

Case No. 07-15838

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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SHIRLEY “RAE” ELLIS, LEAH HORSTMAN, AND ELAINE SASAKI,  
ON BEHALF OF THEMSELVES  
AND ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs – Appellees,*

v.

COSTCO WHOLESALE CORPORATION,

*Defendant – Appellant.*

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On Appeal From The United States District Court  
For The Northern District Of California, San Francisco Division  
Civil Action No. C 04-3341 MHP

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**BRIEF OF AMICI CURIAE**  
**THE EQUAL JUSTICE SOCIETY, EQUAL RIGHTS ADVOCATES,**  
**THE CENTER FOR WORK LIFE LAW AND PICK UP THE PACE IN SUPPORT**  
**OF PLAINTIFFS - APPELLEES**

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## INTEREST OF AMICI

The Equal Justice Society (EJS) is a national organization of scholars, advocates and citizens, that seeks to promote equality and enduring social change through law and public policy, public education and research. Specifically, EJS works to ensure that antidiscrimination law and jurisprudence continue to adequately address gender, racial and other societal inequities, including addressing conscious and cognitive biases while confronting all manifestations of invidious discrimination and second-class citizenship.

Equal Rights Advocates (ERA) is a women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girls through litigation and advocacy. As Title VII is one of the foremost federal laws designed to promote equality in the workplace and protect women from the long-term economic impact of invidious discrimination, ERA has a particularly strong interest in the interpretation and implementation of Title VII through the courts. ERA currently serves as co-counsel in *Dukes v. Wal-Mart Stores*, in the United States District Court for the Northern District of California.

Pick Up the Pace is a non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass ceiling discrimination, cognitive bias, gender stereotyping and work/family conflict. The organization seeks to raise awareness



of cutting edge gender bias issues in the workplace through public education and legal advocacy.

The Center for WorkLife Law is a nonprofit research and advocacy organization that seeks to eliminate discrimination against employees who have caregiving responsibilities, such as mothers and fathers of young children and adults with aging parents or sick spouses. Gender stereotyping is the cause of most of this type of discrimination in the workplace. Much of WorkLife Law's work has involved the applicability of sociological and psychological research on cognitive gender bias to legal claims of sex discrimination and the admissibility of expert testimony on these issues.

*Amici* submit this brief in support of the district court's class certification decision generally, and specifically, the court's crediting of the social science testimony of plaintiffs' sociological expert, Barbara F. Reskin, Ph.D., regarding the causes, manifestations and consequences of gender stereotyping, as well as the organizational circumstances that allow such stereotypes to flourish and those that may diminish them. Such evidence is a critical – and customary – component of plaintiffs' proof in cases challenging an employer's use of subjective decisionmaking processes under the disparate impact theory of discrimination because it can provide a causal link between the challenged employment practice and statistical disparities in the results of the employer's decisionmaking.

Additionally, such evidence can aid the trier of fact in determining whether an employer has engaged in a pattern or practice of discrimination under the disparate treatment theory of discrimination. In both contexts, social science evidence is probative in demonstrating whether common questions of fact exist to warrant certification of the plaintiff class.

Social science testimony such as that presented by Dr. Reskin can inform the trier of fact about the nature of gender stereotypes and the workplace conditions under which such stereotypes are likely to influence decisionmakers. Moreover, such testimony also provides guidance regarding practices – noted by Dr. Reskin to be absent at Costco<sup>1</sup> – that can diminish the effects of cognitive biases that companies wishing to avoid class action litigation – and more importantly, to provide equal employment opportunities to all their employees – can and should utilize. This Court has recognized that social science testimony regarding the nature and influences of gender stereotyping in the workplace is relevant and of probative value in employment discrimination class actions. To disallow such evidence, as Costco and *amicus curiae*, the Retail Industry Leaders Association (“RILA”) urge,<sup>2</sup> would make it more difficult for plaintiffs to obtain class

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<sup>1</sup> SER 33-46.

<sup>2</sup> RILA makes the extraordinary assertion that “[t]he impact of the district court’s Order will be to subject retailers to certification of nationwide employment discrimination class actions as long as plaintiffs can find experts willing to ... make

certification and ultimately prevail in such cases, and thereby eradicate classwide employment discrimination.

The parties have consented to the filing of this brief.

## **ARGUMENT**

Dr. Reskin concluded that Costco's centralized control, reinforced by a strong organizational culture, sustains uniformity in its personnel policies and practices; and that its personnel practices, particularly the subjectivity of its procedures for promotion to the Assistant General Manager ("AGM") and General Manager ("GM") positions, increase the likelihood that cognitive gender biases<sup>3</sup> will adversely affect women's opportunities to advance to these positions.<sup>4</sup>

Dr. Reskin based her opinions on deposition testimony of Costco's managers and senior executives, and the named plaintiffs, and documents reflecting Costco's

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(continued ...)

general, speculative statements regarding subjectivity and cognitive bias, despite the absence of legitimate common questions of fact regarding the challenged employment practices." RILA Brief at 2.

