

1 KARLA GILBRIDE, SBN 264118 (CA)
JENNIFER S. GOLDSTEIN, SBN 147791 (CA)
2 DARA S. SMITH, SBN 1027046 (DC)
STEVEN WINKELMAN, SBN 1048481 (DC)
3 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of General Counsel
4 131 M Street N.E., 5th Floor
Washington, D.C. 20507
5 Telephone (202) 921-2564
steven.winkelman@eoc.gov

6 *Attorneys for EEOC as Amicus Curiae*

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

11 DEREK L. MOBLEY, for and on behalf of
himself and other persons similarly situated,

13 Plaintiff,

14 vs.

15 WORKDAY, INC.,

16 Defendant.

Case No. 3:23-cv-00770-RFL

**BRIEF OF THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION AS
AMICUS CURIAE IN SUPPORT OF
PLAINTIFF AND IN OPPOSITION TO
DEFENDANT’S MOTION TO DISMISS**

Date: May 7, 2024
Time: 10:00 a.m.
Judge: Hon. Rita F. Lin
Courtroom: 15, 18th Floor

First Amended Complaint: February 20, 2024

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. STATEMENT OF INTEREST..... 1

II. INTRODUCTION 1

III. BACKGROUND 2

IV. ARGUMENT 3

 A. Mobley has plausibly alleged that Workday is an employment agency..... 4

 B. Mobley has plausibly alleged that Workday is an indirect employer..... 10

 C. Mobley has plausibly alleged that Workday is an agent of employers..... 12

V. CONCLUSION..... 14

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4 *Alexander v. Gardner-Denver Co.*,

5 415 U.S. 36 (1974)..... 1

6 *Anderson v. Pac. Mar. Ass’n*,

7 336 F.3d 924 (9th Cir. 2003) 10

8 *Ashcroft v. Iqbal*,

9 556 U.S. 662 (2009)..... 3, 4

10 *Ass’n of Mexican-Am. Educators v. State of Cal.*,

11 231 F.3d 572 (9th Cir. 2000) (en banc) 1, 11

12 *Bell Atl. Corp. v. Twombly*,

13 550 U.S. 544 (2007)..... 3, 4

14 *Brush v. San Francisco Newspaper Printing Co.*,

15 315 F. Supp. 577 (N.D. Cal. 1970), *aff’d*, 469 F.2d 89 (9th Cir. 1972) 4, 5

16 *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*,

17 37 F.3d 12 (1st Cir. 1994)..... 12, 13

18 *DeVito v. Chicago Park Dist.*,

19 83 F.3d 878 (7th Cir. 1996) 12, 13

20 *Dumas v. Town of Mount Vernon*,

21 436 F. Supp. 866 (S.D. Ala. 1977), *aff’d in part, rev’d in part*, 612 F.2d 974 (5th Cir.

22 1980) 6, 8

23 *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*,

24 521 F.3d 1157 (9th Cir. 2008) (en banc) 9

25 *Garity v. APWU Nat’l Lab. Org.*,

26 828 F.3d 848 (9th Cir. 2016) 2

27 *Gomez v. Alexian Bros. Hosp. of San Jose*,

28 698 F.2d 1019 (9th Cir. 1983) 10

Greenfield v. Field Enters., Inc.,

No. 71-cv-2075, 1972 WL 155 (N.D. Ill. Feb. 1, 1972)..... 4

Hill v. Miss. State Emp. Serv.,

918 F.2d 1233 (5th Cir. 1990) 5-6

Kaplowitz v. Univ. of Chi.,

387 F. Supp. 42 (N.D. Ill. 1974)..... 4

1 *Kemether v. Pa. Interscholastic Athletic Ass’n, Inc.*,
 15 F. Supp. 2d 740 (E.D. Pa. 1998) 6

