

# Legal Liability in AI-Related Workplace Age and Disability Discrimination in the US



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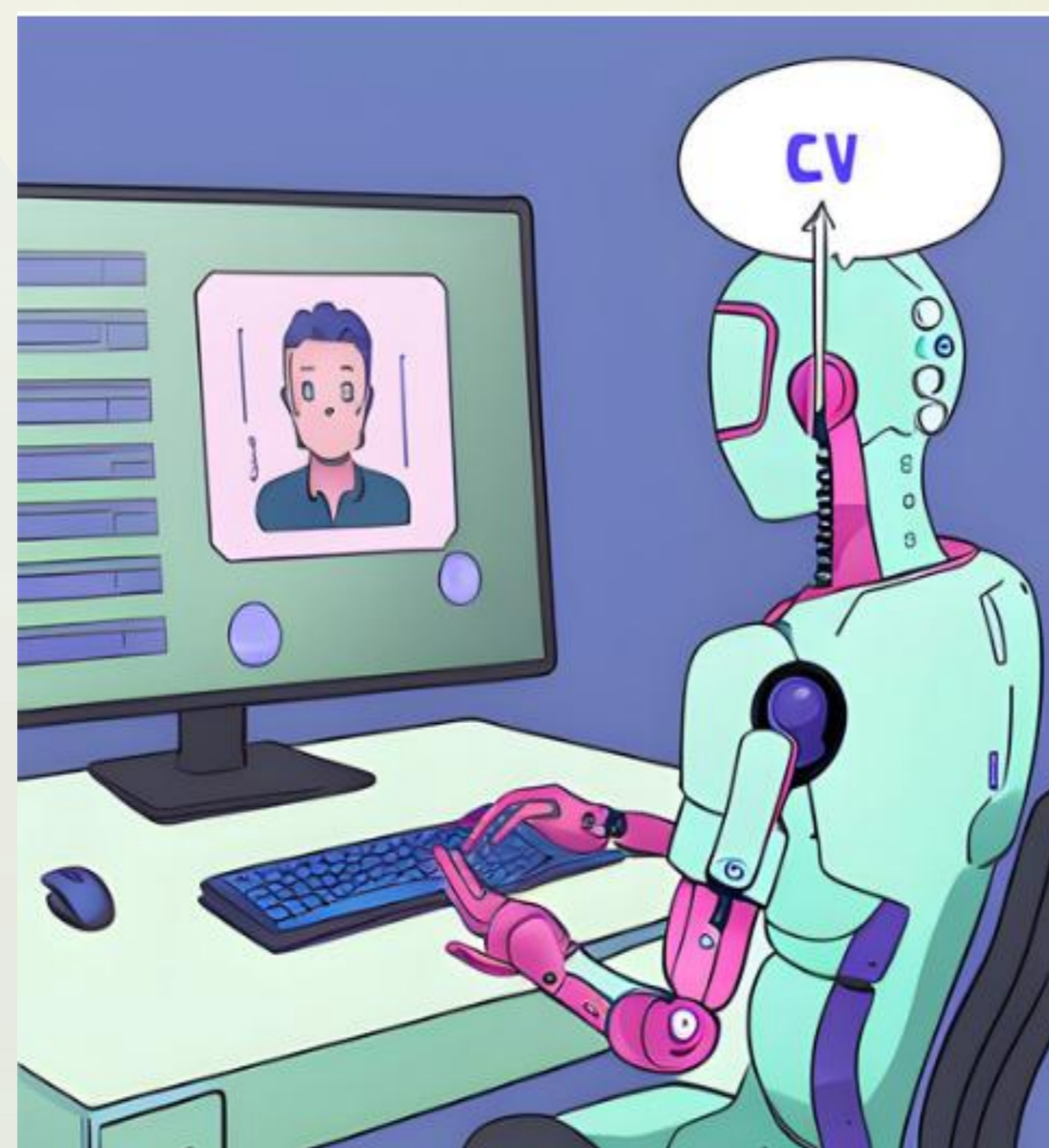
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## INTRODUCTION

AI hiring tools were, by 2021, being used by approximately 55% of human resource leaders in the US and 99% of Fortune 500 companies have AI-powered recruitment processes. The high prevalence of the usage of AI-powered hiring tools in the US is, however, contrasted by the public's lack of knowledge of this technology even though it has the potential to impact their careers. This prevalence is why this paper chooses the US as its national example.

Among the protected characteristics under US laws, age and disability discrimination deserve particular discussion in light of the discriminatory effects posed by AI recruitment, which can be seen from 3 perspectives:

1. The use of AI in hiring disproportionately impacts job seekers with disabilities who are more common among the elderly.
2. The demographic significance of the two minority groups justifies the prospective analysis this paper will carry out.
3. Age and disability discrimination, whether involving AI or not, could result in short or long-term unemployment, financial losses, and even mental illnesses.



This research paper centers on the doctrine of legal liability in age and/or disability discrimination during the hiring process in the US. The significance of such an emphasis lies at both the individual and societal levels.

