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Workday AI Bias Suit Suggests Hiring Lessons For Employers

By **Elaine Horn, Vidya Mirmira and Kent Hiebel** (August 29, 2024, 2:13 PM EDT)

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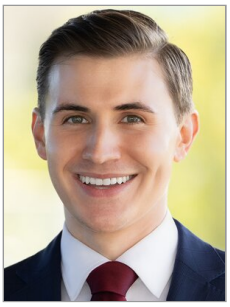

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As artificial intelligence transforms hiring practices with its promises of increased efficiency and cost-effectiveness, regulators and courts are beginning to grapple with its darker side: the potential for discrimination. In a pivotal ruling, the U.S. District Court for the Northern District of California has allowed claims of unlawful discrimination **to proceed** against Workday Inc.'s use of AI-driven recruitment software.[1]

This July decision, along with the U.S. Equal Employment Opportunity Commission's intensified focus on AI under its **new strategic framework**,[2] signals a tightening legal and regulatory environment where employers must carefully navigate the intersection of technology and employment law to avoid significant liability. Indeed, states and cities are prioritizing this topic, with several enacting or proposing laws that extend employers' liability to automated decision making.[3]

Allegations Against Workday

Mobley v. Workday underscores the relevance of these issues for technology-forward businesses.

In his February 2023 complaint, Derek Mobley alleged that Workday offers employers a platform leveraging AI and machine learning to screen job applicants.[4] According to Mobley's complaint,[5] he applied through Workday's platform to over 100 finance, IT and customer service positions after seeing job postings on third-party websites.[6] His applications purportedly listed his degree from a historically Black college or university and his experience in industries, businesses and roles relevant to the positions for which he applied.[7]

Mobley claimed he never made it past Workday's screening.[8] In one instance, Mobley alleged, he was rejected for a consultant position with a technology company even though he was then working for that same company as a contractor and the two roles required similar qualifications.[9] In another instance, he claimed, he received a 12:55 a.m. email turning him down less than an hour after he applied.[10]

Mobley, a Black male over age 40 with anxiety and depression, asserted that Workday's software reflected prejudices and relied on biased training data.[11] Some applications, he added, included personality and other tests that could reveal his mental health disorders.[12]

Based on these allegations, Mobley sued Workday for discrimination on behalf of himself and a putative class of others who applied to jobs through Workday's platform.[13] He brought disparate impact and disparate treatment claims under Title VII of the Civil Rights Act for race discrimination, the Age Discrimination in Employment Act and the Americans with Disabilities Amendments Act.[14] He also asserted a claim under California's Fair Employment and Housing Act that Workday aided and abetted the employers' discrimination.[15]

Notably, Mobley never alleged that he worked for or applied to work for Workday. His case thus asked whether companies that screen, but do not directly hire or employ, job applicants may be liable for unlawful discrimination.[16] It also involved the question of whether developers of automated systems used by employers may be liable for unlawful discrimination.[17]

Workday argued that the answer to both questions was no and moved to dismiss Mobley's complaint for that reason.[18]

The EEOC's Amicus Brief

The EEOC filed an amicus brief in April disputing Workday's arguments.[19] Federal antidiscrimination laws, the EEOC contended, apply not just to employers, but also to entities that "influence or control access" to employment.[20] If businesses like Workday could "engage in discrimination where direct employers" could not, the EEOC added, "the promise of equal employment opportunity would be hollow."[21]

The EEOC advanced three theories to support its view that Mobley's allegations amounted to violations of federal antidiscrimination laws.[22]

Workday as an Employment Agency

The EEOC first compared Workday to employment agencies, which federal antidiscrimination laws cover expressly.[23] "Workday's algorithmic tools perform precisely the same screening and referral functions as traditional employment agencies, albeit by more sophisticated means," the EEOC said.[24]

Workday as an Indirect Employer

The EEOC also cited its own guidance and court cases extending antidiscrimination laws to "indirect employers" — i.e., third parties that control or interfere with an aspect of the employment relationship, such as benefits administrators and labor unions.[25]

As explained by the EEOC, the indirect-employer analysis depends on an entity's control over a candidate's access to employers, not its control over the employers themselves nor the specific ways it exercises that control.[26] "Workday purportedly acts as a gatekeeper between applicants and prospective employers," the EEOC argued.[27]