<sup>3</sup> Cognitive bias refers to the concept of automatic cognitive processing. "Much of human mental process, including those processes mediating interpersonal perception and judgment, occur in 'the cognitive unconscious,' outside of the perceiver's mindful attentional focus. In other words, actors often do not realize that they have formed biased judgments of others." L.H. Kreiger and S.T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997, 1030-31 (2006). This concept also is referred to in the social science and legal literature and by courts as unconscious bias, implicit bias, or automatic bias.

<sup>4</sup> ER 70.

personnel and Human Resources policies and practices, and the company's organization and culture,<sup>5</sup> and a large body of social scientific research on gender stereotyping in the workplace, in-group bias,<sup>6</sup> and organizational policy and practice.<sup>7</sup>

Costco and RILA mischaracterize Dr. Reskin's opinions as "speculative," "unscientific sociological conjecture" and "pop" psychology.<sup>8</sup> As discussed below, and as the district court correctly found,<sup>9</sup> the social science evidence<sup>10</sup> presented by Dr. Reskin is generally accepted in the social science community and has been admitted by federal courts to assist the trier of fact in employment discrimination cases over the past twenty years.

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<sup>5</sup> ER 1020.

<sup>6</sup> In addition to gender stereotyping, Dr. Reskin relied on scientific research regarding in-group bias to support her opinions in this case. ER 1020; SER 27-33. Research has shown that individuals "automatically prefer ingroup members to outgroup members, are more comfortable with them, trust them, feel more obligated and loyal to them, impute to them positive attributes and remember their positive traits while forgetting their negative ones, are predisposed to cooperate with them; and favor them when distributing rewards." SER 22. Costco has not challenged Dr. Reskin's reliance on in-group bias research to support her opinions; but rather, only challenges Dr. Reskin's reliance on scientific research regarding stereotyping. Costco Opening Brief at 35-39.

<sup>7</sup> ER 1021.

<sup>8</sup> Costco Opening Brief at 15, 35, 36; RILA Brief at 2, 3, 12.

<sup>9</sup> ER 1019-1020.

<sup>10</sup> As used in this brief, the term "social science evidence" encompasses research and testimony from the disciplines of psychology and sociology.

## I. COURTS HAVE LONG ADMITTED SOCIAL SCIENCE EVIDENCE OF THE TYPE PRESENTED BY PLAINTIFFS TO ASSIST THE TRIER OF FACT IN DISCRIMINATION LITIGATION

Decades of well developed case law recognizes that social science evidence regarding cognitive bias and stereotyping is relevant and of assistance to the trier of fact in employment discrimination cases. Courts have admitted this evidence, finding that objections to it go to its weight, not admissibility. As one court observed, “in a pattern or practice discrimination case, evidence of discriminatory conduct is often widely-dispersed and difficult to evaluate; expert testimony as to [] stereotyping may again aid jurors in assessing liability.”<sup>11</sup>

Social science evidence has played a significant role in discrimination cases since the Supreme Court’s landmark decision in *Brown v. Bd. of Educ.*<sup>12</sup> In reaching its conclusion that “in the field of public education the doctrine of ‘separate but equal’ has no place,”<sup>13</sup> the Court relied on social science evidence regarding the psychological effects of segregation and discrimination on personality development.<sup>14</sup>

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<sup>11</sup> *Flavel v. Svedala Indus., Inc.*, 875 F. Supp. 550, 557-58 (E.D. Wis. 1994).

<sup>12</sup> 347 U.S. 483 (1954).

<sup>13</sup> *Id.* at 495 & n.11.

<sup>14</sup> 347 U.S. at 494, n.11.

Since *Brown* and with the passage of Title VII, courts have admitted expert social science evidence in employment discrimination cases. The Supreme Court countenanced the use of social science evidence on gender stereotyping in *Price Waterhouse v. Hopkins*.<sup>15</sup> Hopkins' social psychologist expert Susan T. Fiske, Ph.D., had testified at trial that Price Waterhouse's partnership selection process was likely influenced by sex stereotypes.<sup>16</sup> The Supreme Court's discussion and holding regarding Price Waterhouse's challenge to Dr. Fiske's testimony are instructive. The Court did not quarrel with the trial court's finding that some comments from Price Waterhouse partners about Hopkins showed sex stereotyping.<sup>17</sup> Moreover, the Court was adamant that sex stereotyping constituted discrimination, stating:

we are beyond the day when a employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.<sup>18</sup>

The American Psychological Association ("APA"), a non-profit professional organization founded in 1892, with more than 70,000 members at the time,

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<sup>15</sup> 490 U.S. 228, 251-52 (1989).

<sup>16</sup> *Id.* at 235.

<sup>17</sup> *Id.* at 251.

