

SYMPOSIUM CONTRIBUTION

Interview with the Terminator: Artificial Intelligence in the Hiring Process

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Abstract

This article looks at the increasingly important role that artificial intelligence has in the modern hiring process, along with the various challenges that accompany its adoption. It explores what ways employers utilize AI for applicant screening, highlighting the benefits and possible pitfalls with its use. Additionally, this article will analyze how major, established United States legislation and other, emerging federal initiatives, interact with the use of AI while comparing these laws to other international frameworks. Finally, this article will take a look at various case studies regarding the more recent use of AI in the hiring process and its repercussions.

Keywords: artificial intelligence, employers, hiring, screening, bias.

A Introduction

Ever since the creation of artificial intelligence (AI), businesses have moved to implement it into their systems in order to improve their overall functions. Services such as marketing, sales, supply chain operations, customer service and finance have all been impacted by the inclusion of AI. More specifically, AI has revolutionized the way human resources have operated in hiring new employees. Whether it is the initial screening process, a support system for the interview or running the interview itself, AI has been implemented every step of the way. This does not come without risk, as these businesses must be aware of the different laws and regulations that govern these different practices.

B AI and Employment Law Considerations

The modern workplace has evolved its hiring process to better accommodate the influx of both position openings and potential hires. As of September 2024, there are approximately 7.44 million job openings in the United States alone.¹ On average, there

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1 Statista, Monthly Job Openings in the United States from September 2022 to September 2024 (in millions), <https://www.statista.com/statistics/217943/monthly-job-openings-in-the-united-states/> (last visited 12 December 2024).

are roughly 250 candidates that apply for each new job opening.² With those statistics in mind, there are approximately 1,860,000,000 applications that decision-makers in these companies must look at in order to fill those job postings.

Modern companies do not have the time to analyse every one of these applications individually. They instead utilize different AI tools to help facilitate the hiring process through applicant screening, resume analysing and even chatbot-led interviews. Those involved in the hiring process must be aware of the potential negative effects of using these systems, such as algorithmic bias and other forms of discrimination. Having oversight and being transparent about the hiring process and ensuring that such occurrences do not happen is imperative to the company, as it will not only protect them from liability but also help find the ideal candidates to fill open positions.

I Hiring and Recruitment

Modern companies have looked to different technological advancements to make the hiring process easier. Currently, 97% of Fortune 500 companies, 66% of large companies and 25% of small companies are using applicant-screening software to help with their hiring practices.³ These automated systems are meant to act as a filter for unwanted or under-qualified applicants that would not be considered for the position in the first place, ultimately cutting down the time it takes to make these hiring decisions. Tools such as application screening software and automated interview systems have been extensively used in recent years to help streamline the massive influx of potentially viable candidates.

1 Applicant Screening Selection

As previously mentioned, a recruiter will, on average, receive roughly 250 different resumes for an open position.⁴ Of those applications, only 12% meet the requirements for the job.⁵ Having an AI system in place will help streamline the entire process and pick out the applicants that best fit the job description. These AI screening tools utilize three different types of analysis: keyword-based, grammar-based and statistical-based.⁶

Keyword-based resume screening is the simplest way to utilize AI in the application processing system. This type of screening focuses on different keywords in a resume or other submitted documents and attempts to match them with the job description.⁷ An example of this would be if a company was looking for a potential hire to fill a salesperson role, they would use the keyword-based resume

2 Vervoe, AI in Resume Screening: Expectations vs. Reality, <https://vervoe.com/ai-in-resume-screening/> (last visited 12 December 2024).

3 Coresignal, AI Resume Screening: How It Works and Why You Need It, <https://coresignal.com/blog/ai-resume-screening/> (last visited 12 December 2024).

4 Vervoe, *supra* note 2.

5 *Ibid.*

6 *Ibid.*

7 *Ibid.*

screening to look for words such as “business”, “sales” and others that would correlate the most to fulfil the company’s requirements.

