race is the most significant determinant in how people perceive and experience discrimination in the workplace, as well as what they believe employers should do to address such incidents and attitudes.") (internal quotations omitted). Professor Robinson believes that black and white employees have different views on workplace equality because they "interpret allegations of racial discrimination through substantially different perceptual frameworks ... ."

I call the typical white perspective the "colorblindness perspective." This perceptual framework views discrimination as an aberration from a colorblind norm, and it regards most forms of race-consciousness as socially disruptive. I call the typical black perspective the "pervasive prejudice perspective," and it
nation is heavily influenced by the organizational structure of the workplace and the allocation of power between individuals within it. Courts have made some attempts to limit the discrimination that fester as a result of workplace structure, culture, or norms by recognizing that subjective employment practices are especially vulnerable to being impermissibly influenced by race or gender. Nevertheless, they have refused to find that subjective evaluations alone are sufficient to create an inference of discrimination.

There are also other explanations for a plaintiff's limited ability to succeed on an unconscious discrimination claim under Title VII that is unlikely to be fixed by amending the statutory framework. Similar to the views discrimination as a commonplace event, rooted in daily social dynamics. Given this understanding, it is rational—rather than strategic or paranoid—for blacks to be attentive to racial dynamics and to view some conduct that many whites would see as benign as in fact discriminatory. Because most instances of perceived discrimination contain some ambiguity, a person's overarching framework may be more determinative than the facts of the particular incident in forming the person's initial opinion.

Id. at 1117.

92See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) ("We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices."); Crawford v. W. Elec. Co., 745 F.2d 1373, 1384-86 (11th Cir. 1984) (affirming district court's finding that employer's review system that was based in part on wholly subjective evaluations by white foremen of black employees' "skill" had a disparate impact on black employees); Robinson v. Union Carbide Corp., 538 F.2d 652, 662 (5th Cir. 1976) (holding that a promotion system that relied on supervisor's subjective opinion concerning qualities such as "adaptable," "bearing, demeanor, manner," "verbal expression," "appearance," "maturity," "drive," and "social behavior" [violated Title VII because] [s]uch high-level subjectivity subjects the ultimate promotion decision to the intolerable occurrence of conscious or unconscious prejudice") (quoting Rowe v. Gen. Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972)); Wade v. Miss. Coop Extension Serv., 528 F.2d 508, 518 (5th Cir. 1976) (holding that evaluation form violated Title VII where "the questions on the evaluation form were in part subjective and vulnerable to either conscious or unconscious discrimination by the evaluating supervisors"); "the evaluation scores themselves were not consistently used as a basis for . . . promotion"; and "the defendants wholly failed to make a showing that the test was substantially related to the particular jobs of the individual being evaluated.").

93See, e.g., Denney v. City of Albany, 247 F.3d 1172, 1185 (11th Cir. 2001) ("Absent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext under Title VII or other federal employment discrimination statutes."); United States v. City of Northlake, 942 F.2d 1164, 1169 (7th Cir. 1991) (noting that the government is not arguing that subjective hiring practices are per se discriminatory, but rather that they "provide a ready mechanism for discrimination"); Grano v. Dep't of Dev. of Columbus, 699 F.2d 836, 837 (6th Cir.1983) (stating that "the legitimacy of the articulated reason for the employment decision is subject to particularly close scrutiny where the evaluation is subjective and the evaluators themselves are not members of the protected minority" but finding that "[s]ubjective employment evaluations, however, are not illegal per se.").
debate among commentators, judges also struggle with determining an appropriate remedy for victims of unconscious discrimination that reflects the proper distribution of liability, without causing the employer to engage in behavior that is both costly and overly deterrent. After all, what is the appropriate standard of "fault" when the employer is not aware that he has committed an actionable wrong? The remedy in the face of deliberate acts is unquestionable: monetary damages, front and back pay, compensatory damages, or some combination thereof. The global effects are also evident if such actions are costly because this encourages deterrence and gives the employer an incentive to institute programs and policies to regulate and reduce the incidence of discrimination claims. The remedy, however, is less clear when the wrong involves co-workers or supervisors reinforcing negative stereotypes or unknowingly slighting minority employees. Such actions are difficult to deter with monetary damages.

The focus on the "ultimate" employment decision further undermines Title VII's ability to address most unconscious discrimination claims. Many actions that would form the basis for these claims involve employment decisions that do not constitute an adverse employment action in some circuits. Generally, courts require an employee to

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94 For example, some scholars argue that employers should be held liable for unthinking stereotypes based on a negligence standard. See David Benjamin Oppenheimer, Negligent Discrimination, 141 U. PA. L. REV. 899, 967 (1993) (arguing that employers who engage in unthinking stereotypes should be liable for negligent discrimination as they breach the duty to treat all employees equally regardless of the presence of a protected characteristic). But see Wax, supra note 4, at 1132-33 (arguing that employers should not be liable for unconscious discrimination which is, arguably, an accident).

95 Wax, supra note 4, at 1224-25. According to Professor Wax:

[A system of liability] that requires assigning a precise probability to the elements—including unconscious discrimination—that contribute to any workplace decision would strain the fact-finding capacity of a liability system to the breaking point .... [Further.] requiring employers to pay even actuarially sound compensation could produce perverse effects by tempting employers to reduce activity levels and take wasteful "pseudo-precautions," or by shifting costs away from the cheapest cost avoiders. Thus, internalization of all costs of unconscious bias to the employer, even if it could be achieved, is not an unalloyed good.

