SEAL THE ESCAPE HATCH: AI THIRD-PARTY VENDORS CAN BE LIABLE UNDER TITLE VII'S AGENT PROVISION

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ABSTRACT

Derek Mobley applied to over one hundred job postings using Workday's artificial intelligence (AI) screening algorithms. Despite his extensive qualifications, employers rejected Mobley's application. He later discovered that the AI algorithms used by Workday may be systematically screening out applications based on their race, age, and disability—characteristics explicitly protected under Title VII of the Civil Rights Act of 1964. Recognizing the gravity of algorithmic discrimination, Mobley and similarly situated applicants brought claims against Workday as an "agent of the employer" in violation of federal antidiscrimination laws.

Third-party vendors, who market and sell their software to employers interested in using these tools for their talent acquisition processes, claim that they are not agents of the employer as they do not take on traditional hiring functions. Instead, the argument is that as independent contractors, their conduct falls outside of the parameters of Title VII. In turn, even if a third-party vendor were considered an agent, liability would still not attach, as the doctrine of respondeat superior *holds only the employer liable for the actions of its agents. Given the array of ambiguities in the statute, the district court in* Mobley v. Workday *interpreted agent to establish independent liability for AI third-party vendors in accordance with the plain language of Title VII. Congress could not have intended companies like Workday to escape liability entirely for discrimination online which would be otherwise prohibited under Title VII offline. Therefore, the*

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Mobley *court's approach must be correct. If Congress does not seal the hatch, aggrieved plaintiffs will have no legal recourse against third-party vendors who embed discrimination into their programs.*

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INTRODUCTION

"Human biases can make their way into artificial intelligence systems—with harmful results."[1] As AI technologies fundamentally transition into the workplace, ranging from automated hiring tools to personality evaluation algorithms, these systems are at the center of the hiring process and employment decisions.[2] Yet, behind this groundbreaking opportunity lies a troubling reality: the inherent biases from the creators of these systems are being transferred to the data, an integral component of AI decision-making tools.[3] This transference is not merely a mechanical flaw; it raises significant legal and ethical concerns, particularly within the framework of Title VII of the Civil Rights Act of 1964 ("Title VII"),[4] which prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin."[5] Similarly, it triggers protections under the Age Discrimination in Employment Act ("ADEA"),[6] which prohibits age discrimination in any aspect of employment,[7] and the Americans with Disabilities Act ("ADA"),[8] which prohibits disability discrimination.[9]

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1. James Manyika, Jake Silberg & Brittany Presten, *What Do We Do About the Biases in AI?*, HARV. BUS. REV. (Oct. 25, 2019), https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-ai [https://perma.cc/J97K-46WS]. When long-established, biased selection tools are combined with emerging AI technologies, it amplifies existing social inequities by reinforcing the bigotry present in historical data. *See* Olga Akselrod, *How Artificial Intelligence Can Deepen Racial and Economic Inequities*, ACLU (July 13, 2021), https://www.aclu.org/news/privacy-technology/how-artificial-intelligence-can-deepen-racial-and-economic-inequities [https://perma.cc/TFV8-R7SY]; *see also* Cole Stryker & Eda Kavlakoglu, *What Is Artificial Intelligence (AI)?*, IBM (Aug. 9, 2024), https://www.ibm.com/topics/artificial-intelligence [https://perma.cc/3ENA-UP4D] (cautioning that "[i]f organizations don't prioritize safety and ethics when developing and deploying AI systems, they risk committing privacy violations and producing biased outcomes").

2. *See* Elham Albaroudi, Taha Mansouri & Ali Alameer, *A Comprehensive Review of AI Techniques for Addressing Algorithmic Bias in Job Hiring*, 5 AI 383, 390–93 (2024); Lori Andrews & Hannah Bucher, *Automating Discrimination: AI Hiring Practices and Gender Inequality*, 44 CARDOZO L. REV. 145, 148 (2022).

3. *See* Manyika et al., *supra* note 1; Akselrod, *supra* note 1.

4. 42 U.S.C. §§ 2000e-2000e17.

5. 42 U.S.C. § 2000e-2(a)(1)–(2).

6. 29 U.S.C. § 623.

7. 29 U.S.C. § 623(a)(1)–(3).

8. 42 U.S.C. § 12101.

9. 42 U.S.C. § 12112(a). While the actions of AI algorithms trigger protection and liability under the ADA, this Note will primarily discuss Title VII. *See id.*

The rise of AI-driven decision-making tools presents a novel challenge to traditional legal theories of liability. While Title VII provides robust protections against discrimination with respect to human beings, its application in the context of AI remains largely in flux.[10] Can an AI tool itself be considered discriminatory? If an employer relies on a biased AI system, who should bear responsibility—the employer, the creators of the technology, or the AI system itself? Currently, the law is unsettled. While employers are held liable for any adverse impact resulting from AI decision-making tools purchased or administered by third-party vendors, the third-party vendor remains "immune" from liability.[11] According to AI third-party vendors, these entities are not agents under Title VII but instead independent contractors.[12] In this view, no liability exists because Title VII's antidiscrimination laws do not regulate independent contractors who may provide services for an employer similar to those offered by undisputed employees.[13] However, this Note argues that AI third-party vendors should not be classified as independent contractors but as "agents of an employer,"

10. *See* Keith E. Sonderling, Bradford J. Kelley & Lance Casimir, *The Promise and The Peril: Artificial Intelligence and Employment Discrimination*, 77 U. MIA. L. REV. 1, 37 (2022) ("Legislation is particularly challenging because AI develops rapidly and can be instantly scaled across industries. . . . [E]fforts to develop a harmonized regulatory framework for AI are still in the early stages on the federal, state, and international levels."). There is currently no comprehensive federal legislation or regulation in the United States that regulates the development of AI or specifically restricts their use. Nick Reem & John Oltean, *AI Watch: Global Regulatory Tracker – United States*, WHITE & CASE (July 21, 2025), http://whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker-united-states#article-content [https://perma.cc/75US-W7MZ]. Some proposals include the SAFE Innovation Framework, a bipartisan set of guidelines, and the AI Research Innovation and Accountability Act, which calls for greater transparency and security in establishing a framework for AI usage. *See* CHUCK SCHUMER, SCHUMER'S SAFE INNOVATION FRAMEWORK 1 (2023), https://www.democrats.senate.gov/imo/media/doc/schumer_ai_framework.pdf [https://perma.cc/UZ86-3VP6]; Artificial Intelligence Research, Innovation, and Accountability Act of 2024, S. 3312, 118th Cong. (2024) (died in chambers).

11. *See* Sonderling et al., *supra* note 10, at 16; *see also* Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J.L. & TECH. 889, 907 (2018) [hereinafter Bathaee, *Artifical Intelligence Black Box*] ("Because we cannot look to the program's instructions or design to determine the intent of its creator or user, intent tests become impossible to satisfy.").

12. *See* 42 U.S.C. § 2000e(f) ("The term 'employee' means an individual employed by an employer.").

13. *See id*.

making them subject to Title VII's provisions.[14] Notably, there is a growing split among U.S. district and appellate courts regarding the interpretation of the word *agent*. Some courts maintain that third-party entities are not agents under Title VII because in the employment context, the term is traditionally associated with principles of *respondeat superior*, and those principles do not cover independent entities.[15] Others, however, interpret the term agent to include independent entities, therefore recognizing a basis for liability.[16]

Among the latter, *Mobley v. Workday*[17] has garnered the most attention. Here, the United States District Court for the Northern District of California interpreted *agent* to establish independent liability for AI third-party vendors, unlocking a significant expansion of legal liability.[18] Plaintiff Derek Mobley ("Mobley") alleged that Workday, Inc. ("Workday"), a Human Capital Management platform, discriminated against him and other similarly situated applicants through its algorithmic decision-making tools.[19] Specifically, Mobley claimed that Workday violated Title VII and other federal antidiscrimination laws by wrongfully eliminating him from the applicant pool based on

14. *See* 42 U.S.C. § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and *any agent of such a person*.") (emphasis added); *see also* Yavar Bathaee, *Artificial Intelligence Opinion Liability*, 35 BERKELEY TECH. L.J. 113, 154 (2020) [hereinafter Bathaee, *Artificial Intelligence Opinion Liability*] ("Just as one would assign a high degree of autonomy to a trusted agent, the user or creator of AI may defer to [a] powerful and accurate AI.").

15. *See generally* McKee v. Brimmer, 39 F.3d 94, 96 (5th Cir. 1994) ("Generally, an employer is liable for negligent acts of its employee done in the course and scope of his employment under the doctrine of *respondeat superior*, but an employer is not liable for the negligence of an independent contractor."). The doctrine of *respondeat superior*, a form of vicarious liability, permits employers to be held strictly liable for the torts of their agents under certain circumstances. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (A.L.I. 2006).

16. *See, e.g.*, Williams v. City of Montgomery, 742 F.2d 586, 589 (11th Cir. 1984) (holding that an independent entity may be liable as an agent where the employer delegates "functions [that] are traditionally exercised by an employer").

17. Mobley v. Workday, Inc., 740 F. Supp. 3d 796 (N.D. Cal. 2024).

18. *Id.* at 807 ("Drawing an artificial distinction between software decisionmakers and human decisionmakers would potentially gut anti-discrimination laws in the modern era.").

19. *Id.* at 802 (describing how Workday "provides its customers with a platform on the customer's website to collect, process, and screen job applications" and "reduce[s] time to hire by automatically dispositioning or moving candidates forward in the recruiting process").

his protected characteristics—race, age, and disability.[20] Since Workday's clients delegate traditional hiring functions to Workday and allow it to participate in the hiring process, the court allowed claims that Workday acted as an *agent* of the employer, therefore establishing independent liability that would not have been applicable otherwise.[21]

This Note argues that the *Mobley* court's approach is correct, but for a reason other commentators have yet to articulate—Congress could not have intended for an online entity like Workday to escape liability entirely for discrimination otherwise prohibited offline under Title VII. In fact, Congress addressed a similar legal question with respect to another congressional statute, Section 230 of the Communications Decency Act ("§ 230").[22] Section 230 grants "safe harbor" (also later referred to as "immunity") to online service providers who publish harmful content that others—the users of the online service—create.[23] Congress wanted to encourage online providers to act as "Good Samaritans," and police harmful material posted online without the concern of liability.[24] However, Congress created a limitation to this provision. If the online service provider participated in the harmful speech, it lost the protection of Section 230.[25]

Just as Congress did not intend for Section 230 to provide absolute immunity for online platforms engaging in unlawful activity, it similarly did not intend for online third-party vendors like Workday to be shielded from discrimination claims that would be actionable in offline settings.[26] Therefore, district and appellate courts applying a *respondeat superior* analysis to

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20. *Id.* at 803.

21. *Id.* at 806.

22. 47 U.S.C. § 230(c)(1).

23. *Id.* § 230(c)(2).

24. *Id.* § 230(c).

