

EEOC Resolves First Ever Lawsuit Targeting Employer Using AI in Hiring

On August 9, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) filed a proposed consent decree intended to resolve the agency's first-ever lawsuit targeting an employer's use of artificial intelligence (AI) in hiring. Employers should take note of what the consent decree prohibits and of the EEOC's increasing scrutiny of employers that use AI systems to engage with employees.

In *Equal Employment Opportunity Commission v. iTutorGroup, Inc. et al.* (E.D.N.Y. May 05, 2022), the EEOC sued three affiliated entities (collectively, iTutor) that used an online hiring platform to hire college-educated applicants for tutoring jobs performed remotely from the United States, assisting students in China. In the complaint filed by the EEOC initiating the lawsuit, the agency alleged that an online applicant for an iTutor position was rejected because she was over the age of 55. According to the EEOC, the applicant became aware that she may have been discriminated against when she later re-applied for the same position and falsely represented herself as younger.

The EEOC alleged that iTutor intentionally programmed its application software, which screened resumes with AI, to automatically reject female applicants over the age of 55 and male applicants over the age of 60. Although the consent decree allows iTutor to not admit to any liability, it requires each defendant to cease all forms of discrimination, including through AI, and to engage in other measures such as posting and distributing notices of the lawsuit and the decree as well as training employees to avoid and report unlawful discrimination.

Consent decrees are a powerful tool in the EEOC's toolkit. Federal law empowers the EEOC to enter consent decrees to resolve lawsuits with companies rather than simply entering into settlement agreements. By doing so, the agency avoids the time, cost and risk of litigation but can sue to enforce the consent decree as a court order to obtain faster compliance than it likely could with a regular settlement.

The most obvious takeaway from the EEOC's lawsuit and consent decree is that employers cannot hide behind AI systems to engage in intentional discrimination. A decision to exclude members of a protected category (e.g., on the basis of race, sex, color, national origin or age) is illegal whether made by a decision maker

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post-interview about a candidate or by a system programmed to screen out applicants on an unlawful basis.

Although most employers would know that intentionally targeting members of a protected group through AI software is unlawful, employers should nonetheless carefully examine any such programs that interface with applicants and employees. Companies using AI-based programs that result in members of a protected group being rejected, demoted or otherwise targeted could face similar allegations from the EEOC and be faced with the dilemma of deciding whether to invest in a costly defense or enter into a burdensome consent decree with the EEOC.

For more information or questions regarding AI-based programs or the EEOC's scrutiny thereof, contact [Michael Gentry](#) or another member of Reinhart's [Labor and Employment](#) Practice or [Artificial Intelligence](#) Group.

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