Id. See also Travis, supra note 48, at 482-83 (highlighting that judges resolve ADA claims by viewing the issue solely in terms of full liability or no liability for the employer, and arguing that "[f]raming the issue [in these terms] is at once both overinclusive and underinclusive, imposing too great a punishment on some forms of discrimination, while leaving other forms completely unchecked").

96 Sturm, supra note 7, at 468 ("Conscious remedies tended not to focus on the organizational and cultural dimensions of bias that were operating along with more visible and blatant forms of exclusion.").

97 See, e.g., O'Neal v. Chicago, 392 F.3d 909, 913 (7th Cir. 2004) ("[B]eing shifted to an essentially equivalent job that [an employee does] not happen to like as much does not a Title VII claim create.") (quoting Place v. Abbott Labs., 215 F.3d 803, 810 (7th Cir. 2000)); Tucker v. Merck & Co., 131 F. App'x 852, 857 (3d Cir. 2005) ("A negative evaluation, by
show a serious and material change in the terms, conditions, or privileges of employment before a discrimination action is deemed viable. Unconscious discrimination tends to be more cumulative—a series of isolated incidents that in the aggregate illustrate that minorities and women are treated differently—but much of this behavior would not rise to the level of a hostile work environment. While a class action suit alleging disparate impact might generate an appropriate remedy, the vast majority of unconscious bias remains largely unaddressed.

In single plaintiff litigation, many courts frame an adverse employment action as encompassing a variety of behavior, but in reality, they apply the standard very narrowly. Other courts have allowed some flexibility in cases where the plaintiff alleges retaliatory discharge, finding conduct that falls short of an ultimate employment decision must meet "some threshold level of substantiality" in order to be actionable. The narrow reading embraced by most courts, however, stems from the idea that an adverse employment action has to have tangible consequences. This illustrates that the focus of the courts is on outcome rather than the procedure by which a decision is reached. If the deliberations are less important doctrinally than the actual decision, then unconscious bias does not lend itself to an adequate resolution by the judicial system.

B. Thomas v. Eastman Kodak Company: Isolating the Bias

_Thomas v. Eastman Kodak_ is one of those rare cases in which an individual plaintiff successfully survived summary judgment on her unconscious discrimination claim. This case is illustrative not only of what factors are required in order for a plaintiff to make it past summary judgment, but also of why most plaintiffs will inevitably fail to prevail itself, is not an adverse employment action. Indeed, even a negative evaluation that leads to a lower than expected merit wage increase or bonus probably does not constitute an adverse employment action.

98Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001).

99See Hillig v. Rumsfeld, 381 F.3d 1028, 1033 (10th Cir. 2004) ("Even though we do not require the plaintiff to show the loss of a specific job, we do not define 'adverse employment action' as encompassing every 'action taken by a plaintiff's employer ... that may affect the plaintiff's future employment opportunities ...'"") (quoting Aquilino v. Univ. of Kan., 268 F.3d 930, 935 (10th Cir. 2001)).

100Wideman v. Wal-Mart Stores Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) ("Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions.").

101Krieger, _supra_ note 21, at 1213 ("Cognitive sources of intergroup bias corrupt decisionmaking not at the moment of decision, but long before it, by distorting the interpretive framework through which decisions are made. ... Decisionmaking is not, as the 'moment of decision' fallacy assumes, structurally disjoined from those perceptual and inferential processes which comprise it.").
on their claim. The plaintiff, Myrtle Thomas, was the only black customer service representative (CSR) in Kodak's Wellesley, Massachusetts office.\footnote{Thomas v. Eastman Kodak Co., 183 F.3d 38, 42 (1st Cir. 1999).} For ten years, Thomas's supervisors, coworkers, and customers provided glowing praise of her work product, ethic, and professionalism, praise which was reflected in her annual performance reviews.\footnote{Id. at 43. The court noted, in fact, that individuals within the corporation were so impressed with Thomas’s work that another sales representative who worked with Thomas "sent a memorandum to Thomas's supervisor praising her 'continuous professionalism,' ‘very high level of commitment,' and ‘total dedication.' The sales representative later noted that he was particularly impressed with the way a certain customer 'really went out of his way to emphasize his satisfaction with Thomas's support." Id. Another customer expressed a similar sentiment, stating that his primary reason for selecting Kodak copiers was because of his dealings with Thomas. Id.} To evaluate the work of its employees, Kodak used annual performance appraisals that graded on a curve with a median score of four out of seven.\footnote{Id. at 44 n.1.} Thomas's appraisals for 1988 and 1989 had scores of five or better out of seven and included positive feedback from her supervisor.\footnote{Id. at 44.}