25. *See* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008); *see also* discussion *infra* Section IV (examining *Mobley* as background for courts recognizing Title VII applying to third-party vendors).

26. *See Roommates.com*, 521 F.3d at 1163 ("In passing [§ 230], Congress sought to . . . immunize the *removal* of user-generated content, not the *creation* of content.").

the agent provision in Title VII are incorrect because such principles do not apply here, as this legal question concerns the interpretation of a congressional act. Thus, this Note urges other courts to adopt Mobley's interpretation of Title VII's scheme of agent liability. The *agent* prescription of Title VII should be interpreted broadly to remedy the discrimination that is at the heart of the statute—i.e., providing a remedy to plaintiffs who have been subjected to discriminatory practices in the workplace.[27] If courts continue to interpret *agent* narrowly, third-party vendors that create algorithmic decision-making tools will not be liable and have no incentive to end discriminatory conduct.

Part I examines the historical background of Title VII and its protections under the federal statute. Part II discusses the consequences of using discriminatory decision-making tools in hiring processes. Part III explores the incomplete framework of third-party liability. Part IV provides an overview of the factual background and procedural posture of *Mobley v. Workday*. Part V suggests that Congress could not have intended to allow third-party vendors to evade liability by handing off the responsibility to employers alone. Therefore, district and appellate courts should interpret *agent* as establishing independent liability for third-party vendors. If confusion across district and appellate courts persists, Congress should amend Title VII to clarify the term *agent* and define its applicability. Alternatively, the United States Equal Employment Opportunity Commission ("EEOC") should release guidelines on a new structure of liability.[28] As AI continues to transform the future of employment,

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27. Mobley v. Workday, Inc., 740 F. Supp. 3d 796, 806 (N.D. Cal. 2024). This includes liability for an employer and an *agent* of the employer. This construction is consistent with legislative history and the plain text of the statute. *Id.*

28. "The EEOC provides leadership and guidance to federal agencies on all aspects of the federal government's equal employment opportunity program. EEOC assures federal agency and department compliance with EEOC regulations, provides technical assistance to federal agencies concerning EEO complaint adjudication, monitors and evaluates federal agencies' affirmative employment programs, develops and distributes federal sector educational materials and conducts training for stakeholders, provides guidance and assistance to our Administrative Judges who conduct hearings on EEO complaints, and adjudicates appeals from administrative decisions made by federal agencies on EEO complaints." *Overview*, EEOC,

the legal framework must evolve to safeguard aggrieved plaintiffs against algorithmic discrimination.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

This Part will examine the historical background of Title VII and the socio-political urgency that led to its enactment in 1964. Additionally, it will explore the legal protections afforded to plaintiffs when wrongdoers violate its provisions.

A. Legislative History of Title VII

Race discrimination in employment practices is deeply rooted in the institution of slavery.[29] Beyond the profound impact of slavery on employers and lawmakers, the most significant effect of this phenomenon has been the limited professions traditionally accessible to African Americans.[30] In the days of slavery, free and enslaved African Americans alike were almost entirely confined to agricultural work and domestic service.[31] Despite the enactment of the Thirteenth Amendment formally ending slavery in 1865, inherent doubts, prejudices, and hatreds remained, and African Americans found themselves, to a great degree, as members of an economic underclass.[32]

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https://www.eeoc.gov/overview [https://perma.cc/AN4Q-NXHY] (last visited Mar. 9, 2026). At the time of publication, the author recognizes the uncertainty of federal employment discrimination guidance under the second Trump administration; nevertheless, the EEOC remains the preeminent authority on issues of workplace discrimination and continues to serve as the best source of expert guidance in this evolving legal landscape. *See* Brief of the EEOC as Amicus Curiae in Support of Plaintiff and in Opposition to Defendant's Motion to Dismiss at 1, Mobley v. Workday, Inc., 740 F. Supp. 3d 796 (N.D. Cal. 2024) (No. 3:23-cv-00770-RFL).

29. DANYELLE SOLOMON, CONNOR MAXWELL & ABRIL CASTRO, SYSTEMATIC INEQUALITY AND ECONOMIC OPPORTUNITY 3 (2019), https://www.americanprogress.org/wp-content/uploads/sites/2/2019/08/StructuralRacismEconOpp-report.pdf [https://perma.cc/CJZ7-RR4C].

30. *Id.*; Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 100 (2011).

31. Perea, *supra* note 30, at 100.

32. *Id.* at 101 ("The formal abolition of slavery in the Constitution made little difference. One writer described the situation in 1936: 'Slavery was too integral a part of the social life of the South and too vital to the interests of certain classes to be suddenly eliminated by a mere constitutional amendment.'").

The Thirteenth Amendment may have abolished the practice of slavery,[33] but it did not otherwise address the fundamental rights of African Americans. To remedy this shortcoming, Congress enacted the Civil Rights Act of 1866 ("1866 Act"), which declared that all persons of every race and color were United States citizens, and shall have the same rights and benefits of the law previously enjoyed only by white citizens.[34] In 1868, the Fourteenth Amendment emerged with Due Process and Equal Protection provisions, erasing several questions about the constitutionality of the 1866 Act.[35] Despite these new legal protections, for the next hundred years, they were useless as tools against employment discrimination.[36]

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33. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

34. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981–1982, 1988–1989). After the ratification of the Thirteenth Amendment, Lyman Trumbull, the Senator from Illinois, introduced the first federal civil rights bill. Trumbull argued that the "'abstract truths and principles' of the Thirteenth Amendment meant nothing 'unless the persons who are to be affected . . . have some means of availing themselves of their benefits.'" *Civil Rights Act of 1866, "An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication"*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/civil-rights-act-of-1866-april-9-1866-an-act-to-protect-all-persons-in-the-united-states-in-their-civil-rights-and-furnish-the-means-of-their-vindication [https://perma.cc/3VZA-UMDE] (last visited Mar. 18, 2026). President Andrew Johnson attempted to veto the bill; however, Congress swiftly overrode his efforts on April 9, 1866. *Id.* The Civil Rights Act of 1866 emerged and became "the template for the Fourteenth Amendment." *Id.*

35. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see also Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/senate-and-constitution/14th-amendment.htm [https://perma.cc/3MNE-TSJE] (last visited Mar. 9, 2026) ("Passed by the Senate on June 8, 1866, and ratified two years later, on July 9, 1868, the Fourteenth Amendment granted citizenship to all persons 'born or naturalized in the United States,' including formerly enslaved people, and provided all citizens with 'equal protection under the laws,' extending the provisions of the Bill of Rights to the states.").

36. SAMUEL A. ESTREICHER, MICHAEL C. HARPER & ZACHARY D. FASMAN, EMPLOYMENT DISCRIMINATION: THE FIELD AS PRACTICED 41 (6th ed. 2022) ("[I]t was not until the [Supreme] Court's 1954 decision in *Brown v. Board of Education*, and the ensuring decade of resistance to integration and the emergence of a national civil rights movement, that federal involvement began in earnest.") (citation omitted).

In the early 1960s, the federal government attempted to confront the longstanding patterns of employment discrimination.[37] Most notably, Title VII broke new ground by imposing an enforceable ban on discrimination by private employers on the basis of "race, color, religion, sex, or national origin."[38] This landmark legislation sought to promote the economic integration of African Americans and attack the lasting legacy of slavery.[39] By 1972, Title VII's scope significantly broadened to "cover[] not only all private employers affecting interstate commerce with fifteen or more employees, but also all governmental employers—federal, state and local—as well."[40] Under this legal protection, an employer is prohibited from taking discriminatory actions against an employee or applicant in every aspect of employment.[41] If an employee has reason to believe that their employer has engaged in discriminatory practices in violation of Title VII, there are several legal claims they can pursue, including disparate treatment and disparate impact.[42]

B. *Protections Under Title VII*

To engage in unlawful disparate treatment or intentional discrimination, an employer must intentionally exclude applicants from an employment opportunity based on a protected characteristic.[43] Disparate treatment claims under Title VII originated in *McDonnell Douglas Corporation v. Green*, where the

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37. *Id.*

38. 42 U.S.C. § 2000e-2(a)(1). *See generally Prohibited Employment Policies/Practices*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/prohibited-employment-policiespractices [https://perma.cc/7F2N-CBQ5] (last visited Mar. 18, 2026) (listing classes protected by Title VII). Sex discrimination now includes gender identity, sexual orientation, and pregnancy. *Id.*

39. ESTREICHER ET AL., *supra* note 36, at 42.

40. *Id.*

41. This includes but is not limited to pre-employment inquiries and recruitment, denial of hiring, demotion or denial of promotion, pay and benefits, or any other employment actions based on race, color, religion, sex, or national origin. *See Prohibited Employment Policies/Practices*, *supra* note 38.

42. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1988-13, THEORIES OF DISCRIMINATION § 604.1 (1988).

43. 42 U.S.C. § 2000e-2(a); *see* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 42, at § 604.1.

United States Supreme Court first articulated its burden-shifting framework.[44] To succeed on a claim of disparate treatment, the plaintiff must first establish

> (i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[45]

Once the plaintiff pleads the prima facie case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[46] Then, the plaintiff may establish that the employer's stated reason is merely a pretext for discrimination.[47]

As it concerns artificial intelligence, disparate treatment claims arise "when automated systems 'learn' from biased training data to recognize and discriminate against protected characteristics without being explicitly programmed to do so."[48] The platform is only as reliable as the one that programs the system.[49] Scholars caution that "[a]ddressing algorithmic bias can present a 'whack-a-mole' problem, where the new algorithm—re-engineered to have [a] less negative impact on

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44. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

45. *Id.* at 802. "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

46. *Id.* at 802.

47. *Id.* at 804; *see, e.g.*, Haynes v. Waste Connections, Inc., 922 F.3d 219, 225 (4th Cir. 2019) (citing EEOC v. Sears Roebuck & Co., 243 F.3d 846, 852–53 (4th Cir. 2001)) ("In order to show pretext, a plaintiff may show that an employer's proffered nondiscriminatory reasons for the termination are inconsistent over time, false, or based on mistakes of fact."); Harding v. CareerBuilder, LLC, 168 Fed. App'x 535, 538 (3d Cir. 2006) (quoting Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1067 (3d Cir.1996) (en banc)) ("[A] plaintiff may survive summary judgment . . . if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action.") (alterations in original).

48. Sonderling et al., *supra* note 10, at 23.

49. *See id.* at 22.

members of one protected group—now has an increased adverse impact on another protected group."[50] For instance, if an AI tool analyzes resumes from previously selected candidates, it may simply learn and replicate past discriminatory preferences.[51] State legislatures and regulators have risen to meet these challenges.[52]

However, given the complex structure of an algorithmic program, it is difficult to determine which inputs are being used as decoys to target protected characteristics.[53] Given this shortcoming, it would likely be difficult to prove intentional discrimination.[54] Thus, a disparate impact claim is the best venue for plaintiffs to bring an employment discrimination action. A disparate impact policy or rule seems neutral on its face, but has an adverse impact on a member of a protected class.[55] Under

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50. *Id.*; *see also* Allan G. King & Marko Mrkonich, *"Big Data" and the Risk of Employment Discrimination*, 68 OKLA. L. REV. 555, 580 (2016) (providing an example of the "whack-a-mole" problem).