Grammar-based resume screening utilizes machine learning to understand the structure of the resume’s sentence in order to better understand its meaning and overall makeup.⁸ This will give the hiring company a better insight into the applicant and their knowledge, as it applies to the potential role. Grammar-based resume screening is considered more advanced than keyword-based and is normally preferred between the two.⁹

Statistical-based resume screening is considered the most valuable and in-depth way to filter resumes between the three options.¹⁰ This type of screening builds on grammar-based resume screening and can gain insight into the employment, education and location of the potential applicant.¹¹

2 Interviews

On average, an applicant will have to participate in two to four different interviews in order to land the coveted job.¹² With the number of interviews necessary to properly screen an applicant, companies have been utilizing AI to cover the initial interviews to confirm the very basic requirements of the job and to move those qualified candidates to the next phase of the interview process. From automated question generation to actual video and voice interviews, different AI systems are being used by these companies to preserve company resources while managing the influx of candidates that are prevalent in today’s job market (Forbes).

Interviews that use AI are known as automated video interviews (AVIs) and can be either led by AI or assisted by them.¹³ AVIs track three different types of data sets that are being used to determine an applicant’s potential for progression in the interview process: visual, verbal and vocal.¹⁴ Visual data includes facial expressions, eye movements, hand movements and any other displayed reactions that are given on the screen.¹⁵ Verbal data includes the vocabulary that is being used by the applicant and targets certain keywords, depending on the job position.¹⁶ Vocal data focuses on the applicant’s voice tone and pronunciation during the interview.¹⁷ The data collected during the AVI is compiled together by AI and is used to either approve or deny an applicant from going to the next interview stage.

It is important to note that AI-led interviews are not a viable replacement for a full interview process, just the first steps. AVIs that utilize AI also lack a certain

8 Coresignal, *supra* note 3.

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 Insight Global, How Many Interviews Before Job Offer?, <https://insightglobal.com/blog/how-many-interviews-before-job-offer/> (last visited 12 December 2024).

13 Tomas Chamorro-Premuzic & Cindy Makhoul, Are You Prepared to Be Interviewed by an AI?, HARV. BUS. REV. (7 February 2023), <https://hbr.org/2023/02/are-you-prepared-to-be-interviewed-by-an-ai>.

14 *Ibid.*, at 2.

15 *Ibid.*, at 7.

16 *Ibid.*

17 Chamorro-Premuzic & Makhoul, *supra* note 13, at 7.

level of human interaction and can be prone to technical issues.¹⁸ Because these types of interviews are still novel, they have limited assessment capabilities and are not capable of properly determining every quality that a company could be looking for in an applicant.¹⁹

II *Bias and Discrimination*

In theory, by utilizing AI systems in the hiring process, companies are preventing the unconscious bias that humans often exhibit. However, AI systems are not incapable of making mistakes and discriminating against potential hires. A 2021 analysis of AI used in hiring processes found that 44% of AI systems demonstrated some form of gender bias, and 26% of those systems displayed some sort of gender and race bias.²⁰ Companies cannot sacrifice ethics and nondiscriminatory practices in the name of efficiency for determining qualified candidates for a position.

1 *Algorithmic Bias*

The training data sets that the AI learns from can be the source of different biases that could lead to potential issues for the company (Research.Aimultiple).²¹ These biases can happen due to pre-existing beliefs held by the developers of the AI system.²² This occurs when the developers lack qualified oversight that is intended to prevent such discriminatory acts from occurring. The AI system must be trained on clean, unbiased data sets to ensure candidates for job openings are hired based on merit.

Different types of bias can be found in an AI system's algorithm. One such bias is historical bias, which occurs when an AI system is trained on outdated data sets.²³ Historical bias reflects prejudices that are historical and do not represent the modern world today, such as the data favouring men over women.²⁴ Another bias to consider is what is known as sample bias. Sample bias occurs when the AI system is trained from a data set that is not reflective of the real-world population, such as a data set containing mostly White men.²⁵ There are numerous types of biases that organizations need to be aware of, and performing checks on the systems that aid in the hiring of their workforce is imperative to ensuring fairness for all applicants and compliance with all laws.