In 1989, Kodak created a new customer support manager (CSM) position that Thomas asked to be considered for, but was told she was not qualified.\footnote{Thomas, 183 F.3d at 44.} Instead, Kodak hired Claire Flannery, "a former CSR who had been working as a division secretary."\footnote{Id.} Both Thomas and Flannery denied having any problems with each other—in fact, Flannery denied having any problems with Thomas's job performance—yet Flannery's appointment as CSM marked a significant decline in Thomas's career. As CSM, Flannery treated Thomas differently from the other five white CSRs. Among other things, Flannery graded Thomas lower on her appraisals and failed to provide the same training the other CSR's received.\footnote{Id. at 45. The court noted that: after receiving only 5s and 6s in 1988 and 1989, Thomas received a 2, four 3s, and a 4 from Flannery in 1990, for an overall score of 3. This was a below-average rating, appropriate for employees who had "need for further improvement to achieve a middle rating [of 4] . . . . Thomas's performance appraisal scores in 1991 and 1992, while higher than her 1990 scores, were also inappropriately low, in Thomas's estimation—especially when compared to the higher scores that Flannery gave to other CSRs. Id.} After receiving extremely low scores on her 1990 and 1992 appraisals, Thomas refused to sign them and she signed the 1991 appraisal, which was also "inappropriately low," only because she considered it "a joke."\footnote{Id. at 45-46}
On a number of occasions, Flannery damaged Thomas's professional standing with customers by taking over customer training sessions where Flannery was supposed to be observing Thomas's work. She also told Thomas the wrong time for a training session that Flannery scheduled, and then refused to explain the mix up to an irate customer. On another occasion, Flannery became angry with Thomas and attempted to physically block her "from leaving a CSR meeting which had been scheduled at the same time as an important training session for one of Thomas's customers." While none of Thomas's salary raises given during Flannery's tenure as CSM differed significantly from those of other employees, Thomas complained about the appraisals to Flannery and to management within Kodak, including a regional vice president and a human resources representative. "However, fearing retaliation from her new boss, she did not file a formal charge against Flannery with the Human Resources Department, and Kodak did not take any action in response to her informal complaints." Ultimately, in 1993, Kodak relied upon the low appraisal scores that Flannery gave Thomas in deciding to lay Thomas off.

The court found that Thomas had presented enough evidence that a trier of fact could conclude that the evaluation process was tainted with racial bias. Among the factors that the court considered were: Flannery was at times "inappropriately upset" with Thomas, some of Thomas's performance scores were lower than one would expect given her past performance, and Flannery's actions in treating Thomas differently from the other CSRs in training and professional development, all of which could be inferred as Flannery having a problem with Thomas's race.

10 Thomas, 183 F.3d at 45.  
11 Id.  
12 Id.  
13 Id. at 46.  
14 Thomas, 183 F.3d at 46.  
15 Id. at 65 ("Thomas has presented 'evidence from which the trier of fact reasonably could conclude that [her] abilities and qualifications were equal or superior to employees who were retained.'" (quoting Goldman v. First Nat'l Bank at Boston, 985 F.2d 1113, 1119 (1st Cir. 1993))).  
16 Id. at 64.  
17 Id. at 63.  
18 According to the court:
In addition to the performance appraisals themselves, Thomas presents other evidence to show that Flannery treated her differently than she treated the other CSRs. According to Thomas, Flannery used flimsy grounds to prevent her from delivering an important presentation at a Kodak meeting, refused to provide her with computer training, failed to allow her appropriate developmental opportunities, and failed to evaluate her accurately on the basis...
Thomas is a quintessential unconscious discrimination case because the underlying facts involve a black employee and a white supervisor who purport to have no problems with each other, but a significant decrease in the employee's performance scores ensues after the supervisor is hired. The case, however, is largely limited to its facts. It teaches us that the only time an unconscious discrimination claim will make it past the summary judgment stage is if the court can isolate the impermissible bias and ultimately give it the same legal status as intentional discrimination. In this case, the court easily isolated the potential bias because (1) Thomas was the only black employee supervised by Flannery; (2) she had an excellent track record prior to Flannery's arrival; (3) she was the only employee treated differently by Flannery; and (4) her performance appraisal scores significantly decreased after Flannery was hired. Furthermore, Thomas behaved "reasonably" by refusing to sign the appraisals and reporting Flannery's behavior to upper management. There are also hints of Kodak's unreasonableness in promoting Flannery from the position of division secretary (almost certainly a demotion given that she was previously a CSR prior to becoming a division secretary) to a supervisory position for which she may not have been qualified, and also by failing to heed the complaints of arguably one of their best employees. To prove the saliency of the factors raised by Thomas, this thesis will be applied to various other cases that can rightly be considered or recharacterized as

of her interaction with customers (since she never accompanied Thomas on site in order to observe that interaction, as she did with the other CSRs).

Thomas, 183 F.3d at 63.

Hart, supra note 4, at 757. In fact, Professor Hart has noted that "discriminatory intent" can really be defined as "the absence of another explanation." Id. She notes:

When courts assert that a successful plaintiff has proven discriminatory intent, what they mean is that, in the absence of another explanation, given the weight of the circumstantial evidence, they are inferring that the employer acted with bad intent. The widely accepted legal fiction in such cases is that while there may be little external evidence of discriminatory attitude or motivation in a supervisor's actions, if there were a way to discover what that supervisor actually was thinking, we would learn that his or her impulses were overtly racist or sexist.

Id. (citations omitted). See also Selmi, supra note 5, at 662-63 (arguing that subtle bias can be a form of intentional discrimination, if proven, but noting that such proof is elusive).