2

3 *Kentucky v. Biden*,
 23 F.4th 585 (6th Cir. 2022) 8

4 *Radentz v. Am. Ass’n of Physician Specialists, Inc.*,
 No. 13-cv-01486, 2014 WL 12601014 (C.D. Cal. Nov. 10, 2014) 5

5

6 *Raines v. U.S. Healthworks Med. Grp.*,
 534 P.3d 40 (Cal. 2023) 13

7

8 *Riesgo v. Heidelberg Harris, Inc.*,
 36 F. Supp. 2d 53 (D.N.H. 1997)..... 6

9 *Scaglione v. Chappaqua Cent. Sch. Dist.*,
 209 F. Supp. 2d 311 (S.D.N.Y. 2002) 6

10

11 *Sciarra v. DaMar Staffing Sols. of Indianapolis, Inc.*,
 No. 1:07-cv-1580, 2009 WL 10719817 (S.D. Ind. Aug. 21, 2009)..... 6

12

13 *Shehadeh v. Chesapeake & Potomac Tel. Co. of Md.*,
 595 F.2d 711 (D.C. Cir. 1978)..... 11

14 *Sibley Mem’l Hosp. v. Wilson*,
 488 F.2d 1338 (D.C. Cir. 1973)..... 10, 12

15

16 *Spirit v. Tchrs. Ins. & Annuity Ass’n*,
 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), *reinstated*
 and modified on other grounds, 735 F.2d 23 (2d Cir. 1984)..... 12-13

17

18 *Stewart v. Am. Ass’n of Physician Specialists, Inc.*,
 No. 5:13-cv-01670, 2015 WL 7722349 (C.D. Cal. Nov. 30, 2015) 5

19

20 *United States v. Gonzales*,
 520 U.S. 1 (1997)..... 5

21

22 *Vanguard Just. Soc. Inc. v. Hughes*,
 471 F. Supp. 670 (D. Md. 1979)..... 11

23

24 *Whitsitt v. Hedy Holmes Staffing Servs.*,
 No. 2:13-cv-00117, 2015 WL 5560119 (E.D. Cal. Sept. 21, 2015), *aff’d*, 671 F. App’x
 1004 (9th Cir. 2016)..... 7

25

26 *Wilborn v. S. Union State Cmty. Coll.*,
 720 F. Supp. 2d 1274 (M.D. Ala. 2010) 4

27

28 *Williams v. City of Montgomery*,
 742 F.2d 586 (11th Cir. 1984) 12, 13

1 *Wilson v. Timec Servs. Co., Inc.*,
 No. 2:23-cv-00172, 2023 WL 3436900 (E.D. Cal. May 12, 2023)..... 11

2 **Statutes**

3 29 U.S.C. § 621..... 1

4 29 U.S.C. § 623..... 4, 5, 10

5 29 U.S.C. § 630..... 4, 12

6 42 U.S.C. § 12101..... 1

7 42 U.S.C. § 12111..... 4, 10, 12

8 42 U.S.C. § 12112..... 4, 10

9 42 U.S.C. § 2000e..... 1, 4, 8, 12

10 42 U.S.C. § 2000e-2..... 4, 5, 10

11 47 U.S.C. § 230..... 9

12 **Rules**

13 Fed. R. Civ. P. 8..... 3

14 **Other Authorities**

15 *Black’s Law Dictionary* (11th ed. 2019)..... 8

16 EEOC Compliance Manual § 2-III (Aug. 2009)..... 10, 11, 13

17 EEOC, *CM-631: Employment Agencies* (Feb. 15, 1990) 5, 6, 8

18 EEOC, *Policy Guidance: What constitutes an employment agency under Title VII, how*
 19 *should charges against employment agencies be investigated, and what remedies can be*
 20 *obtained for employment agency violations of the Act?*, No. N-917-002. (Sept. 20, 1991)..... 5

21 EEOC, *Policy Statement on control by third parties over the employment relationship*
 22 *between an individual and his/her direct employer* (May 20, 1987)..... 12