Workday as an Agent of its Employer-Customers

The EEOC last proffered an agency theory.[28] It argued that federal antidiscrimination statutes explicitly cover employers' agents and that an agent faces liability when an employer delegates their traditional functions to that agent.[29] Citing its own guidance, the EEOC wrote:

> A software vendor acts as an employer's agent, if the employer has given the vendor significant authority to act on the employer's behalf, which may include situations where an employer relies on the results of a selection procedure that the agent administers on its behalf.[30]

That described Workday's relationship with Mobley's potential employers, the EEOC argued.[31] It pointed to Workday's algorithmic screening tools that either refer or reject job applicants for employers.[32]

The Agency Theory of Liability

On Workday's motion to dismiss, U.S. District Judge Rita F. Lin agreed that Workday could be liable as an agent, albeit without mentioning the EEOC or its amicus brief.[33] She explained that other courts have found agents liable when they are delegated traditional employment functions.[34] The court also relied on the inclusion of "any agent" in the definition of "employer" in antidiscrimination statutes.[35]

Judge Lin offered a hypothetical example to show the need for agency liability.[36] She imagined an employer that uses software to automatically screen out alumni of historically Black colleges and universities.[37] The hypothetical assumed that the software developer, but not the employer, knows about the tool's effect.[38]

In this scenario, the court theorized, a job applicant could not assert intentional discrimination against the employer or, absent agency liability, even against the software developer.[39] "Such an outcome," the court reasoned, "cuts against the well-recognized directive that courts are to construe remedial statutes such as Title VII, the ADEA, and the ADA broadly to effectuate their purposes."[40]

The court then concluded that Workday qualified as an agent under the statutes.[41] Judge Lin recounted how Workday's software allegedly automatically rejects or refers job applicants.[42] "Given Workday's allegedly crucial role in deciding which applicants can get their 'foot in the door' for an interview," the court said, "Workday's tools are engaged in conduct that is at the heart of equal access to employment opportunities."[43]

That Workday relies on AI rather than human beings made no difference to the court.[44] "Drawing an artificial distinction between software decisionmakers and human decisionmakers," the court wrote, "would potentially gut anti-discrimination laws in the modern era."[45] Neither antidiscrimination statutes nor courts make that distinction, the court explained.[46] Instead, Judge Lin said, courts focus on what functions are delegated to the agent, not how the agent performs that function.[47]

The court then distinguished Workday's software from a spreadsheet used to filter out employees over 40 and an email service used to send rejection letters.[48] In contrast to those passive tools that make no decisions, the court explained, Workday's were "alleged to perform a traditional hiring function of rejecting candidates at the screening stage and recommending who to advance to subsequent stages, through the use of artificial intelligence and machine learning."[49]

As for the EEOC's alternative argument that Workday acted as an employment agency, the court quickly rejected it because antidiscrimination statutes explicitly define employment agencies as entities that regularly procure or find employees.[50] Mobley, Judge Lin said, alleged that he found job postings on his own, decided which to apply to and only then interacted with Workday's screening platform.[51] So Workday merely screened and did not procure employees, the court concluded.[52]

Disparate Impact Claim Moves Forward

In his complaint, Mobley alleged both disparate impact and disparate treatment claims. In July, the court allowed only Mobley's disparate impact claim to **proceed**.[53]

Disparate impact suits require an employee to show that a specific employment practice caused a significant disparate impact on a protected class.[54] Workday's use of automated screening tools counted as a specific employment practice, the court held, spurning Workday's attempt to show variation in how employers use its software.[55] As Judge Lin explained, the tools plausibly employed a common discriminatory component in rejecting Mobley from over one hundred jobs in various industries.[56] The court found this broad pattern of rejection even more compelling than one where a single employer failed to hire one hundred applicants with Mobley's characteristics.[57]

Moreover, Mobley also alleged that Workday's tools were trained with biased data and rely on various tests that could reflect bias.[58] The court held that those combined allegations, if proved, could show both a significant disparity based on race, age, and disability, and a causal link between Workday's tools and the resulting disparity.[59]

The complaint, the court found, supported "a plausible inference that Workday's screening algorithms were automatically rejecting Mobley's applications based on a factor other than his qualifications, such as a protected trait."[60] So the court refused to dismiss the disparate impact claims under Title VII, the ADEA and the ADA.[61]

In contrast, the court did dismiss the disparate treatment claim, which required a showing of intentional discrimination.[62] Judge Lin refused to infer from the complaint that Workday intended for its tools to discriminate against Mobley.[63] Awareness of the discriminatory effects, she explained, was not enough under the U.S. Court of Appeals for the Ninth Circuit's precedent.[64] The court also threw out Mobley's separate California Fair Employment and Housing Act claim for aiding and abetting his potential employers' discrimination against him.[65]

State and Local Laws: Catching Up With AI Trends

As issues like those that confronted the Mobley court continue to arise, states and localities have shown an interest in ensuring that businesses do not sidestep their responsibilities by delegating HR decisions to automated systems. This is especially true in the absence of federal legislation.