The importance of this factor should not be understated. The court specifically stated that:

[o]ur assessment of the evidence would be quite different if Thomas had been one of several black employees supervised by Flannery . . . . Thomas was the only black CSR, and one can infer from the evidence that she was also the only CSR who was evaluated unfairly. Given this, it is reasonable to infer that race played a determinative role in the evaluation process . . . .

Thomas, 183 F.3d at 64-65. This factor, however, seems largely limited to the context of race, but not age or gender. See Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061 (8th Cir. 1988); Sweeney v. Bd. of Trs. of Keene State Coll., 604 F.2d 106 (1st Cir. 1979).
"unconscious discrimination" cases to illustrate the limitations of these claims. To reiterate, in order to find in favor of a plaintiff alleging unconscious discrimination, the court must be able to: (1) eliminate every nondiscriminatory reason from the record that could explain the adverse employment action, and (2) determine that the plaintiff's behavior is more reasonable than that of the employer. Once it is clear that one factor is missing, I will then discuss the relevance of employment at will in the court's decision, which serves as the default justification warranting dismissal in these cases.

1. Employment at Will and Hicks: Eliminating All Nondiscriminatory Reasons from the Record

Despite the deluge of scholarship in the area of unconscious discrimination, a study of the case law reveals that the scholarship on unconscious bias has failed to capture the attention of the courts because these claims are successful in only limited circumstances, restrained by the legally unsettled nature of the claim, the doctrine of employment at will, and a limited judicial competency to resolve employment disputes. While some courts are willing to make the necessary inferences to hold an employer liable for unconscious discrimination, the margin of failure for these claims is so high that it ultimately makes the debate about Title VII's ability to reach them somewhat desultory. The courts' reticence comes from statutory concerns and from their belief that they are not qualified to resolve these claims. Thus, amending or expanding Title VII would serve very little purpose in aiding victims of unconscious bias as courts will find in favor of the employee in only the most extreme cases, regardless of statutory constraints.

Thomas demonstrates that a plaintiff's work record essentially has to be flawless because of the courts' deference to employment at will. Employment at will exists, in some form, in all fifty states and the District of Columbia. The most famous formulation of the employment at will doctrine was advanced by the Tennessee Supreme Court in 1884: "All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."
The concept of good cause, bad cause, or no cause termination is the animating principle behind the first *Thomas* factor. Contrary to the admonition by scholars that employment at will has been subordinated by the antidiscrimination laws, if a plaintiff alleging unconscious discrimination does not eliminate every nondiscriminatory reason from the record, then his claim fails regardless of the possible existence of discrimination. Courts are reluctant to hold an employer liable for discrimination especially where the employer may be unaware of such impermissible motives and if there is another plausible reason in the record for the adverse action. The idea is to avoid turning Title VII into a rule where employers could be held liable for "perceived slights" towards employees who happen to be in a protected category, especially if the employee has committed sanctionable acts that render him or her worthy of termination.

To understand the hold that employment at will has on our courts and the flexibility that employers have pursuant to the doctrine, one must consider the rationale behind the rule. As one commentator noted, about half of all common law adoptions of employment at will addressed the significant number of employer-employee disputes over job terminations. This type of dispute currently accounts for a large percentage of the litigation brought under Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). Employment at will still remains the baseline for most private employment relationships. In fact, employees who are in the middle of their careers have "made the fewest contributions to the doctrinal erosion of at will employment," which suggests that the risk of being subject to the

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124 Derum & Engle, *supra* note 6, at 1182 ("Even with an awareness of the pervasiveness of unconscious bias, courts are loath to make a legal finding of discrimination in the absence of clear evidence.").

125 Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) ("Title VII, we have said, does not set forth 'a general civility code for the American workplace.' An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.") (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)); Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("A recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (internal citation omitted).


127 Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will, 34 Loy. L.A. L. REV. 351, 388 (2001)* ("Just after Title VII came into affect, the majority of discrimination claims dealt with firings. By 1985, however, there were six times more discharge cases filed per year than hiring cases.").

rule is highest for the subset of employees most likely to bring a Title VII, ADA, or ADEA lawsuit.

Any test that seeks to outline the legal perimeters of unconscious discrimination must acknowledge that employment at will takes precedence and work within its boundaries. Many scholars have discussed the reemergence of the doctrine,¹²⁹ but few have given it a permanent place as a factor in analyzing this species of employment discrimination claims.¹³⁰ In carving out exceptions to employment at will, courts have rejected certain preferences as legitimate, and by implication, have deemed themselves competent to gauge when these factors motivate the challenged behavior. This is necessarily in tension with the judiciary's belief that the employer, not the court, is more competent to analyze the employment relationship.¹³¹ In fact, Professor Morriss argues that employment at will is largely related to concerns regarding institutional competency and was adopted by courts because of "the difficulty of setting a standard by which they could measure the employee's conduct."¹³²

In Title VII lawsuits, the court has to conduct an evaluation of employee work performance to determine which party has departed from the socially and legally acceptable norms that define the employment relationship, a norm that encompasses the idea that decisions should be based on some combination of merit and business sense. This evaluation is significantly complicated when plaintiffs allege unconscious discrimination, which imposes liability by inference instead of direct proof, through evidence that is usually less substantial than the circumstantial evidence presented as a part of the McDonnell Douglas burden-shifting formula. If the plaintiff eliminates every nondiscriminatory reason

¹²⁹ See, e.g., Theodore Y. Blumoff & Harold S. Lewis, Jr., The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task, 69 N.C. L. REV. 1 (1990); Corbett, supra note 122; McGinley, supra note 4.