23 EEOC, *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial*
 24 *Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights*
 25 *Act of 1964* (May 18, 2023)..... 13-14

26 EEOC, *The Americans with Disabilities Act and the Use of Software, Algorithms, and*
 27 *Artificial Intelligence to Assess Job Applicants and Employees* (May 12, 2022) 14

28 Pauline T. Kim & Matthew T. Bodie, *Artificial Intelligence and the Challenges of Workplace*
Discrimination and Privacy, 35 ABA J. Lab. & Emp. L. 289, 297 (2021)..... 9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Pauline T. Kim, *Manipulating Opportunity*, 106 Va. L. Rev. 867 (2020) 7, 12
Rev. Rul. 85-187, 1985-2 C.B. 338, 1985 WL 291469 (1985) 9
Susan C. Morse, *Do Tax Compliance Robots Follow the Law?*, 16 Ohio St. Tech. L.J. 278
(2020)..... 9
Webster’s New International Dictionary (2d ed. 1959)..... 8

1 **I. STATEMENT OF INTEREST**

2 Congress charged the Equal Employment Opportunity Commission (EEOC) with
3 administering and enforcing federal statutes that prohibit employment discrimination, including Title
4 VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (Title VII), the Americans with
5 Disabilities Act, *id.* §§ 12101 *et seq.* (ADA), and the Age Discrimination in Employment Act,
6 29 U.S.C. §§ 621 *et seq.* (ADEA). The operative allegations in this case implicate whether these
7 statutes cover entities that purportedly screen and refer applicants and make automated hiring
8 decisions on behalf of employers using algorithmic tools. The EEOC has issued several guidance
9 documents addressing what types of entities are covered by—and thus subject to—these statutes.
10 Because the EEOC has a significant interest in whether and how these longstanding theories of
11 coverage apply to the novel circumstances presented in this case, the agency offers its views. The
12 EEOC takes no position on the accuracy of the allegations in this case, including whether they
13 correctly characterize the nature, ownership, or creatorship of the relevant algorithmic tools.

14 **II. INTRODUCTION**

15 Federal employment discrimination laws share the same animating goal: “to assure equality
16 of employment opportunities by eliminating those practices and devices that discriminate on the
17 basis of [protected traits].” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). To achieve
18 this goal, Congress ensured that prohibitions on employment discrimination extended beyond direct
19 employers to a range of institutions, entities, and persons that might influence or control access to
20 employment, including employment agencies, labor organizations, and training programs. *See Ass’n*
21 *of Mexican-Am. Educators v. State of Cal.*, 231 F.3d 572, 580-81 (9th Cir. 2000) (en banc). Congress
22 recognized that if these types of entities were permitted to engage in discrimination where direct
23 employers were not, the promise of equal employment opportunity would be hollow.

24 Here, Derek Mobley’s First Amended Complaint (FAC) [ECF 47] alleges that Workday, Inc.
25 provided employers with algorithmic applicant screening tools that discriminated against him (and
26 others similarly situated) based on race, disability, and age. Although the EEOC takes no position on
27 the accuracy of Mobley’s assertions, the FAC alleges that Workday’s algorithmic tools dictated
28 whether applicants were referred to—and thus considered by—employers; Workday systems made

1 automated decisions on behalf of employers to reject certain candidates; and the Workday platform
2 was the exclusive point of entry for many job opportunities. Accepting the allegations in the FAC as
3 true, as the court must at the pleading stage, Workday is a type of intermediary that Congress meant
4 federal anti-discrimination laws to cover.

5 More precisely, Mobley has alleged facts sufficient to support a reasonable inference that
6 Workday is subject to Title VII, the ADA, and the ADEA under the statutory text and three
7 longstanding legal theories. *First*, Mobley has plausibly alleged that Workday operates as an
8 employment agency because it purportedly engages to a significant degree in screening and referral
9 activities that have long been associated with traditional employment agencies. *Second*, Mobley has
10 plausibly alleged that Workday is an indirect employer because it purportedly exercises significant
11 control over his and other applicants' access to employment opportunities with Workday's
12 employer-clients. *Third*, and finally, Mobley has plausibly alleged that Workday is an agent of
13 employers because employers have purportedly delegated authority to Workday to make at least
14 some hiring decisions.

