

How to Effectively Identify and Address Explicit and Unconscious Bias in the Workplace

Carmen Cole and Katharine Liao



Presenters



Carmen Cole
Partner, Los Angeles and Atlanta
T +1 213 689 5189
E carmen.cole@squirepb.com



Katharine Liao
Partner, New York and Los Angeles
T 1 212 872 9804
E katharine.liao@squirepb.com

A man and his son are in an accident and are rushed to the hospital in need of emergency care. The doctor looks at the boy and says, “I can’t operate on this boy, he’s my son!”





The Case for Diversity

Why This Is Important

Discrimination is illegal and employment actions based on stereotypes can be discriminatory.

It's unethical. Rules of professional conduct prohibit discrimination.

Discrimination violates company EEO policy.

Losing good talent.

It's bad business.

Business Needs for Diversity, Equity & Inclusion

Companies are more successful when they champion diversity, equity and inclusion because DEI:

Facilitates hiring from a wider pool of qualified job candidates

Enhances decision-making when views from employees with diverse backgrounds and experiences are considered (prevents “groupthink”)

Enables companies to communicate better externally

Decreases turnover by emphasizing values, policies and platforms to allow employees to feel respected, heard and included

Helps prevent instances of harassment and discrimination in the workplace and lawsuits

The **Business** Case for Diversity, Equity and Inclusion

Companies in the top quarter for...

RACIAL & ETHNIC DIVERSITY

are 36% more likely to have financial returns above national industry medians

GENDER DIVERSITY

are 20% more likely to have financial returns above national industry medians

GENDER DIVERSITY ON EXECUTIVE TEAMS

are 25% more likely to experience above-average profitability than peer companies in the fourth quartile

Ethics Rules

ABA Model Rule 8.4(g) adopted 2016:

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Ethics Rules

California (effective November 1, 2018)

- Prohibits unlawful harassment and discrimination.
- Prohibits “knowingly permitting”
- “Knowingly permitting” means “fail to advocate corrective action when the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination or harassment”



CROWN Laws by State and Locality

California's CROWN Act (Creating a Respectful and Open Workplace for Natural Hair)

CA's Fair Employment and Housing Act now includes in the definition of race "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles," the latter including "hairstyles [such] as braids, locks, and twists."

States with CROWN Act laws: California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maine, Maryland, Massachusetts, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Virginia, Washington.



Religious Accommodation Law

- California's Workplace Religious Freedom Act of 2012 protects against employment discrimination based on all aspects of religious belief, observance, and practice.
- Employers must reasonably accommodate an employee or applicant's sincerely held religious belief or observance, *including religious dress and grooming practices*, unless the employer can show undue hardship.
- “Religious grooming practice” shall be construed *broadly* to include all forms of head, facial, and body hair that are part of an individual observing a religious creed. Cal. Gov't Code § 12926(q)
- Accommodation also includes scheduling accommodations.
- California AB 987 which was passed in 2015 also makes it clear that employers cannot retaliate against employees for requesting reasonable accommodations due to religious reasons.

The Future

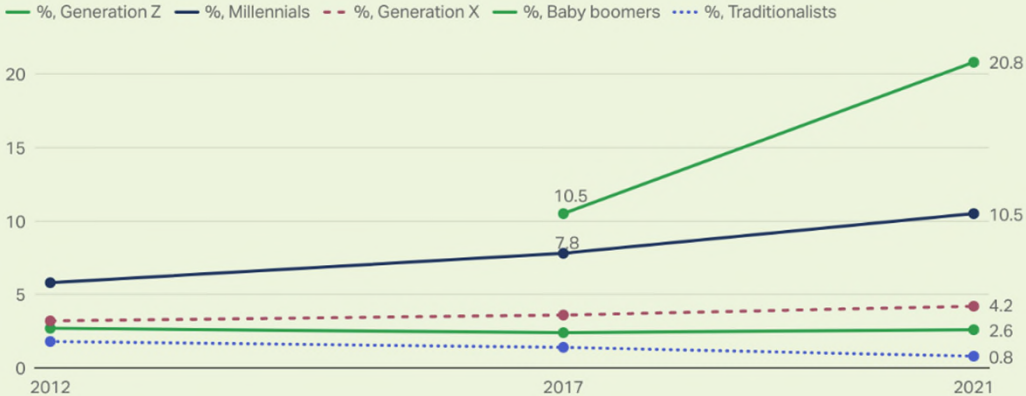
Millennials or Gen Y make up approximately 40% of the workforce currently, and will continue to increase.

