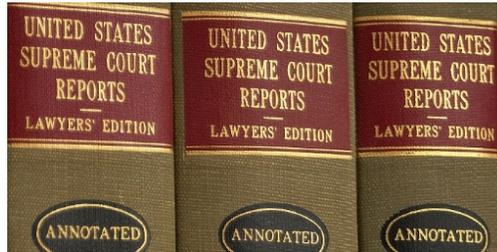




SUFFOLK ACADEMY OF LAW
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UNCONSCIOUS BIAS

FACULTY

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Suffolk County Sheriff

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Christine Malafi chairs the Corporate department at Campolo, Middleton & McCormick, LLP, which was recently recognized by Forbes as a Top Trusted Corporate Law Firm in America. Her practice focuses on mergers and acquisitions, corporate governance, routine and complex transactions, labor and employment issues (including sexual harassment prevention policies and training), and other business matters, as well as municipal, insurance coverage, and fraud issues. She routinely represents buyers and sellers in multimillion dollar transactions (from technology companies to manufacturers to healthcare businesses) and serves in a general counsel role for many of the firm's internationally-based clients.



DR. ERROL D. TOULON, JR., Suffolk County Sheriff



On January 1, 2018, Errol D. Toulon, Jr., Ed.D., became Suffolk County, New York's 67th Sheriff and the County's first African American to be elected to a non-judicial countywide office. As Suffolk's highest-ranking law enforcement official, he is working to serve and protect the county's 1.5 million residents through innovative programs to reduce crime and recidivism, and by implementing sound fiscal policies.

Sheriff Toulon is highly focused on using data analytics and technological assets to capture crime patterns -- which are used to uncover trends like drug dealing in local neighborhoods and the movement of international gangs encroaching into parts of Suffolk County. Early in his term, he reorganized departments into multi-

disciplinary teams focused on corrections intelligence gathering, violent crimes, gang activity and human trafficking.

In his first year, and in the wake of heightened violence in schools nationwide, Sheriff Toulon launched the Sandy Hook Promise School Safety Initiative. Since then, more than 22,000 students have been taught to recognize the signs of a peer in distress, especially on social media, and how to report concerning information to a trusted adult.

He has also made it a priority to get to the root causes of youthful delinquency and inter-generational crime. In October 2018, Sheriff Toulon launched a task force named Deconstructing the Prison Pipeline to study these issues, drive policy discussions, and implement solutions. Simultaneously, he greatly expanded correctional rehabilitation programming aimed to reduce recidivism and improve offenders' desistance from crime. In just 2 years, he launched Choose Your Path for young adults, Choose to Thrive for incarcerated women, a Senior Citizen Program POD, and made significant improvements to the Sheriff's Addiction Treatment Program. He also launched the nation's first jail-based Human Trafficking Initiative which assesses all county inmates for signs of victimization. Programming is offered to both pre-trial and sentenced individuals and is aimed at addressing the needs and deficits correlated with criminal activity, such as substance abuse, mental health issues, limited educational and employment skills, transportation, housing, and identification issues. In February 2020, Sheriff Toulon launched a Resource Center on the grounds of the Yaphank Correctional Facility. The fully staffed center provides a continuum and expansive array of case management services for individuals exiting the county jail.

Sheriff Toulon has more than 30 years of criminal-justice experience, heavily centered upon corrections intelligence and combating gang violence. Prior to serving as Suffolk County Sheriff, Errol worked for 22 years as a Uniformed Member of Service with the New York City Department of Correction. He was assigned to the Emergency Service Unit as a captain during a challenging time when the department housed almost 25,000 inmates. He was a captain assigned to the Firearms & Tactics Unit when the World Trade Center was attacked. In July of 2014, he was named Deputy Commissioner of Operations for the New York City Department of Correction.

Sheriff Toulon is certified through the Department of Homeland Security in Emergency Planning, Radiological Emergency Management, Incident Response to Terrorist Bombing, WMD Threat and Risk Assessment and State Disaster Management. In addition, he is certified to teach courses in weapons of mass destruction awareness, National Incident Management Systems (NIMS), domestic terrorism and hate crimes. He received his Master's degree in Business Administration and Doctorate in Educational Administration from Dowling College; an advanced certificate in Homeland Security Management from Long Island University, and he attended leadership courses at the JFK School of Government at Harvard University.