These AI systems must be trained on data sets that must ensure that every applicant is being interviewed fairly and that the decision on whether to push them

18 PSCI, Interviewing with AI: The Pros and Cons, <https://www.psci.com/interviewing-with-ai-the-pros-and-cons/> (last visited 12 December 2024).

19 *Ibid.*

20 Genevieve Smith & Ishita Rustagi, When Good Algorithms Go Sexist: Why and How to Advance AI Gender Equity, STAN. SOC. INNOVATION REV. (31 March 2021), https://ssir.org/articles/entry/when_good_algorithms_go_sexist_why_and_how_to_advance_ai_gender_equity.

21 AIMultiple, Bias in AI: What It Is, Types, Examples & 6 Ways to Fix it, <https://research.aimultiple.com/ai-bias/> (last visited 21 November 2024).

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 AIMultiple, *supra* note 21.

forward in the interview process is based on merit.²⁶ Doing this requires constant monitoring and not just allowing the AI to operate freely with no oversight. Consistent audits of the system are required that will ensure that applicants are not filtered out based on protected statuses such as sex, race and age.

III Transparency and Explanation

In the event that a company does utilize an AI system in their hiring process, they must make the applicant aware of the AI component. Ensuring the trust of potential employees is imperative to an effective workforce, and notifying these applicants of the use of AI is the first step in this process. These companies need to explain exactly what the AI system does in the hiring process and to what extent it was used in making the decisions regarding the applicant's employment.

Employers must only incorporate AI systems in the initial stages of the hiring process and have human oversight to ensure that qualified applicants are given a chance at employment. John Pennypacker, Vice President at Deep Cognition, said that a key practice when using AI is "to assure candidates that a human element remains integral to our decision-making processes" and that "AI is a tool for efficiency and not replacing human judgment".²⁷ In other words, these employers must not only notify applicants of the use of AI in the hiring process but also ensure that the AI does not make the final hiring decision, but just streamlines the process.

C Legal and Regulatory Framework

I United States Laws and Regulations

Businesses that utilize AI in their hiring practices must be aware of the laws that not only govern the AI systems themselves but also those that protect applicants from being dismissed for discriminatory reasons. For the AI systems, the United States has altered and adopted legislation that requires employers to ensure that their new hiring practices comply with the laws that govern discrimination, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, Executive Order 14110 as well as the proposed Algorithmic Accountability Act.

1 Title VII of the Civil Rights Act

Title VII of the Civil Rights Act (Title VII) prohibits employment discrimination on the basis of race, colour, religion, sex and national origin. In May 2023, the United States Equal Employment Opportunity Commission (EEOC) issued new technical guidelines when a company utilizes AI with their employment selection tools.²⁸ These new standards determine that an AI violates Title VII if the system

26 Aspen HR, Using AI for Resume Screening: What HR Teams Should Know, <https://aspenhr.com/ai-resume-screening/> (last visited 12 December 2024).

27 Lin Gensing-Pophal, Transparency Essential When Using AI for Hiring, SHRM (18 April 2024), <https://www.shrm.org/topics-tools/news/technology/transparency-essential-using-ai-hiring>.

28 Akin Gump Strauss Hauer & Feld LLP, EEOC Releases New AI Guidance for Employers (18 May 2023), <https://www.akingump.com/en/insights/alerts/eec-releases-new-ai-guidance-for-employers>.

disproportionately exclude applicants or employees based on race, color, religion, sex or national origin, (i) and are not job related and consistent with business necessity, or (ii) an alternative selection procedure exists that would meet the employer's needs without causing the disproportionate exclusion.²⁹

The EEOC's stipulates that the guidance covers "algorithmic decision-making tools", which applies to multiple different systems that utilize AI.³⁰ Congress defines "AI" 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".³¹ These systems include resume scanners, video interviewing software, virtual assistants, chatbots, testing software and employee monitoring software.³²

2 *Americans with Disabilities Act*

The American with Disabilities Act (ADA) is a federal law that was created to enhance accessibility and promote equal opportunities for those with disabilities in everyday life.³³ The ADA stipulates that employers

must avoid using hiring technologies in ways that discriminate against people with disabilities. This includes when an employer uses another company's discriminatory hiring technologies.³⁴

This would put not just the companies that are creating these discriminatory systems liable, but the companies that are actively hiring people using this software as well.

