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Job Applicant's Algorithmic Bias Discrimination Lawsuit Survives Motion to Dismiss

Law and the Workplace on **July 25, 2024**

In a recent development in *Mobley vs. Workday, Inc.*, the United States District Court for the Northern District of California denied in part Workday, Inc.'s ("Workday") Motion to Dismiss, allowing the Plaintiff to pursue novel claims that Workday – a third-party software vendor which provides artificial intelligence ("AI") driven employment screening tools to assist employers in selecting job applicants – may be liable for the discriminatory effects of those tools under federal anti-discrimination laws.

Background

Plaintiff Derek Mobley ("Mobley") filed a putative class action lawsuit in February 2023, alleging that his applications for 80-100 jobs with employers who use Workday's screening tools were rejected because the tools allegedly allow the employers to make discriminatory judgments when evaluating applicants, and allow for "preselection" of applicants not within certain protected categories. For instance, Mobley alleged that he applied for a job he was already performing as a contractor, and was rejected without an interview. Mobley further alleged that Workday's administration and dissemination of the tools amounted to intentional and disparate impact discrimination in violation of Title VII of the Civil Rights Act ("Title VII"), the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA").

On January 19, 2024, the Court granted Workday's Motion to Dismiss, with leave to amend. The Court held that Mobley had not sufficiently alleged facts demonstrating that Workday qualifies as an "employment agency" subject to liability under federal anti-discrimination laws. Mobley filed his Amended Complaint in February 2024, and included two additional theories of liability – that Workday should be held liable as either an "indirect employer" or an employer's "agent."

The Recent Decision

On July 12, 2024, the Court denied Workday's Motion to Dismiss with respect to an agency theory of liability, holding that Mobley plausibly alleged that Workday's employer-customers delegated to Workday and its AI screening tools their "traditional function of rejecting candidates or advancing them to the interview stage." The Court viewed this delegation of duties traditionally exercised by the employer as the type of conduct Congress intended to prohibit by including the term "agent" in the definition of "employer" under the relevant anti-discrimination statutes. The Court held that Mobley plausibly alleged that Workday acts as an agent through his allegations that the company's AI software automatically rejects or moves candidates forward in the hiring process, illustrated by Mobley allegedly receiving several rejection emails in the middle of the night.

The Court further stated that there is no meaningful distinction between "software decisionmakers" and "human decisionmakers" for purposes of determining coverage as an agent under the anti-discrimination laws, noting that to hold otherwise would lead to undesirable results (*e.g.*, the Court opined that employers could delegate "discriminatory programs" to third-party software tools instead of humans, and the third parties who created the software could escape liability). The Court reasoned, however, that many software vendors do not qualify as agents because employers have not *delegated* to them any traditional employer functions. As an example, the Court explained that no agency theory of liability would exist for a software vendor that provides an employer with spreadsheet software, where the employer uses the spreadsheet software to sort and filter job applicants in a discriminatory manner, because the software is not *participating* in the determination of who should be hired.

The Court also denied Workday's Motion to Dismiss Mobley's discrimination claims pled on a disparate impact theory. The Court reasoned that the "sheer number of rejections and the timing of those decisions, coupled with [Mobley's] allegations that Workday's AI systems rely on biased training data support 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."

Finally, the Court dismissed the claims that Workday engaged in intentional discrimination on the grounds that Mobley failed to plausibly allege that Workday *intended* that its screening tools discriminate against job applicants.

Takeaways

The Court's decision establishes that third-party vendors who furnish AI-screening tools to employers may be held liable as "agents" of those employers under Title VII, the ADA and ADEA. In reaching this conclusion, the Court focused on allegations that employers *delegated* traditional job functions to the third-party vendor's screening tools. Employers should also be aware that the EEOC has released a technical assistance document on considerations for incorporating automated systems into employment decisions, as we reported here. In relevant part, the EEOC takes the position that employers can be held liable under Title VII for selection procedures that use an algorithmic decision-making tool if the procedure discriminates on a basis prohibited by Title VII, *even if* the tool is designed or administered by another entity, such as a software vendor. We will continue to monitor this case for further developments.

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