¹³⁰ Two scholars who discuss at length how the judicial commitment to employment at will has affected the court's ability to handle unconscious discrimination claims are Professors Derum and Engle. See Derum & Engle, supra note 6, at 1182 (examining the personal animosity cases to analyze employment at will and unconscious bias critiques of employment discrimination law; arguing that the McDonald Douglas framework is designed to reign in employment at will as well as attend to unconscious discrimination, but ultimately determining that the rise of the personal animosity presumption indicates a judicial commitment to employment at will). See also Ann C. McGinley, Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy, 57 OHIO ST. L.J. 1443, 1459 (1996) (noting that "three systemic causes responsible for the result in St. Mary's [Honor Center v. Hicks, 509 U.S. 502 (1993)]; the underlying employment at will doctrine, the plaintiff's burden of proof, and the requirement that the plaintiff prove discriminatory intent").

¹³¹ See Corbett, supra note 122, at 317 (noting that employment at will was originally adopted by the courts as a gatekeeping rule because of institutional competency concerns about evaluating employee behavior).

¹³² Morriss, supra note 126, at 752.
(legitimate or not) from the record, the court no longer has to worry about encroaching on the employer's prerogative to do as he pleases in his place of business, imposing a contract where there is none, or, most importantly, branding an employer with the stigma of being a discriminator.  

The importance of eliminating every nondiscriminatory reason from the record has become important in cases alleging conscious discrimination because of the Supreme Court's decision in St. Mary's Honor Center v. Hicks. Because of the nature of unconscious discrimination, this case carries far greater implications for such claims.

In Hicks, the plaintiff, who is black, worked as a correctional officer for the defendant, St. Mary's. In February 1980, Hicks was promoted to shift commander and enjoyed a satisfactory employment record until 1984, when the defendants hired a new supervisor, John Powell. After the personnel change, Hicks became the subject of repeated and increasingly severe disciplinary actions. On June 7, 1984, Hicks was discharged for threatening Powell during an argument, and Hicks subsequently filed a Title VII action. After a bench trial, the district court found that Hicks was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations "committed by plaintiff's co-workers, were either disregarded or treated more leniently"; and that Powell followed Hicks and provoked the final verbal confrontation in which Hicks threatened him. The district court concluded, however, that Hicks failed to carry his ultimate burden of proving that his race was the determining factor in the defendants' decision to first demote and then subsequently to dismiss

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133See Schwab, supra note 128, at 47-48, 54 (noting that courts defer to the employment at will scheme because the court presumes that "midcareer employees have an at will relationship with their employer because that contractual structure best deters opportunistic behavior" such as employee shirking or arbitrary terminations).
136Id. at 488-89.
137Id. at 489. The court of appeals agreed with the district court that defendant's reasons were pretextual because:

[the] plaintiff was "mysteriously" the only one disciplined for violations actually committed by his subordinates; that the alleged policy of disciplining only the shift commander for violations occurring during a shift was only applied during plaintiff's shifts; and that, on numerous occasions, plaintiff was singled out for unusually harsh disciplinary treatment while others who committed more serious violations either were not disciplined or were treated more leniently.

Id. at 492.
138Id. at 488-89.
him, and that plaintiff also failed to show that the crusade against him was racially, rather than personally, motivated.\textsuperscript{140}

The Eighth Circuit reversed the district court's decision, finding that it was improper for the district court "to assume—without evidence to support the assumption—that the defendants' actions were somehow 'personally motivated.'\textsuperscript{141} Further, "[o]nce plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law."\textsuperscript{142}

The issue presented on appeal to the Supreme Court was whether a prima facie case of discrimination, coupled with proof that the employer's reasons for the employment action were determined to be false, required a verdict for the employee as a matter of law. In a 5-4 decision, the Supreme Court held that once a plaintiff succeeds in showing at trial that the defendant's proffered reasons are pretextual, the factfinder can still look for a nondiscriminatory explanation for the defendant's actions.\textsuperscript{143} Specifically, the Court found that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, '[n]o additional proof . . . is required.'\textsuperscript{144} Rejection of the defendant's proffered reasons, however, did not compel judgment for the plaintiff.\textsuperscript{145} Commentators have interpreted Hicks as adopting a pretext plus rule, where a plaintiff not only has to prove pretext once a defendant comes forward with a nondiscriminatory reason for the adverse action, but the plaintiff also has to disprove all possible nondiscriminatory reasons for the employment action.\textsuperscript{146} The Hicks decision is also seen as a rejection of the "pretext only" rule, where evidence of falsity is sufficient to yield a verdict for the employee.\textsuperscript{147}

If one views the events prior to the verbal confrontation between the plaintiff and his supervisor in isolation, Hicks could be categorized as an unconscious discrimination case. There is no indication in the record