51. King & Mrkonich, *supra* note 50, at 580. Compounding these challenges, legal commenters highlight that there is a significant lack of awareness among job seekers about the use of these tools in the hiring process, as well as their functionality and potential for discriminatory implications. *See* NYC CONSUMER & WORKER PROT., AUTOMATED EMPLOYMENT DECISION TOOLS: FREQUENTLY ASKED QUESTIONS 2 (2023), https://www.nyc.gov/assets/dca/downloads/pdf/about/DCWP-AEDT-FAQ.pdf [https://perma.cc/GZ4M-9TDP]. This lack of transparency can leave applicants vulnerable and unable to seek accommodations where necessary. *See id.* (enforcing N.Y.C., N.Y. INT. NO. 1894-2020(A) (Dec. 11, 2021) in New York, which requires employers and employment agencies to audit their AI tools and provide applicants with notice).

52. *See generally* Alex Katz, *AI and Antidiscrimination: The Evolving Legal Landscape*, BENDER'S LAB. & EMP. BULL., Aug. 2025. *See, e.g.*, MD. CONST. art. II, § 17(c), c. 446 (amended 2020) (enacting a law in Maryland that requires employers to seek written consent from potential employees when using AI facial recognition services during the interview process); H.R. 3773, 103d Gen. Assemb. (Ill. 2024) (prohibiting the use of predictive data analytics in "recruiting, hiring, promotion, renewal of employment, selection for training"); S. 24-205, 75th Gen. Assemb., 2d Reg. Sess. (Colo. 2024); CAL. CODE REGS. tit. 2, §§ 11008–11008.1 (2026) (implementing California's new regulation on automated decision-making systems).

53. McKenzie Raub, *Bots, Bias and Big Data: Artificial Intelligence, Algorithmic Bias and Disparate Impact Liability in Hiring Practices*, 71 ARK. L. REV. 529, 550 (2018) ("[G]iven the complex nature of data mining and algorithmic construction, it is difficult to even determine which characteristics are being legitimately targeted as job related, and which ones are being used as proxies for protected characteristics.").

54. *See* Bathaee, *Artifical Intelligence Black Box*, *supra* note 11, at 920–21 and accompanying text.

55. *See* 42 U.S.C. § 2000e-2(k) (setting out the burden of proof in disparate impact cases under Title VII); Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971) ("The Act proscribes not

this framework, "[a plaintiff] may prove discrimination without proving intent to discriminate if an employment policy or practice disproportionately affects a protected group."[56] Once a plaintiff proves that the policy has a discriminatory effect on a protected class, the employer must show that the practice is job-related and necessary to perform the duties required.[57] The Supreme Court has scrutinized employment practices for biases, particularly with respect to seemingly neutral intelligence tests in hiring.[58] For example, the Court's decision in *Griggs v. Duke Power Company* fundamentally reshaped how companies approach their testing mechanisms by holding that a selection tool will not have "controlling force" unless it is a "reasonable measure of job performance."[59] In this regard, algorithmic tools used in hiring may face similar scrutiny, especially if they result in disproportionate outcomes for members of a protected class.

If an employer is outsourcing their employment decisions by utilizing an AI algorithm, they take on substantial risk for potential disparate impact claims.[60] An algorithm analyzing a large quantity of data "might identify a statistical correlation between a specific characteristic of a job applicant and future job success," even though no causal relationship exists.[61] Given

only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

56. Sonderling et al., *supra* note 10, at 23.

57. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting *Griggs*, 401 U.S. 432) (emphasizing the employer's burden is to demonstrate that a practice has "a manifest relationship to the employment in question"); Washington v. Davis, 426 U.S. 229, 233–35 (1976) (finding no Title VII violation where a police department's written test disproportionately excluded Black applicants because the test measured verbal ability important for the job). *See generally* § 2000e-2(k)(1)(A) (explaining that the plaintiff may establish disparate impact if the employer "fails to demonstrate that the challenged practice is job related for the position"); 29 C.F.R. § 1607 (codifying the Uniform Guidelines on Employee Selection Procedures).

58. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (holding that a statute that is neutral on its face cannot be applied so as to violate the protected traits under Title VII); Dothard v. Rawlinson, 433 U.S. 321, 331 (1971) (finding a height and weight requirement had a disparate impact on women and was not shown to be job related).

59. *Griggs*, 401 U.S. at 431, 436 ("The touchstone is business necessity. If an employment practice which operates to exclude [protected classes] cannot be shown to be related to job performance, the practice is prohibited.").

60. Sonderling et al., *supra* note 10, at 24.

61. *Id.*; *see* Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 874–75 (2017) (discussing how statistical correlations may be "entirely coincidental").

this, plaintiffs may introduce statistical evidence such as "[b]iased data labeling and poor selection of target variables" to support their disparate impact claim.[62] In addition, employees and applicants may find it easier to raise class action discrimination claims if the employer applies the same algorithm to evaluate all candidates.[63]

To illustrate, in the 1980s, St. George's Hospital Medical School designed a computer software to streamline their application and interview process.[64] A primary goal of the admissions team included "eliminat[ing] any inconsistencies" wherever possible.[65] Interestingly, instead of introducing new biases, the program merely reflected existing biases already embedded in the data.[66] For example, although the admissions form did not directly elicit information on racial demographics, the program inferred it based on an applicant's surname.[67] As a result, women and those from racial ethnic groups were less likely to be selected for interviews, despite their academic qualifications.[68] In fact, as many as sixty applicants out of two thousand did not receive a callback interview solely on the basis of their race or sex.[69] The Commission for Racial Equality[70] found St. George's Hospital Medical School guilty of engaging in racial

62. Raub, *supra* note 53, at 547.

63. Sonderling et al., *supra* note 10, at 24 (explaining that an algorithm applied across a group may provide the common questions of law or fact necessary to certify a class under FED. R. CIV. P. 23(a)(2)). For an example of class action discrimination claims, see Liu v. Uber Tech., Inc., 551 F. Supp. 3d 988, 990 (N.D. Cal 2021). *See also infra* Section III.A (discussing third-party liability in Title VII discrimination classes).

64. Stella Lowry & Gordon Macpherson, *A Blot on the Profession*, 296 BRIT. MED. J. 657, 657 (1988).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. "The Commission for Racial Equality (CRE) was a non-departmental public body in the United Kingdom which aimed to address racial discrimination and promote racial equality. The Commission was replaced by the Equality and Human Rights Commission." *Commission for Racial Equality*, GOV.UK, https://www.gov.uk/government/organisations/commission-for-racial-equality [https://perma.cc/3XVS-6C3F] (last visited Mar. 19, 2026).

and sexual discrimination in its admission policy.[71] Most of the administrative staff were not privy to the program's contents, while those who were did not report the biases they found.[72] This example illustrates how even well-intentioned algorithms, when poorly designed or implemented, can perpetuate discriminatory outcomes.[73]

II. DISCRIMINATORY DECISION-MAKING TOOLS

Despite considerable advancements in the employment sector to provide more equitable opportunities for job seekers, racial differences in employment continue to be one of the most persistent types of economic inequality.[74] Compared to their white counterparts, African Americans are "twice as likely to be unemployed and earn nearly 25 percent less when they are employed."[75] In 2004, the National Bureau of Economic Research conducted a field study to examine whether employers discriminate by race.[76] In this experiment, researchers sent resumes in response to job openings in Chicago and Boston newspapers to measure the number of callbacks each resume received for an interview.[77] To manipulate the perception of race, the researchers randomly assigned very White-sounding names to half of the resumes and very African American names to the other half.[78] In connection with this, they also varied the quality of the resumes to analyze how credentials affected discrimination.[79]

71. UNIV. OF MANCH., MEDICAL SCHOOL ADMISSIONS: REPORT OF A FORMAL INVESTIGATION INTO ST. GEORGE'S HOSPITAL MEDICAL SCHOOL 8–9 (1988), https://www.jstor.org/stable/pdf/community.28327674.pdf [https://perma.cc/R936-Y8CU].

72. Lowry & Macpherson, *supra* note 64, at 657.

73. This is not the only example. *See, e.g.*, Settlement, EEOC v. iTutorGroup, Inc., JVR No. 2310200016, 2023 WL 6998296 (E.D.N.Y. 2023) (approving settlement after employer used AI software to discriminate against men above 60 and women above 55).

74. Devah Pager, Bruce Western & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOCIO. REV. 777, 777 (2009).

75. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991 (2004); Pager et al., *supra* note 74, at 777.

76. Bertrand & Mullainathan, *supra* note 75, at 991–92.

77. *Id.* at 991.

78. *Id.* at 992.

79. *Id.*

Their findings were significant. It revealed that African Americans received significantly fewer callbacks than their White counterparts.[80] On average, "[r]esumes with White names have a 9.65 percent chance of receiving a callback" and "[e]quivalent resumes with African American names have a 6.45 percent chance of being called back."[81] This suggests that an African American applicant must apply to fifteen job postings more than a similarly situated White applicant to achieve similar results.[82] The disparities across both cities were even more statistically striking. In Chicago, 49% of White applicants were more likely to receive a callback than African American applicants, whereas in Boston, 50% more likely.[83] Moreover, African Americans with similar high-quality credentials received far fewer callbacks.[84] While African Americans do appear to significantly benefit from high-quality resumes, they benefit much less than their White counterparts. For instance, "[t]he ratio of callback rates for high-versus low- quality resumes [was] 1.60 for African Americans, compared to 1.89 for Whites."[85] By the same token, African Americans did not benefit more than Whites by living in more affluent neighborhoods.[86] These findings suggest that race remains highly salient and influential in employers' evaluations of potential candidates, and no amount of improved credentials can alleviate these barriers—insights that set the stage for a renewed interest in employment discrimination today.[87]

In 2022, Chicago economist Evan Rose, along with Patrick Kline and Christopher Walters, significantly expanded on the

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80. *Id.* at 997–98.

81. *Id.*

82. Bertrand & Mullainathan, *supra* note 75, at 998.

83. *Id.*

84. *Id.* at 992, 1000–01.

85. *Id.*

86. *Id.* at 1003.