Employers that use hiring technologies must fulfil any request for reasonable accommodations that would allow applicants who have disabilities an equal chance of possible employment. To do this and ensure fairness, employers must conduct regular checks on the hiring technologies to properly assess whether those with disabilities are being screened from a possible position, despite meeting the qualifications of the job.³⁵ The ADA suggests that different tests or games should be used that will highlight the applicants' qualifications for the job rather than their disability.

3 *Age Discrimination in Employment Act*

The Age Discrimination in Employment Act (ADEA) specifically prohibits discrimination on the basis of age, with a heightened emphasis on job applicants and employees over the age of 40.³⁶ While the ADEA does not explicitly state how AI should

²⁹ *Ibid.*

³⁰ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, <https://www.eeoc.gov/statutes/age-discrimination-employment-act-1967> (last visited 12 December 2024).

³¹ *Ibid.*

³² *Ibid.*

³³ U.S. Department of Justice, Civil Rights Division, Disability Rights Section, Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring, <https://www.ada.gov/assets/pdfs/ai-guidance.pdf> (last visited 15 December 2024).

³⁴ *Ibid.*, at 2.

³⁵ *Ibid.*, at 3.

³⁶ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, <https://www.eeoc.gov/statutes/age-discrimination-employment-act-1967> (last visited 12 December 2024).

be treated, the EEOC has taken similar actions as it has with Title VII, in that they provide guidance on how AI systems should be utilized in hiring practices.

The EEOC is responsible for enforcement of the ADEA and has the power to investigate discrimination complaints related to age.³⁷ In the event that a complaint is not settled, the EEOC can file lawsuits on behalf of the affected individuals or the general public to ensure adherence to the act.³⁸

4 *Executive Order 14110*

Signed in October 2023, Executive Order 14110 (EO 14110) focuses on the safe, secure and trustworthy development use of AI.³⁹ The EO 14110 also was made to address the risks associated with AI, including bias, discrimination, fraud and other national security concerns.⁴⁰ The overarching act itself covers eight different policy areas, including safety and security, innovation and competition, worker support, consideration of AI bias and civil rights, consumer protection, privacy, federal use of AI and international leadership.⁴¹

This order establishes the AI guidelines that federal agencies use today, mandates the creation of AI safety standards, requires frequent reporting and audits of AI models and promotes transparency and public engagement.⁴² The EO 14110 helps showcase how the technological landscape is shifting and that the government is attempting to address the problems that come with these emerging technologies. For oversight, EO 14110 requires that each government agency appoints a Chief Artificial Intelligence Officer to “promote innovation and manage the risk of their agency’s use of AI”.⁴³

Further, a violation of EO 14110 is considered a deceptive and unfair act. The order and its possible sanctions are enforced by the Federal Trade Commission, through the Federal Trade Commission Act.⁴⁴ This act aims to prevent unfair methods of competition and unfair or deceptive acts or practices affecting commerce.⁴⁵

5 *Algorithmic Accountability Act*

The proposed Algorithmic Accountability Act (AAA) makes it so the Federal Trade Commission would require covered entities that utilize AI in their decision-making

37 Fact Sheet: Age Discrimination (15 January 1997), <https://www.eeoc.gov/laws/guidance/fact-sheet-age-discrimination>

38 *Ibid.*

39 Exec. Order No. 14,110, 88 Fed. Reg. 75,191 (30 October 2023), <https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence>.

40 *Ibid.*

41 CONG. RSCH. SERV., R47843, Artificial Intelligence and the Workforce (2023), <https://crsreports.congress.gov/product/pdf/R/R47843>.

42 *Ibid.*

43 Holistic AI, Executive Order 14110 on Artificial Intelligence, <https://www.holisticaicom/blog/executive-order-14110-on-artificial-intelligence> (last visited 12 December 2024).

44 Federal Trade Commission Act, 15 U.S.C. §§ 41-58, <https://www.ftc.gov/legal-library/browse/statutes/federal-trade-commission-act> (last visited 12 December 2024).

