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ARE CORPORATE AND EDUCATIONAL USES OF "EMOTIONAL INTELLIGENCE" GROUNDS FOR DISCRIMINATION UNDER THE ADA?

BY MICHAEL JOHN CARLEY

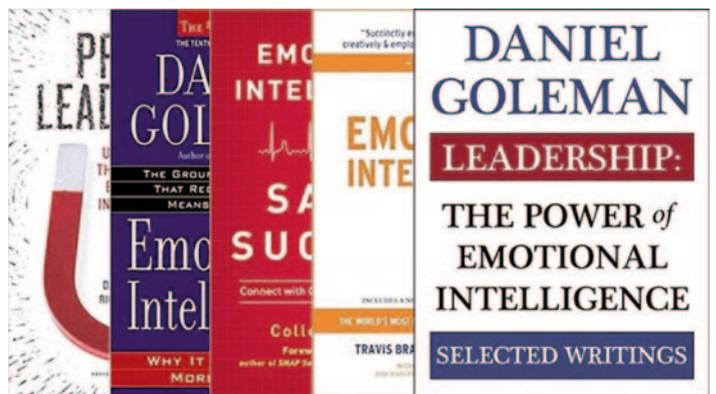
Over the last ten years, both business leaders and educators have increased their usage of "Emotional Intelligence (EI)," a tool that attempts to measure a person's ability to understand not only their own emotions, but also the emotions of others. First introduced in 1990 by psychologists Peter Salovey and John Mayer, EI only really burst onto the scene following the publication of Daniel Goleman's 1995 book (also called Emotional Intelligence). Originally just a theoretical way to break down the capacity for empathy, EI's modern value resides in the theoretical ability to read an individual's capacity for emotional regulation, and to work with others in a collaborative setting.

Despite the variety of arenas in which EI is now employed, the business world has embraced it the most, especially in companies' hiring, employee evaluation, and professional development strategies. The business world, after all, loves metrics, and their embracing of this concept has arguably morphed from "usage" to "reliance" very quickly. In an era where data has never been more sought after, many executives believe there is a direct correlation between employee productivity and a high EI score.

EI herein, is one component of our newfound love of data. And the competition for new information has created a race so large that it has escalated into the need for an even newer category, "metadata" – which can be defined as "data that studies data."

But what has yet to be examined is that low scores on an EI test can then be assumed to reduce a person's chances of obtaining or even keeping a job, and therefore could alter the individual's career track even if they are successfully completing their job requirements. And since many non-apparent disabilities contain life experiences wherein people are often ostracized or left out of "developmentally-appropriate" life markers throughout youth and early adulthood, two conundrums are immediately posed: 1. Is it therefore a violation of the Americans with Disabilities Act (ADA) to subject an employee with a disclosed developmental disability to an EI screening of any kind? And 2. If so, are companies actually even aware that such practices are illegal?

I too, as a data-loving individual on the spectrum, embraced the concept of EI at first, wondering if it could help the spectrum world to improve its ability to decipher non-verbal communication. But I then began to wonder if the rush to embrace such time-saving data was causing us to unwisely bypass necessary examinations regarding context, and/or critical thinking.



BOOK SMART?: Emotional Intelligence has become a large-selling topic in the business publishing world. The business world's embrace of EI has morphed from "usage" to "reliance" very quickly.

A SHORT HISTORY OF “EMOTIONAL INTELLIGENCE”

Though the idea has been taken to a variety of definitions since even Goleman’s book, the original concept of Salovey and Mayer involved four categories:

1. *Perceiving Emotions*
2. *Reasoning with Emotions*
3. *Understanding Emotions*
4. *Managing Emotions*

Soon, tests emerged to rate an individual’s capacities for EI, and quickly became enormously popular with (especially large) corporations. Additionally, those who work with these companies in advisory roles evolved in their footsteps. Risk management firms, though initially slow to embrace the concept of EI, have since fallen head over heels with using it both as a sales device to draw business, and as a fix-all training method with new clients. Firms such as TalentSmart have also sprung up, that focus only on products created around the hyperbole of EI – and this strategy appears to have benefited them greatly, as TalentSmart lists over 150 Fortune 1000 clients on their website.¹ Other corporate consulting firms have followed suit, propelled by articles from *Forbes*,² *Inc.*,³ and the *Harvard Business Review*⁴ that extol EI’s virtues. And lastly, from the many HR, and Corporate Diversity and Inclusion (D&I) conferences I’ve spoken at, I can certainly attest to the enthusiasm I’ve seen for the use of EI in the workplace, even to the point of some companies and consultants believing EI to be a foolproof means of

overcoming Unconscious Bias – the hidden prejudices we all may have, but are as yet unaware of.