87. *See* Pager et al., *supra* note 74, at 781 (conducting a field experiment in the low-wage market of New York City, recruiting white, black, and Latino job applicants who were matched on demographic characteristics and interpersonal skills). Results show that black applicants were "half as likely to receive a callback or job offer" than their white counterparts. *Id.* at 792.

foundational work of Bertrand and Mullainathan.[88] Their comprehensive study, titled "*Systemic Discrimination Among Large U.S. Employers*," analyzes callback rates from over 83,000 fictitious job applications submitted to "108 of the largest [United States] employers."[89] Unlike traditional audit studies that passively sample job listings from newspapers or job boards,[90] this study actively targeted 108 Fortune 500 companies and applied directly to their online entry-level job vacancies.[91] The findings revealed a striking revelation: a small number of companies are responsible for a disproportionate amount of the discrimination observed in hiring practices.[92] Firms detected as discriminating against African American names are highly concentrated in the auto dealers and services sector, noting 87% of firms in this industry discriminate against African American applicants.[93] Although the legal status of organizations collecting evidence of discrimination through "testing" remains unresolved, an employer who bases the decision to contact a job applicant based on their "perceived race or sex" is "engag[ing] in disparate treatment," thus violating the provisions of Title VII.[94]

Scholars are skeptical of the idea that biases remain at the core of inequitable hiring outcomes.[95] However, the findings

88. *See* Patrick Kline, Evan K. Rose & Christopher R. Walters, *Systemic Discrimination Among Large U.S. Employers*, 137 Q.J. ECON. 1963, 1974 (2022). The experiment aimed to "quantify the extent to which discriminatory patterns differ across firms and assess the feasibility of using experimental evidence to target firms likely to be engaged in discrimination." *Id.* at 1965.

89. *Id.* at 1963.

90. *See e.g.*, Bertrand & Mullainathan, *supra* note 75, at 991 (using newspaper "help-wanted" ads to study race in the labor market).

91. Kline et al., *supra* note 88, at 1965. Each job received four pairs of applications, with one member of each pair assigned a distinctively Black name and the other a distinctively white name. Additionally, signals of sex, age, sexual orientation, gender identity, and political affiliation were randomly varied. In total, over 83,000 job applications were submitted, providing highly precise insights into employer conduct. *Id.*

92. *Id.* at 1964. To preserve anonymity, firm names are suppressed. Table IX lists industry, federal contractor status, and contact gap estimates. *Id.* at 2018. Table X covers a wide array of industries. *Id.* at 2019–20.

93. *Id.* at 2017, 2019–21.

94. *Id.* at 1970; 42 U.S.C. § 2000e-2(a).

95. Jay H. Hardy, Kian Siong Tey, Wilson Cyrus-Lai, Richard F. Martell, Andy Olstad & Eric Luis Uhlmann, *Bias in Context: Small Biases in Hiring Evaluations Have Big Consequences*, 48 J. MGMT. 657, 657 (2021).

from recent studies indicate that systemic hiring bias remains a real issue, largely unchanged since Bertrand and Mullainathan's 2004 study.[96] Even seemingly objective hiring practices may, knowingly or unknowingly, disseminate existing racial disparities, much like the computer software implemented by St. George's Hospital Medical School.[97] Similarly, Workday's algorithms, which, despite their goal of impartiality and fairness, reinforce pre-existing racial biases.[98] Instead of addressing racial biases in their hiring processes, employers are systematically reinforcing them: whether that is through resume screenings, name recognition, or even subtle cues of an applicant's neighborhood.[99] The unconscious bias infiltrating hiring practices is not merely a product of individual decision-making but is deeply entrenched into how employers filter candidates, regardless of whether humans or machines made the decision. And it is being heightened through artificial intelligence created by third-party vendors.

Employers often rely on a third-party vendor's AI-powered algorithm to assist with hiring decisions.[100] Essentially, these vendors design these AI systems and place them in the

96. *See, e.g.*, *id.* (conducting a study that found residual amounts of subgroup bias can undercut the potency of otherwise successful recruitment efforts); AKSHAJ KUMAR VELDANDA, FABIAN GROB, SHAILJA THAKUR, HAMMOND PEARCE, BENJAMIN TAN, RAMESH KARRI & SIDDARTH GARG, ARE EMILY AND GREG STILL MORE EMPLOYABLE THAN LAKISHA AND JAMAL? INVESTIGATING ALGORITHMIC HIRING BIAS IN THE ERA OF CHATGPT 10 (2023), https://arxiv.org/pdf/2310.05135 [https://perma.cc/9RCM-HETK] (revisiting the findings of Bertrand & Mullainathan's 2004 study and indicating that racial biases in employment decisions persist, even with the advent of advanced hiring algorithms).

97. *See e.g.*, Dominique Meurs & Patrick A. Puhani, *Culture as a Hiring Criterion: Systemic Discrimination in a Procedurally Fair Hiring Process*, 87 LAB. ECON., Apr. 2024, at 1–2 (finding using "culture" as a criterion in hiring decisions can lead to systemic discrimination, even within processes designed to be procedurally fair); Lincoln Quillian, Devah Pager, Arnfinn H. Midtbøen & Ole Hexel, *Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years*, HARV. BUS. REV. (Oct. 11, 2017), https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years [https://perma.cc/6EZK-75VF] (finding that conscious or unconscious bias still impacts hiring decisions even though "overtly prejudicial beliefs" have declined over the years).

98. *See* Mobley v. Workday, Inc., 740 F. Supp. 3d 796, 811–12 (N.D. Cal. 2024).

99. *See, e.g.*, Katz, *supra* note 52 (discussing H.R. 3773, 103d Gen. Assemb. (Ill. 2024)).

100. Hilke Schellmann, *Podcast: Beating the AI Hiring Machines*, MIT TECH. REV. (Aug. 4, 2021), https://www.technologyreview.com/2021/08/04/1030513/podcast-beating-the-ai-hiring-machines/ [https://perma.cc/7H4E-BL4Z].

market.[101] In this context, the rationale is that the creators of AI may not be able to anticipate all the problematic issues that could arise from the use of their technology or identify every necessary constraint to prevent discrimination. Therefore, proving liability on the part of vendors is rather difficult.[102]

Consequently, today's use of artificial intelligence tools heightens the risk of unintentional bias when algorithms are applied uniformly across a large candidate pool, making disparate impact more likely without explicit discriminatory intent.[103] Agencies such as the EEOC have provided substantial guidance on the use of AI in employment decisions, emphasizing that if an AI tool has an adverse impact on individuals of a particular race or with other protected characteristics, its use will violate Title VII.[104] In the same tone, it emphasizes that the employer

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101. Kennynn Malone, *How DeepSeek Changed the Market's Mind*, NPR (Jan. 31, 2025, at 22:08 ET), https://www.npr.org/transcripts/1215793948 [https://perma.cc/CL6K-SZ39] ("I've heard people talk about this moment as a shift towards AI models as a commodity. And that is a completely different vision than what markets seemed to be betting on before this week. Like, seemingly overnight, we went from an imagined future where a handful of gigantic American companies controlled the most powerful AI models to a future where it seems very powerful AI models can be built and used by maybe anyone anywhere, someday.").

102. *See* Bathaee, *Artificial Intelligence Opinion Liability*, *supra* note 14, at 148–49 (explaining that AI which discriminates because of biases in the data used to train it will likely not result in liability for the company that created the AI, mainly because there is no evidence of the intent element necessary for recklessness or gross negligence).

103. *See supra* note 52 and accompanying text. One key application of AI in hiring is to help employers narrow the candidate pool to a more manageable and qualified number. Kenneth Coats, *How Businesses Can Leverage AI to Optimize the Hiring Process*, FORBES (Sep. 4, 2024, at 09:45 ET), https://www.forbes.com/councils/forbestechcouncil/2024/09/04/how-businesses-can-leverage-ai-to-optimize-the-hiring-process/ [https://perma.cc/6XJK-59Z7]. AI models can be designed to filter out applications that don't meet specific criteria, allowing human resource teams to refine their search. *Id.* This specificity enables human resource teams to pass through candidates who may not fit certain qualifications but meet others. *See id.*

104. The guidance, issued during the term of former president Joseph R. Biden, has since been removed from public-facing websites. Eric J. Felsberg & Joseph J. Lazzarotti, *We Get AI for Work: Unpacking the Federal Deregulation of AI*, JACKSON LEWIS (Mar. 18, 2025), https://www.jacksonlewis.com/insights/we-get-ai-work-unpacking-federal-deregulation-ai [https://perma.cc/2ND6-4Z32]. Title VII entrusted the EEOC to investigate complaints by or on behalf of persons claiming to be aggrieved by a violation of the Act. 42 U.S.C. § 2000e-5(b). If the EEOC determines that the complaint is well-founded, the agency has the authority to remedy the problem through informal conciliation with the party charged. *Id.* If it cannot do so satisfactorily, the agency can bring a court action against that party, as it does not have the authority to adjudicate cases or issue enforcement orders on its own. § 2000e-5(f)(1). In addition, aggrieved individuals have a private right of action under the Act. *Id.* Injured plaintiffs may seek limited legal damages, as well as equitable relief, to compensate for the intentional

will always remain liable for discriminatory employment practices.[105] As a part of their Artificial Intelligence and Algorithmic Fairness Initiative in 2023, the EEOC issued guidance on potential uses of AI which could trigger employer liability, providing examples of AI tools that are commonly used in employment decisions:[106]

> [r]esume scanners that prioritize applications using certain keywords;
>
> employee monitoring software that rates employees on the basis of their keystrokes or other factors;
>
> "virtual assistants" or "chatbots" that ask job candidates about their qualifications and reject those who do not meet predefined requirements;
>
> video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and
>
> testing software that provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived "cultural fit" based on their performance on a game or on a more traditional test.[107]

However, nowhere in these guidelines does it suggest that third-party vendors will be held liable for Title VII discrimination violations. Instead, it emphasizes that employers bear the responsibility for any adverse impact resulting from AI tools

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discrimination. § 2000e-5(g). However, complainants cannot exercise their Title VII right of action until they first give the EEOC an opportunity to reconcile and/or to bring its own public suit. *See* § 2000e-5(f)(1).

105. *See* § 2000e-2(a).

106. *See generally* Jim Paretti, Marko Mrkonich & Niloy Ray, *EEOC Issues Guidance on Use of Artificial Intelligence Tools in Employment Selection Procedures Under Title VII*, LITTLER (May 18, 2023), https://www.littler.com/news-analysis/asap/eeoc-issues-guidance-use-artificial-intelligence-tools-employment-selection [https://perma.cc/C5MR-EYR9] (providing an explanation of the guidelines); Felsberg & Lazzarotti, *supra* note 104.

107. Paretti et al., *supra* note 106.

purchased or administered by third-party AI vendors.[108] It's worth questioning—if a third-party vendor engages in the same discriminatory practices that, when done by a traditional employer, trigger a violation of a federal statute, why should they be allowed to evade liability?

III. THE INCOMPLETE FRAMEWORK OF THIRD-PARTY LIABILITY

This Part will explore the incomplete framework of third-party liability. The first framework, most commonly asserted by third-party vendors, claims that since Title VII does not extend to the conduct of independent contractors, liability is barred.[109] In this view, the employer remains solely responsible for any employment discrimination.[110] The second framework suggests that even if a third-party vendor were considered an agent, liability would still not attach, as the doctrine of *respondeat superior* holds only the employer liable for the actions of its agents.[111]

A. Structural Loopholes: The Legal Fiction of Vendor Independence

The provisions of Title VII are primarily limited to employees and employers, enforcing obligations solely on employers.[112] In light of this, AI third-party vendors argue they should be regarded as independent contractors—not agents—and their actions should, therefore, fall outside of the parameters of Title VII.[113] Since these terms are not clearly defined in the statute,

108. *See id.*

109. *See* discussion *infra* Section III.A.