45 *Ibid.*

to perform impact assessments on those systems.⁴⁶ A “covered entity” that would be subject to this act would be

any person, partnership, or corporation that makes more than \$50 million per year, possesses or controls the personal information on at least one million people or devices, or primarily acts as a data broker that buys and sells consumer data.⁴⁷

The goal of this act is to evaluate the systems for “potential biases, discriminatory outcomes, and other risks associated with the use of these algorithms”.⁴⁸

The AAA provides guidelines for the internal impact assessments that covered entities would have to adhere to as well. These include the descriptions of any current processes or those that are being replaced, the testing of the privacy risks and privacy-enhancing measures of the system, the evaluation of the current and historical performance of the system and the identification of the possible negative impact on consumers along with possible mitigation strategies of them.⁴⁹ The AAA would also require that the covered entities train relevant employees on the likelihood of these negative impacts and the planned response to them to better prepare for any potentially harmful situation.⁵⁰ Finally, the AAA would mandate a system where the covered entity would place limitations on the AI and identify opportunities for improvement in these systems to always be improving the systems and functions as a whole.⁵¹

Violating the AAA would be considered an unfair and deceptive practice and would open the door for states to bring civil action against those entities⁵² (Wyden). Also, the AAA clarifies that nothing in it preempts any “state, tribal, city, or local law or ordinance”.⁵³

II Future Regulatory Trends

Even though laws are being created and altered to better fit the changing technological landscape, there are still other actions being taken to help fight against the faulty use of AI and protect applicants and other consumers. A growing trend amongst states is the creation of AI standards-setting boards.

1 AI Standards-Setting Boards

These AI standards-setting boards would have a variety of functions that would ensure the safe utilization of AI. Some of the functions of these boards would

46 Jones Day, Proposed Algorithmic Accountability Act Targets Bias in Artificial Intelligence (June 2019), <https://www.jonesday.com/en/insights/2019/06/proposed-algorithmic-accountability-act>.

47 *Ibid.*

48 *Ibid.*

49 S. COMM. ON FIN., 118th Cong., Algorithmic Accountability Act of 2023 Section-by-Section (Comm. Print 2023), https://www.wyden.senate.gov/imo/media/doc/algorithmic_accountability_act_of_2023_section_by_section.pdf.

50 *Ibid.*, at 3.

51 *Ibid.*

52 *Ibid.*, at 4.

53 S. COMM. ON FIN., *supra* note 49, at 4.

include creating guardrails that would guide the introduction of AI in the workplaces, including impact assessment mandates, transparency, consent requirements and ethics frameworks.⁵⁴ They will also help monitor the growing use of AI by these entities to ensure compliance with the regulations that they set forth.⁵⁵

The boards would be composed of a variety of government, employer and worker representatives so that everyone has a voice in this process.⁵⁶ They would act as a mechanism for workers and other committees to engage with in regard to making decisions about AI usage, integrating them into the current workflows and evaluating the impact of those decisions over time.⁵⁷

These AI standards-setting boards are a step in the right direction to ensure the fair use of AI and the protection of employees. These boards will help regulate the implementation of AI into the workforce and act as a third party when any issues arise regarding it.

III International Perspectives

While the United States has its own policies in place and is adapting its laws to deal with the ever-increasing prevalence of AI as it relates to employment law, other countries have their own frameworks. For instance, the European Union has the European Union AI Act, and China has the Interim Administrative Measures for Generative Artificial Intelligence Services.

1 European Union AI Act

The European Union AI Act (AI Act) is the first comprehensive regulation of AI by a major regulatory body. The AI Act categorizes AI into different risk categories, including unacceptable risk, high risk, limited risk and minimal risk.⁵⁸ Systems in the unacceptable risk category include AI systems that are strictly prohibited and are considered a threat to people.⁵⁹ Systems in the high-risk category are those that would be a detriment to fundamental rights and are split into two categories: those that are used in consumer products and those that need to be registered with the EU's product safety legislation.⁶⁰ Those in the limited risk category include systems like chatbots and deepfakes and are subject to lighter transparency obligations.⁶¹ Finally, systems in the minimal risk category are the majority of free AI applications and are currently unregulated.⁶²

54 Clean Slate for Worker Power, Regulating AI in the Workplace, HARV. L. SCH. LAB. & WORKLIFE PROGRAM, <https://clje.law.harvard.edu/publication/building-worker-power-in-cities-states/regulating-ai-in-the-workplace/> (last visited 12 December 2024).