<sup>18</sup> *Id.* at 251-52 (internal quotations omitted).

submitted an *amicus curiae* brief to the Supreme Court in *Price Waterhouse* to inform the Court about and support the use of social science evidence in employment discrimination litigation.<sup>19</sup> The APA argued that the methodology and literature relied on by Dr. Fiske was consistent with generally accepted research practice in the field.<sup>20</sup> Moreover, it emphatically stated that empirical research on sex stereotyping, which had been conducted over many decades, was generally accepted in the scientific community.<sup>21</sup> The APA concluded that “[r]esearch on sex stereotypes clearly satisfies the essential criteria for general scientific acceptance.”<sup>22</sup>

The Court specifically credited Dr. Fiske’s testimony and field of study, refusing to accept Price Waterhouse’s “belated and unsubstantiated characterization of Dr. Fiske’s testimony as ‘gossamer evidence’ based only on ‘intuitive hunches’ and her detection of sex stereotyping as ‘intuitively divined.’”<sup>23</sup> It also disagreed with the dissent’s “dismissive attitude toward Dr. Fiske’s field of study and toward her own professional integrity.”<sup>24</sup> Finally, the Court made clear

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<sup>19</sup> *Price Waterhouse v. Ann B. Hopkins*, Amicus Curiae Brief for the American Psychological Association, No. 87-1167, 1988 WL 1025869, at \*4 (June 17, 1988).

<sup>20</sup> *Id.* at \*5.

<sup>21</sup> *Id.* at \*9.

<sup>22</sup> *Id.*

<sup>23</sup> *Price Waterhouse*, 490 U.S. at 255 (internal quotations omitted).

<sup>24</sup> *Id.*

that by focusing on the specific proof that Hopkins had offered regarding stereotyping by managers, it did not intend to “suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision.”<sup>25</sup>

Since *Price Waterhouse*, other courts have admitted evidence on stereotyping in race,<sup>26</sup> gender,<sup>27</sup> and age<sup>28</sup> discrimination employment cases, including over motions to exclude under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>29</sup>

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<sup>25</sup> *Id.* at 251-52.

<sup>26</sup> See e.g., *Wright v. Stern*, 450 F. Supp. 2d 335, 360 (S.D.N.Y. 2006) (admitting sociologist’s report regarding in-group bias and racial stereotyping); *Satchell v. FedEx Corp.*, No. C 03-02659, C 03-02878, 2005 WL 2397522 (N.D. Cal. Sept. 28, 2005) (admitting sociological report on racial stereotypes on motion for class certification).

<sup>27</sup> See e.g., *Arnold v. Cargill Inc.*, No. 01-2086, 2006 WL 1716221, at \*7-8 (D. Minn. June 20, 2006) (admitting sociologist’s report regarding gender stereotyping at class certification stage).

<sup>28</sup> See e.g., *Hurst v. F.W. Woolworth Co.*, No. 95 Civ 6584, 1997 WL 685341, at \*2 (S.D.N.Y. Nov. 3, 1997) (refusing to exclude trial testimony of expert regarding age stereotyping); *Flavel*, 875 F. Supp. at 557-58 (admitting expert testimony on stereotyping, recognizing that age discrimination may arise from unconscious stereotyped ideas about abilities of older workers).

<sup>29</sup> 509 U.S. 579 (1993); see e.g. *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 191-92 (N.D. Cal. 2004) (*Dukes II*); *Hnot v. Willis Group Holdings LTD*, No. 01 CIV 6558, 2007 WL 1599154, at \*2 (S.D.N.Y. June 1, 2007) (refusing to preclude expert testimony regarding gender stereotyping, which applied social framework analysis, finding it was “grounded in academic study and practical experience not available to the average layperson [and] can be helpful to the jury”); *Int’l Healthcare Exch., Inc. v. Global Healthcare Exch., LLC*, 470 F. Supp. 2d 345, 355 (S.D.N.Y. 2007) (refusing to strike plaintiff’s expert report regarding stereotyping at summary judgment stage); *Arnold*, 2006 WL 1716221, at \*7-8; *EEOC v.*



Courts in this circuit routinely have admitted and relied on social science evidence regarding stereotyping in employment discrimination cases. In *Dukes*, the district court admitted and credited testimony from plaintiffs' sociological expert regarding gender stereotyping in finding that plaintiffs met the commonality requirement of Federal Rule of Civil Procedure 23.<sup>30</sup> The court found that the expert presented sufficient basis, "both in his review of the scientific literature and on the facts of the case, to provide a foundation for his opinions."<sup>31</sup> On appeal, this Court upheld certification of the class based, in part, on this evidence.<sup>32</sup>

In *Butler*, the district court relied on expert testimony regarding gender stereotyping in certifying the class.<sup>33</sup> The court denied defendant's subsequent motion to exclude this evidence at trial.<sup>34</sup> In *Stender v. Lucky Stores, Inc.*, the

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*Morgan Stanley & Co.*, 324 F. Supp. 2d 451, 461-62 (S.D.N.Y. 2004) (allowing sociologist, who relied on social framework methodology, to testify about gender stereotyping at trial, noting that defendant's objections were factors to be evaluated and weighed by the trier of fact); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1262-65 (N.D. Cal. 1997) (finding expert testimony regarding gender stereotyping both reliable and relevant); *Hurst*, 1997 WL 685341, at \*2; *Flavel*, 875 F. Supp. at 557-58.

<sup>30</sup> 222 F.R.D. 137, 154 (N.D. Cal. 2004) (*Dukes I*); see also *Dukes II*, 222 F.R.D. at 191-92 (rejecting defendant's objection to the evidence under *Daubert*).

<sup>31</sup> *Dukes I*, 222 F.R.D. at 154.