110. *See id.*

111. *See* discussion *infra* Section III.B.

112. *See* 42 U.S.C. §§ 2000-e(b),(f), 2000e-2(a)(1)-(2); *see also* ESTREICHER ET AL., *supra* note 36, at 3 ("Most employment statutes cover only employees and impose obligations only on employers.").

113. *See* Defendant Workday, Inc.'s Reply in Support of Its Motion to Dismiss at 5–7, Mobley v. Workday, Inc., 740 F. Supp. 3d 796 (2023) (No. 4:23-cv-00770-YGR) (arguing Workday functions as an independent contractor because it does not operate as a "de-facto employer"). For background on the distinction between an independent contractor and an employee, see Dynamex Operations West, Inc. v. Superior Ct., 416 P.3d 1, 7, 36–40 (2018) (establishing the "ABC

interpretation requires reference to principles like the traditional common law of agency.[114]

The common law of agency serves as an effective mechanism that allows one person (the "principal") to authorize another person (the "agent") to act on his behalf.[115] Three core tenets govern this relationship: mutual assent, benefit or behalf, and control.[116] First, to form an agency relationship, mutual assent from both the principal and the agent is required.[117] The manifestation of consent can be expressed in written or oral statements, or it may be implied from their conduct.[118] Second, the agent must act on the principal's behalf.[119] This requirement is important as it establishes the creation of the relationship from the principal's perspective.[120] It is not enough that the agent simply acts in a way that benefits the principal; the agent must act *primarily* for the benefit of the principal, as this distinction is critical for courts trying to decide whether an agency relationship exists.[121] Finally, the principal must exercise control over the agent.[122] While the principal does not need to exercise physical control over the agent, they must govern how the

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test" to determine work classification, placing the burden on the hiring entity to prove that a worker is an independent contractor).

114. ESTREICHER ET AL., *supra* note 36, at 3 ("These critical terms of coverage are generally not defined in the legislation, requiring resort to background principles, including the common law of agency and employment relations.").

115. *Agency*, BLACK'S LAW DICTIONARY (7th ed. 1999); RESTATEMENT (THIRD) OF AGENCY § 1.01 (A.L.I. 2006). In essence, the principal manifests consent to the agent to "act on [his] behalf and subject to [his] control," and the other consents to do so. *Id.*

116. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (A.L.I. 2006).

117. *Id.* § 1.01 cmt. d.

118. *See id.*

119. *Id.* § 1.01 cmt. c.

120. *Id.*

121. *See* Yost v. Wabash Coll., 3 N.E.3d 509, 519 (Ind. 2014) ("The consent innate to the agency relationship is not merely acquiescence to control, but also the undertaking of some action on behalf of the principal."); *see also* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (A.L.I. 2006) ("The common-law definition [of agency] requires that an agent hold power, a concept that encompasses authority but is broader in scope and connotation."); J. DENNIS HYNES & MARK J. LOEWENSTEIN, AGENCY, PARTNERSHIP, AND THE LLC: THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES: CASES, MATERIALS, PROBLEMS 17 (7th ed. 2007) ("Merely benefitting another by one's conduct does not qualify. It is too far removed in degree.").

122. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (A.L.I. 2006).

agent will accomplish its assigned task.[123] However, if the principal does not have control, the individual or entity is not considered an agent but rather an independent contractor.[124]

For example, suppose an electrician is contracted to install a new light fixture in a home. One can assume the homeowner controls the manner in which the light fixture is positioned, the time and place of service, and the objective of the task. However, absent extrinsic facts, the control element of the agency relationship cannot be established. While the homeowner has some degree of control over the task's objective, the electrician controls how they ultimately install the light fixture. Similarly, the electrician conducts their services primarily for their own benefit, mostly because they set the price for their services and retain the profits of their labor. Although the homeowner benefits from this service, the electrician's primary objective is to complete the job and receive compensation. Thus, one could persuasively argue that the electrician is an independent contractor, a *non-agent*, and the relationship between the homeowner and the electrician is one of service, not agency.[125]

This distinction is critical when determining liability. The United States Court of Appeals for the Seventh Circuit created

123. *Id.*

124. *See* RESTATEMENT (SECOND) OF AGENCY § 2 (A.L.I. 1958) (asserting that an independent contractor is a "person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking").

125. Alfaro-Huitron v. Cervantes Agribusiness, 982 F.3d 1242, 1252 (10th Cir. 2020) (citing RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (A.L.I. 2006) and RESTATEMENT (SECOND) OF AGENCY § 2 cmt. a (A.L.I. 1958)) ("An agent who is not an employee is called an independent contractor, although some independent contractors (perhaps most) are not even agents."). A lawyer hired by a client for representation in a claim may be an independent contractor but also an agent because the lawyer acts on behalf of the client (the principal) and is subject to the client's control. Whereas a company hired to perform a service but which retains complete autonomy in how it does the work, with no obligation to act on behalf of the employer, is considered a nonagent. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (A.L.I. 2006) ("[T]he common term 'independent contractor' is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers."). It is important to note that an independent contractor can be an agent if the independent contractor is acting as a fiduciary for the other. *See* Kemether v. Pa. Interscholastic Athletic Ass'n, 15 F. Supp. 2d 740, 748 (E.D. Pa. 1998).

an "economic reality" test to decide whether someone is an employee or an independent contractor.[126] Several factors include:

> 1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed;
>
> 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> 3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers;
>
> 4) whether the service rendered requires a special skill;
>
> 5) the degree of permanency and duration of the working relationship; [and]
>
> 6) the extent to which the service rendered is an integral part of the alleged employer's business.[127]

In *Nationwide Mutual Insurance Company v. Darden*, the Supreme Court clarified what constitutes an independent contractor using a "right to control" test.[128] Robert Darden ("Darden") sold only Nationwide policies in exchange for commissions on his sales and enrollment in a company retirement plan.[129] However, Nationwide made clear that if Darden ever sold to Nationwide's competitors, he would forfeit his benefits.[130] The agreement also disqualified him if, after ceasing his representation of Nationwide, he ever convinced a policyholder to drop Nationwide's business.[131] When Nationwide parted ways with Darden, he became an independent agent and "sold insurance

126. *See* Sec'y of Lab. v. Lauritzen, 835 F.2d 1529, 1534–35 (7th Cir. 1987).
127. *Id.* at 1535.
128. 503 U.S. 318, 323 (1992).
129. *Id.* at 319–20.
130. *Id.* at 320.
131. *Id.*

policies for several of Nationwide's competitors."[132] The company responded by disqualifying him from receiving the retirement plan benefits pursuant to their agreement.[133] The Court adopted a common law test for determining who qualifies as an employee, considering "'the hiring party's right to control and the manner and means by which the product is accomplished."[134] The Court found that Darden most likely did not qualify as an employee under common law agency principles after balancing the factors.[135]

Similarly, the United States Court of Appeals for the Ninth Circuit found that Royal Administration Services, Inc. ("Royal"), a seller of vehicle service contracts, was not liable for several telephone calls made in violation of the Telephone Consumer Protection Act ("TCPA"), by telemarketers it retained to sell its contracts.[136] Here, the court considered several factors to determine whether Royal had enough authority to control the actions of its agent.[137] Notably, the court concluded that Royal did not have sufficient authority to control the telemarketers because they were an independent business that sold vehicle service contracts to multiple companies.[138] While the court

132. *Id.*

133. *Id.*

134. *Darden*, 503 U.S. at 323–24 ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.") (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989)).

135. *Id.* at 328.

136. Jones v. Royal Admin. Servs., Inc., 887 F.3d 443, 453 (9th Cir. 2018). The Telephone Consumer Protection Act prohibits contact with those on the national do-not-call registry. *Id.* at 448.

137. *Id.* at 450 (considering "1) control exerted by the employer, 2) whether the one employed is engaged in a distinct occupation, 3) whether the work is normally done under the supervision of an employer, 4) the skill required, 5) whether the employer supplies tools and instrumentalities [and the place of work], 6) the length of time employed, 7) whether payment is by time or by the job, 8) whether the work is in the regular business of the employer, 9) the subjective intent of the parties, and 10) whether the employer is or is not in business").

138. *Id.* at 452.

acknowledges that Royal exercised some control over the telemarketers, it was not enough to establish an agency relationship.[139] Royal did not directly supervise the telemarketers or monitor the calls to potential customers, provide the telemarketers with the necessary materials to complete their task (i.e., computers, phones, office space), or pay the telemarketers for the time worked.[140] Because the telemarketers were found to be independent contractors, Royal could not be held liable for any calls made in violation of the TCPA.[141]

The common law of agency came to fruition with a "particular type of agent [in mind]: human beings."[142] Given the lack of emotional intelligence, where does artificial intelligence fit within this framework? While humans, as agents, can make rational judgments on their employer's behalf, AI algorithms cannot do so in the same manner.[143] AI is programmed to operate within the parameters set by its creators.[144] This autonomy undermines the traditional understanding of control central to an agency relationship.[145] Similar to the telemarketers in *Jones*, AI third-party vendors that provide AI decision-making tools are typically independent entities that retain control over their operations.[146] They are not subject to direct supervision or oversight by the employers who utilize their services, which makes it challenging to establish the type of control required under

139. *Id.* at 451. The telemarketers were required to submit weekly reports on sales, collect payments on Royal's behalf, receive Royal's approval for the sales literature used to approach potential customers, update Royal on cancellation requests, and implement measures to protect consumer information. *Id.*

140. Telemarketers were only paid a commission for each sale. *Id.*

141. *Id.* at 453.

142. Noam Kolt, *Governing AI Agents*, 101 NOTRE DAME L. REV. (forthcoming 2026) (manuscript at 30).

143. *See* Bathaee, *Artifical Intelligence Black Box*, *supra* note 11, at 907–21 (highlighting how AI cannot have "intent").

144. *Id.* at 907. For example, an AI securities-trading program may be tasked with the goal of maximizing profit, but how it achieves this end may be entirely unclear to its creators, courts, and regulators. *Id.*

145. *See supra* text accompanying notes 122–24 & 129–31.

146. *See generally Jones*, 887 F.3d at 453 (holding that AAAP was independent from Royal, and, therefore, Royal cannot be held liable for the actions of AAAP telemarketers).

common law of agency.[147] This independence renders the AI vendor more akin to an independent contractor than an agent, as they do not act on behalf of the principal (the employer) and are not subject to the employer's control.[148] But what happens when an algorithm produces discriminatory outcomes? If the AI vendor is treated as an independent contractor, they may escape liability under Title VII. The key question, then, is whether third-party AI vendors qualify as *agents*, as used in Title VII.