15 For these reasons, Mobley has adequately pleaded that Workday is a covered entity under
16 Title VII, the ADA, and the ADEA. Accordingly, Workday's Motion to Dismiss [ECF 50] should be
17 denied to the extent it seeks dismissal on these grounds. The EEOC takes no position on any other
18 issues.

19 **III. BACKGROUND¹**

20 Workday offers human resource management services to employers across multiple
21 industries. FAC p.2. Key among those services, the FAC states that Workday provides employers
22 with automated "applicant screening systems" that incorporate "algorithmic decision-making tools."
23 FAC ¶ 28. These tools analyze and interpret resumes and applications and then "determine whether
24 an employer should accept or reject an application for employment." FAC ¶¶ 8, 28-29. Although an
25 employer may supply the desired qualifications for a given job, the FAC states that Workday's

26
27 ¹ We draw these facts from Mobley's FAC and present them in the light most favorable to him, as
28 required at the pleading stage. *See Garity v. APWU Nat'l Lab. Org.*, 828 F.3d 848, 854 (9th Cir.
2016). Again, the EEOC takes no position on the accuracy of the FAC's factual allegations,
including the descriptions about what services Workday allegedly provides.

1 screening tools determine which job candidates possess those qualifications. FAC ¶ 38 (“Workday
2 determines which candidates to recommend based on the demonstrated interests of its client-
3 employers in certain types of candidates....”); FAC ¶ 8 (“Workday ... utilizes screening tools, to
4 include Workday branded assessments and/or tests, to [] process and interpret an applicant’s
5 qualifications and recommend whether the applicant should be accepted or rejected.”).

6 Mobley is an African-American man, is over the age of forty, and has anxiety and
7 depression. FAC ¶ 19. Beginning in 2017, Mobley applied for more than one hundred positions with
8 employers that “exclusively use Workday, Inc. as a screening platform for talent acquisition and/or
9 hiring,” and every application was rejected. FAC ¶¶ 49, 88. The application process generally
10 proceeded as follows: Mobley would first respond to an online job ad “on a third-party website such
11 as LinkedIn, Indeed, Monster, or Careerbuilders,” by clicking on a link, which would “direct[] him
12 to the Workday platform on the employer’s website.” FAC ¶¶ 51-52. The Workday platform would
13 then prompt Mobley to create an account and either upload a resume or enter his information
14 manually. FAC ¶¶ 54-55. The FAC also states that some positions “required [Mobley] to take a
15 Workday branded assessment and/or personality test.” FAC ¶ 56. After that, Mobley would receive
16 an email notification that he had been rejected for the position. FAC ¶¶ 61-88. Notably, some of
17 these rejections came within hours of Mobley submitting his application, FAC ¶¶ 68-69, 76-77, and
18 one came in just fifty-five minutes, FAC ¶¶ 84-85.

19 In June 2021, Mobley filed a charge of discrimination with the EEOC, which he later
20 amended. FAC ¶ 6. After receiving a right-to-sue letter, Mobley filed this action. FAC ¶ 6. As
21 relevant here, his operative complaint asserts claims under Title VII, the ADA, and the ADEA. FAC
22 ¶¶ 130-58.

23 **IV. ARGUMENT**

24 Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain “a short and plain
25 statement of the claim showing that the pleader is entitled to relief.” Given this liberal pleading
26 standard, a complaint need only “contain sufficient factual matter, accepted as true, to ‘state a claim
27 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
28 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible when the facts alleged in the

1 complaint allow for “the reasonable inference that the defendant is liable for the misconduct
2 alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). Importantly, “a well-pleaded complaint may proceed
3 even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is
4 very remote and unlikely.” *Twombly*, 550 U.S. at 556 (citation and quotation marks omitted).