Americans' Self-Identification as LGBT, by Generation

	LGBT %	Straight/Heterosexual %	No response %
Generation Z (born 1997-2003)	20.8	75.7	3.5
Millennials (born 1981-1996)	10.5	82.5	7.1
Generation X (born 1965-1980)	4.2	89.3	6.5
Baby boomers (born 1946-1964)	2.6	90.7	6.8
Traditionalists (born before 1946)	0.8	92.2	7.1

GALLUP, 2021

Trend in LGBT Identification by Generations of U.S. Adults, 2012, 2017 and 2021



--Generation Z are those born between 1997 and 2012. In 2017, only those born between 1997 and 1999 had reached adulthood. In 2021, only those born between 1997 and 2003 had reached adulthood.
 --Millennials are those born between 1981 and 1996. In 2012, only those born between 1981 and 1994 had reached adulthood.
 --Generation X are those born between 1965 and 1980.
 --Baby Boomers are those born between 1946 and 1964.
 --Traditionalists are those born before 1946.

GALLUP

The Future – Specific Questions During Recruiting


Questions being asked by the candidates:




What is your company doing to support Black Lives Matter?



Tell me about the DE&I work that your company is doing to support diverse employees?



Tell me about your affinity groups and what your company does to support them?

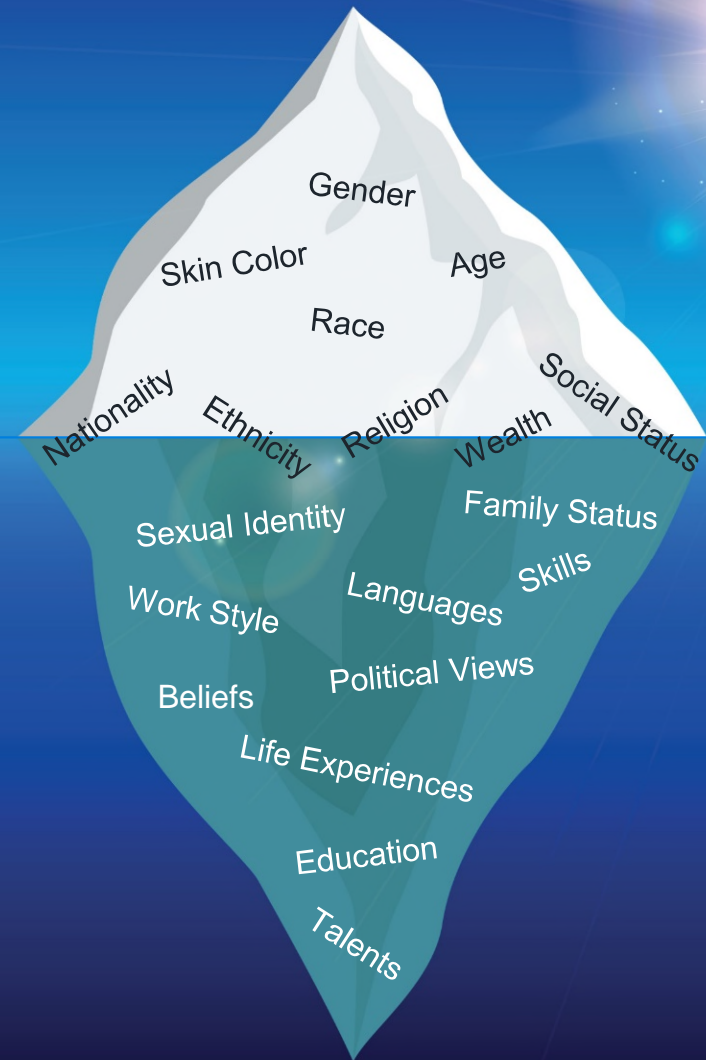


What percentage of your leadership team is ethnically diverse?



The Differences: Diversity, Equity and Inclusion

DE&I is More Than Race and Gender





Diversity

Diversity refers to any characteristic that makes an individual unique - from the place they were born, languages they speak, their race, their gender, the places they have lived, and whether they have children or grandchildren.

Inclusion

Inclusion refers to the sense of belonging that comes from being in work spaces where people are accepted, their unique talents and perspectives are valued, and they are encouraged to be themselves at work.

Equity

Equity refers to removing obstacles for historically underrepresented groups so that they have a fair opportunity to succeed.

What's the difference?

Diversity

The gateway, i.e., the getting of the job, gaining admittance into school, what law firms get invited to pitch business, etc.

Easy to measure

Inclusion

Path that leads up to the gateway, and what happens after you get through the gateway.

Pathway processes we don't measure; they can be fluid, who goes to drinks, who gives eye contact to who gets invited to the high profile projects, who gets invited to the meetings; who gets cut off by who, etc.



Diversity

Being invited to the party

Inclusion

Dancing

Choosing the Music

Member of the Party-
Planning Committee

Equity

Making sure those who
are invited are actually
able to attend and
participate in the
planning of the party

We can use diversity statistics and metrics to drive inclusion strategies, but **inclusion is much harder to measure**



What is Covering?