<sup>32</sup> *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1227 (9th Cir. 2007) (*Dukes III*).

<sup>33</sup> *Butler v. Home Depot, Inc.*, No. C-94-4335, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996).

<sup>34</sup> *Butler*, 984 F. Supp. at 1262-65.

court admitted trial testimony from plaintiffs' sociological expert regarding the interplay of gender stereotyping and defendant's subjective decisionmaking and found that the evidence was probative of plaintiffs' claims of classwide discrimination.<sup>35</sup>

Courts in other circuits similarly have admitted expert testimony on gender stereotyping in employment discrimination cases finding the evidence relevant and probative on issues of commonality as well as causation.<sup>36</sup>

Finally, it is clear that as a society we continue to grapple with issues of stereotyping and cognitive bias in the workplace and resultant unlawful sex based employment decisions.<sup>37</sup> It is thus critical that courts in employment

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<sup>35</sup> 803 F. Supp. 259, 301-03 (N.D. Cal. 1992).

<sup>36</sup> See e.g., *Hnot*, 2007 WL 1599154, at \*2; *Int'l Healthcare Exch., Inc.*, 470 F. Supp. 2d at 355; *Morgan Stanley*, 324 F. Supp. 2d at 461-62; *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 869, n.54 & 882 (D. Minn. 1993) (crediting expert testimony regarding gender stereotyping in class promotion and sexual harassment trial); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502-05 (M.D. Fla. 1991) (crediting expert testimony regarding sex stereotyping at trial).

<sup>37</sup> In 2003, Chief Justice Rehnquist highlighted the pernicious nature of gender stereotypes that continue to affect the employment rights of women and men. In *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003), the Court held that employees may recover damages for the state's failure to comply with the Family and Medical Leave Act. Citing the legislative history, the Court found that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men," which justified legislation to eradicate gender based discrimination in the administration of leave benefits. *Id.* at 736. Additionally, just this year, the EEOC issued guidelines intended to highlight the ways in which stereotypes about women's caregiving responsibilities can result in Title VII violations. EEOC Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (2007), <http://www.eeoc.gov/policy/docs/caregiving.html>.

discrimination cases continue to admit social science expert testimony to assist the trier of fact in understanding the operation and effects of stereotyping and cognitive bias in the workplace.

## **II. DR. RESKIN'S METHODOLOGY AND THEORIES ARE WELL ACCEPTED IN THE SOCIAL SCIENCE COMMUNITY**

### **A. "Social Framework Analysis"**

Costco challenges the "social framework analysis" methodology used by Dr. Reskin. Costco contends that testimony of its industrial and organizational psychology expert, Dr. Frank Landy, supports that "Dr. Reskin's opinions do not qualify as social framework analysis" because this methodology requires an expert witness to provide a fact finder with "settled" social science research and, according to Dr. Landy, research on the effects of automatic cognitive bias, or stereotyping, in the workplace is "far from settled."<sup>38</sup>

Costco further argues that "social framework analysis" was first proposed by Drs. Monahan/Walker to introduce the concept of "battered woman syndrome" in litigation.<sup>39</sup> It argues that Drs. "Monahan/Walker[']s studies do not involve employment discrimination or class action commonality,"<sup>40</sup> implying that "social

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<sup>38</sup> Costco Opening Brief at 35-36.

<sup>39</sup> *Id.*

<sup>40</sup> Costco Opening Brief at 35. Costco confounds the *methodology* for introducing social science research in litigation that Drs. Monahan and Walker developed with

framework analysis” cannot or has not been used to introduce social science research on cognitive bias in support of class certification in employment discrimination cases. This is incorrect. Social scientists explain social framework analysis as follows:

A social analysis framework uses general conclusions from tested, reliable and peer reviewed social science research and applies them to the case at hand. It provides an assessment of general causation in a research area in order to inform fact finders about more specific causation issues associated with a particular case.<sup>41</sup>

This is precisely the methodology the district court found Dr. Reskin employed in this case.<sup>42</sup>

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the *subjects* they studied. Costco provides no support for the notion that “social framework analysis” is limited to issues such as “battered woman syndrome.”

<sup>41</sup> E. Borgida and A. Kim, “Reflections on Being an Expert Witness in Class Action Sex Discrimination Litigation,” in *Sex Discrimination in the Workplace*, F. Crosby (ed.), M. Stockdale (ed.), and S. A. Ropp (ed.), (Blackwell Publishing 2007) at 119; *see also Arnold*, 2006 WL 1716221, at \*6 (in applying social framework analysis, the expert looks at distinctive features of the organization’s policies and practices and evaluates them against factors that create and sustain bias and those that minimize bias as shown by social science research).

<sup>42</sup> The district court found “Dr. Reskin arrived at her opinion by reviewing materials pertaining to personnel policies and practices of Costco in addition to deposition testimony of Costco employees ... in the context of ‘a large body of social scientific research on sex stereotyping and ingroup bias ... [which] appears in peer reviewed journals or edited volumes of the highest scholarly caliber.’ Defendant has not proved, therefore, that Dr. Reskin’s research methodology deviates from similar research methodology accepted by courts in Title VII cases or is otherwise ‘junk science.’” ER 1020 (internal citations omitted).

