IMPLICIT BIAS

Considerations for Employers to Avoid Liability Stemming From its Impact

By John L. Shahdanian II, Asaad K. Siddiqi and Valentina Scirica

JOHN L. SHAHDANIAN II *is a director at Trenk Isabel Siddiqi & Shahdanian in Hackensack and a veteran practitioner of employment law. He is well-versed in and frequently consulted about matters related to discrimination claims, disability claims, sexual harassment claims, whistleblowing, noncompete clauses, wage and hour, family leave and both public and private sector labor law. John is a trustee of the Bergen County Bar Association, former trustee of the New Jersey State Bar Association and 2nd Vice-Chair of the New Jersey State Bar Association Labor and Employment Law Section.*

ASAAD K. SIDDIQI, *the chair of the editorial board of* New Jersey Lawyer *and a member since 2011, is a director at Trenk Isabel Siddiqi & Shahdanian, P.C., and advises clients on myriad issues, including employment, commercial and complex litigation and non-profit law. He serves on the Civil Practice and Model Civil Jury Charges Committees of the New Jersey Supreme Court, and is a member of the Board of Trustees for the New Jersey State Bar Association, the Association of the Federal Bar of New Jersey and the Bergen County Bar Association.*

VALENTINA M. SCIRICA *is an associate at Trenk Isabel Siddiqi & Shahdanian in the Employment and Governmental Representation practice groups defending employers ranging from Fortune 500 companies to traditional business startups on claims including wrongful discharge, discrimination and retaliation, and breach of employment contracts. Valentina's governmental law practice focuses on providing counsel in all aspects of the increasing number of legal issues facing local public entities.*

O n Jan. 31, the New Jersey Appellate Division addressed issues of first impression when it rendered its decision in *State of New Jersey v. William L. Scott*. The Appellate Division held for the first time that "implicit bias" can be a basis for establishing a *prima facie* case of police discrimination under the burden-shifting standard adopted in the 2002 New

ple and stereotypes about those groups.[2] Implicit bias operates at a subconscious level and is oftentimes contrary to a person's stated beliefs and attitudes. Implicit bias is different than explicit bias, in that it is not expressed directly and does not operate on a conscious level.[3]

The Court in *State v. Andujar* defined implicit bias as referring to "Attitudes or stereotypes that affect our understanding, actions, and decisions in an uncon-

be-on-the-lookout (BOLO) description of a person who committed an armed robbery in the vicinity just minutes earlier. The BOLO described the robber as a Black male wearing a dark raincoat. However, the victim of the armed robbery did not provide the race of the perpetrator when she reported the crime. The state acknowledged that it did not know why the dispatcher assumed the perpetrator was Black while announcing the BOLO.[8]

Jersey Supreme Court case of *State v. Segars*.[1] While the concept of "implicit bias" is long-standing in New Jersey, the Appellate Division's most recent determination in *Scott* should be regarded by all employers to ensure that the workplace is free from discrimination, including biases, especially in the context of hiring, promoting, evaluating and terminating employment and in conjunction with the fairly new use of artificial intelligence in making such employment decisions.

What is Implicit Bias?

Implicit bias is an automatic association people make between groups of peo-

scious manner."[4] Implicit biases "encompass both favorable and unfavorable assessment, [and] are activated involuntarily and without an individual's awareness or intentional control."[5] The Court further stated that "implicit bias is no less real and problematic than intentional bias."[6] "It makes little sense to condemn one form of racial discrimination yet permit another."[7]

State v. Scott

In the matter of *State v. Scott*, defendant Scott contended that he was subjected to discriminatory policing when he was stopped and frisked based on the

The New Jersey Appellate Division was tasked with addressing three issues of first impression, one of which being whether implicit bias can be the basis for establishing a *prima facie* case of police discrimination under the *Segars* burden-shifting standard.[9] In *Segars*, defendant Segars, a Black motorist, pleaded guilty in the municipal court to a charge of driving with a suspended license. Throughout the proceedings, Segars maintained that Officer Williams checked his license plate on the Mobile Data Terminal because of his race. The question before the Court was whether the trial court's conclusion that Segars failed to sustain the burden of