- Not being authentic or hiding parts of one's identity or experience
- “Not Flaunting” or making something about yourself too apparent (e.g., “I don't want be too ethnic”)

FDR intentionally stationed himself behind a desk before his advisers came in for meetings. Everyone knew he used a wheelchair but he was covering, playing down his disability so people would focus on his more conventionally presidential qualities.

Martin Sheen was Ramon Estevez on his birth certificate, Ben Kingsley was Krishna Bhanji, Kirk Douglas was Issur Danielovitch Demsky and Jon Stewart was Jonathan Leibowitz.

Helen Keller allegedly replaced her natural eyes (one of which protruded) with blue glass ones.

Bias is Broad

- Blonde women's salaries were 7% higher than women who were brunettes or redheads. (*Queensland University Study, 2010*)
- For every 1% increase in a woman's body mass, there was a 0.6% decrease in family income. (*The National Bureau of Economic Research*)
- "Mature-faced" people had a career advantage over "baby-faced" people – i.e., people with large, round eyes, high eyebrows and a small chin. (*Duke University study, 2010*)
- Male and female scientists—trained to reject the subjective—were more likely to hire men, rank them higher in competency than women, and pay them \$4,000 more per year than women. (*Yale University study, Wilkie, 2015*)
- 58% of Fortune 500 CEOs are just shy of six feet tall, while only 14.5% of the male population are that same size. (*Price, n.d.*)

A top-down photograph of a diverse group of people standing in a circle with their hands stacked in the center. The individuals are wearing various clothing items, including a red and white plaid shirt, a brown sweater, an orange sweater, a yellow sweater, and a blue and white checkered shirt. The background is a light-colored floor. The image is split vertically by a teal overlay on the left side, which contains the title text.

Recognizing Unconscious Bias and Moving Toward Solutions

Cognitive Bias is Normal

- Attitudes, beliefs and behaviors are shaped by influences beyond our awareness
- They can be activated in memory without our awareness or intent
- These subtle reactions are referred to as “implicit” or “unconscious” bias
- Implicit bias is not bigotry – it is a systematic or cognitive “error”
- Our brains are wired to categorize – make inferences

Blame It on the Brain

- Amygdala
- Hippocampus
- Temporal lobe
- Media frontal cortex



How the Brain Processes Information to Create Biases

- **Amygdala**
 - Associated with emotional learning and fear conditioning
 - Where preferences and evaluations are developed
 - Responsible for the fight, flight or freeze emotional response to stimuli
- **Hippocampus**
 - Forms links between memories
 - Matches new information with subjective memories

How the Brain Processes Information to Create Biases

- **Temporal lobe**
 - Stores information about people and objects
 - Integrates sounds and words into memories
- **Frontal cortex**
 - Responsible for empathy, emotional responses and rational thought

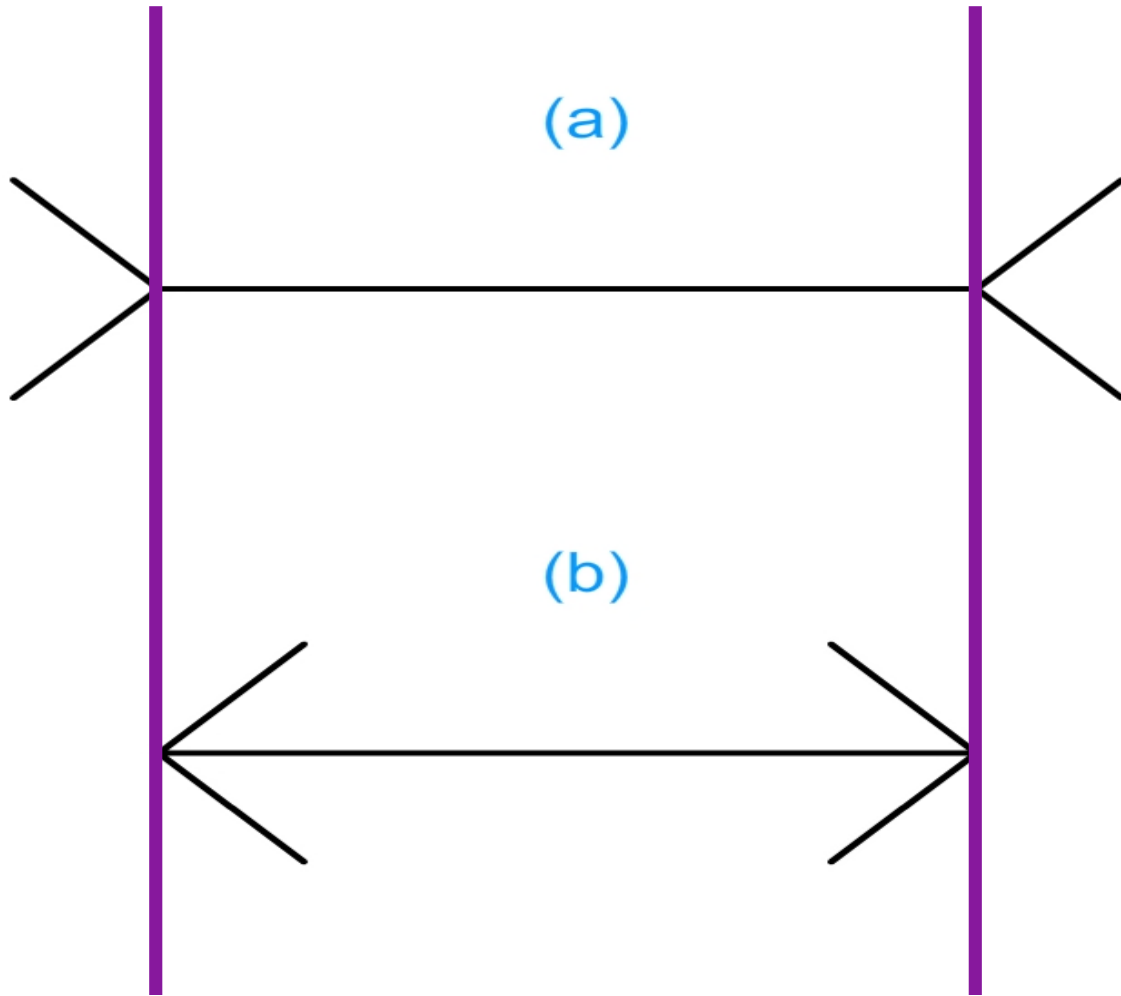
Cognition “Errors”

