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AI Resume Screening Tool Developer Is Subject to Federal Anti-Discrimination Laws, Says EEOC

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Is the developer of an AI resume-screening tool an "employment agency" or "agent" subject to liability under Title VII of the Civil Rights Act for its customers' allegedly discriminatory employment decisions? According to the United States Equal Employment Opportunity Commission ("EEOC"), the answer is yes. On April 9, 2024, the EEOC filed a motion for leave to file a brief as amicus curiae, together with a brief, in *Mobley v. Workday, Inc.*, Case No. 3:23-cv-00770-RFL, to support plaintiff Derek Mobley's ("Mobley") motion to dismiss.

The EEOC's action is the latest step focusing on the use of workplace technology, consistent with its Strategic Enforcement Plan for Fiscal Years 2024-2028. As we previously reported, in June 2022, the EEOC issued guidance about the intersection of AI hiring tools and the Americans with Disabilities Act ("ADA"). In May 2023, the EEOC issued a technical assistance document concerning the use of AI with respect to "selection procedures." In August 2023, the agency entered into a consent judgment with AI vendor iTutorGroup based on allegations that the company programmed its software to automatically reject applicants based on their age. The EEOC's *Mobley* motion and brief appears to continue the EEOC's initiatives with respect to workplace AI tools.

Mobley brought his lawsuit against software vendor Workday, Inc. ("Workday"), a provider of enterprise management software and services, on February 21, 2023, alleging that Workday violated Title VII, the Age Discrimination in Employment Act ("ADEA"), and the ADA, because it offered screening tools to employers that rejected his applications for employment. In Mobley's initial complaint, Mobley asserted that Workday was an "employment agency." The court, however, granted Workday's motion to dismiss on the ground that Mobley failed to allege any details about his application process other than that he "applied to jobs with companies using Workday and did not get any of them." On February 20, 2024, Mobley filed his first amended complaint ("FAC") in which he attempted to provide additional details supporting his employment

application process, as well as additional details regarding his “employment agency” theory of liability, including allegations that: (i) Workday’s website states it can “reduce time to hire by automatically dispositioning or moving candidates forward in the recruitment process;” (ii) Workday’s systems “source candidates and then use algorithmic decision-making tools to recommend job opportunities” and (iii) “a prospective employee can only advance in the hiring process if they get past the Workday platforms [sic] screening algorithms.” Mobley also expressly alleged two new theories of liability; namely, that Workday is an “indirect employer” and that Workday is an “agent” of employers who use its tools. The EEOC filed its motion for leave to file a brief as amicus curiae in opposition to Workday’s motion to dismiss the FAC and in support of Mobley’s FAC.

While the EEOC declines to take any position as to the truth or accuracy of Mobley’s allegations, the EEOC nevertheless argues that Mobley’s FAC adequately pled that Workday was subject to Title VII, the ADEA, and the ADA under three separate theories. First, the EEOC argues that, under its interpretation of federal anti-discrimination laws, Workday is a covered “employment agency” – defined by Title VII as “any person regularly undertaking with or without compensation to procure employees for an employer or to procure employees opportunities to work for an employer” – because its alleged “algorithmic decision-making tools” perform the same screening and referral functions as traditional, human-driven employment agencies, like evaluating and making judgments about candidate qualifications and recommending candidates for further consideration by the employer. Second, the EEOC argues that Workday is also subject to civil rights laws as an “indirect” employer because it acted as a “gatekeeper” through an algorithm that controlled candidates’ access to employment. Finally, the EEOC argues that Workday is a covered “agent” of its customers/employers because those customers/employers delegate control of their hiring processes to Workday, giving it the “final say” over the decision to hire candidates.

The EEOC’s motion for leave to file a brief as amicus curiae and its accompanying brief falls in line with its stated intention in its Strategic Enforcement Plan to “focus on recruitment and hiring practices and policies that discriminate on any basis unlawful under the statutes EEOC enforces” including through the “use of technology, including artificial intelligence.”

If accepted, the EEOC’s position would arguably expand the entities subject to federal anti-discrimination laws and the EEOC’s oversight. Indeed, under the EEOC’s theories, software developers and employment technology vendors may be subject to liability under Title VII, the ADEA, and/or the ADA.

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