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Diversity, Inclusion & Elimination of Bias

Presented by:

Christine Malafi, Esq.

and

Dr. Errol D. Toulon, Jr., Suffolk County Sheriff





THE STATS

- *The Wall Street Journal* reported in September 2020 that only 1% of America's top 500 companies have chief executive positions held by Black executives and among all companies with 100 or more employees, Black people hold only 3% of senior-level roles ¹
- University of Chicago study: identical resumes with a stereotypical black name (Jamal) verses a white name (Brendan) were called 50% fewer times for an interview ²
- Harvard study: found that unconscious bias against obese individuals is one of the strongest biases ³

¹ Te-Ping Chen, *Why Are There Still So Few Black CEOs?*, WALL ST. J. (Sept. 28, 2020), <https://www.wsj.com/articles/why-are-there-still-so-few-black-ceos-11601302601> (citing data from the U.S. Equal Employment Opportunity Commission).

² 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), available at https://cos.gatech.edu/facultyres/Diversity_Studies/Bertrand_LakishaJamal.pdf.

³ *The Scarlet F*, HARV. PUB. HEALTH (Spring 2017), https://www.hsph.harvard.edu/magazine/magazine_article/the-scarlet-f.



THE STATS - CONTINUED

- According to the latest Glass Ceiling Report from LAW 360, with totals as of the end of 2019, at U.S. law firms, women represent only:
 - 37.3% of all attorneys (up from 34% in 2014)
 - 46.3% of non-partners (up from 43.8% in 2015)
 - 31.9% of nonequity partners (up from 22.5% in 2015)
 - 22.2% of equity partners (up from 19.2% in 2015)

Of these women, women of color are represented by:

- 9% of all attorneys
- 4% of equity and nonequity partners
- 3% of equity partners

Woman leave law firms at the rate of 43%, and women of color leave at the rate of 13%

UNCONSCIOUS/IMPLICIT BIAS



- Unconscious bias (or implicit bias) is often defined as prejudice or unsupported judgments in favor of or against one thing, person, or group as compared to another, in a way that is usually considered unfair
- Unconscious biases are learned attitudes or stereotypes that are automatic, unintentional, deeply ingrained, universal, and able to guide and influence behavior and expectations
- Both affect understandings, actions, and decisions unconsciously
- Embracing diversity recognizes and respects differences; unconscious bias does not
- Being aware and educating ourselves on unconscious bias is the first step to understanding and diminishing it



THE BRAIN



Consciously we can process 40 pieces of information per second.

Unconsciously we can process 11 million pieces.

To keep up with all the stimuli around us, we create mental shortcuts that ostensibly make decision-making easier.

Conclusions drawn can affect lives, prospects, etc. of both you and the people with whom you interact.



WHAT CREATES BIAS?



- Where we grow up
- How we are taught
- Family
- Economics
- Experience
- Values/beliefs
- Culture
- Media



WHAT TRIGGERS UNCONSCIOUS BIAS?



- Color/ethnicity
- Gender
- Appearance: hair, tattoos, size, skin color, weight, age
- Disabilities (or perceived disabilities)
- Religion
- Economic similarity
- Educational background
- Political beliefs
- Geography

There are over 150 different types of unconscious bias



HOW CAN UNCONSCIOUS BIAS HURT YOUR ORGANIZATION?