B. *Not Your Tort Law: Why* Respondeat Superior *Does Not Apply Under Title VII*

Legal scholars and courts seem to ignore the plain text of the statute in suggesting the interpretation of *agent* in Title VII is meant to incorporate the principle of *respondeat superior*.[149] The common law doctrine is based on the notion that if an employee or agent commits a wrongful act, respondeat superior holds the employer legally responsible.[150] When invoked, such acts will only be actionable if they occurred during the scope of employment or agency.[151] Since *respondeat superior* is grounded in common tort law, states have created their own standards for the doctrine and attempted to link its applicability to Title VII.[152] For example, the Ninth Circuit concluded that liability schemes

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147. *See id.*; *see generally* RESTATEMENT (THIRD) OF AGENCY § 1.01 (A.L.I. 2006) (defining agency relationships).

148. *See, e.g.*, *Jones*, 887 F.3d at 452.

149. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (A.L.I. 2006); *see, e.g.*, Miller v. Maxwell's Intern. Inc., 991 F.2d 583, 588 (9th Cir. 1993) ("No employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation. An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief. . . . There is no reason to stretch the liability of individual employees beyond the respondeat superior principle intended by Congress."); Kendra Samson, *Does Title VII Allow for Liability Against Individual Defendants*, 84 KY. L.J. 1303, 1309 (1996) (noting that the court in *Miller* "rejected the notion that disallowing individual liability would promote employee violation of Title VII. Instead, the court felt that employers wishing to avoid liability would see to it that employees follow the dictates of Title VII").

150. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (A.L.I. 2006).

151. *See id.*

152. *See generally Miller*, 991 F.2d at 587 (holding that defendants "have no personal liability under Title VII").

are limited to the employer under Title VII.[153] Further articulating that "the obvious purpose of this agent provision was to incorporate respondeat superior liability into the statute."[154] After making this determination, the Ninth Circuit acknowledged that the interpretation of Title VII that extends individual liability to agents has merit, but failed to give the argument consideration.[155] Similarly, while some circuits, like the U.S. Court of Appeals for the D.C. Circuit, find individual liability "facially plausible," they have failed to explore this interpretation and instead agree with the Ninth Circuit's interpretation of the agent provision in Title VII.[156] Federal courts in Pennsylvania have reached the same conclusion.[157] The rationale behind ignoring this plausible statutory construction argument is in part because of the idea that Congress wanted to "protect small entities with limited resources from liability," thus making it unreasonable to allow civil liability to attach to individual employees and agents.[158] Even if Congress intended to shield small entities from liability, it does not necessarily imply that they chose to write individual liability out of the statute.[159]

Specifically in the context of AI, experts note that "the law protects AI developers from liability so long as the vendor can demonstrate that it was 'designed for a particular purpose and was reasonably accurate and effective in accomplishing that

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153. *Id.* (holding that the plaintiff could not recover from individual defendants and that she "received all of the relief to which she was entitled when she settled her claims with her corporate employer").

154. *Id.* (quoting Miller v. Maxwell's Int'l, No. C-87-1906-WWS, 1990 WL 91801, at *2 (N.D. Cal. Jan. 17, 1990).

155. *Id.* ("This conclusion is buttressed by the fact that many of the courts that purportedly have found individual liability under the statutes actually have held individuals liable only in their *official* capacities and not in their individual capacities.").

156. *See* Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995) ("While a construction of the statute to impose individual liability on an agent is facially plausible, we agree with the Ninth Circuit.") (citing *Miller*, 991 F.2d at 587); Samson, *supra* note 149, at 1311 n.53 (discussing *Gary*, where the court held that "when an individual is sued in his or her official capacity, the claim merges into a claim against the larger employer and the individual is properly dismissed").

157. *See, e.g.*, McLaughlin v. Int'l Bhd. of Teamsters, 641 F. Supp. 3d 177, 206–07 (W.D. Pa. 2022).

158. *Miller*, 991 F.2d at 587; *see* Grant v. Lone Star Co., 21 F.3d 649, 652 (5th Cir. 1994).

159. *See* discussion of § 230 *infra* Part V.

purpose.'"[160] Since the responsibility for hiring ultimately rests on the employer, liability will not shift away from the employer.[161] Just as delegating hiring tasks to human supervisors does not shield an employer from liability, relying on AI does not absolve the employer of responsibility for discriminatory or unlawful employment practices.[162] In both scenarios, the employer remains solely liable. Some scholars claim that the principal might be better equipped to endure the damage of potential liability than the agent itself.[163] It can motivate the principal to vet their agents more carefully and incentivize them to uphold ethical standards.[164] But what incentives do agents have to end their discriminatory conduct? What will deter them from harming members of protected classes? The answer lies in independent individual liability.

IV. *MOBLEY V. WORKDAY, INC.*

This Part discusses the judicial opinion of *Mobley v. Workday*,[165] along with a factual background of the case prior to the lawsuit. It also examines other courts that have recognized independent liability of third-party vendors under Title VII.

A. *Exploring the Boundaries of Title VII: The Question of Vendor Liability*

Title VII's plain language defines which entities are liable for violating its provisions.[166] An employer is defined as "a person

160. Sonderling et al., *supra* note 10, at 16 (quoting Bathaee, *Artificial Intelligence Black Box*, *supra* note 11, at 919); *see also* Bathaee, *Artificial Intelligence Opinion Liability*, *supra* note 14, at 148–49 (explaining that biases in the data will not render an AI vendor liable because of limited evidence of scienter or negligence).

161. Sonderling et al., *supra* note 10, at 16 n.71.

162. *Id.*

163. Anat Lior, *AI Entities as AI Agents: Artificial Intelligence Liability and the AI Respondeat Superior Analogy*, 46 MITCHELL HAMLINE L. REV. 1043, 1097 n.332 (2020) ("The obligation to make restitution falls on the master as the financially responsible individual, rather than on the servant as the morally responsible party.") (citing Leon E. Wein, *The Responsibility of Intelligent Artifacts: Toward an Automation Jurisprudence*, 6 HARV. J.L. & TECH. 103, 110 (1992)).

164. *Id.* at 1097.

165. 740 F. Supp. 3d 796 (2024).

166. 42 U.S.C. § 2000e.

engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such [] person."[167] Still, several courts do not include third-party vendors in the definition of agent, resulting in ambiguity regarding the scope of liability and chance for a remedy.[168] The reasoning employed by these courts is flawed; instead, the statute should be interpreted to encompass liability for independent third-party vendors.

On this same note, relying on the "agent" of an employer clause, some courts have reasoned that an employer's agent may be held independently liable for discrimination under some circumstances.[169] In *Williams v. City of Montgomery*, the Eleventh Circuit held that "[w]here the employer has delegated control of some of the employer's traditional rights, such as hiring or firing, to a third-party, the third-party has been found to be an 'employer' by virtue of the agency relationship."[170] The court allowed a plaintiff to recover from his employer's agent after being terminated because of his race.[171] In conjunction, the Supreme Court of California, in *Raines v. U.S. Healthworks Medical Group*, has also concluded that "an employer's [business-entity] agent can, under certain circumstances, appropriately bear direct liability under the federal antidiscrimination laws."[172] This Part, which this Note advocates for, encourages

167. § 2000e(b).

168. *See, e.g.*, Murray v. Principal Fin. Grp., Inc., 613 F.3d 943, 944 (9th Cir. 2010) (demonstrating the court's hesitancy to extend the definition of "agent"); Butler v. Drive Auto. Indus. of Am., Inc., 793 F.3d 404, 406 (4th Cir. 2015) (demonstrating the same where an employer enlisted the help of a staffing agency).

169. *See, e.g.*, Halpert v. Manhattan Apartments, Inc., 530 F.3d 86, 88 (2d Cir. 2009) ("[I]t makes no difference whether the person whose acts are complained of is . . . an independent contractor . . . . If a company gives an individual authority to interview job applicants and make hiring decisions on the company's behalf, then the company may be held liable if that individual improperly discriminates.") (internal quotations omitted).

170. 742 F.2d 586, 589 (11th Cir. 1984) (quoting BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1002 (2d ed. 1983).

171. *Id.* at 587. A black fire fighter sued his former employer claiming the city's personnel board terminated him because of his race. *Id.* at 587–88. The Eleventh Circuit found that "the Board [was] an agent of the City for purposes of Title VII." *Id.* at 589.

172. Raines v. U.S. Healthworks Med. Grp., 534 P.3d 40, 51 (Cal. 2023) (allowing a plaintiff to recover from a third-party health service provider who violated California's Fair Employment and Housing Act). The California Supreme Court clarified that its decision was limited to answering the legal question on whether a business entity agent may ever be held directly liable

courts to recognize independent liability for third-party vendors who have violated antidiscrimination laws, as illustrated in the *Mobley v. Workday, Inc.* decision below, and the courts mentioned above.[173]

B. Factual Background & Procedural Posture

In July 2024, the Northern District of California issued a ruling that places liability directly in the hands of an AI third-party vendor.[174] *Mobley v. Workday* sealed the escape hatch by interpreting *agent* under Title VII to cover third-party entities, opening the door for a significant expansion of independent liability for AI vendors.

Workday offered its clients employment screening services on a subscription basis.[175] Their platform is incorporated into their client's website to screen and collect applicants, essentially serving as an internal recruitment portal.[176] As stated on Workday's platform, their algorithm can shorten the hiring process by automatically rejecting applicants or pushing applicants further in the recruitment process.[177] Notably, the algorithm has artificial intelligence embedded in its data that allows the program to make hiring decisions.[178] An applicant's progression

under the FEHA. *Id.* at 51–52. The court did not provide specific examples on its applicability. *Id.*

173. *See* discussion *infra* Part V.

174. *See* Mobley v. Workday, Inc., 740 F. Supp. 3d 796, 806, 808 (N.D. Cal. 2024).

175. *See AI for Recruiting*, WORKDAY, https://www.workday.com/en-us/products/talent-management/ai-recruiting.html [https://perma.cc/H8BG-CWD5] (last visited Mar. 22, 2026); *Mobley*, 740 F. Supp. 3d at 802.

176. *Mobley*, 740 F. Supp. 3d at 802.