Illinois

Illinois, for example, recently **amended its Human Rights Law** to explicitly prohibit an employer's use of AI if it results in discrimination against a protected class.[66] Also, employers must inform job applicants that they are using AI. The new law goes into effect in January 2026.

A separate Illinois law already in effect requires employers that use AI in video interviews to collect racial and ethnicity demographic data and report it to a state agency, which analyzes the data for bias.[67]

New York City

In New York City, each employer and employment agency must **conduct and publicly report** an annual audit of any AI tool it uses for hiring or promoting employees.[68]

These entities must also inform applicants that the tool will be used and what qualifications and characteristics the tool assesses and provide candidates with an alternative process or accommodation. Information about what data is collected, the source of the data, and the data retention policy must be available publicly or on

request.

Colorado

Starting Feb. 1, 2026, **Colorado will require** developers and users of AI tools to exercise reasonable care to protect Colorado residents from known or reasonably foreseeable risks of discrimination resulting from the use of AI, including in the employment context.[69]

Other Jurisdictions

Other jurisdictions may be on the cusp of following these jurisdictions' lead. California's Civil Rights Council, for instance, **recently proposed** extensive regulations that attach liability to employers who use AI in a discriminatory manner.[70]

Assessing the Risks of AI in Employment Decisions

In light of the EEOC's strategic focus, its view in Mobley, that court's decision and the patchwork of laws popping up around the country, employers, their agents, employment agencies and companies that develop automated decision-making tools must regularly assess the risks that those tools present.

Remember Mobley.

This case offers at least two lessons. First, companies cannot escape liability by delegating tasks to AI systems, particularly in view of the fact that the law recognizes disparate impact claims. As the court noted, artificially distinguishing between human and software decision makers could gut modern discrimination laws.[71]

Second, developers and users of AI tools likely cannot point the finger at each, as both may be responsible for discrimination even under existing law.[72]

Be proactive.

Employers seeking assistance from automated tools for human resources decisions should probe the developers on, among other things, how the tools were developed and trained. Employers should ask:

- What data was used to train the system? Biased inputs may lead to biased outputs.
- What characteristics does the platform look for, what proxies does the platform use to identify those characteristics and have those proxies been validated? Ensure that the those characteristics and proxies are connected to necessary qualifications rather than protected traits.
- Were any attempts made to evaluate the system for bias?

Conduct regular impact assessments and audits.

Regular audits and impact assessments can help identify and mitigate potential biases in AI algorithms.

Assessments can help determine whether AI tools are disproportionately disadvantaging certain groups based on protected traits. Audits should evaluate the ongoing performance of AI tools and assess whether they continue to function as intended without introducing new biases.

Be mindful of accommodation duties.

Consider informing candidates that an automated system will be used in the employment process. Provide an opportunity or method for applicants to seek necessary accommodations and a system for implementing accommodations as appropriate.

Provide ongoing internal training and education.

As AI tools evolve and become more embedded in the hiring process, HR and compliance teams must understand how these technologies work, their potential biases and the legal implications of their use. Given the rapid pace of technological change, education and training must be continuous.

Conclusion

AI offers the promise of saving businesses and employees time and resources by automating decisions that we

once thought only humans were capable of making. At the same time, this newly adopted technology learns from past human decisions that may have reflected human biases. Businesses that employ AI in their HR decisions must guard against this possibility to avoid potential liability under current and future antidiscrimination laws.

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[1] Mobley v. Workday Inc. , 2024 WL 3409146, at *1 (N.D. Cal. July 12, 2024) ("Mobley").

[2] U.S. Equal Emp. Opportunity Comm'n, Strategic Enforcement Plan Fiscal Years 2024-2028 ("EEOC Strategy"), https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028 (last visited Aug. 19, 2024); see also U.S. Equal Emp. Opportunity Comm'n, Artificial Intelligence and Algorithmic Fairness Initiative, https://www.eeoc.gov/ai (last visited Aug. 19, 2024).