- We are hardwired for survival
- 90% of our thinking is quick, automatic, unconscious and involuntary
- 10% of our thinking is controlled, deliberate, conscious
- We tend to believe the opposite, that 90% of our thinking is rational, objective, intentional



We tend to believe what we see.
The “90%” unconscious thinking
determines our perception.

This is true even if we are told (and
proof is offered) that our perception is
incorrect.







Headwinds

Challenges, some big, some small, some visible, some invisible, that make life harder for some people, but not all people. **When you run against a headwind, your speed slows down and you have to work harder.**

Tailwinds

When you have a tailwind pushing you, it is a force that propels you forward. Consequential, but easily unnoticed or forgotten.



- 1953: first group of women attended Harvard Law School
- No bathrooms for them to use
- Told they could use the ones at Harvard Square, a 15 minute walk away
- They protested and their male counterparts joined
- A small bathroom installed for them in the basement janitor's closet
- They achieved gender diversity, but not gender inclusion

“Diversity speaks to who is represented in the organization, whereas inclusion speaks to who is respected, expected and integrated into an organization.”

- Verna Myers

Ordinary Privilege

I'm female.

~~I'm straight.~~ I'm gay.

I'm American.

I'm physically able-bodied.

I'm mentally able-bodied.

I'm cisgender.

I'm married.

I'm a mother.

Lots of tailwinds.

Ordinary privilege is ordinary because it blends in with the norms and people around us and is easily forgotten.

Growth Mindset




When a group believes they can:

- speak up
- ask for help
- admit mistakes
- propose ideas
- take blame
- confess uncertainty
- disclose inability

They learn more and perform better.

One Way to Activate your Growth Mindset: Be on Alert for Your Fixed Mindset

"I'm not a racist."	FIXED MINDSET
"I support <insert marginalized group here>!"	FIXED MINDSET
What I "really" meant was _____.	FIXED MINDSET
I'm sorry, I was wrong.	GROWTH MINDSET
I accept that my apology might not erase the damage done, but I'm not going to keep trying to make that person put their anger aside.	GROWTH MINDSET
"I don't really understand what I did wrong, but I would like to"	GROWTH MINDSET



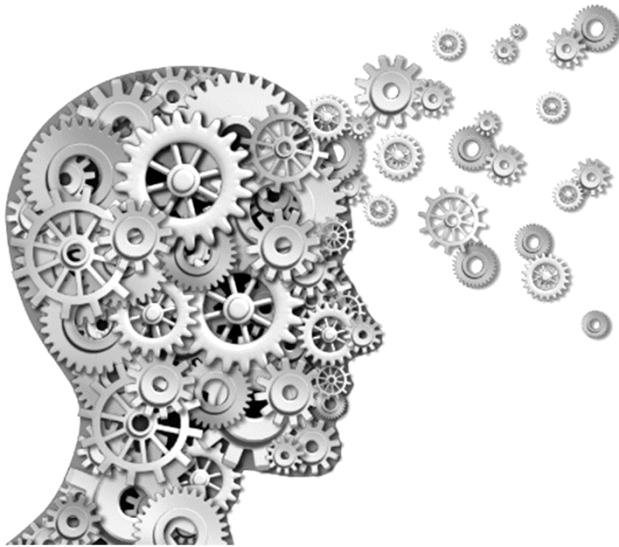
Why is this so
hard to talk
about?