“Social framework analysis” is a well accepted methodology to introduce social science research on a wide array of topics in litigation to assist the fact finder.<sup>43</sup> As discussed in Section I above, numerous federal courts, including this Court, have found the methodology is reliable and relevant to employment discrimination class action litigation,<sup>44</sup> including at the class certification stage to support commonality.<sup>45</sup> In fact, Dr. Fiske’s seminal testimony on behalf of the plaintiff in *Price Waterhouse* presented social framework analysis by citing research findings on the causes, manifestations and consequences of gender stereotyping as well as the workplace conditions at Price Waterhouse that likely

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<sup>43</sup> E. Borgida and A. Kim, *supra*, at 119 (“The social framework analysis approach to expert scientific testimony represents a scientifically known and established approach to using social science evidence in litigation.”).

<sup>44</sup> *Dukes III*, 474 F.3d at 1227; *Hnot*, 2007 WL 1599154, at \*3; *Jenson*, 824 F. Supp. at 882; *Morgan Stanley*, 324 F. Supp. 2d at 461-62; *Arnold*, 2006 WL 1716221, at \*7 (finding social framework analysis methodology is reliable and that empirical research is not required under this methodology). Costco’s contention that *Dukes III* does not support Dr. Reskin’s methodology because Wal-Mart never challenged plaintiffs’ stereotyping expert’s use of social framework analysis “and thus accepted plaintiffs’ sociological methodology at face value” (Costco Opening Brief at 36, n. 208), is misleading. Although Wal-Mart abandoned its challenge to Dr. Bielby’s methodology on appeal, the district court expressly found that social framework analysis “is an acceptable social science methodology,” *Dukes II*, 222 F.R.D. at 191-92, and this Court, in affirming, also found Dr. Bielby “employed a well-accepted methodology to reach his opinions.” *Dukes III*, 474 F.3d at 1227.

<sup>45</sup> *Dukes III*, 474 F.3d at 1227; *Hnot*, 2007 WL 1599154, at \*3; *Arnold*, 2006 WL 1716221, at \*7.

allowed such stereotypes to flourish and other practices that could diminish decisionmakers' reliance on stereotypes.<sup>46</sup>

## **B. Theory Of Cognitive Bias**

Costco and RILA claim the theory of cognitive bias, on which Dr. Reskin based her opinions, is “conjecture” and “far from generally accepted by the scientific psychological community.”<sup>47</sup> Costco also asserts that “no scientific basis permits one to extrapolate cognitive bias lab [sic] results into workplaces.”<sup>48</sup>

The concept of automatic cognitive processing as an explanation for gender discrimination in the workplace is generally accepted by the social science community. Dr. Margaret Stockdale, Costco's stereotyping expert, acknowledges this:

Although conscious beliefs about men and women may be changing ..., stereotypes still operate as implicit knowledge .... We draw on them and they influence our perceptions of men and women, Anglo, Black, Hispanic, or Asian. There is evidence that stereotypes influence a number of work-related outcomes .... In general, women are perceived as less competent and subsequently are less likely to be promoted or are promoted at a slower rate than men with the same

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<sup>46</sup> E.F. Loftus, *Resolving Legal Questions with Psychological Data*, 46 *American Psychologist* 1046 (Oct. 1991).

<sup>47</sup> Costco Opening Brief at 35-36. RILA also argues there is no legal support for Dr. Reskin's testimony, and specifically that “*Price Waterhouse* did not endorse the type of expert testimony provided by Reskin.” RILA Brief at 13-17.

<sup>48</sup> Costco Opening Brief at 36.

qualifications .... In fact, even when women receive higher performance ratings than men, men receive more promotions ....<sup>49</sup>

The theories regarding cognitive bias underlying Dr. Reskin's testimony have been subjected to peer review, published in reputable scientific journals and are generally accepted by experts in the field.<sup>50</sup> Expert testimony based on the concept of cognitive bias has been accepted by numerous courts, including this Court.<sup>51</sup>

Costco's expert, Dr. Landy, does not accept the concept of automatic cognitive processing as an explanation for workplace gender discrimination, and calls it "little more than 'pop' psychology."<sup>52</sup> Dr. Landy acknowledges he is not in the mainstream of the basic psychological profession with respect to the effects of automatic cognitive processing in the workplace.<sup>53</sup> In fact, the APA, of which Dr.

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<sup>49</sup> J. Cleveland, M. Stockdale and K. Murphy, *Women and Men in Organizations: Sex and Gender Issues at Work*, (Lawrence Erlbaum Associates 2000) at 57 (citations omitted); see also SER 224-26.

<sup>50</sup> SER 237.

<sup>51</sup> *Price Waterhouse*, 490 U.S. at 251-52; *Dukes III*, 474 F.3d at 1227; *Hnot*, 2007 WL 1599154, at \*3; *Int'l Healthcare Exch., Inc.*, 470 F. Supp. at 355; *Arnold*, 2006 WL 1716221, at \*6-7; *Morgan Stanley*, 324 F. Supp. 2d at 461-62; *Hurst*, 1997 WL 685341, at \*2; *Butler*, 984 F. Supp. at 1265; *Flavel*, 1994 WL 761447, at \*1; *Stender*, 803 F. Supp. at 301-303, 328; *Robinson*, 760 F. Supp. at 1505.