> In applying the concept of implicit bias to the *Lehmann* Court's determination, it can be concluded that even though an implicit bias is "unintentional" or "involuntary," such bias can still be considered discriminatory under the New Jersey Law Against Discrimination because the LAD is not an intent-based statute. Additionally, as further demonstrated in *Lehmann*, an employee's discriminatory implicit bias toward another can cause an employer to become vicariously liable under the LAD.

proving discriminatory targeting be sustained. The Supreme Court of New Jersey held that: (1) the evidence established racial targeting by a police officer; (2) the defendant had the burden of establishing a *prima facie* case of racial targeting; (3) a *prima facie* case shifted the burden to the state to produce evidence of a race-neutral reason; and (4) the defendant bore the burden of proving discriminatory treatment by a preponderance or greater weight of the credible evidence.[10] Under *Segars*, the Appellate Division in *State v. Scott* determined that implicit bias can be a basis for establishing a *prima facie* case of police discrimination.[11] In reaching such conclusion, the court was persuaded by the Attorney General Directive 2005-1, which states in part that under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the New Jersey Constitution, a person's race may not be considered as a basis for making law enforcement decisions other than when determining whether an individual matches the description in a BOLO alert.[12]

In addition, the Appellate Division considered the harm that can be caused by implicit bias as set forth in *Andujar supra*, and determined:

> We likewise hold that implicit bias may be considered as part of a *Segars* analysis notwithstanding that *Segars* provides that a defendant bears the 'ultimate burden of proving by a preponderance of the evidence that the police acted with discriminatory purpose.' Accordingly, evidence of implicit bias can support an inference of discrimination that would establish a prima facie case under *Segars*, shifting the burden of production to the prosecutor.[13]

The court further stated:

> But even if we were to hold that evidence of implicit bias is not sufficient to establish

a *prima facie* case of purposeful discrimination under *Segars*, the evidence in this case, when viewed in a light favorable to defendant's claim, supports the inference that the dispatcher made a conscious decision to infer the robber's race based on a prejudiced assumption about the correlation of race and criminality. While any such inference of intentional discrimination might be rebutted under the *Segars*, burden-shifting paradigm, the State was obliged—and failed—to do so.[14]

In sum, the court determined that the defendant presented evidence establishing a *prima facie* case of discrimination, shifting the burden to the state to provide a race-neutral reason as for the dispatchers assumption that the perpetrator was Black. Because the state failed to meet its burden of production and even admitted that it does not know why the dispatcher added the racial description to the BOLO, the defendant established a *prima facie* case.[15]

Implicit Bias's Impact on Employers

While the case of *State v. Scott* was determined in a criminal context, implicit bias is apparent in all realms of society, including the employment context. Given the new ruling in *State v. Scott,* employers should be cognizant, now more than ever, to eradicate and prevent implicit bias in the workplace.

The concept of implicit bias in an employment law context was demonstrated in the seminal New Jersey employment law case of *Lehmann v. Toys 'R' Us, Inc.,* where the New Jersey Supreme Court ultimately held that an employer may be vicariously liable, based on principles of agency law, for sexual harassment committed by a supervisor resulting in a hostile work environment.[16] In determining whether the plaintiff in *Lehmann* was harassed based on her sex, the Court stated:

The LAD is not a fault-or intent-based statute. A plaintiff need not show that the employer intentionally discriminated or harassed her, or intended to create a hostile work environment. The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional. Although unintentional discrimination is perhaps less morally blameworthy than intentional discrimination it is not necessarily less harmful in his effects, and it is at the *effects* of discrimination that the LAD is aimed.[17]

In applying the concept of implicit bias to the *Lehmann* Court's determination, it can be concluded that even though an implicit bias is "unintentional" or "involuntary," such bias can still be considered discriminatory under the New Jersey Law Against Discrimination because the LAD is not an intent-based statute. Additionally, as further demonstrated in *Lehmann*, an employee's discriminatory implicit bias toward another can cause an employer to become vicariously liable under the LAD.

In *Cutler v. Dorn*, the New Jersey Supreme Court was tasked with determining whether comments that stereotyped persons of Jewish ancestry occurred because of Cutler's particular ancestry and religion, thus constituted harassment. The Court concluded that such stereotypic comments were not accidents and were aimed to have an effect on their listener, and their listener was known as a person of Jewish faith and ancestry.[18] Although the Court did not use the term "implicit bias," it was concluded that stereotyping (discussed *supra* as a form of implicit bias) was considered harassment/hostile work environment under the NJLAD.