Stereotypes are perceived as negative.

We all think we're progressive, don't have any biases and don't act based on stereotypes. Why should I talk about a disease I don't have?

But we are all human.

What are Unexamined Biases?



Lingering stereotypes

Assumptions about a person's capabilities and qualifications based on personal characteristics such as gender, race, religion, etc.

Unexamined biases can result in subtle and unconscious barriers to success which hold back the victims of such biases.

Known Unconscious Biases that Directly Impact the Workplace

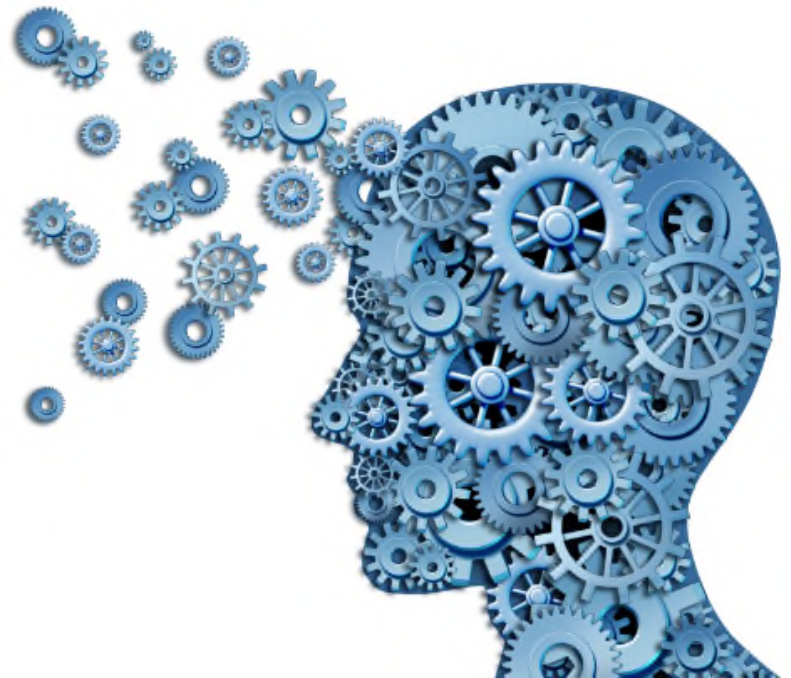
Affinity bias

Halo effect

Perception bias

Confirmation bias

Group think



Microaggressions

Definition: A statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination against members of a marginalized group such as a racial or ethnic minority.

Micro-messages are signals we send through our behavior. They are called “micro” because the behaviors are small, although their impact can be enormous.

Microaggressions are these messages that we send to other people that cause them to feel devalued, slighted, discouraged or excluded.

“Little acts of disrespect, failures to give performance feedback can erode professional relationships like bits of sand and ice.” (Mary Rowe, 2008)

Microinequities – Little Acts of Disrespect

Insider jokes

Interruptions

People not introduced at meetings (or mistakenly introduced as someone else of the same race)