5 Here, Mobley has met this lenient standard with respect to all three theories of coverage
6 alleged in the FAC.

7 **A. Mobley has plausibly alleged that Workday is an employment agency.**

8 Title VII, the ADA, and the ADEA all prohibit discrimination by employment agencies.
9 42 U.S.C. §§ 2000e-2(b), 12111(2), 12112(a); 29 U.S.C. § 623(b). All three statutes also define the
10 term “employment agency” to include “any person regularly undertaking with or without
11 compensation to procure employees for an employer.” 42 U.S.C. §§ 2000e(c), 12111(7); 29 U.S.C.
12 § 630(c).²

13 Courts have generally construed the term to “include only those engaged to a significant
14 degree” in such procurement activities “as their profession or business.” *Brush v. San Francisco*
15 *Newspaper Printing Co.*, 315 F. Supp. 577, 580 (N.D. Cal. 1970), *aff’d*, 469 F.2d 89 (9th Cir. 1972).
16 This inquiry often focuses on the degree to which an entity engages in “the *activities* of an
17 employment agency in the traditional and generally accepted sense of that term.” *Greenfield v. Field*
18 *Enters., Inc.*, No. 71-cv-2075, 1972 WL 155, at *4 (N.D. Ill. Feb. 1, 1972) (emphasis added). The
19 statutory definition thus sweeps broadly and encompasses any person or type of entity that actively
20 performs or assists in traditional employee- or job-procurement functions. *See, e.g., Wilborn v. S.*
21 *Union State Cmty. Coll.*, 720 F. Supp. 2d 1274, 1291-92 (M.D. Ala. 2010) (truck driver vocational
22 program was employment agency where it “actively assist[ed] participants in the job search process”
23 by helping them submit job applications, inviting recruiters to program, and facilitating job
24 interviews); *Kaplowitz v. Univ. of Chi.*, 387 F. Supp. 42, 46 (N.D. Ill. 1974) (law school was an
25 employment agency where its placement office was “the primary source through which employers
26

27 ² Unlike the ADEA, Title VII and the ADA also define “employment agency” as including “any
28 person regularly undertaking with or without compensation ... to procure for employees
opportunities to work for an employer.” 42 U.S.C. §§ 2000e(c), 12111(7).

1 hire[d] ... law students and recent graduates” and a senior administrator estimated that he spent
 2 “25% of his time on placement-related activities”); *see also United States v. Gonzales*, 520 U.S. 1, 5
 3 (1997) (“Read naturally, the word ‘any’ has an expansive meaning....”).³

4 Screening and referral activities are among those classically associated with employment
 5 agencies.⁴ In enacting Title VII, Congress expressly contemplated referral activities, making it
 6 unlawful for an employment agency to “fail or refuse to *refer*” an individual for employment based
 7 on a protected trait. 42 U.S.C. § 2000e-2(b) (emphasis added); *see also* 29 U.S.C. § 623(b) (same
 8 with respect to age). The EEOC has further described “referral activities” as the “primary function of
 9 employment agencies.” EEOC, *CM-631: Employment Agencies*, § 631.4(d) (Feb. 15, 1990);⁵ *see*
 10 *also* EEOC, *Policy Guidance: What constitutes an employment agency under Title VII, how should*
 11 *charges against employment agencies be investigated, and what remedies can be obtained for*
 12 *employment agency violations of the Act?*, No. N-917-002, § II.E. (Sept. 20, 1991)⁶ (directing
 13 investigators to gather information about employment agencies’ “screening and referral practices”).