But EI has not evolved without criticism. Many have outright panned EI, calling it a “hallucinatory desire” to break down feelings into a math equation. Further, cynics believe EI to be a Sisyphean pursuit; in that by definition, emotions cannot be accurately measured due to their intangible nature. Amidst the many tests that have been developed (estimated between two to three thousand, with no licensing mandate or accountability), a decent percentage of these examinations are self-given despite the common knowledge that, to quote a 2014 piece on EI in *The Atlantic*,⁵ “abilities cannot be accurately measured with self-reports.” Even the *New York Times*-owned, but now defunct About.com, ended their definitions of EI with a self-test. Moreover, the emotional capabilities of the evaluator must also come under scrutiny, yet is not, when conducting EI exams that are not self-administered.

Despite the cautions, a supposed ability to perceive the thoughts and emotions of others, and react to them, has been quantified to the satisfaction of many. And in many large companies, a blanket love affair with EI seems to have caused many employees with disclosed, non-apparent disabilities to be subjected to tests that cause them to appear less capable even (again) when they are satisfactorily meeting all of the requirements of their job. Such separation is important because with neurological conditions like autism spectrum disorders, learning disabilities such as Attention Deficit Disorder (ADD), Attention Deficit Hyperactivity Disorder (ADHD), or many mental health conditions, feelings herein grow differently. In varying levels, emotional regulation is a challenge for anyone with Executive Functioning issues, and overall emotional underdevelopment is often a telltale sign for many of these non-apparent conditions. Emotions herein not only evolve at a different pace, they also can mature at differing levels, and in rarer instances certain emotions may never even surface.

Probably the greatest documented value of EI as a tool exists not in corporations, but in our educational system, where the rising popularity of EI gave birth to the dozens of emotional literacy programs now employed by tens of thousands of schools. Studies reported on in a 2014 *New York Times* article⁶ determined that kids who get these programs at an early age were “more likely to do well at work but also to have longer marriages and to suffer less from depression and anxiety. Some evidence even shows that they will be

physically healthier.” Though author Jennifer Khan’s piece was not without skepticism, her article added that, when it came to career and personal success, emotional recognition might factor more so than academic achievement.

And in the aforementioned article in *The Atlantic*, author Adam Grant made a great case that EI is not – as most “corporatespeak” implies it to be – synonymous with personal character. The piece notes how EI projects the ability to manipulate emotions as well as understand them, citing not only Martin Luther King, Jr., but also Adolf Hitler as extreme examples of this talent. The article also pointed out what some, but not all of the corporations who use EI...understand: that while it’s a noticeable benefit to socially-oriented positions such as sales, it has actually been proven to be a detriment in less-social vocations such as scientist, data entry person, financial analyst, or auto mechanic.

Finally, many clinical professionals object not only to the notion



SKEPTICS VIEW: The concept of Emotional Intelligence has not evolved without criticism. Many have called it a “hallucinatory desire” to break down feelings into a math equation, and believe that, by definition, emotions cannot be accurately measured due to their intangible nature.

that high EI indicates that the beholder of a high test score is a good person, but also that EI is an “intelligence” of any kind. They seem to concur that EI is an entity of its own, outside of brains, good intentions, or even personality.

WHERE CORPORATE USE OF EI IS INDISPUTABLY LEGAL, AND WHERE IT IS QUITE POSSIBLY ILLEGAL

Nothing illegal exists in the use of EI during the hiring and onboarding process, as usually no disclosure of a non-apparent disability occurs before or during these stages by the prospective candidate. Like anything else containing protection under the ADA, disclosure is a must. No one can expect protection or accommodations at any stage of their careers without first having disclosed their condition with their employer, and then subsequently having requested reasonable accommodations.

However, if a disclosure of any developmental disability should occur during these hiring stages, it stands to reason that this changes the legality of using EI during their interview process. By definition, EI discriminates against those with slower emotional development.