- Unconscious bias hiring practices can decrease diversity
- It may lead to discrimination
- Can damage your culture
- May decrease engagement if employees do not feel heard
- Decrease innovation (employees are 2.6 times more likely to withhold ideas if they feel there are biases at work)
- Subject businesses to shareholder derivative lawsuits¹

¹ Mondaq.com, US: A New Wave of Board Diversity Derivative Litigation, C. Palmer (10/23/2020) (“plaintiffs’ bar fired their first shot in July 2020 with a shareholder derivative complaint against the board of a Fortune 100 company, followed in quick succession by additional derivative lawsuits against the boards of a number of public companies that allegedly lack any racially diverse directors. The allegations are largely the same: the boards of directors of these public companies allegedly breached their fiduciary duties by failing to include diverse directors on their boards, despite statements of commitment to diversity, equality, and inclusion. With eight suits filed in just three months against some of the largest public companies in the country, copy-cat suits targeting public companies without racially diverse directors are likely to follow”) https://www.mondaq.com/unitedstates/shareholders/997128/a-new-wave-of-board-diversity-derivative-litigation?email_access=on.





WHAT DIFFICULTIES CAN ARISE?

- Miscommunication
- Hostility
- Decrease in diversity
- Unfair treatment
- Disrupted teamwork
- Lack of productivity
- Client dissatisfaction



CHALLENGES



- Understanding and embracing differences
- Understanding cultures and “unwritten rules”
- Coordinating work styles
- Learning to communicate with people from different cultures
- Developing flexibility
- Adapting to change



STRUGGLING WITH UNCONSCIOUS BIAS



- People see the world through our own narrow view and judge the world by what is familiar to us
- Most people resist change
- Most people find comfort and trust in likeness



BENEFITS TO DECREASING UNCONSCIOUS BIAS



- Attracts and keeps quality employees
- Increases diversity, in people, perception, and thinking
- Inspires innovation, creative thinking
- Increases employee morale
- Maximizes productivity
- Reduces costly discrimination suits
- Improves decision making
- Raises company profile



TO DECREASE UNCONSCIOUS BIAS EMPLOYERS SHOULD



- Make diversity a priority
- Make decreasing unconscious bias a commitment of the organization
- Train employees
- Protect employee rights
- Promote compliance and prevention
- Create a respectful and dignified work environment for all
- Provide uniform expectations
- Promote an open-door policy



STRIVE FOR INCLUSION



The essence of a workplace where everyone in the organization has an opportunity to fully participate in creating business success and is valued for the distinctive skills, experiences and perspectives they bring.

Don't emphasis diversity in hiring/recruitment and then overlook it in retention and advancement of employees.



DIVERSITY



- Diversity is about coming to terms with our beliefs and expectations about others and gaining comfort with being different
- All of us have been responsible for and have been victims of discrimination and stereotyping
- Having diversity in the workplace gives everyone an understanding that each individual is unique, and helps recognize our individual differences



WHAT ARE YOUR UNCONSCIOUS BIASES?



“There is hope in the sheer act of reflection. This is where the power lies and how the process starts.”¹

Jennifer Eberhard, Professor, Department of Psychology, Stanford University, researcher on unconscious bias



¹ Douglas Starr, *Meet the Psychologist Exploring Unconscious Bias – and Its Tragic Consequences for Society*, SCIENCE MAG. (Mar. 26, 2020), <https://www.sciencemag.org/news/2020/03/meet-psychologist-exploring-unconscious-bias-and-its-tragic-consequences-society>.

REDUCING/DECREASING UNCONSCIOUS BIAS



- Be aware – think before acting
- Avoid personal attacks
- Rely on facts not feelings
- Change micro-behaviors by treating people the same
- Communicate clearly and openly
- Consciously change behavior – adjust the lens from which you view people
- Discuss events and reasons for actions
- Show interest in co-workers
- Use discussion guidelines at meetings
- Do not go on the defense
- Use the variety of experiences among co-workers, respect differences, and look at abilities
- Don't go along with improper comments
- Have policies and programs which are neutral (i.e. parental leave, flex-time schedules)
- Think inclusive – not exclusive

Decreasing unconscious bias will encourage new ideas and perspectives and allow employees to contribute to goals and share in success.



THE BIGGER PICTURE

- We are living during a time of very passionate discussion
- Work to positively add to the discussion by providing information and support to our community
- Understand stereotypes and preconceptions and assess situations for inclusion and diversity
- Empathize
- Be curious and learn about experiences of others
- Make others feel safe



HOW DO WE REACT TO ALL OF THIS IN THE BEST INTEREST OF OUR BUSINESS?