<sup>52</sup> ER 206.

<sup>53</sup> SER 219.

Landy has long been a member, endorsed the concept twenty years ago. In its *amicus curiae* brief to the Supreme Court in *Price Waterhouse*, the APA wrote

The five decades of research on sex stereotyping is generally accepted within the scientific community as judged by commonly acknowledged criteria.”<sup>54</sup>

The APA explained that this extensive body of research demonstrates that:

(1) stereotyping under certain conditions can create discriminatory consequences for stereotyped groups – for example, where they shape perceptions about women's typical and acceptable roles in society – and negative effects on women in work settings have been demonstrated; (2) conditions that promote stereotyping were present in Price Waterhouse’s workplace; and (3) although Price Waterhouse was found to have taken no effective steps to prevent its discriminatory stereotyping of respondent, methods are available to monitor and reduce the effects of stereotyping.<sup>55</sup>

RILA’s argument that the Supreme Court did not endorse the concept of cognitive bias in *Price Waterhouse*<sup>56</sup> relies on Justice Kennedy’s *dissent*, to which

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<sup>54</sup> 1988 WL 1025869, at \*4.

<sup>55</sup> *Id.*

<sup>56</sup> RILA’s Brief at 16-17; *see also* Costco’s Opening Brief, arguing *Price Waterhouse* “denigrated [the] scientific nature” of the sociological testimony by noting “it takes no special training to discern sex stereotyping” in the context of that case. *Id.* at 36, n. 209, quoting *Price Waterhouse*, 490 U.S. at 256. However, according to social scientists, “[o]ne significant value of much social science research is that it makes clearer what we only dimly perceive, if we perceive it at



the plurality responded it was not “disposed to adopt the dissent’s dismissive attitude toward Dr. Fiske’s field of study and toward her own professional integrity,”<sup>57</sup> and ignores the wide acceptance the concept has received by courts since *Price Waterhouse*<sup>58</sup> and its continued dominant recognition by the social science community.<sup>59</sup> A recent publication reviewed the “considerable body of theory and research in psychology and other social science on the nature and consequences of gender stereotyping [that] has accumulated over the past several

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all.” D. L. Faigman *et al.*, *Legal Issues*, in 2 *Modern Scientific Evidence: The Law and Science of Expert Testimony* (David L. Faigman *et al.* eds., 2002) at 374. They suggest that research on gender stereotyping “offers insights about gender relations ... beyond what experience alone can provide.” *Id.* Significantly, in admitting such evidence, courts have found that it aids the trier of fact. *See e.g.*, *Hnot*, 2007 WL1599154, at \*2 (finding that expert social science evidence regarding stereotyping while “hardly controversial and unlikely to surprise the jury,” would nonetheless be valuable by providing a context within which to evaluate the particular evidence relating to the workplace at issue. Moreover, “expert testimony grounded in academic study and practical experience not available to the average layperson can be helpful to the jury.”)

<sup>57</sup> 490 U.S. at 255. In her concurring opinion, Justice O’Connor opined: “testimony such as Dr. Fiske’s in this case, standing alone, would not justify shifting the burden of persuasion to the employer.” *Id.* at 277. However, nothing in Justice O’Connor’s concurrence can be read to discredit Dr. Fiske’s opinions regarding gender stereotyping and its potential effect in the workplace.

<sup>58</sup> *See* cases cited above at n 51.

<sup>59</sup> *See e.g.*, P. Glick and S. Fiske, *Sex Discrimination: The Psychological Approach in Sex Discrimination in the Workplace*, F. Crosby (ed.), M. Stockdale (ed.), and S. A. Ropp (ed.), (Blackwell Publishing 2007) at 155-87; C. Ridgeway and P. England, *Sociological Approaches to Sex Discrimination in Employment in Sex Discrimination in the Workplace*, F. Crosby (ed.), M. Stockdale (ed.), and S. A. Ropp (ed.), (Blackwell Publishing 2007) at 190-211.

decades.”<sup>60</sup> The study reported that there is agreement about certain psychological processes associated with gender stereotyping: that people automatically categorize others according to their memberships in social groups; that gender is a fundamental dimension of categorization; that categorization can lead to stereotype activation, of which an individual may be unaware; and that certain individual differences can influence the use of gender stereotypes.<sup>61</sup>

Costco claims Dr. Reskin’s opinions are based on laboratory studies using college students that are not transferable to the decision making environment at Costco.<sup>62</sup> In fact, Dr. Reskin’s testimony did not rely solely on research conducted in laboratories. She relied on the findings of a large body of interdisciplinary, peer-reviewed social science research, which is based on both empirical and experimental research.<sup>63</sup>

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<sup>60</sup> E. Borgida and A. Kim, *supra*, citing J.S. Hunt, E. Borgida, K.M. Kelly, & D. Burgess, (2002) *Gender Stereotyping: Scientific Status in Modern Scientific Evidence: The Law and Science of Expert Testimony* (D.L. Faigman, *et al.* eds., 2002) (St. Paul, MN: West Publishing Co.) at 374-426.

