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California Federal Court Clears Path for Software Developers' Potential Employment Discrimination Liability

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On July 12, 2024, in **a landmark decision**, the US District Court for the Northern District of California held that software developer Workday, a human resource management service provider for employers, can be held liable as an "agent" of its customers – that is, employers under federal antidiscrimination law.

In *Mobley v. Workday, Inc*., job applicant Derek Mobley alleges algorithmic screening tools provided by Workday to its customers unlawfully rejected his applications to more than 100 jobs. In denying in part Workday's motion to dismiss Mobley's complaint, the court held that Mobley plausibly alleged Workday operates as an agent of its customer-employers when those customers delegate a portion of their hiring authority to Workday through use of its algorithmic software to screen applicants. Further, the court found Mobley plausibly alleged Workday's software results in a disparate impact on applicants with characteristics protected by antidiscrimination law by unlawfully screening out those candidates.

Case background

Mobley is an African American male over the age of 40, with a bachelor's degree in finance from Morehouse College, a historically Black college and university, and an honors graduate of ITT Technical Institute. Mobley's background includes working in various financial, IT help desk, and customer-service oriented jobs. He also alleges that he suffers from anxiety and depression.

Mobley allegedly applied to 100+ positions with companies that use Workday's screening tools for talent evaluation. After being redirected to the Workday platform on the employer's website, Mobley uploaded his résumé or entered his information manually, which included his graduation from Morehouse in 1995 and his employment history. According to the complaint, Mobley also was required to take Workday-branded assessments and/or personality tests, which he alleges were likely to reveal mental health disorders or cognitive impairments, and that individuals like Mobley who suffer from depression and anxiety are likely to perform worse on these assessments and be "screened out." Despite having the requisite experiential and educational qualifications, Mobley alleges he was denied employment on every application, sometimes receiving a rejection email almost immediately after submitting an application. For example, Mobley alleges he applied for a customer services specialist position at 12:55 a.m. and received a rejection less than an hour later.

Mobley brought race, age, and disability discrimination claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866 (Section 1981), the Age Discrimination in Employment Act of 1967 (ADEA), and the ADA Amendments Act of 2008, alleging intentional discrimination and disparate impact discrimination. He also asserted an aiding and abetting discrimination claim under California's Fair Employment and Housing Act (FEHA). In April 2024, the US Equal Employment Opportunities Commission filed an amicus brief in the case, arguing that Workday could be liable under the federal antidiscrimination laws (Title VII, ADEA and ADA) that the agency enforces.

Court decision

As detailed below, the court granted in part and denied in part Workday's motion to dismiss. Critically, the court found in favor of Mobley on the threshold issue of Workday's potential for liability for discrimination under Title VII, ADA and ADEA, as an agent of an employer. On the substantive claims, the court held that Mobley sufficiently alleged the elements of a disparate impact claim, but it dismissed the intentional discrimination claims. The court also dismissed the FEHA claims, but it permitted Mobley to amend his complaint to include more specific allegations relating to Workday's alleged aiding and abetting liability.

Theories of liability

On this threshold issue, the court held that under the plain language of the antidiscrimination statutes, as well as the case law interpreting their purpose and structure, a third-party agent such as Workday may be independently liable as an employer where the agent has been delegated functions traditionally exercised by an employer.

In Mobley's case, the traditional employer functions allegedly delegated to Workday included rejecting job candidates or advancing them to the interview stage. For example, the complaint alleged that Workday's software "participat[es] in the decision-making process by recommending some candidate to move forward and rejecting others," by embedding artificial intelligence and machine learning into its algorithmic decision-making tools. The software can then "automatically disposition[] or mov[e] candidates forward in the recruiting process." In reaching this conclusion, the court pointed to allegations regarding the timing of a rejection email Mobley received late at night less than one hour after he applied, which gave rise to an inference that the decision was automated.

Significantly, the court expressed concerns about companies' ability to escape liability for unlawful hiring decisions by handing those functions to artificial intelligence (AI): "Accepting Workday's argument […] would allow companies to escape liability for hiring decisions by saying that function has been handed over to someone else (or here, artificial intelligence). Such an outcome 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."