- Many of us need to understand – that we do not understand
- We need to take to heart – and not be defensive – about things like unconscious bias
- Educate ourselves
 - Communicate with our teams in new ways
 - Communicate with other companies
 - Reach out to advocacy groups for information





CAN UNCONSCIOUS BIAS LEAD TO LEGAL LIABILITY?

- If it's unconscious, as we just heard, am I responsible?
- The simple answer is yes ¹
- Let's examine different specific statutes

Remember: Even if you cannot be sued for your actions or inactions, you can be hurt by others' reactions to them



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¹ *A Growing Number of State Courts are Confronting Unconscious Racism in Jury Selection*, MARSHALL PROJECT (May 11, 2020), <https://www.themarshallproject.org/2020/05/11/a-growing-number-of-state-courts-are-confronting-unconscious-racism-in-jury-selection> (Washington was the first state to issue a rule requiring judges to consider “implicit, institutional, and unconscious biases, in addition to purposeful discrimination”; states such as California and Connecticut have since followed suit).

LAWS AIMED AT DISCRIMINATION PREVENTION CAN UNCONSCIOUS BIAS LEAD TO ACTIONABLE DISCRIMINATION?



- Title VII of the Civil Rights Act of 1964 prohibits making employment decisions based on race, color, religion, sex, or national origin
- ADA and ADEA prohibit discrimination based on age or real or perceived disabilities
- N.Y. Executive Law Article 15: Human Rights Law prohibits various discrimination
- N.Y. Executive Law § 291: Equality of Opportunity a Civil Right ¹
- Pregnancy,² Veterans' Status, Marital Status,³ Sexual Orientation,⁴ Citizenship Status, Sex,⁵ Gender Identity, Criminal Record



¹ The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, disability.

² *Chauca v. Abraham*, 30 N.Y.3d 325 (2017) (employee brought action against employer alleging that their refusal to allow her to return to work following her maternity leave violated the NYSHRL; court held that the standard for determining punitive damages under the NYCHRL is whether the wrongdoer has engaged in discrimination with willful or wanton negligence, or recklessness).

³ *Morse v. Fidessa Corp.*, 165 A.D.3d 61 (1st Dep't 2018) (former employee asserted a violation of the NYCHRL by alleging that he was suspended and then fired because a co-employee, whom company perceived to be former employee's spouse and with whom former employee had two children, had left company to work for another firm; court held that employee could sustain discrimination claim based on marital status).

⁴ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (skydiving instructor claim for sex discrimination under Title VII after he was involuntarily terminated because of his sexual orientation after he disclosed to a customer that he was gay; court held sexual orientation discrimination actionable under Title VII).

⁵ *Edwards v. Nicolaj*, 153 A.D.3d 440 (1st Dep't 2017) (defendants hired plaintiff as a yoga and massage therapist; defendant informed plaintiff that his wife might become jealous of plaintiff because plaintiff was "too cute;" plaintiff was then fired; court held that plaintiff's firing was sufficient to raise a claim of gender discrimination under both State and NYC Human Rights Laws).

LEGISLATION THAT STRENGTHENED PROTECTIONS AGAINST DISCRIMINATION AND HARASSMENT ¹



- The New York Human Rights Law is to be liberally construed **without reference to any federal law that may lead to a more restrictive result** ²
- Protection to victims of harassment, including sexual harassment, in important new ways:
 - Harassment is against the law whenever an individual is subjected to **inferior terms, conditions or privileges of employment**
 - The harassment **need not be severe or pervasive** for the employer to be liable. (However, employers may raise a defense that the actions were not **more than “petty slights or trivial inconveniences”**)
 - In order to establish liability, the complainant does **not have to identify a similarly situated person/employee** that was treated more favorably
 - A complainant **does not have to complain to their employer or file a formal grievance** in order to establish liability
- **Non-employees working in the workplace are protected from all discrimination**
 - Protections extend to contractors, subcontractors, vendors, consultants or others providing services in the workplace
- **Punitive damages** may be awarded against private employers
- **Attorney’s fees may be awarded** in all employment cases

¹ *New Workplace Discrimination and Harassment Protections*, N.Y. St., <https://dhr.ny.gov/workplaceharassment> (last visited Oct. 9, 2020).