<sup>61</sup> *Id.*

<sup>62</sup> Costco Opening Brief at 35.

<sup>63</sup> SER 236-237.

The APA, explaining in its *amicus* brief in *Price Waterhouse* that sex stereotyping research “clearly satisfied the essential criteria for general scientific acceptance,”<sup>64</sup> stated:

[R]esearchers on sex stereotypes have used an impressive diversity of methodologies (including surveys and laboratory and field experiments), qualitative and quantitative measurement strategies in a variety of research settings (including the workplace) with a variety of subject populations (including managers who make selection decisions), to examine how people think about women and men and how their perceptions influence social behavior.<sup>65</sup>

Many of the studies Dr. Reskin relied on were meta-analyses, a statistical technique that combines the results of a number of single studies,<sup>66</sup> which have revealed that:

[G]ender stereotyping effects tend to be consistent across student and employee participant samples. When differences do emerge, they tend to show that individuals in workplace environments show more evidence of bias than do college students. Thus, the accumulated body of research suggests that weak external validity is not an important problem with research on stereotyping.<sup>67</sup>

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<sup>64</sup> 1988 WL 1025869, at \*9.

<sup>65</sup> *Id.* According to the APA, this body of research yielded an “internally valid pattern of consistent, mutually confirmatory findings as well as considerable convergence across time, about the judgmental and behavioral consequences of sex stereotypes, including in the employment setting.” *Id.* at \*9-10.

<sup>66</sup> SER 222.

<sup>67</sup> D. L. Faigman, *supra*, at 587.

In any event, it is an appropriate and probative use of laboratory research for a qualified expert to apply the results of such research to form opinions about issues similar to those examined in the studies, when those issues arise in real-world settings.<sup>68</sup> Costco’s own experts relied on laboratory studies to support their opinions in this case.<sup>69</sup>

**C. Relevance of Dr. Reskin’s Testimony**

Testimony as to the causes, manifestations, and consequences of gender stereotyping as well as the organizational circumstances which allow such stereotypes to flourish and diminish is relevant to the issues plaintiffs raise in this case. For example, as to plaintiffs’ disparate treatment claim, Dr. Reskin’s testimony on stereotyping comments made by Costco’s managers can be evidence that gender played a part in adverse employment decisions.<sup>70</sup>

Dr. Reskin’s testimony also is relevant to plaintiffs’ claim that Costco’s subjective decisionmaking processes have had a disparate impact on Costco’s female employees.<sup>71</sup> The Supreme Court has recognized that subjectivity can be a

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<sup>68</sup> SER 221-23.

<sup>69</sup> *Id.*

<sup>70</sup> *Butler*, 984 F. Supp. at 1264, citing *Price Waterhouse*, 490 U.S. at 251.

<sup>71</sup> *Butler*, 984 F. Supp. at 1264 (finding plaintiffs’ expert’s testimony was “relevant to plaintiffs’ claim that ... ambiguous and subjective decision-making processes have had a disparate impact on female applicants and employees ...”), citing *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 989-91 (1988); *Stender*, 803

common practice applicable to a class.<sup>72</sup> This and other courts have recognized that social science evidence regarding how subjective employment practices increase the likelihood unconscious stereotypes may affect decisionmaking “may add probative value to plaintiffs’ class action claims.”<sup>73</sup>

Social science evidence, such as that presented by Dr. Reskin, also can assist the fact finder in understanding workplace conditions that allow stereotypes to flourish and those that diminish decisionmakers’ reliance on cognitive biases.<sup>74</sup> There are a number of empirically derived “best practices” that organizations use to enhance workforce diversity and minimize the impact of stereotyping and cognitive bias, including: (1) ensuring that diversity efforts are disseminated from the very top of the company and having an individual or entity within the

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F. Supp. at 331 (“The absence ... of personnel policies requiring decision makers to collect accurate information about applicants, apply written selection criteria, and be accountable for their decisions, increases the likelihood that gender stereotypes will influence their decisions.”).

<sup>72</sup> *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 159, n. 15 (1982).

<sup>73</sup> *Dukes III*, 474 F. 3d at 1227, citing *Price Waterhouse*, 490 U.S. at 235-36, 255; *Hnot*, 2007 WL 1599154, at \*2 (expert testimony regarding gender stereotyping “can be helpful to the jury”).