177. *Id.*

178. *Id.* (explaining that Workday's screening tools are reported to use "'pymetrics' that 'use neuroscience data and AI,' in combination with existing employee referrals and recommendations"). Pymetrics is a platform that refines the hiring and talent acquisition process. *See Workday Ventures: Investing in Changemakers to Meet This Moment*, WORKDAY (Aug. 24, 2022), https://blog.workday.com/en-us/workday-ventures-investing-changemakers-meet-moment.html [https://perma.cc/Z4L5-TA6J] ("[P]ymetrics, a Harver Company, provides AI-driven behavioral insights to create more efficient, effective, and fair talent processes across the talent life cycle.").

through the hiring stages depended on passing Workday's screening algorithms.[179]

The plaintiff, Derek Mobley, an African American man over forty years old, graduated from Morehouse College with a bachelor's degree in finance.[180] He held a Server+ certification with accumulated experience in financial services, IT helpdesk roles, and customer service.[181] Mobley also "suffer[ed] from anxiety and depression."[182]

Mobley alleged that he applied to over one hundred job postings with employers that used Workday's screening algorithms.[183] When looking for employment, Mobley would discover the job posting on the employer's website, which then redirected him to Workday's platform.[184] It then instructed Mobley to create an account to access the application, and "upload[] his resume or enter[] [his] information manually."[185] In conjunction, Workday's platform required applicants to complete personality assessments.[186] Mobley asserted that these tests revealed his cognitive disabilities; therefore, putting him at a disadvantage against other applicants.[187] Mobley further claimed that Workday used these results to "evaluate a[] [candidate's] qualifications" to determine whether the applicant should move forward.[188] In light of this, employers denied

179. *Mobley*, 740 F. Supp. 3d at 802.

180. *Id.* Morehouse College is a Historically Black University in Atlanta, Georgia. *Our History*, MOREHOUSE COLL., https://morehouse.edu/about/our-history/ [https://perma.cc/T5TK-A9S6] (last visited Mar. 22, 2026).

181. *Mobley*, 740 F. Supp. 3d at 802.

182. *Id.* Mental health conditions are protected against employment discrimination. U.S. EEOC, GUIDANCE: DEPRESSION, PTSD, & OTHER MENTAL HEALTH CONDITIONS IN THE WORKPLACE: YOUR LEGAL RIGHTS (2016), https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights?renderforprint=1 [https://perma.cc/2YQ2-PD9T].

183. *Mobley*, 740 F. Supp. 3d at 802.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 802–03.

Mobley employment for over 100 of the applications he submitted using Workday's platform.[189]

Mobley brought an action against Workday on behalf of himself and other similarly situated applicants, "alleg[ing] that Workday's algorithmic decision-making tools discriminat[ed] against" him on the basis of race, age, and disability in violation of Title VII, the ADEA, and the ADA.[190]

C. Court's Interpretation of Title VII's Text

The principle that "[e]mployers cannot escape liability for discrimination by delegating their traditional functions, like hiring, to a thirdparty" under Title VII is firmly rooted in caselaw.[191] However, the *Mobley* court clarified that a plaintiff may seek recovery from both the employer and the third-party AI vendor for employment discrimination.[192]

The court rejected Workday's argument that the Ninth Circuit does not recognize separate liability for agents under federal antidiscrimination statutes.[193] Workday argued that the term *agent* established only an employer's liability for unlawful "acts of their agents. "[194] However, the court found this unpersuasive and contrary to the plain language of Title VII.[195] Looking at only the four corners of the statute, the court interpreted

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189. *Mobley*, 740 F. Supp. 3d at 803. For instance, "while working for Hewlett Packard on a contract basis," Mobley applied to a "Service Solutions Technical Consultant position" through hpe@myworkday.com. *Id.* Despite the position requiring the same qualifications as his existing role, Mobley was rejected the following month. *Id.* On a different occasion, Mobley applied for a "Customer Services Specialist position" with Unum through unum@myworkday.com, and his application was rejected "less than an hour later." *Id.* Mobley's subsequent applications "for customer service roles submitted through Workday were [similarly] rejected." *Id.* Mobley contends that, for each of these positions, he "met their educational and experiential requirements." *Id.*

190. *Id.* at 803 (citing first 42 U.S.C. § 2000e; then citing 29 U.S.C. § 621; and then citing 42 U.S.C. § 12101).

191. *Id.* at 804; *see* City of Los Angeles v. Manhart, 435 U.S. 702, 718 n.33 (1978) (quoting 42 U.S.C. § 2000e(b)) ("We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer.").

192. *Mobley*, 740 F. Supp. 3d at 806.

193. *See id.* at 804–06.

194. *Id.* at 804–05.

195. *Id.* at 805; *see* 42 U.S.C. § 2000e(c).

that Title VII prohibits any agent from engaging in discriminatory conduct.[196]

Furthermore, the Court explained that Workday's argument falsely misconstrues two separate doctrines, employment agency and agent of an employer.[197] Employment agencies undertake distinct responsibilities that an employer and their agent may not.[198] For example, the court explained that employment agencies "procure employees for an employer."[199] This means that an employment agency actively finds applicants on behalf of the employer and presents them for consideration.[200] Therefore, while employment agencies may be subject to liability for failing to consider an applicant in the recruitment process on the basis of a protected characteristic, they are not bound to the same restrictions as employers exercising their "traditional functions."[201] Thus, an entity liable as an employment agency is not automatically liable as an employer's agent.[202] Here, the court held that while Mobley did not plausibly allege that Workday is an employment agency, he sufficiently alleged that Workday's clients delegated their functions of recruitment, including rejecting or accepting applicants.[203]

At oral argument, the Court presented a hypothetical scenario to Workday: what if a "software vendor [knowingly] provides employers with a tool that" automatically rejects applicants who graduated from historically Black institutions, but the employer remains unaware of this functionality?[204] Workday conceded that the employer must know of the tool's discriminatory implications to be liable for intentional

196. *Mobley*, 740 F. Supp. 3d at 805.

197. The employment agency claim brought by Plaintiff and analyzed by the Court will only be discussed in short as it is beyond the scope of this Note. To read the full analysis, see *id.* at 805–06.

198. *See id.* at 805.

199. *Id.*

200. *Id.*

201. *Id.* (highlighting that traditional functions include "hiring, discharging, compensating, or promoting employees").

202. *Mobley*, 740 F. Supp. 3d at 805.

203. *Id.*

204. *Id.* at 806.

discrimination.[205] The court responded that if independent liability does not exist for agents, it would seem that no party would be liable in such a case.[206] The court concluded that this is the very purpose of the agent provision of Title VII.[207] If the court were to accept Workday's argument, it would imply that an employer can avoid liability for discrimination by simply remaining unaware of a discriminatory tool provided by a third-party vendor.[208]

The court determined that through Workday's "algorithmic decision-making tools," its clients could delegate tasks such as rejecting applicants early in the recruitment process.[209] Rather than merely applying a criteria set by employers, Workday actively participates in the hiring process by evaluating and recommending some candidates for advancement while rejecting others.[210] As evidence of this automated decision-making process, Mobley alleged that he received rejection emails after business hours, further suggesting that the decisions were made without human intervention.[211] The court noted that assessing and determining candidate suitability is fundamental to the "traditional [hiring] functions that the anti-discrimination laws [aim] to address."[212] Employers may not reject employees on the basis of a protected characteristic protected by Title VII.[213] Given Workday's central role in deciding which applicants are selected for an interview, its AI tools engage in practices that directly impact access to employment.

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205. *Id.*

206. *Id.*

207. *See id.* ("This is the very gap that the agency theory is intended to address.").

208. *Id.* The EEOC has made clear that employers can be held responsible for employment discrimination by biased AI tools despite not being aware of its biased functionalities. *See Employment Discrimination and AI for Workers*, EEOC, https://www.eeoc.gov/sites/default/files/2024-04/20240429_Employment%20Discrimination%20and%20AI%20for%20Workers.pdf [https://perma.cc/KB8L-S7JS] (last visited Mar. 9, 2026).

209. *Mobley*, 740 F. Supp. 3d at 806–07.

210. *Id.* at 807.

211. *Id.*

212. *Id.*

213. 42 U.S.C. § 2000e-2(a)(1).

Moreover, the court emphasized that Workday's involvement in the hiring process is noteworthy, regardless of whether it functions through AI rather than a human recruiter manually choosing applications.[214] In fact, courts applying the agency exception have consistently focused on the "function" entrusted to the agent rather than the nature of the agent itself.[215] Creating a false divide between software decision-makers and human ones could undermine antidiscrimination protections in today's workforce.

If the court accepts Workday's proposed distinction, it could allow employers to outsource various employment decisions—such as hiring, firing, promotion, and compensation—to a third-party vendor's algorithmic tools. This could enable employers to "delegat[e] discriminatory programs" to software vendors, leaving job applicants and employees with no avenue to "challenge such discrimination."[216] The distinction lies here: software vendors will only qualify as agents when entrusted with "traditional employment functions."[217] For example, if an employer disqualified applicants based solely on their birthdates using a spreadsheet program, the software vendor would not be considered the employer's agent for federal antidiscrimination purposes, as it does not participate in the hiring decision.[218] However, here, Workday can be categorized as an *agent* because its tools used to screen and recommend candidates constitute functions traditionally performed by their employer clients.[219]

214. *Mobley*, 740 F. Supp. 3d at 807 ("Nothing in the language of the federal anti-discrimination statutes or the case law interpreting those statutes distinguishes between delegating functions to an automated agent versus a live human one.").

215. *Id.*; *see* Williams v. City of Montgomery, 742 F.2d 586, 589 (11th Cir. 1984).

216. *Mobley*, 740 F. Supp. 3d at 808.

217. *See id.*

218. *See id.*

219. *Id.*

Mobley v. Workday, Inc. is still pending before the Northern District of California, with discovery and notice to class members now underway.[220]

V. EMBRACING MOBLEY V. WORKDAY: DEFINING AI VENDORS AS TITLE VII AGENTS

The interpretation of agent that limits it to the *respondeat superior* doctrine is flawed and carries profound implications. If this view is upheld, plaintiffs will not be entitled to any relief when harmed by third-party vendors, which is precisely the scenario in *Mobley v. Workday*.[221] This creates a substantial gap in legal protections, as it allows third-party vendors to evade liability even though they are active participants in the discriminatory conduct. Imagine a scenario where an employer enters an independent contractor relationship with a software vendor to accept job applications through software that creates a disparate impact. For the sake of this argument, the software vendor is not an employment agency or an indirect employer, nor is the vendor covered under Title VII because of its employment relationship. To find a remedy, the only possible scenario left would be to classify the vendor as an *agent* of the employer.

Scholars may argue that holding third-party vendors liable is unnecessary if the employer is ultimately responsible.[222] However, this perspective misses an essential point: accountability should fall upon all active parties. Third-party vendors actively participate in the recruitment process.[223] They do not merely provide a platform; these entities—like Workday—collect applications, review and evaluate candidates, and make decisions about advancing or rejecting applicants based on established criteria embedded within their algorithms.[224] This active

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220. Order Granting Preliminary Collective Certification at I, Mobley v. Workday, No. 23-cv-00770-RFL (N.D. Cal. May 16, 2025).

221. *Mobley*, 740 F. Supp. 3d at 807 (noting that this could potentially "gut anti-discrimination laws in the modern era").

222. *See* Lior, *supra* note 163, at 1097 n.332 and accompanying text.

223. *See* discussion *supra* Section IV.C.