But if a disclosed employee is well into their tenure at a particular company – with a position that does not demand great socialization to complete the work – and they are then told that they must partake in one of these quantifiable exams, herein is where the real illegality might appear, especially if the result of the assessment would then be entered into their personnel file. Of the two employment law specialists I talked with (both of whom have written about EI’s use in the workplace), neither could answer the question – of legal vs. not legal – directly, leaving me not with the feeling that they didn’t know the law, but that this idea of EI contrasting with the ADA was new territory for them as well.

Granted, as one senior human resources leader from the financial services sector stated; “All tests have the possibility of resulting in a disparate impact against a given population.” A test, after all, is intended to produce a distinction between those who score well, and those who do not, and this will never not be the reality. But certain examinations are known to have biases wherein one population, just based on their cultural upbringing, might score better than those from a more marginalized group – one controversy that immediately comes to mind are the complaints that African-Americans historically have made towards the New York City firefighter exam.⁷

And according to six of the 46 HR and D&I professionals I contacted (interestingly, all of whom requested anonymity) the love

affair with EI is blinding their companies to even the concept that this might be illegal. As a result, their companies are implementing across the board testing with their entire employee base. No one I contacted suggested their company was in full knowledge of any legal boundaries and oddly enough, I contacted these individuals about their hiring practices only. They themselves volunteered the correlation regarding existing employees.

Now, one grey area that still remains is if the disclosed employee agrees to take the test, does it then become legal? Herein, there lies further room for legal exploration though it is safe to say that companies

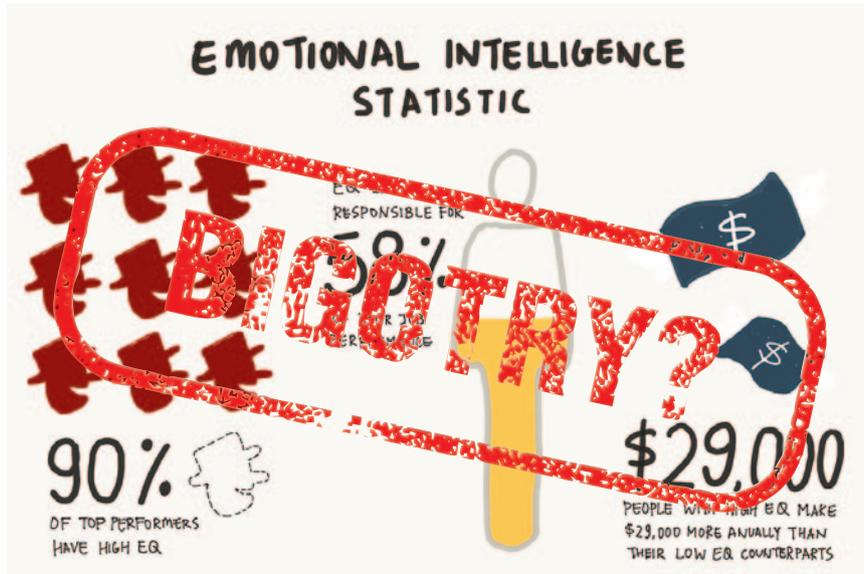
would be wise to refrain from asking these employees to participate, and equally wise for the employees, if asked, to politely refuse.

OVERVIEW

The recent criticisms of EI in the aforementioned *New York Times* and *Atlantic* articles are fair and diplomatic. But while they put new scrutiny on the praise bestowed on those with high EI scores, they refrain from criticizing the stigma given unconsciously to employees with low EI scores. Again, we who

are diagnosed with non-apparent disabilities not only grow differently on an emotional level, but some of us also grow with fewer, or even more, emotions; so that the question of “what emotions exist” must be taken into the same consideration as “when do emotions enter into maturity.” And under the current corporate climate, to say that a low EI scores contains no indirect negative consequences to the employee... this is, at best, ignorant.

The problem doesn’t persist because companies wish to ignore the ADA, or because anyone’s trying to ostracize certain employees. The issue seems to exist due to many factors, including an overconfidence in EI’s value as an assessment tool, and also because the Diversity & Inclusion (D&I) strategies of most large companies are surprisingly antiquated. From my consulting experience over 80% of the D&I departments in Fortune 1000 companies should be called “Race & Gender departments,” as most barely mention the other traditional aspects of D&I (disabilities, sexual orientation, and veteran status) – this material just isn’t even on their radar. Though the greater job is by no means accomplished with racial and gender equality in the workplace, most of the D&I departments I’ve come across are there only for show, some minor instruction about unconscious bias, and for legal compliance. Whether these D&I leaders wish to shape their strategies towards giving equal weight to every marginalized community – a near impossibility – or not, one professional I spoke with bitterly believed that a lack of accountability contributed to his firm’s D&I department remaining



STRESS TEST: A blanket love affair with EI seems to have caused many employees with disclosed disabilities to be subjected to tests that cause them to appear less capable even when they are meeting all of the requirements of their job.