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*

58 Clean Slate for Worker Power, *supra* note 54.

59 European Parliament, EU AI Act: First Regulation on Artificial Intelligence, <https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence> (last visited 12 December 2024).

60 *Ibid.*

61 European Parliament, *supra* note 59.

62 *Ibid.*

The systems that use AI in their hiring process are categorized as high-risk and are subject to strict obligations that employers must follow.⁶³ Some of these obligations include ensuring data quality, providing technical documentation, performing conformity assessments and having human oversight, among others.⁶⁴

Also, employers must determine whether they are a “provider” or a “deployer” in the context of an AI system. A “provider” is one that develops an AI system or has one developed and places it on the market or puts it into service.⁶⁵ A “deployer” is one that is using the AI system in a professional capacity.⁶⁶ Employers can be considered providers and thus subject to most of the obligations imposed by the AI Act. This occurs when the employer puts its name or trademark on the AI system, if it makes a substantial modification to the AI system, or if it modifies the intended purpose of the AI system in a way that turns it into a high-risk system.⁶⁷

2 *Interim Administrative Measures for Generative Artificial Intelligence Services*

In August 2023, China introduced the Interim Administrative Measures for Generative Artificial Intelligence Services (Interim Measures). These measures were made as a result of the feedback given from the Draft Measures for the Management of Generative Artificial Intelligence Services in April 2023.⁶⁸ The Interim Measures were created to “encourage platform construction, independent innovation, international exchange, and development of generative AI technology in various fields, while making AI subject to reasonable supervision”.⁶⁹

The Interim Measures introduced some legal responsibilities that these providers and others who utilized AI were required to follow. Some of these obligations include performing security assessments, creating filings on algorithms, data tagging, data labelling, carrying out real-name verification, ensuring anti-addiction measures are in place, creating a mechanism for complaints and reports, providing stable and sustained services, and performing model optimization.⁷⁰ These duties will help ensure the safe use of AI as well as showcasing that Chinese officials are fostering support for the advancement and promotion of AI.

The Interim Measures do not directly address the use of AI in the hiring process in its articles, but the regulations provided could still have an impact on employers that utilize AI. These include how the Interim Measures are promoting transparency

63 Clifford Chance, What Does the EU AI Act Mean for Employers? (1 August 2024), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2024/08/what-does-the-eu-ai-act-mean-for-employers.pdf>.

64 *Ibid.*, at 3.

65 *Ibid.*, at 5.

66 *Ibid.*

67 Clifford Chance, *supra* note 63.

68 PwC China, Regulatory and Legislation: China’s Interim Measures for the Management of Generative Artificial Intelligence Services Officially Implemented (August 2023), <https://www.pwc.cn.com/en/tmt/interim-measures-for-generative-ai-services-implemented-aug2023.pdf>.

69 *Ibid.*

70 *Ibid.*, at 3.

with the use of AI, creating a system that enables reporting of faulty handling of AI, and focusing on the quality and diversity of AI training.

IV Legal Analysis

Each of these laws, rules and regulations has different language, but they all have the same general idea: to encourage the safe use of AI, both in general use and in the hiring process. The laws that the United States has altered to conform with the increasing usage of AI are done to promote equality and transparency across the board for all hiring practices. The federal legislation that the United States has created as a response to AI has similar goals and even further acknowledges that AI is a part of the new norm and is here to stay. The international communities, such as the European Union and China, have created their own AI laws that have similar goals, namely to encourage the safe use of AI.

D Case Studies

The repercussions for improper use of AI systems in the hiring process can be detrimental to a company. This could lead to financial burdens, reputational problems and legal consequences. *EEOC v. iTutorGroup, Inc.* and *Mobley v. Workday, Inc.* both give real world examples of how the misuse of AI in the hiring process can do substantial harm.