\textsuperscript{140}Id. at 1252.
\textsuperscript{141}Hicks, 970 F.2d at 492.
\textsuperscript{142}Id.
\textsuperscript{143}Hicks, 509 U.S. at 511.
\textsuperscript{144}Id. (emphasis omitted) (quoting Hicks, 970 F.2d at 493).
\textsuperscript{145}Id.
\textsuperscript{146}Some commentators have interpreted the holding of Hicks to mean that a plaintiff has to prove intentional discrimination. See, e.g., Stefanie Vines Efrati, Between Pretext Plus and Pretext Only: Shouldering the Effects of Pretext on Employment Discrimination After St. Mary's Honor Ctr. v. Hicks and Fisher v. Vassar College, 75 CHI.-KENT L. REV. 153, 155-56 (1999); JuLyn M. McCarty & Michael J. Levy, Focusing Title VII: The Supreme Court Continues the Battle Against Intentional Discrimination in St. Mary's Honor Center v. Hicks, 14 HOFSTRA LAB. L.J. 177, 179 (1996).
\textsuperscript{147}Henry L. Chambers, Jr., Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm, 60 ALB. L. REV. 1, 31-32 (1996) (discussing pretext plus and pretext only rules).
that there were other minority supervisors, or minority employees supervised by Powell, who were subjected to the same treatment as Hicks. Similar to the plaintiff in *Thomas*, Hicks also had a satisfactory employment record prior to the personnel change, and there was no evidence of any blatant racial animus between him and Powell. But Hicks was treated differently than other shift managers in ways that were otherwise inexplicable.

The final verbal confrontation, however, caused serious problems for Hicks's claim. Once it occurred, it became impossible for the harm of which Hicks complained of to be traced to the defendant's actions. His threat to his supervisor was an intervening factor that ultimately prompted and justified his termination. His actions allowed the court to conclude that it was he, and not the employer, who caused the harm, and his verbal confrontation overwhelmed any evidence of discrimination, blatant or subtle. For example, Hicks used quantitative evidence at his bench trial to show the possible existence of institutional discrimination against blacks in supervisory positions in the defendant's institutions, but this evidence was ignored by the district court and later by the Supreme Court.\(^\text{148}\) Hicks did not have a "legitimate" claim because of his unreasonable actions, even where there was evidence of pretext and statistical evidence of discrimination. Employment at will became a prominent focal point in this case because an untruthful employer, one who has likely discriminated, is still not obligated to employ an unreasonable (i.e., insubordinate) employee.

*Hicks* is viewed by some commentators as the reemergence of the doctrine of employment at will because it reasserts the ideal of good cause, bad cause, or no cause termination.\(^\text{149}\) Contrary to this argument, *Hicks* does not necessarily represent a reemergence of employment at will and is more likely a reiteration of a doctrine that had long been utilized by the courts. Professor Corbett, for example, argues that the subordination of antidiscrimination law to employment at will began with the Supreme Court's decision in *Furnco Construction Corporation v. Waters*,\(^\text{150}\) where the Court outlined the parameters of the second

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\(^{148}\) *Hicks*, 970 F.2d at 490 n.6 (An in-house study was conducted of two Missouri correctional centers which concluded that "too many blacks were in positions of power at St. Mary's, and ... the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real.") (citations omitted).

\(^{149}\) *Derum & Engle*, *supra* note 6, at 1210. These commentators argue that:

By giving employers more latitude in offering reasons for their decisions, the Court has moved closer to enforcing an at-will than a for-cause regime. *Hicks*, in particular, reemphasizes the extent to which employment at will is the background rule against which Title VII operates. It begins the replacement of the *Furnco* presumption with the personal animosity presumption.

prong of the *McDonnell Douglas* burden-shifting formula in which the employer has to offer a legitimate, nondiscriminatory reason for its action.\(^{151}\) Professor Corbett notes that the Court's decision to allow the employer to offer "'some legitimate, nondiscriminatory reason'" that neither has to be persuasive nor be best for hiring the maximum number of minority employees is reflective of the Court's belief that they are not competent to restructure the employer's business practices, "'and unless mandated to do so by Congress they should not attempt it.'"\(^{152}\) Other language in *Furnco* supports this position. The Court, while acknowledging the presumption of discrimination that arises from the prima facie case, was clear that it "is not the equivalent of a factual finding of discrimination,"\(^{153}\) a point that is self-evident given that the remaining two prongs of *McDonnell Douglas* are so deferential to the employer's prerogative.

It is apparent that the *McDonnell Douglas* burden-shifting formula has a built-in mechanism to ensure that the employer's autonomy is protected from government intrusion. Undoubtedly, when the employer has to present a legitimate, nondiscriminatory reason for the adverse action, it is likely that there is some other reason available to explain the adverse action, especially if the employer has unconsciously discriminated.\(^{154}\) The reason may or may not be known to the employee or clear from the record, but in accordance with *Hicks*, the court is free to "discover" the reason on its own initiative.\(^{155}\) Moreover, the third stage of *McDonnell Douglas*, in which the employee has to prove pretext, reflects the court's unwillingness to second guess the employer's business decisions. In some circuits, the plaintiff actually has to prove that the employer's justification is a lie, usually resulting in microscopic analysis of the plaintiff's credibility rather than the legal sufficiency of the employer's proffered reason.\(^{156}\) *Hicks* illustrates that the "pretext is a lie"