“narrow-minded.” “Regarding our directives, [our D&I executives are] stuck in 1985 even if our language is present-day... without exception they all believe themselves to be ‘Thought Leaders.’ And... they resent being asked to expand their thinking.”

Think of it this way: If everyone wanted to put such a premium on the ability to walk that it affected one’s salary or career track, then people who use wheelchairs would rightfully object. Well, people whose emotions develop differently should be equally upset over how the concept of EI is being applied.

Finally though, some fault also has to lie with the disclosed employees who have these non-apparent conditions, as it is a very rare instance where these individuals both understand and acknowledge any existing, relative emotional underdevelopment caused by their diagnosis. Granted, an inability to emotionally regulate is no easy element of one’s disability to own up to; but to ensure that they are protected, our population would be wise to make foregoing such testing a part of the reasonable accommodations they request in their workplace.

CONCLUSION

There are lots of reasons why a seemingly-intelligent culture could buy into the snake-oil medicine of measuring an emotion, many of which we’ve hopefully discussed. But EI’s main attempt to quantify the unmeasurable arguably stems from our collective over-excitement (soon to be over-reliance) on data. The use of data wouldn’t be a bad thing if it was universally used to elicit truth, and eloquence. However, the attractiveness of data unfortunately also revolves around data’s ability to *superficially* prove truths, or to lie. Data guru, Nate Silver, paradoxically tells us that *very few* people really know how to use data. Well, image and compliance-concerned D&I departments probably don’t fall under this category.

A perfect example of the desire to use data to lie was found in my local public school district in Green Bay, Wisconsin. As a school consultant, I try never to turn down a conversation with a special needs parent or teacher from our school community, and none have anything good to say about the leadership currently in place. One study that one district administrator boasted to me about (trying to convince me what a great job they were doing) contained the quagmire that those parents who were too incensed over past injustices... had not taken part in their study.

But instead of allocating their absence to the more truthful “I am not happy” column, their absenteeism was placed into a “Did not participate” column, therefore giving the information the inaccu-

rate stamp of neutrality, rather than disapproval. And this obviously gave the district a false seal of approval from their parents.

No matter how blatant the Green Bay public school district’s disingenuousness might have been, the overall effort was successful for them. They were reporting the “positive figures” to school and other community boards that didn’t understand data either. Ergo, said boards could not contest the district’s inaccurate findings. But as heinous as this might sound to some, I’d guess that the same strategy is utilized by school districts and D&I departments all over the country.



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But rather than try to quantify out who has the brains to use data vs. who does not, it’s probably more feasible as well as healthy for us maybe instead to question *why* we love data. For starters, the Trump era has blatantly shown us that facts mean infinitely less to the greater populace than they used to, or that we want them to. As a means of coercion, truth has lost the majority of its power. And that’s not all bad.

Whether EI is illegal, or useful, or not, it seems at least to be a

fabricated construct – bordering on religion – that is clearly at odds with the disability community’s ongoing search for acceptance. And if this concept falls on deaf ears, then maybe we should begin to examine whether EI is worse. Is it instead a surprisingly conscious strategy to exclude people with non-apparent disabilities... to paint our lives as being of less value than theirs?•

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Michael John Carley is the founder of GRASP, a school consultant, and the author of *Asperger’s From the Inside-Out* (Penguin/Perigee 2008), *Unemployed on the Autism Spectrum* (Jessica Kingsley Publishers 2016), the upcoming *Book of Happy, Positive, and Confident Sex for Adults on the Autism Spectrum... and Beyond!*, and the column, “Autism Without Fear.” In 2000, he and his son were diagnosed with Asperger Syndrome. When re-evaluated in 2014 under DSM-5, he was diagnosed with autism spectrum disorder. For more information on Carley or to subscribe to his updates, go to www.michaeljohncarley.com

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