I *EEOC v. iTutorGroup, Inc.*

1 Background

iTutorGroup is the brand name for the companies iTutorGroup, Inc., Shanghai Ping “An Intelligent Education Technology Co., Ltd.”, and Tutor Group Limited.⁷¹ They provide English-language tutoring services to students in China and hire tutors using an AI hiring system through their website.⁷² The only qualification that iTutorGroup requires of its applicants to become tutors is that they must have a bachelor’s degree.⁷³

In 2020, Wendy Pincus and roughly 200 other qualified applicants were denied employment with iTutorGroup.⁷⁴ Pincus was rejected from the tutoring position despite her qualifications and suspected that iTutorGroup’s AI hiring system was

71 Alex W. Karasik et al., *EEOC Settles Its First Discrimination Lawsuit Involving Artificial Intelligence Hiring Software*, Duane Morris, Class Action Defense Blog (11 August 2023), <https://blogs.duanemorris.com/classactiondefense/2023/08/11/eec-settles-its-first-discrimination-lawsuit-involving-artificial-intelligence-hiring-software/>.

72 *Ibid.*

73 *Ibid.*

74 Alston & Bird LLP, *EEOC Brings First-of-Its-Kind Enforcement Action Against Employer Using Artificial Intelligence in Hiring*, <https://www.afslaw.com/perspectives/alerts/eec-brings-first-its-kind-enforcement-action-against-employer-using-artificial> (last visited 15 December 2024).

discriminating against her.⁷⁵ Pincus then applied to the same position and she was rejected from using the same credentials, with the exception of a more recent birthdate.⁷⁶ iTutorGroup invited Pincus for an interview based off her second application stating that she was younger than her actual birthdate.⁷⁷ Pincus filed a charge with EEOC who then brought suit on behalf of Pincus and over 200 others that were denied employment by iTutorGroup.⁷⁸

The EEOC is alleging that iTutorGroup programmed its AI hiring system to automatically reject male applicants over age 60 and female applicants over age 55.⁷⁹ Further, the EEOC asserts that by denying these applicants, iTutorGroup violated the ADEA.⁸⁰ iTutorGroup is denying all of these claims and asserts that the tutors that they hired are independent contractors as opposed to actual employees.⁸¹

2 Analysis

The EEOC made a compelling case that prompted the two parties to create a settlement out of court, which created provisions that iTutorGroup must comply too. While it did not admit to any wrongdoing, iTutorGroup agreed to pay \$365,000 to Pinkus and the other applicants who were denied employment based on their age.⁸² iTutorGroup is enjoined from rejecting tutor applicants over age 40 based on age, requesting birth dates of applicants prior to making a job offer, rejecting applicants on the basis of sex, and retaliating against employees for engaging in protected activities.⁸³

Further, the settlement made it so iTutorGroup must provide an EEOC-approved memo that identifies the requirements of federal anti-discrimination laws, such as ADEA. Additionally, iTutorGroup must apply EEOC-approved anti-discrimination policies and complaint procedures to its hiring processes, provide EEOC-approved training programmes for its employees involved in the hiring process, provide the EEOC with written notice of any discrimination-related complaints, and contract all applicants who were rejected based on their age and invite them to reapply.⁸⁴

The settlement between the EEOC and iTutorGroup showcases how the United States and its legislative bodies have begun to regulate the use of AI and are prioritizing the compliance of employers with anti-discrimination laws.⁸⁵ The

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Alston & Bird LLP, *supra* note 74.