Failure to include some in social engagements with others from work

Names mistakenly left off list

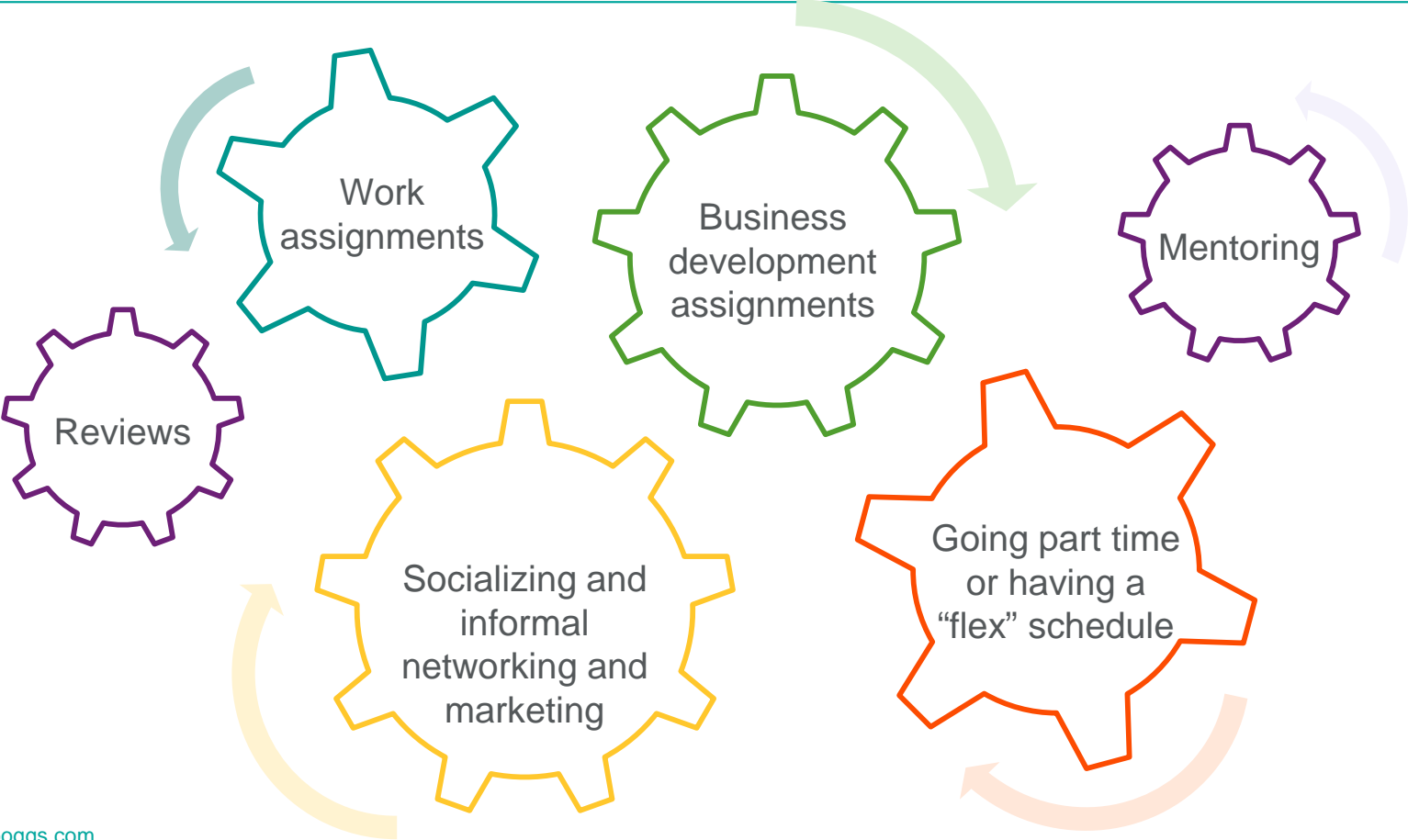
Excessive chumminess with some

Sighing, eye rolls, etc.

Smartphone use/taking calls during meeting

Greeting some but not others

How Else Can Bias Materialize?





Best Practices for Helping Your Organization



Empowering Your Leaders: What Do I Do When I Observe Bias in Others?

Don't laugh at inappropriate or insider jokes

Speak up and respond – express discomfort

Speak to the person privately (public confrontations make people defensive)

Enlist an ally to join you

Elevate the issue if necessary

Redirect when someone has been overlooked

- Add them to the email chain
- Ask why they haven't been included/suggest they be added
- Ask their opinion even if conversation lead has not

Training Your Team to Recognize Microinequities

Notice your conduct . . .

When am I listening and when am I shutting people out?

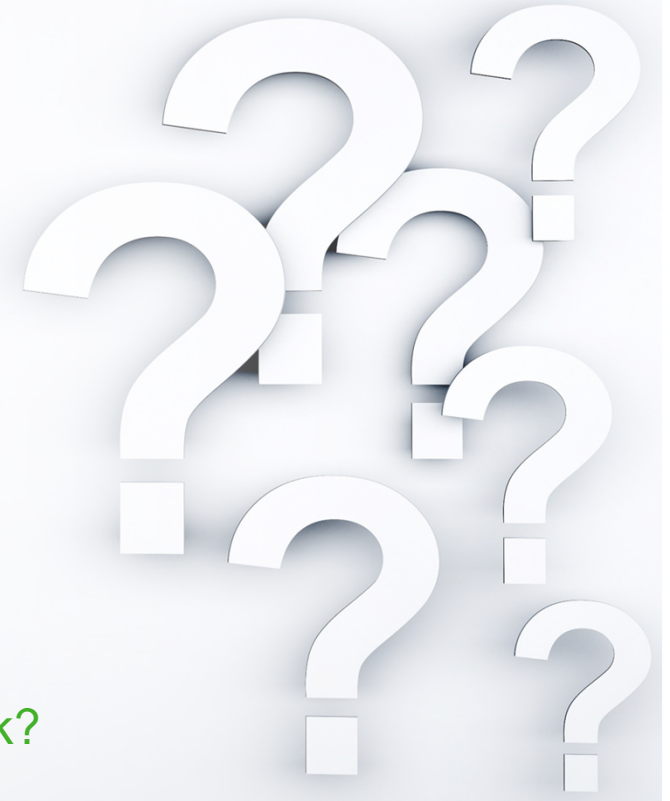
Who am I including and excluding?