<sup>74</sup> *Butler*, 984 F. Supp. at 1264 (finding plaintiffs’ expert’s “testimony regarding Home Depot’s failure to implement specific corrective steps may be relevant if plaintiffs can show that Home Depot was aware of and refused to take the corrective steps identified by Dr. Fiske.”)

organization responsible for managing diversity and meeting company goals;<sup>75</sup> (2) implementing formal human resource management structures, such as formal job analyses, structured interviews, and validated assessment tools and procedures, that decrease discretion;<sup>76</sup> and (3) implementing identity conscious human resources practices, such as targeted recruitment; diversity training; and measuring, monitoring and rewarding diversity efforts, which formally recognize gender and race to improve the status and opportunities of protected group employees.<sup>77</sup>

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<sup>75</sup> S. Bisom-Rapp, M.S. Stockdale, F.J. Crosby, A Critical Look at Organizational Responses to and Remedies for Sex Discrimination, *Sex Discrimination in the Workplace* (2007), Blackwell Pub., p. 280; F. A. Blanchard, (1989), Effective Affirmative Action Programs, in F.A. Blanchard & F.J. Crosby (eds.), *Affirmative Action in Perspective*, pp. 193-208, New York Springer-Verlag; M. A. Hitt, & B. W. Keats, (1984), *Empirical Identification of the Criteria for Effective Affirmative Action Programs*, *Journal of Applied Behavioral Science*, 20, 203-222; A. Kalev, F. Dobbin, E. Kelly, (2006), *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, *American Sociological Review*, 71, 589-617; A.M. Konrad, F. Linnehan (1995), *Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?* *Academy of Management Journal*, 38, 787-829; Morrison, A.A. (1992), *The new leaders: Guidelines on leadership diversity in America*, San Francisco: Jossey-Bass.

<sup>76</sup> S. Bisom-Rapp, M. S. Stockdale, F. J. Crosby, *supra*, at p. 281; M. Champion, E. Pursell, B. Brown, (1988), *Structured Interviewing: Raising the Psychometric Properties of the Employment Interview*. *Personnel Psychology*, 41, 25-42; S. J. Motowidlo, G. W. Carter, M. D. Dunnette, et al., (1992), *Studies of the Structured Behavioral Interview*, *Journal of Applied Psychology*, 77, 571-87.

<sup>77</sup> Konrad & Linnehan, *supra*; S. Kerr, (1975), *On the Folly of Rewarding A, While Hoping for B*, *Academy of Management Journal*, 18, 769-83; S. Bisom-Rapp, M. S. Stockdale, F.J. Crosby, *supra* at p. 281.

Dr. Reskin testified that the “best practices” enumerated above, were lacking at Costco.<sup>78</sup> Consistent with the social science literature, Dr. Reskin articulated steps Costco could take to increase the representation of women in the AGM and GM positions, specifically: (1) mandating goals for female representation in the merchandising manager position and enforcing compliance with these goals;<sup>79</sup> (2) creating meaningful diversity initiatives;<sup>80</sup> (3) implementing standardized promotion procedures;<sup>81</sup> and (4) holding managers accountable for their selection decisions.<sup>82</sup>

**D. Dr. Reskin Accounted for the Mitigating Effect of Individuating Information**

Costco argues Dr. Reskin failed to account for the mitigating effect on stereotypes of “individuating information” – information about specific employees’ work performance, collected by Costco managers about potential candidates for promotion.<sup>83</sup> However, Dr. Reskin carefully considered whether

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<sup>78</sup> SER 34-46.

<sup>79</sup> SER 35-36, 38.

<sup>80</sup> SER 41.

<sup>81</sup> SER 42-45.

<sup>82</sup> SER 45-46.

<sup>83</sup> Costco Opening Br. at 37.

“individuating information” collected by Costco was sufficient to mitigate the effects of stereotypes.<sup>84</sup> She explained that the research shows that the mere presence of some individuating information may not fully mitigate the effects of stereotyping.<sup>85</sup> Applying that research to specific facts in the record, she concluded that the individuating information obtained by Costco is unlikely to fully mitigate stereotyping.<sup>86</sup>

Dr. Reskin’s opinion is well supported by facts in the record. As she explained, Costco managers maintain lists of employees deemed “promotable” for years, making it unlikely they would be motivated to acquire individuating information to offset cognitive biases.<sup>87</sup> Substantial evidence in the record shows Costco managers did indeed utilize promotable lists in this way.<sup>88</sup> In addition, individuating information collected in warehouse walks is unlikely to provide current, accurate, job-related information to the ultimate decisionmaker, because participating managers kept no notes of the information they collected on those walks.<sup>89</sup>

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<sup>84</sup> SER 223-224.

<sup>85</sup> SER 224.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> SER 59-60; SER 72-73; ER 956-978.

<sup>89</sup> SER 224; SER 49-51; SER 137; ER 509-510; ER449; SER 149-152; SER 144-145.



### III. CONCLUSION

In the four decades since the passage of Title VII, the focus of gender discrimination class action litigation has shifted from challenges to overt exclusionary policies and practices, which were proven through direct evidence of discrimination, to more subtle, but nonetheless discriminatory, practices requiring proof through circumstantial evidence. It is critical that plaintiffs be permitted to introduce social science evidence of the interplay of subjective decisionmaking processes and gender stereotyping to help them establish claims of gender-based classwide discrimination.

Dated: November 2, 2007

Respectfully submitted,

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**BRIEF FORMAT CERTIFICATION PURSUANT TO  
RULE 29(c)(5) AND RULE 32(a)(7)(C) OF THE FEDERAL RULES OF  
APPELLATE PROCEDURE**

Pursuant to Rule 29(c)(5) and Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that the Brief Of *Amici Curiae* is proportionately spaced, has a type face of 14 point and contains 6,061 words.

Dated: November 2, 2007

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Roberta L. Steele