⁷⁹ Baker Donelson, The EEOC Settles Its First Lawsuit Alleging AI-Based Discrimination in Employment, <https://www.bakerdonelson.com/the-eeoc-settles-its-first-lawsuit-alleging-ai-based-discrimination-in-employment> (last visited 12 December 2024).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Donelson, *supra* note 79.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

EEOC remains committed to rectifying “any disparate impact caused by AI tools used in the employment context”.⁸⁶

II *Mobley v. Workday, Inc.*

1 *Background*

Workday, Inc. (Workday) provides “human resource management services, including applicant screening services” and “can reduce time to hire by automatically dispositioning or moving candidates forward in the recruiting process”.⁸⁷ Workday also allegedly “embeds artificial intelligence and machine learning into its algorithmic decision-making tools, enabling these applications to make hiring decisions”.⁸⁸

Derek Mobley (Mobley) is an African American male over the age of forty, with a bachelor’s degree in finance from Morehouse College.⁸⁹ He is also an honors graduate of ITT Technical Institute and Server+ certified.⁹⁰ Mobley suffers from anxiety and depression. Since 2010, he has worked in various financial, IT help-desk, and customer-service oriented jobs.⁹¹

From 2017 to 2023, Mobley applied to over 100 positions that use Workday’s screening tools.⁹² Mobley created a profile on Workday’s platform and uploaded his resume and personal information to the platform.⁹³ For some positions, Mobley had to take “Workday-branded assessments and/or personality tests”.⁹⁴ Mobley alleges that these tests were done to determine if an applicant has any mental health disorders or cognitive impairments and that those that do are rejected from the position.⁹⁵

Mobley was denied employment from every single application that he submitted through Workday’s platform. Some of the positions had qualifications that matched what he was doing in his current job and he was still denied.⁹⁶ Mobley also asserts that he met each educational and experiential requirement that was necessary for each job opening.⁹⁷

2 *Analysis*

Mobley filed suit against Workday for “intentional discrimination on the basis of race, age, and disability” and that “Workday’s algorithmic decision-making tools

⁸⁶ *Ibid.*

⁸⁷ *Mobley v. Workday, Inc.*, No. 3:23-cv-00770-RFL, 2024 WL 3409146 (N.D. Cal. 12 July 2024).

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Mobley v. Workday, Inc.*, *supra* note 87.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*, at 2.

⁹⁵ *Mobley v. Workday, Inc.*, *supra* note 87.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

discriminate against job applicants who are African American, over the age of forty, and/or disabled”.⁹⁸ Mobley alleges

federal law claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 42 U.S.C. § 2000e et seq., the Civil Rights Act of 1866 (Section 1981), 42 U.S.C. § 1981, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq. and the ADA Amendments Act of 2008 (ADA), 42 U.S.C. § 12101 et seq.⁹⁹

The court found 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 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.¹⁰⁰

Further, the court here found that Workday did not intentionally make its AI system to act in a discriminatory way as Mobley alleged.¹⁰¹ While this is considered a small win for Workday in the course of this litigation, it still acted negligently in not ensuring its AI systems complied with all relevant discrimination laws.

While the case is not over, the legal proceedings will inevitably affect Workday’s public perception. Workday will have to recover from this reputational fallout and possibly be forced to pay compensation to Mobley and the others who have experienced similar discrimination as a result of their actions.

E Conclusion

The use of AI systems in the hiring process presents employers with the opportunity to filter through hundreds of applicants in a short amount of time. Employers must ensure that the AI systems are trained using algorithms that accurately reflect the world today and do not have any biases. Similarly, these companies must perform regular audits of the AI systems to confirm their lack of bias and that they are functioning properly. Transparency is also key, with employers notifying applicants of their AI usage when it occurs so that these applicants can properly consent to it.

These employers must guarantee that the AI systems are complying with all relevant laws regulating hires. This includes the anti-discrimination laws that have incorporated AI use into their sections and the newly created laws that address AI systems directly. These companies will also need to comply

⁹⁸ *Ibid.*

⁹⁹ *Mobley v. Workday, Inc.*, *supra* note 87.

¹⁰⁰ *Ibid.*, at 8.

¹⁰¹ *Ibid.*, at 9.

with the newly created AI standards-setting boards so that workers, employers and government officials are aware of any issues that occur regarding the use of AI in the workplace, and everyone is familiar with the guidelines for these systems.

AI presents a great opportunity for employers to streamline their hiring process and obtain the best possible employees, but they must complete their due diligence and verify that these AI systems are operating without any issues that could lead to legal, monetary and reputational repercussions.