

ALGORITHMIC BIAS IN USING AI-DRIVEN APPLICANT FILTERING

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Use of Artificial Intelligence ("AI") technologies is becoming commonplace and widespread across industries. Title 15 of the U.S. Code created the National Artificial Intelligence Act of 2020. Under 15 U.S.C. 9401(3), the Act defines artificial intelligence as "*a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.*" The section further states that AI systems use machine and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis; and use model inference to formulate options for information or action. *Id.*

In the field of human resources, recruiting and talent acquisition, the hiring process is undoubtedly becoming automated. According to a 2023 *Forbes* article, AI is replacing humans in the hiring process. Citing Charlotte Burrows, the Former Chair of the Equal Employment Opportunity Commission (EEOC), *Forbes* stated that 99% of Fortune 500 companies now use some form of automated tool as part of their hiring process.

What does that mean for the defense of lawsuits in which plaintiffs allege discriminatory failure to hire claims? Unfortunately, the fact that a computer program and not an actual human being may have overlooked or outright rejected a candidate does not insulate a company from legal risk. In fact, the opposite may be true. While AI tools that are automating sourcing, screening resumes, scheduling, and even conducting interviews may be saving time and promoting efficiency for helping identify qualified candidates, these tools are not necessarily free of bias. The practical efficiencies of AI may not save the company from legal risk of discrimination claims down the road. The recommendations AI makes based on human input may potentially be biased and expose companies who utilize such tools to discrimination claims.

THEORIES ON HOW AI DISCRIMINATION WORKS

AI applications are used in various phases of the hiring process. Even interviews are now

being automated through an Automated Video Interview ("AVI") features which allows a candidate to engage with the hiring platform and AI algorithms analyze, transcribe, and summarize the interview for recruiters. These applicant screening and evaluation services evaluate biometric information about a person's voice, tone, face, speech patterns and vocabulary. If an AI algorithm is trained to utilize information that embeds bias, it will perpetuate the problem.

For example, in its 2022 statement, the EEOC used the example of hiring technology predicting who will be a good employee by comparing applicants to current successful employees. The EEOC advised "because people with disabilities have historically been excluded from many jobs and may not be a part of the employer's current staff, this may result in discrimination. Employers must carefully evaluate the information used to build their hiring technologies." The EEOC also used the example of facial and voice technologies to screen out candidates with disabilities like autism or speech impairments even if they are qualified for the job. In 2024, the EEOC further stated that facial recognition monitoring software was less accurate for darker skin tones, leading to Black employees being more likely to be terminated.

MOBLEY V. WORKDAY

Last year, the case of *Mobley v. Workday, Inc.* made national headlines because the Plaintiff Mobley alleged violations of Title VII, the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA) in Defendant Workday's use of algorithm-based applicant screening tools. 740 F.Supp.3d 796 (N.D. Cal. 2024).

Derek Mobley ("Mobley") is an African American man over the age of 40 with anxiety and depression. Mobley possessed a degree in finance from Morehouse College, an all-male Historically Black College and University ("HBCU"). Mobley's job experience included various financial, IT help-desk and customer service-oriented jobs. Since 2017, he applied to over 100 positions with com-

panies that use Workday's screening tools. The application process entailed seeing a job posting on a third-party website such as LinkedIn, clicking on the job, redirection to the Workday platform, creating a username and password to access the opportunity, and uploading his resume or entering it manually. *Id.* at 802.

Mobley's resume stated that he graduated from Morehouse in 1995, and he further alleged that various positions required him to take Workday branded assessments or personality tests. Even though his qualifications and experience met and exceeded those of the roles he applied for, he was rejected for all of them. Sometimes he received notice of rejection in the middle of the night and sometimes **less than an hour** after applying. Mobley did not get an interview. He sued Workday, a human resources software company, claiming their algorithms caused him to be rejected from these opportunities because of his age, race and disabilities.

In a July 12, 2024 decision, Judge Rita Lin of the Northern District of California denied Workday's motion to dismiss the federal discrimination claims finding that Workday fell within the definition of an "employer" because evaluating and dispositioning candidates are at the core of the traditional employment functions that the anti-discrimination laws seek to address. The Court reasoned, "Drawing an artificial distinction between software decisionmakers and human decisionmakers would potentially gut anti-discrimination laws in the modern era." *Id.* at 807.

Less than a year later, in May 2025, Judge Lin granted Mobley's motion for preliminary certification of a collective action on the age discrimination claim. Workday argued that the collective could include hundreds of millions of people, but the court reasoned that "allegedly widespread discrimination is not a basis for denying notice." *Mobley v. Workday* remains an active case currently in discovery. Many believe this lawsuit and its outcome will have far-reaching consequences in the utilization of AI screening tools.

NJDCR GUIDANCE

In January 2025, the New Jersey Attorney General through the Division on Civil Rights (“DCR”) issued guidance to clarify how the New Jersey Law Against Discrimination (“NJLAD”) applies to algorithm discrimination resulting from the use of data-driven technologies by employers. As a reason for issuing this Guidance, the DCR cites to studies revealing that in New Jersey 63% of surveyed employers use one or more AI-enabled tools to recruit job applicants and/or make hiring decisions.

Like the EEOC, the DCR gave examples of how AI technology tools could result in biased outcomes. The DCR cited a 2024 study in which a tool assumes an applicant’s race and gender based on their names and reproduced assumed correlations. For example, the tool ranked Hispanic women more favorably for a position as a human resources specialist than white men. The tool also ranked Asian women as the top candidates for a financial analyst role more than twice as often as black men based on their names. As it pertains to the NJLAD, an employer may inadvertently engage in disparate impact discrimination in its use of an automated decision-making tool. Disparate impact discrimination occurs when policies or

practices disproportionately affect members of an NJLAD protected class in an unlawful manner. Such practices are prohibited unless the employer can demonstrate that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest and there is no less discriminatory alternative that would achieve the same interest.

Another potential NJLAD violation cautioned against by the DCR is in reasonable accommodations. For example, if an employer uses a tool to measure applicants’ typing speed on a traditional keyboard, that tool would not fairly assess the typing speed of an applicant who uses a non-traditional keyboard because of a disability. As another example, an employer that uses a tool to monitor and track the productivity of employees that flags atypical or unsanctioned breaks may disproportionately flag for discipline employees who are allowed additional break time to accommodate a disability. An employer who accepts the recommendation from the tool to discipline that employee may violate the NJLAD.

These rules apply to any entity that is subject to the NJLAD’s requirements. As the Northern District of California found in *Mobley*, it is not necessary that the employer actually

develop the tool to be held liable for a violation of the NJLAD stemming from that tool.

LEGAL RISK OF USING AI AND FUTURE CONSIDERATIONS

The potential impact of *Mobley v. Workday* and those cases that will undoubtedly follow it in courts across the country and in New Jersey should not be discounted, particularly given that the remedies available under the NJLAD are extensive and far-reaching and include fee shifting and potential punitive damages.

Employers and hiring firms ought to be vigilant and careful in implementing and utilizing AI tools in recruiting strategies and reviewing candidates for hire. Although AI tools may appear to make recruiting faster and more efficient with automated skills matching features, automation does not necessarily shield companies from the legal risk of discrimination claims. Technology that identifies qualified candidates and decides which candidates should be contacted or hired may in fact be biased. Just like ChatGPT is no substitute for professional advice, AI driven tools to assist employers and hiring firms should be approached with similar caution.

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