[3] See Cobun Zweifel-Keegan, US State AI Governance Legislation Tracker, https://iapp.org/resources/article/us-state-ai-governance-legislation-tracker/ (last visited Aug. 19, 2024).

[4] Mobley, at *1.

[5] References to the complaint in Mobley refer to the First Amended Complaint.

[6] Mobley, at *1.

[7] Id.

[8] Id. at *2.

[9] Id.

[10] Id.

[11] Id. at *1.

[12] Id. at *2.

[13] Id.; Am. Compl., ECF No. 47 ¶ 8 in Mobley v. Workday Inc., Case No. 3:23-cv-00770-RFL (N.D. Cal. Filed July 12, 2024) ("Mobley Docket").

[14] Mobley, at *2.

[15] Id.

[16] Id. at *3-7.

[17] See generally id.

[18] See Mobley, at *3-7, 9; see also Mot. to Dismiss, ECF No. 50 in Mobley Docket at 4-10, 13-14.

[19] See Amicus Brief, ECF No. 60-1 in Mobley Docket ("Amicus Brief").

[20] Id. at 1.

[21] Id.

[22] Id. at 2.

[23] Id. at 4-10.

[24] Id. at 6.

[25] Id. at 10; see Spirt v. Tchrs. Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979) (subsequent history omitted); Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089, 1092 (D.N.H. 1974).

[26] Amicus Brief at 11.

[27] Id.

[28] Id. at 12-14.

[29] Id. at 12.

[30] Id. at 13.

[31] Id. at 14.

[32] Id.

[33] Mobley, at *3-5.

[34] Id. at *3.

[35] Id. at *4.

[36] Id. at *5.

[37] Id.

[38] Id.

[39] Id.

[40] Id.

[41] Id. at *5-7.

[42] Id. at *5.

[43] Id. at *6.

[44] Id.

[45] Id.

[46] Id.

[47] Id.

[48] Id.

[49] Id. Because the court held that Workday's status as an alleged agent made it an employer under federal law, it declined to evaluate whether Workday qualified as an "employer" under an indirect-employer theory. Id. at *7.

[50] Id.

[51] Id.

[52] Id.

[53] Id. at *8-9.

[54] Id. at *8.

[55] Id.

[56] Id.

[57] Id.

[58] Id.

[59] Id.

[60] Id.

[61] Id.

[62] Id. at *9-10.

[63] Id.

[64] Id.

[65] Id. at *10-11.

[66] H.B. No. 3773, 103rd Gen. Assemb. (Ill. 2024), https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=112&GA=103&DocTypeId=HB&DocNum=3773&GAID=17&LegID=&SpecSess=&Session.

[67] Report of demographic data, 820 Ill. Comp. Stat. 42/20.

[68] Administrative Code of the City of New York §§ 20-870-874.

[69] Consumer Protections for Artificial Intelligence, S.B. 24-205, Reg. Sess. (Co. 2024), https://leg.colorado.gov/bills/sb24-205.

[70] Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems, Cal. Regulatory Notice Reg. 2024, Volume Number 20-Z, at 559-561 (proposed May 17, 2024), https://calcivilrights.ca.gov/civilrightscouncil/.

[71] Mobley, at *6; but see Saas v. Major Lindsey & Afr. LLC , 2024 WL 2113654, at *5 (D. Md. May 10, 2024) (dismissing "algorithmic bias" claim against recruiting firm because allegation that it used artificial intelligence was speculative); Brown v. Port Auth. Transit Corp. , 2023 WL 4747678, at *3 (E.D. Pa. July 24, 2023) (plaintiff failed to allege a nexus between government authorities' use of unauthorized artificial intelligence and the purported racial discrimination).

[72] See Menaker v. Hofstra Univ. , 935 F.3d 20, 37 (2d Cir. 2019) ("In the Title VII context, it is well-settled that employers may be held vicariously liable for the conduct of their agents."); see generally Mobley (developer of screening tool may be liable for employment discrimination even though it never employed or sought to employ plaintiff); U.S. Equal Emp. Opportunity Comm'n, Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964, https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial (last visited Aug. 19, 2024) (noting that employers may be responsible under Title VII for automated tools developed by a software vendor); U.S. Equal Emp. Opportunity Comm'n, The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees, https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence (last visited Aug. 19, 2024) (same under ADA).