The court also refused to recognize any distinction between software decision-makers (i.e., AI) and human decision-makers in connection with antidiscrimination laws because doing so would "potentially gut anti-discrimination laws in the modern era." Again, the court expressed concern that to do so would enable employers to delegate all hiring, firing, promotion, compensation, benefits, and other employment decisions to third-party decision-making tools, leaving applicants and employees with little recourse for challenging any potential discrimination by those tools.

Because the court concluded Workday was sufficiently alleged to be an "employer" on an agency theory, it did not reach the alternative argument that Workday is an "employer" under an indirect employer theory. The court also rejected the theory that Workday constituted an "employment agency" because Mobley failed to allege that Workday produces job opportunities for employees or that Workday brings job listings to the attention of job seekers.

Intentional discrimination and disparate impact claims

The court granted Workday's motion to dismiss the claims that it intentionally discriminated against Mobley based on race and age. In this regard, the court held that Mobley failed to allege specific facts that could lead to the conclusion that Workday **intended** its screening tools to be discriminatory. However, the court noted that if discovery reveals evidence of discriminatory intent, Mobley may seek leave to add back these claims.

In addition, the court found that Mobley sufficiently alleged a disparate impact claim under the ADEA, Title VII and ADA. Such claims require allegations demonstrating:

1. A significant disparate impact on a protected class or group.

2. A specific employment practice/selection criteria at issue.

3. A causal relationship between challenged practices and disparate impact.

The court found that Mobley easily satisfied this burden in the complaint. For example, the court found persuasive Mobley's allegation he was rejected from 100+ jobs he allegedly was qualified for, across many different industries and employers, when evaluating whether a plausible disparate impact claim had been alleged. The court held it did not matter that the complaint did not allege who was hired instead of Mobley for any other positions, because he applied to and was rejected from these jobs, with the "common denominator" being Workday, which provided the platform for application intake and screening for all of Mobley's potential employers. The court considered Mobley's allegations even more compelling on this point, since one of the jobs he was rejected for was for a role he was already performing, albeit as a contractor.

Further, the court found the allegation that Workday uses "algorithmic decision-making tools to screen applicants" was sufficient to allege a specific employment practice or selection criteria – even if there were "variances in Workday's screening tools based on customer hiring preferences." The court reached this conclusion because Mobley alleged the tools "rely on biased training data and information obtained from pymetrics and personality tests, on which applicants with mental health and cognitive disorders perform more poorly," causing unlawful screening out across different industries and employers.

Finally, the court found a causal connection between the disparity raised and the algorithmic screening tools. In support, the court again pointed to Mobley's allegation concerning the timing of some of the rejection emails, and the complaint's references to academic and other literature about bias in data models and algorithms.

FEHA claims

The court also granted Workday's motion to dismiss the FEHA claims, because Mobley failed to allege that any of the specific companies to which he applied discriminated against him or that Workday knew that the conduct of these employers was discriminatory. The court however, permitted Mobley the opportunity to amend his complaint to allege more specifically what the alleged discriminatory conduct was, how Workday knew of the conduct, and how it assisted or encouraged the conduct.

What's next?

The court's decision permits Mobley's case to proceed to discovery on the claims that survived the motion to dismiss. In addition, Mobley has the opportunity to amend the complaint to address the FEHA claims or any intentional discrimination claims that arise through discovery.

This significant decision constitutes the first one by a court on the possibility of independent liability for discrimination claims against software developers providing algorithmic tools for use by employers in making employment decisions. It is important to note that the court has not made any finding concerning the lawfulness of using AI software in the recruiting and hiring process. However, given the finding, employers and software developers should ensure they have a thorough understanding of how such software works and the role that software has in carrying out traditional employment functions, if any. Employers and vendors alike should stay tuned for developments in this litigation.

Employers with questions regarding the use of AI tools should contact their Cooley employment lawyer or one of the lawyers listed below.

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