224. *See id.*; Coats, *supra* note 103.

participation in the decision-making process places them far beyond the role of a neutral service provider.[225]

Moreover, while there is an incentive for employers to vet AI systems to flag discrimination, employers are often not in the best position to assess the quality or fairness of these algorithms.[226] The complexity of these systems, often opaque, makes it difficult for employers to fully understand how decisions are being made and whether they discriminate based on protected characteristics prohibited by Title VII.[227] Therefore, it is unreasonable to place *sole* responsibility on employers when third-party vendors have substantial oversight on the software that optimizes hiring decisions.[228] This calls for a broader interpretation of *agent* in this context.

Moreover, AI third-party vendors should not be able to evade liability by arguing the independent contractor exception. The argument is that while the third-party vendor's client may purchase the software on a subscription basis and apply it to their operations, they do not control the third-party vendor's day-to-day decisions or the functionality of their algorithm.[229] However, this overlooks the fact that even though the third-party vendor's operational model is not directly controlled by its clients in the traditional sense, it still remains at the heart of each client's hiring decisions.[230] Congress could not have intended for an entity like Workday to escape liability entirely for discrimination, otherwise prohibited under Title VII.[231] Such a broad dichotomy would undermine the purpose of the statute, which is to hold responsible parties liable for discriminatory practices and promote fairness.[232]

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225. *See* discussion *supra* Section IV.C.

226. *See* discussion *supra* Section I.B.

227. *Id.*

228. *See* Mobley v. Workday, Inc., 740 F. Supp. 3d 796, 807 (N.D. Cal. 2024).

229. Answer to Amended Complaint at 10, Mobley v. Workday, Inc., No. 3:23-cv-00770-RFL (N.D. Cal. Aug. 2, 2024).

230. *See Mobley*, 740 F. Supp. 3d at 807.

231. *See generally* 42 U.S.C. § 2000e-2 (describing unlawful employment practices based on protected characteristics).

232. *See id.*

This same principle is reflected in other areas of law, such as § 230 of the Communications Decency Act.[233] The Act grants "immunity" to internet service providers from user-generated content, protecting them from liability for merely hosting others' content online.[234] If that content causes harm, injured plaintiffs must go after the specific user/content creator.[235] However, if the internet service provider participates in the development of the content that causes harm, internet service provider will not receive the protection of § 230.[236] In this scenario, both the content creator and the internet service provider are liable for the harm. The same should apply to employers and AI third-party vendors.

For example, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, plaintiffs brought a federal anti-discrimination claim against Roommates.com, a website on which individuals could post their preferences to assist in a search for a roommate, on grounds that it violated the Fair Housing Act ("FHA").[237] The FHA prohibits discrimination on the basis of "race, color, religion, sex, familial status, or national origin" by direct providers of housing.[238] Plaintiffs contended that Roommates.com violated the FHA by allowing users to enter discriminatory preferences and match users based on those outcomes.[239] The court held that:

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233. 47 U.S.C. § 230.

234. *Id.* § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

235. *See id.*; *see generally* Kelly O'Hara & Natalie Campbell, *What Is Section 230 and Why Should I Care About It?*, INTERNET SOC'Y (Feb. 24, 2023), https://www.internetsociety.org/blog/2023/02/what-is-section-230-and-why-should-i-care-about-it/ [https://perma.cc/9BAK-44T2] (describing how internet systems are not liable for content posted by others).

236. *See* 47 U.S.C. § 230(c); *see also* Enigma Software Grp. USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040, 1045, 1051–52 (9th Cir. 2019) (finding § 230(c)(2)(B) did not block a lawsuit alleging anticompetitive conduct and discussing the congressional purpose of § 230).

237. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1161–62 (9th Cir. 2008).

238. 42 U.S.C. § 3604(b).

239. *Fair Hous. Council*, 521 F.3d at 1164.

> Roommate created the questions and choice of answers, and designed its website registration process around them. Therefore, Roommate is undoubtedly the 'information content provider' as to the questions and can claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services.[240]

By analogy, if Congress sought to shield third-party vendors like Workday from liability in Title VII cases and allow discrimination to be embedded into an algorithm, it would have done so, but no such exemption is found in the statute.[241] Therefore, it is reasonable to conclude that Congress intended for entities like Workday—who play an active role in the hiring process—to be held accountable for their discriminatory actions, in conjunction with employers, when they facilitate or contribute to unlawful discrimination.[242] Furthermore, given that *Mobley v. Workday* is being adjudicated in the Ninth Circuit—the same circuit as Roommates.com—it is likely that the circuit will concur with the district court's analysis, drawing parallels to its decision in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.[243]

District and appellate courts should interpret *agent* as establishing independent liability for third-party vendors, in accordance with the plain language of Title VII.[244] The interpretation of Title VII is of paramount importance as it is a defining force in the development and structure of federal anti-discrimination laws.[245] The judicial choices in this realm can be very profound;

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240. *Id*

241. *See generally* 42 U.S.C. § 2000e-2(a) (outlining unlawful employment practices); § 2000e(b) (defining an employer). Additionally, Congress explicitly wrote an exemption into the statute for employers hiring non-citizens to work outside the United States and for religious entities hiring based on religion, further supporting the application of the omitted-case canon of construction used in traditional statutory construction. § 2000e-1.

242. *See supra* Part V.

243. The Northern District of California is part of the Ninth Circuit. *See* Mobley v. Workday, Inc., 740 F. Supp. 3d 796 (N.D. Cal. 2024); Fair Hous. Council, 521 F.3d at 1175–76.

244. *See* 42 U.S.C. § 2000e-2(b).

245. *See* 42 U.S.C. § 2000e-2.

therefore, the judiciary must strive to uphold the will of Congress by interpreting Title VII in a manner that aligns with its core purposes: the eradication of workplace discrimination and the provision of legal redress against all wrongdoers.[246] Rule of law values are undermined when courts adopt obscure interpretations of the law that deviate from the statute's plain meaning and purpose.[247] In doing so, courts risk carving a hole in Title VII's protections and diverging from the core purpose of Title VII.[248] If left unsettled, AI third-party vendors will continue to embed discrimination into in their algorithms with the notion that liability will always attach to the employer.

If ambiguity over the interpretation of *agent* continues to rise,[249] Congress should amend Title VII to define its applicability and coverage. Given the novelty of AI, this presents a unique opportunity for Congress to draft an amendment that will remedy the disarray among lower courts.[250] By reworking Title VII, Congress will reconcile a critical legal question on liability and set a controlling precedent for how the law should adapt to challenges posed by modern technology. This closes the gap that allows AI third-party vendors like Workday to avoid responsibility for discriminatory practices, despite performing traditional hiring functions. AI algorithmic decision-making tools and their creators must be held to the same standard as human agents to prevent biased applicant evaluations. Ultimately, it incentivizes developers of AI technology to carefully design their software to facilitate a platform where applicants

246. *The Civil Rights Act of 1964: Legislative History*, U.S. SENATE, https://www.senate.gov/artandhistory/history/resources/pdf/CivilRights_CRSReport1965.pdf [https://perma.cc/YD5D-GP7W] (last visited Mar. 15, 2026) ("Both justice to persons and technological innovation make it necessary to eliminate discrimination by force of law. Moreover, discrimination in employment means wasted personal abilities and consequent loss to the national product.").

247. *See* Charles Sither, *Statutory Interpretation and the Plain Meaning Rule*, 37 KY. L.J. 66, 67 (1948).

248. *See* 42 U.S.C. § 2000e-2.

249. See *supra* notes 168–72 and accompanying text.

250. *See* discussion *supra* Part IV.

are evaluated on their qualifications.[251] Alternatively, the EEOC should leverage its expertise to issue guidelines on the new structure of liability to provide clarity amongst the public.[252]

CONCLUSION

Artificial intelligence is wholly transforming employment practices. At the outset, individuals relied extensively on individual referrals to gain traction from employers.[253] This reliance limited job seekers to their immediate network or through the circulation of local newspapers.[254] As a result, the job search remained personal yet limited in scope, requiring individuals to build connections through face-to-face interactions at social gatherings or professional events.[255] Seemingly overnight, AI shifted how employers found talent.[256] Without delay, businesses and employers started to leverage AI to optimize and refine their talent acquisition processes.[257] Notwithstanding the widespread benefits of AI, employers take on substantial risks

251. *See* Bathaee, *Artificial Intelligence Opinion Liability*, *supra* note 14, at 148–49 (explaining why a method of liability for AI algorithmic decision-making tools is necessary to engage in ethical hiring practices).

252. *See* 47 U.S.C. § 230(c)(2); *supra* text accompanying note 28; *see also* Marianna Michael Melendez & Catie A. Wheatley, *AI on Trial:* Mobley v. Workday *and the Future of Employment Law*, LOUISVILLE BAR BRIEFS, Oct. 2025, at 16, https://www.loubar.org/wp-content/uploads/2025/09/Bar-Briefs_October25_Employment-Law_AI-on-Trial_Melendez-and-Wheatley.pdf [https://perma.cc/5D27-RGA8] (discussing Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 23, 2025)).

253. Ben Grant, *The Evolution of Job Search: From Newspapers to AI*, RAMPED (Apr. 11, 2024), https://www.rampedcareers.com/blog/the-evolution-of-job-search-from-newspapers-to-ai [https://perma.cc/LU8J-8BGS].

254. *Id.*

255. *Id.*

256. *See* Keith O'Brien & Amanda Downie, *AI in Talent Acquisition*, IBM, https://www.ibm.com/think/topics/ai-talent-acquisition [https://perma.cc/4NEX-FC39] (last visited Mar. 15, 2026).

257. *Id.*; Coats, *supra* note 103 (explaining "that as many as 75% of job applicants are unqualified for the position" to which they apply, and AI helps to filter candidates); *see* Olga Akselrod & Cody Venzke, *How Artificial Intelligence Might Prevent You from Getting Hired*, ACLU (Aug. 23, 2023), https://www.aclu.org/news/racial-justice/how-artificial-intelligence-might-prevent-you-from-getting-hired [https://perma.cc/T9BX-VZME] ("Recent reports indicate that 70 percent of companies and 99 percent of Fortune 500 companies are already using AI-based and other automated tools in their hiring processes.").

when implementing AI systems in their hiring decisions.[258] And when the risk of discrimination comes to the forefront, employers are responsible for its implications, but not exclusively.[259] Third-party vendors bear muster for violating Title VII's anti-discrimination laws just the same.

Third-party vendors should not escape liability for blatant employment discrimination on the theory that they do not fall within the framework of Title VII.[260] If third-party vendors are the bad actors, they should be held responsible along with employers. The contemporary landscape is progressively defined by the integration of artificial intelligence.[261] We must allow plaintiffs an opportunity to be remedied for AI's wrongdoings consistent with the way courts have interpreted similar legislation involving third-party agents.

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258. Sonderling et al., *supra* note 10, at 22.
259. *See* discussion *supra* Section II.
260. *See* discussion *supra* Part III.
261. *See* O'Brien & Downie, *supra* note 256.