Who am I encouraging and praising?

Who am I joking with or lunching with?

Whose contributions am I most likely to recognize?

Is there someone whose contributions I sometimes overlook?



Training Your Team: What Do I Do With My Bias?



Be specific and factual in your evaluations about both achievements and failures. It's okay to use adjectives, but it's better to use examples.




Give specific feedback in real time. Don't just say you think they did a good job. Explain what you liked about what they did.



Be straightforward with each other. Ask your colleague if he or she is willing to commit to the project involving travel, for example. Don't assume one way or the other.



Be aware of how your actions are perceived.



Lead with
empathy

DE&I is
ongoing – not
one-off training

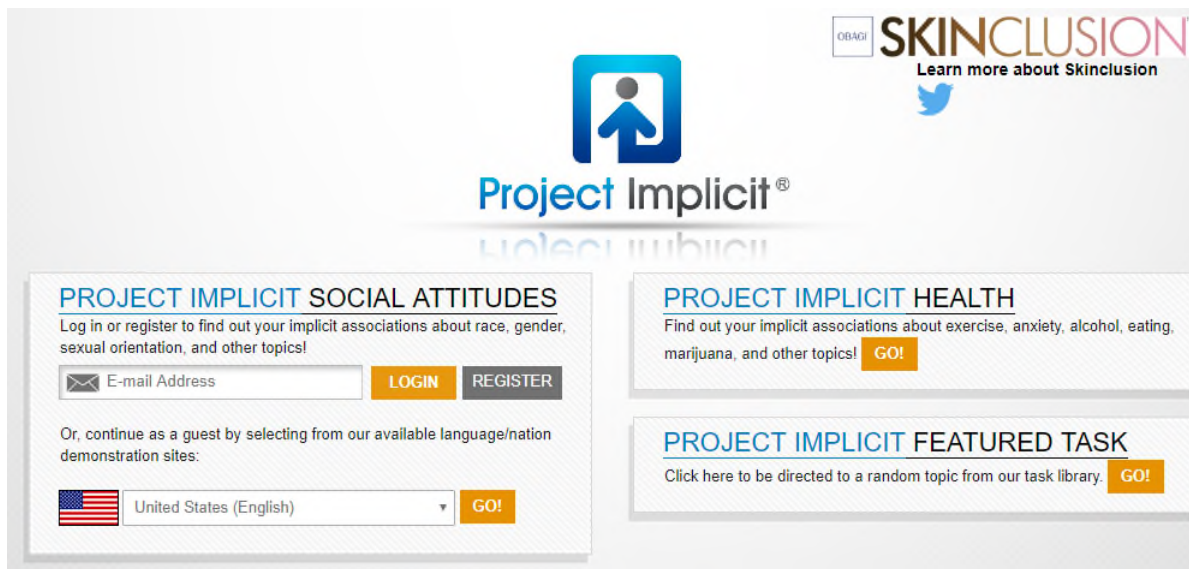
Maximize
connection,
minimize fear

Establish sense
of belonging for
everyone

Recognize
quotas don't
automate
inclusion

Forget fit and
focus on helping
individuals
“thrive”

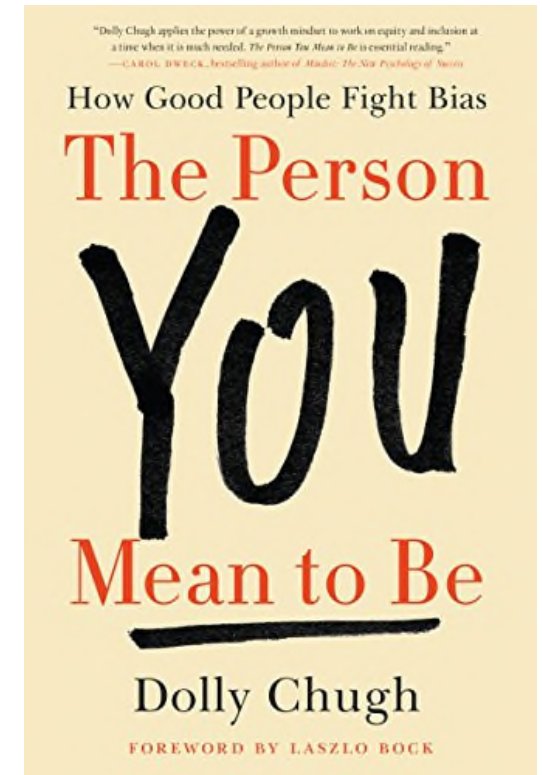
Provide Your Team With Resources



The screenshot shows the Project Implicit website interface. At the top, there is a logo for Project Implicit (a blue square with a white figure) and the text "Project Implicit®". To the right, there is a logo for "OBAGI SKINCLUSION" with the tagline "Learn more about Skinclusion" and a Twitter icon. Below the Project Implicit logo, there are three main sections:

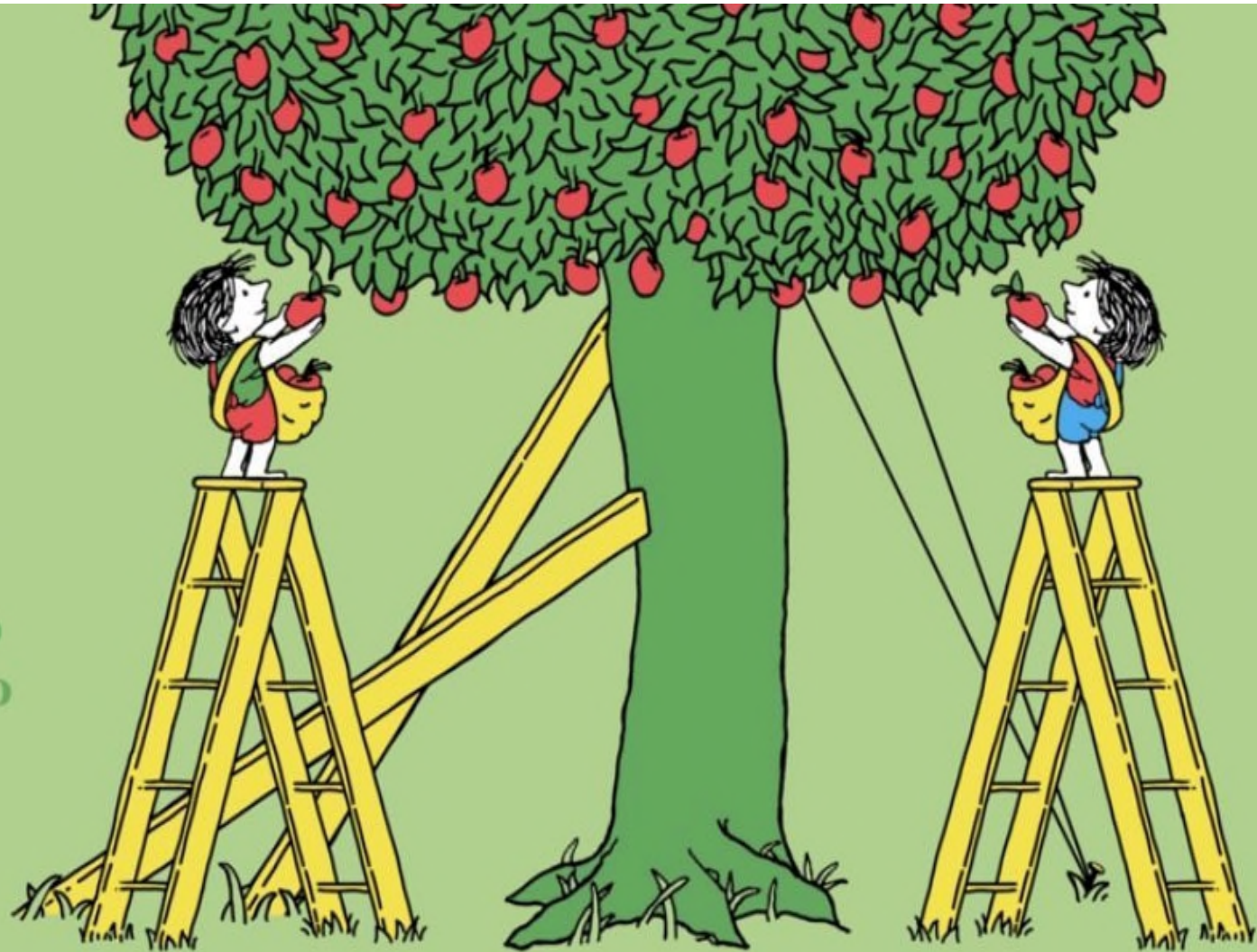
- PROJECT IMPLICIT SOCIAL ATTITUDES**: "Log in or register to find out your implicit associations about race, gender, sexual orientation, and other topics!" Below this is an "E-mail Address" input field, "LOGIN" and "REGISTER" buttons, and a section for guest users: "Or, continue as a guest by selecting from our available language/nation demonstration sites:" with a dropdown menu showing "United States (English)" and a "GO!" button.
- PROJECT IMPLICIT HEALTH**: "Find out your implicit associations about exercise, anxiety, alcohol, eating, marijuana, and other topics!" with a "GO!" button.
- PROJECT IMPLICIT FEATURED TASK**: "Click here to be directed to a random topic from our task library." with a "GO!" button.

Implicit Association Test
at <https://implicit.harvard.edu>



Justice

Fixing the system to offer equal access to both tools and opportunities





Questions?