151 Id. at 578. *See also* Corbett, *supra* note 122, at 333-35 (discussing the Court's decision in *Furnco*).
153 *Furnco*, 438 U.S. at 579.
154 *Hart*, *supra* note 4, at 747. Professor Hart observes that:
   [c]ompounding the effects of these unconscious cognitive processes is ... a pervasive "conflict between the denial of personal prejudice and the underlying unconscious, negative feelings and beliefs." ... [A]s a consequence of this conflict, discrimination is most likely to occur in contexts where it can be justified as something other than discrimination.
   *Id.* (citations omitted).
155 Catherine J. Lancelot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 130 (1991) (stating that in order to prove pretext, the plaintiff "must negate not only the defendants' articulated reasons but also secret reasons they failed to advance in court").
156 See Cardoso v. Robert Bosch Corp., 427 F.3d 429, 435 (7th Cir. 2005) (finding that pretext is not a mere "business error" but rather "a lie or deceit designed to cover one's
formulation is not enough to guarantee victory for the plaintiff even if the plaintiff can meet this threshold because the employer can be dishonest about his motivations, which may or may not be impermissible, since it is his prerogative on how to run his business. Consequently, the defendant as business owner does not have to employ an unreasonable individual, and should he decide to fire the employee, the court will weigh whether the decision to terminate was racially motivated against the employee's unreasonable behavior. In unconscious discrimination cases, the latter always wins because these claims do not have the same legitimacy as intentional discrimination claims unless the plaintiff shows that no other reason exists to explain the adverse action; otherwise, the court will simply focus on the evidentiary gaps in the plaintiff's case to deny relief.\footnote{157}

Besides \textit{Furnco}, other early Supreme Court cases indicate that employment at will was not far from the Court's mind when it initially formulated the prima facie case in \textit{McDonnell Douglas} and \textit{Texas Department of Community Affairs v. Burdine}.\footnote{158} In \textit{Board of Trustees of Keene State College v. Sweeney},\footnote{159} the Supreme Court reversed the First Circuit and reiterated that the burden on the employer is much lighter than that on the plaintiff in Title VII cases.\footnote{160} Initially, the district court found in favor of the plaintiff on her sex discrimination claim, and the

\footnote{155}{\textit{tracks}}; \textit{Silvera v. Orange County Sch. Bd.}, 244 F.3d 1253, 1261 (11th Cir. 2001) (utilizing the Seventh Circuit's standard that pretext is a lie); \textit{Chapman v. Al Transp.}, 229 F.3d 1012, 1050 (11th Cir. 2000) ("Demonstrating pretext by ['c]asting doubt on an employer's asserted reasons for an adverse employment action is an indirect means of demonstrating 'that the employer acted with the forbidden animus.'"). \textit{See also} \textit{Cornwell v. Electra Cent. Credit Union}, 439 F.3d 1018, 1028-29 n.6 (9th Cir. 2006) ("A plaintiff may not defeat a defendant's motion for summary judgment merely by denying the credibility of the defendant's proffered reason for the challenged employment action."). For a thorough discussion of the "pretext is a lie" formulation, see \textit{Lancelot}, \textit{supra} note 155.

\footnote{157}{\textit{See, e.g.,} \textit{Russell v. Acme-Evans Co.}, 51 F.3d 64, 69 (7th Cir. 1995) (granting summary judgment in favor of the defendant because even though "some of [the defendant's proffered] reasons were successfully called into question" by the plaintiff "does not defeat summary judgment if at least one reason for each of the actions stands unquestioned"). Many plaintiffs alleging discrimination also have problems surviving summary judgment because the court views their affidavits as "speculative" and "conclusory." \textit{See Quinones v. Buick}, 436 F.3d 284, 290 (1st Cir. 2006) (finding that the plaintiff's affidavit and deposition testimony "reflects only [his] subjective speculation and suspicion" that he was paid less than his co-worker for discriminatory reasons "rather than from other possible causes that might just as easily have explained the discrepancy"); \textit{Ross v. Univ. of Tex. at San Antonio}, 139 F.3d 521, 526-27 (5th Cir. 1998) (holding that the plaintiff's generalized statements about relative qualifications or treatment of similarly situated employees is insufficient to defeat summary judgment). This hurts plaintiffs bringing unconscious discrimination claims because many of their allegations are based on their own subjective interpretation of disparities within the workplace.\footnote{158}450 U.S. 248, 252-53 (1981). \footnote{159}439 U.S. 24 (1978). \footnote{160}Id. at 25-26.
court of appeals affirmed. The court of appeals found that the defendants had to prove the absence of a discriminatory motive because the defendant had better access to the evidence. The Supreme Court reversed and, relying on Furnco and McDonnell Douglas, found that the court of appeals had "imposed a heavier burden on the employer than Furnco, and the dissent here, require." In dissent, Justice Stevens chastised the majority, noting that:

[i]n this case, the Court's action implies that the recent opinion in Furnco Construction Corp. v. Waters, made some change in the law as explained in McDonnell Douglas Corp. v. Green. When I joined the Furnco opinion, I detected no such change and I am still unable to discern one. In both cases, the Court clearly stated that when the complainant in a Title VII trial establishes a prima facie case of discrimination, "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race."

Furnco and Sweeney both prove that very little evidence is required on the part of the employer to rebut what is supposed to be a presumption of discrimination. Thus, the Court had already made it clear, prior to Hicks, that McDonnell Douglas was intended to place the burden of proving discrimination on the plaintiff and relieve the employer of having to defend his employment practices.