## OBJECTIVES

This research aims to understand how the involvement of AI would create difficulties (by both current and future AI hiring tools) for establishing legal liability in age and disability discrimination during hiring—focusing on the elements of the relevant offence, the burden of proof, the rule of evidence, and remedies under current US law. It is hoped that this paper could thereby use the resulting conclusions to address the research question of what we can do to make liability establishment clearer in age and disability discrimination cases when AI is involved in the hiring process, and how to prepare for the future with more prevalent usage of more advanced AI in hiring.

## CONCLUSION & NEW DIRECTIONS

By analyzing primary legislation, this work first ascertained the current federal legal standards in the establishment of liability for age and disability discrimination. Three federal laws—the ADEA, the ADA, and the CRA of 1991—constitute the legal framework for determining legal liability and awarding remedies for age and disability discrimination in the US. This paper then proceeded to analyse the difficulties and challenges faced by these current legal standards due to the involvement of AI in hiring. By using an altered real case and a hypothetical case, this paper reached the conclusion that current and future AI tools create difficulties on the plaintiff's side to establish the defendant's liability: it will be difficult to provide evidence of will and intent with the involvement of current AI hiring tools that have opaque and ambiguous logic behind their decisions; future AI that has full autonomy and sole control over the hiring process will likely prevent the plaintiff from proving the necessary causal link for establishing legal liability. These difficulties in turn hamper the aggrieved parties' prospects for receiving adequate remedies.



Looking into a Future with AI: How to Achieve a More Feasible Liability Regime?

- A federal legal requirement of compulsory involvement of human “checkpoints” during the hiring targeting the decision-making processes will be beneficial for the victims to establish liability and receive remedies.
- The creation of a federal legal right to request a human review after the final adverse decision was made by an AI-powered hiring tool.

## CURRENT FEDERAL LEGAL STANDARDS

### 1. Age Discrimination in Employment Act of 1967 (ADEA)

- The ADEA prohibits employment discrimination against persons 40 years of age or older. To establish legal liability, as ruled in *Duffy v. Paper Magic Grp., Inc.*, a plaintiff under the ADEA must establish that he or she: “(1) was over forty years old; (2) was qualified for the position; (3) suffered an adverse employment action; and (4) was replaced by a person sufficiently younger to permit an inference of age discrimination.

### 2. Title I of the Americans with Disabilities Act of 1990 (ADA)

- Title I of the ADA prohibits an employer or employment agency from discriminating against qualified individuals on the basis of disabilities in regard to job application procedures and hiring. To convince the court to recover remedies, the plaintiff has to prove that the defendant “has intentionally engaged in or is intentionally engaging in” an unlawful employment practice. Also echoing the ADEA, the defendant is given the opportunity under Title I of the ADA to invoke the defenses of “job-relatedness and business necessity” and/or “reasonable accommodation”.

### 3. Title I of the Civil Rights Act of 1991

- Title I of the CRA of 1991 is remedy-focused and sets out a guideline for the plaintiff's right of recovery, compensatory damages, and punitive damages within the US federal legal standards on unlawful discrimination during hiring.
- To recover punitive damages, the plaintiff must demonstrate that the defendant engaged in a discriminatory practice “with malice or with reckless indifference” to the plaintiff's federally protected rights.

### The Burden of Proof and Evidentiary Standard

In civil cases, the aggrieved individuals (plaintiffs) bear the burden of proof. As an initial matter, the plaintiff has to meet the burden of production and once met, the burden of production shifts to the defendant. The plaintiff then needs to meet the burden of persuasion—the standard of proof of a preponderance of evidence—by convincing the act finder that “the fact in dispute is more likely than not” to have occurred.

## DISCUSSION - AI Hiring Tools: Friends or Foes?

### 1. Federal Legal Standards Facing Current AI-Powered Hiring Tools

- *EEOC v. Novo Nordisk*, a case concerning age discrimination, is altered for the analytical purpose of this section.
- In civil proceedings brought under the ADEA, the ADA, and/or the CRA of 1991, the plaintiff bears the burden to establish the prima facie case of age and/or disability discrimination either by “direct evidence of discriminatory intent” or by meeting the McDonnell Douglas test in reliance of circumstantial evidence. In *EEOC's* claim, one of the primary grounds and factual allegations made and relied upon by Hunter is Fujimoto's words to her stating that he (Fujimoto) wanted “someone who was going to be in the territory ‘long term’”.
- In the altered case (the employment decision be reached by a modern-day AI-powered hiring tool), it will be difficult to provide evidence of will and intent with the involvement of current AI hiring tools that have opaque and ambiguous logic behind their decisions

### 2. Federal Legal Standards Facing Future AI-Powered Hiring Tools

- A hypothetical is devised with future AI that has full autonomy and sole control over the hiring process.
- The autonomous decision-making of the AIs used by BumbleBee makes it difficult for Rudy to establish the causal link between the retail company's consideration of Rudy's age and disability and the actions taken by the company (i.e. refusing Rudy's application). In *Gross v. FBL Financial Services Ltd.* (2009), the High Court held that “the plaintiff must prove that age was the ‘but-for’ cause of the employer's adverse action”. However:
  - It is hard to find the type of evidence that could show that BumbleBee indeed “considered” or has taken into account Rudy's age and disability.
  - The BumbleBee can refute the causal link by arguing that even if they considered Rudy's age and disability when making the decision of refusing his application, the consideration of Rudy's age and disability was not the “but-for” cause.