² N.Y. EXEC. LAW § 300; N.Y. HUMAN RIGHTS LAW § 296-d.



LEGISLATION THAT STRENGTHENED PROTECTIONS AGAINST DISCRIMINATION AND HARASSMENT ¹



- Settlements of employment discrimination claims can only include the conditions of confidentiality if it is the **complainant's preference** and agreements regarding nondisclosure must be **"in writing to all parties in plain English, and, if applicable, the primary language of the complainant"** ²
- Settlements of employment discrimination claims cannot prevent complainants from speaking to an attorney, the New York State Division of Human Rights, the U.S. Equal Employment Opportunity Commission, local human rights commissions, or any other form of law enforcement
- The Human Rights Law will **apply to all employers within New York State**, even those with fewer than **four employees.** ³
- The one-year statute of limitations for filing with the Division will be extended to **three years for sexual harassment in employment cases** only. ⁴

¹ *New Workplace Discrimination and Harassment Protections*, N.Y. St., <https://dhr.ny.gov/workplaceharassment> (last visited Oct. 9, 2020).

² N.Y. CPLR § 5003-b; N.Y. GOL § 5-336.

³ N.Y. EXEC. LAW § 292(5).

⁴ N.Y. EXEC. LAW § 297(5).





RISKS AND LIABILITIES

- Thresholds to prove liability are going to be lower and easier for plaintiff/employees
- Damage awards go up in times of heightened awareness and sensibility like we are now experiencing
- Not just employees: Discrimination claims are available to non-employee contractors, both individuals and companies
- *Griffin v. Sirva, Inc.*, 29 N.Y.3d 174 (2017) (while only “employers” may be liable for criminal conviction history discrimination under the Human Rights Law, a covered employer may also include entities that exercise “order and control” over the individual’s work; “aiding and abetting” provisions of the Human Rights Law may apply to entities even where a direct or indirect employment relationship cannot be shown).



INTERRUPTING BIAS



- “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹

U.S. Supreme Court Chief Justice John Roberts, 2007

- “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”²

U.S. Supreme Court Justice Sonia Sotomayor, 2014

- Legislative attempts to interrupt bias can't work alone

- Affirmative Action
- Equal Pay Act
- Laws banning employers from asking about salary history³
- Civil Rights Act
- Fair Chance Act
- Marriage Equality

- Don't be afraid to look bias in the eye without blinking
- Be an ally for someone in need
- Doubt your own objectivity when you should
- Question other people's biases and judgments. Don't blindly follow another person's prejudices and biases.

¹ *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007).

² *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 381 (2014).

³ As of August 2020, there are 18 statewide bans on salary history (AL, CA, CO, CT, DE, HI, IL, ME, MD, MA, NJ, NY, NC, OR, PA, VT, VA, WA) and 22 local bans on salary history (Albany County, NY; Atlanta, GA; Chicago, IL; Cincinnati, OH; Columbia, SC; Jackson, MS; Kansas City, MO; Louisville, KY; Montgomery County, MD; New Orleans, LA; New York, NY; Philadelphia, PA; Pittsburgh, PA; Puerto Rico; Richland County, SC; San Francisco, CA; Salt Lake City, UT; St. Louis, MO; Suffolk County, NY; Toledo, OH; Washington, DC; Westchester County, NY).

WHAT WILL THE BUSINESS ENVIRONMENT LOOK LIKE AFTER ALL THIS?



- No one really knows
- We do know that things will never be the same
- Socially, and more importantly, economically, most of us will operate with vast amounts of information and perspective we never had before
- Today's discussion has to be a part of a much larger conversation
- Let us all continue this larger conversation together



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Thank You

Christine Malafi, Esq. and Dr. Errol D. Toulon, Jr., Suffolk County Sheriff