Not only should an employer be aware of implicit bias in connection with vicarious liability and actions of employees, but an employer should also be aware of

its presence when hiring, promoting, evaluating and terminating an employee. Such notion is demonstrated in the United States Supreme Court case of *Phillips v. Martin Marietta Corp.,* where the plaintiff, a female job applicant, instituted an action against an employer under Title VII of the Civil Rights Act of 1964 alleging that she had been denied employment because of her sex. In *Phillips*, the United States Supreme Court held that stereotypes about the child-care obligations of women are a form of gender discrimination.[19] The Court stated:

> By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing to 'hire an individual based on *stereotyped* characterizations of the sexes.' Even characterizations of proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity. (Emphasis added).[20]

As demonstrated above, implicit bias has permeated judicial decision-making and will continue to be a focus of courts after *State v. Scott*.

AI, Bias and Employers

On Jan. 10, the Equal Employment Opportunity Commission published its draft Strategic Enforcement Plan, which includes updates that take into account employers increasing use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring decisions.[21] The SEP builds upon the previous SEP adopted in 2018, which added "emerging and developing issues," such as AI bias.[22] In October 2021, the EEOC launched its initiative to ensure that AI and other emerging tools used in hiring and other employment decisions comply with federal civil

> Not only should an employer be aware of implicit bias in connection with vicarious liability and actions of employees, but an employer should also be aware of its presence when hiring, promoting, evaluating and terminating an employee. Such notion is demonstrated in the United States Supreme Court case of *Phillips v. Martin Marietta Corp.*, where the plaintiff, a female job applicant, instituted an action against an employer under Title VII of the Civil Rights Act of 1964 alleging that she had been denied employment because of her sex.

rights laws. EEOC Chair Charlotte A. Burrows stated:

> Bias in employment arising from the use of algorithms and AI falls squarely within the Commission's priority to address systemic discrimination. While the technology may be evolving, anti-discrimination laws still apply. The EEOC will address workplace bias that violates federal civil rights laws regardless of the form it takes, and the agency is committed to helping employers understand how to benefit from these new technologies while also complying with employment laws.[23]

While the EEOC's focus on employment bias, including implicit bias, is based on the federal level, individual states, such as New York, have also issued guidance on automatic employment decision tools. On April 6, the New York City Department of Consumer and Workers Protection issued a final rule to provide guidance regarding the city's Automatic Employment Decision Tool. The final rule came after the New York City Council enacted an ordinance which took effect on Jan. 1 banning AI in employment decisions unless the technology has been subject to an independent bias audit within a year of use.[24] The final rule defines an AEDT as any tool that applies artificial intelligence to "substantially assist or replace discretionary decision making" of an employer, such that it does any of the following: scores, classifies or ranks job applicants or employees based on only one factor; gives more weight to simplified output as one set of criteria; or uses a simplified output to overrule conclusions derived from human decision-making or other factors.[25]

Accordingly, an employer cannot use an AEDT unless the tool was subject to a bias audit within the last year to ensure that the AEDT does not disparately impact a particular group.[26] The final rule also has a notice requirement which requires employers to inform applicants and employees of the use of the AEDT and the process of requesting an alternative selection process or reasonable accommodation.[27] The DCWP announced that it will begin enforcement of the AEDT law and final rule on July 5.[28]

In addition to New York, a bill has been introduced in the New Jersey Assembly that would impose new obligations on employers with the use of AI in the hiring process. At present, the bill remains in committee. It was approved by the Assembly Labor Committee and referred to the Innovation and Technology Committee.[29]

As a takeaway, it is important for employers who use software to assist in the hiring process and other employment related decisions to consult with their venders to determine whether their AI tools are subject to the AEDT law and final rule. If so, it is important for employers to ensure that such venders complete the bias audit by the applicable enforcement date(s) to eliminate the potential bias in such tools.

What Can Employers Do?