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161 Sweeney v. Bd. of Trs. of Keene State Coll., 569 F.2d 169 (1st Cir. 1978).
162 Bd. of Trs. of Keene State Coll., 439 U.S. at 25 n.2.
163 Id. at 26 (quoting Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978)).
164 Derum & Engle, supra note 6, at 1218 ("[T]he prima facie case creates a legal presumption so strong that 'if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff....'") (quoting Tex. Dep't Cnty. Affairs v. Burdine, 450 U.S. 248, 254 (1981)).
165 St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 513 (1993). The majority opinion authored by Justice Scalia was clearly more concerned about the impact of the dissent's position on the employer than about fairness to the individual alleging discrimination. Consider this example given by Justice Scalia to prove that the Hicks decision is consistent with prior case law:

Assume that 40 percent of a business' work force are members of a particular minority group, a group which comprises only 10 percent of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that same minority group, and the search to fill the opening continues. The rejected applicant files suit for racial discrimination under Title VII, and before the suit comes to trial, the supervisor who conducted the company's hiring is fired. Under McDonnell Douglas, the plaintiff has a prima facie
As this discussion illustrates, the first Thomas factor is important because employment at will makes it difficult for a plaintiff to establish an impermissible motivation where the discrimination occurs within the perimeters of legal behavior. 166  
Hicks supports the proposition that courts can look for and ultimately rely on any reason, other than discrimination, to explain the adverse employment action. Arguably, the tension and subsequent altercations between Hicks and his supervisor could have been the result of unconscious racial animus, yet the court relies on what Professors Derum and Engle have termed the personal animosity presumption in finding against the plaintiff. 167 These scholars have persuasively argued that because of deference to employment at will, courts are more likely to rely on a presumption of personal animosity between the plaintiff and the defendant to explain away the discrimination. 168 Most telling is the fact that the district court in Hicks, not the defendant, raised personal animosity as a possible justification for the employment action. 169 At the trial level, both individual decision makers, including Powell, denied that they harbored any personal animosity towards Hicks. 170 Nevertheless, this case makes it clear that, despite the justifications offered by the employer, plaintiffs not only have to eliminate every nondiscriminatory reason from the record, but they

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167 Derum & Engle, supra note 6, at 1179.

168 Id. at 1182.

169 Id. at 1226.

170 Id.
also have to anticipate potential justifications that might be raised by the court to explain the adverse employment action.\(^{171}\)

As these examples indicate, employment at will has not been abrogated by the antidiscrimination laws.\(^{172}\) Those alleging unconscious discrimination must, therefore, take this factor into consideration when attempting to prove their claim by ensuring that there are no nondiscriminatory reasons that may explain the adverse action in the record.

2. Reasonableness

The behavior of the *Hicks* plaintiff indicates that reasonableness plays a vital role in this analysis. In our legal system, rationality is a proxy for nondiscrimination.\(^{173}\) The theory is that rational people do not discriminate, at least not in ways that are counterproductive, uneconomical, or inefficient.\(^{174}\) Judges assume that employers are

\(^{171}\)See also McGinley, *supra* note 130, at 1459 ("[J]udges often rely on the employment at will doctrine to conclude that the mere fact that the plaintiff proved that he was wrongfully discharged is insufficient to establish illegal discrimination.").

\(^{172}\)Early cases such as *Slack v. Havens*, No. 72-59-GT, 1973 U.S. Dist. LEXIS 12662 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975), seem to suggest otherwise. *Id.* (finding that an employee's discharge for refusing to perform a discriminatory work assignment violated Title VII); see also *Smith v. Texas Dept. of Water Res.*, 799 F.2d 1026 (5th Cir. 1986) (plaintiff was not insubordinate where she refused a discriminatory assignment as a relief secretary and her subsequent discharge violated Title VII). But as *Hicks* and later cases indicate, employment at will is alive and well.

\(^{173}\)In analyzing the role of rationality in the *McDonnell Douglas* framework Professor Krieger observed that:

[p]retext analysis thus rests on the assumption that, absent discriminatory animus, employment decisionmakers are rational actors. They make evenhanded decisions using optimal inferential strategies in which all relevant behavioral events are identified and weighted to account for transient situational factors beyond the employee's control. If an employer's proffered explanation for its decision is shown to be irrational or implausible in light of the relevant data set, the trier of fact may conclude, and to find for the plaintiff, must conclude, that the reasons given did not really motivate the decisionmaker, but were simply contrived to mask discriminatory intent. The presumption of invidiousness permits the trier of fact to infer discriminatory intent from flaws in a decisionmaker's inferential process. Without this presumption, one could only infer that an irrational decision was made; such a decision, in the absence of a duty to discharge only for good cause, would not be actionable.

Krieger, *supra* note 21, at 1181.

\(^{174}\)In fact, some discrimination that we would consider especially egregious today can be justified on the basis of rationality. *See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review* 31 (1980). Professor Ely discussed the view that academic progress of children is greater when the races are segregated and concluded that:

[i]ndeed, apartheid generally is a *rational*, if misguided, means of avoiding racial strife, and one might *rationally* distribute jobs on the basis of color—giving what we generally think of as the better ones to whites—in light of the