In light of the *State v. Scott* decision and its impact, employers should take additional steps to ensure that the workplace is free of bias, including implicit bias, and discrimination. On Aug. 4, 2021, the EEOC launched Diversity, Equity and Inclusion workshops through the EEO Training Institute to help employers understand, prevent and correct discrimination in the workplace.[30]

In addition to attending EEOC training sessions, it is important for employers and employees to attend state-specific anti-harassment/anti-discrimination training conducted by seasoned employment counsel of the employer's home state as a best practice. It is important for both employers and employees to understand and acknowledge the types of discrimination and how they can be prevalent in the workplace. With regard to implicit bias, it is essential for employers and employees to define and acknowledge implicit bias; recognize different types of implicit bias; and understand the impact of implicit bias in order to protect employees in the workplace. Employers should further familiarize themselves with how bias can play a role in hiring, terminating, promoting, evaluating and demoting. Employers should consult with counsel for further assistance and guidance on appropriate training(s). ■

Endnotes

1. *State of New Jersey v. William L. Scott*, 474 N.J. Super. 388 (2023).
2. *Implicit Bias*, National Initiative for Building Community Trust & Justice, trustandjustice.org/resources /intervention/implicit-bias#:~:text =Implicit%20bias%20describes%20t he%20automatic,and%20stereotype s%20about%20those%20groups.
3. *Equity Council Corner: What Is Implicit Bias?,* New Jersey School Boards Association (January 22, 2020), njsba.org/news-publications/ school-board-notes/january-22- 2020-vol-xliii-no-24/equity-council- corner-what-is-implicit-bias/.
4. *State v. Andujar*, 247 N.J. Super. 275, 302 (2012) (citing Cheryl Staats et al., Kirwan Inst. for the Study of Race and Ethnicity, Implicit Bias app. at 62 (2015), kirwaninstitute.osu. edu/wp-content/uploads/2015/05/ 2015-kirwan-implict-bias.pdf).
5. *Id*. at 302-03.
6. *Id*. at 303.
7. *Id*.
8. *State v. Scott*, 474 N.J. Super. at 398.
9. *Id*. at 399.
10. *State v. Segars*, 172 N.J. 481 (2002).

11. *Id*.

12. *Id*. at 403-04.

13. *Id*. at 410.

14. *Id*. at 410-11.

15. *Id*. at 411.

16. *Lehmann v. Toys 'R' Us, Inc.,* 132 N.J. 587 (1993).

17. *Id*. at 605.

18. *Cutler v. Dorn,* 196 N.J. 419, 433 (2008).

19. *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971).

20. *Id*. at 545.

21. *Draft Strategic Enforcement Plan*, A Notice by the Equal Employment Opportunity Commission (January 10, 2023), federalregister.gov/documents/2023/01/10/2023-00283/draft-strategic-enforcement-plan.

22. *J. Edward Moreno, EEOC Targets AI-Based Hiring Bias in Draft Enforcement Plan*, Bloomberg Law (January 12, 2023), news.bloomberglaw.com/daily-labor-report/eeoc-targets-ai-based-hiring-bias-in-draft-enforcement-strategy.

23. *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness*, U.S. Equal Employment Opportunity Commission (October 28, 2021), eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness.

24. New York City Council, Int. No. 1894-A, Section 1. Chapter 5 title 20, Subchapter 25 (January 1, 2023).

25. Section 1. Chapter 5 of Title 6 of the Rules of the City of New York, Subchapter T, §5-300.

26. New York City Council, Int. No. 1894-A, Section 1. Chapter 5 title 20, Subchapter 25 (January 1, 2023).

27. Section 1. Chapter 5 of Title 6 of the Rules of the City of New York, Subchapter T, §5-304.

28. *NYC Publishes Final Rule for AEDT Law and Identifies New Enforcement Date*, The National Law Review, Volume XIII, Number 121 (April 6, 2023), natlawreview.com/article/nyc-publishes-final-rule-aedt-law-and-identifies-new-enforcement-date.

29. *Bill A4909,* New Jersey Legislature, njleg.state.nj.us/bill-search/2022/A4909.

30. *EEOC Launches Diversity, Equity & Inclusion (DE&I) Workshop Series*, U.S. Equal Employment Opportunity Commission (August 4, 2021), eeoc.gov/newsroom/eeoc-launches-diversity-equity-inclusion-dei-workshop-series.