14 Although screening and referral activities go by various names and come in different forms,
 15 they typically involve three hallmark tasks: (i) evaluating candidates’ skills and qualifications,
 16 including by reviewing their resumes or other application materials; (ii) making judgments about
 17 which candidates are qualified or suitable for a given job opening; and (iii) referring or
 18 recommending those candidates to an employer for further consideration. *See Hill v. Miss. State*

19 ³ By contrast, courts have held that merely publishing information about employment opportunities
 20 is not enough to make an entity an employment agency. *See, e.g., Brush*, 315 F. Supp. at 580-81
 21 (newspaper was not employment agency where it merely published help wanted ads); *Stewart v. Am.*
 22 *Ass’n of Physician Specialists, Inc.*, No. 5:13-cv-01670, 2015 WL 7722349, at *5 (C.D. Cal. Nov.
 23 30, 2015) (nonprofit physicians’ organization not employment agency where it “simply has a page
 on its website which allows potential employers to list job opportunities”); *Radentz v. Am. Ass’n of*
Physician Specialists, Inc., No. 13-cv-01486, 2014 WL 12601014, at *3-5 (C.D. Cal. Nov. 10, 2014)
 (similar).

24 ⁴ To be clear, we do not suggest that an entity *must* engage in screening and referral activities to
 25 qualify as an employment agency. Determining whether an entity is an employment agency is a fact-
 26 intensive inquiry, which considers the degree to which the entity engaged in employee- or job-
 procurement activities. Because those activities can (and do) manifest in different ways, and an
 employment agency’s level of involvement in those activities may vary, there is no single archetype
 of an employment agency.

27 ⁵ Available at <https://www.eeoc.gov/laws/guidance/cm-631-employment-agencies>.

28 ⁶ Available at <https://www.eeoc.gov/laws/guidance/policy-guidance-what-constitutes-employment-agency-under-title-vii-how-should-charges>.

1 *Emp. Serv.*, 918 F.2d 1233, 1234-35 & n.1 (5th Cir. 1990) (state commission was employment
 2 agency where it “match[ed] applicants to jobs” by determining which applicants were “most
 3 qualified” and then referring those applicants to local employers); *Scaglione v. Chappaqua Cent.*
 4 *Sch. Dist.*, 209 F. Supp. 2d 311, 312-13, 315-18 (S.D.N.Y. 2002) (county personnel office was
 5 employment agency where it reviewed candidates and generated “preferred eligible list” from which
 6 municipalities could hire); *Kemether v. Pa. Interscholastic Athletic Ass’n, Inc.*, 15 F. Supp. 2d 740,
 7 764 (E.D. Pa. 1998) (athletic association potentially liable as employment agency where its agents
 8 “perform[ed] the actual ‘matchmaking’ task of procuring officials for schools”).⁷

9 Importantly, an employment agency’s role in evaluating candidates may include
 10 administering pre-referral tests. *See Dumas v. Town of Mount Vernon*, 436 F. Supp. 866, 871 (S.D.
 11 Ala. 1977) (employment agency “tested the plaintiff” and “certified the plaintiff for consideration for
 12 the position which she sought,” among other things), *aff’d in part, rev’d in part*, 612 F.2d 974 (5th
 13 Cir. 1980); *Dixon v. CMS of the State of Ill.*, No. 14-cv-4986, 2016 WL 4158926, at *2 (N.D. Ill.
 14 Aug. 5, 2016) (employment agency “administer[ed] the examinations plaintiff took in an effort to
 15 obtain employment with the [state]”); *see also* EEOC, *CM-631: Employment Agencies*, § 631.4(h)(2)
 16 (discussing employment agencies that “administer[] prereferral tests as the basis for making
 17 referrals”).

18 Accepting the FAC’s allegations as true, as required at the pleading stage, Mobley has
 19 plausibly alleged that Workday’s algorithmic tools perform precisely the same screening and referral
 20 functions as traditional employment agencies—albeit by more sophisticated means. Like traditional
 21 employment agencies, Workday’s screening tools allegedly review a candidate’s application or
 22 resume to identify relevant skills and qualifications. FAC ¶ 29 (alleging that algorithmic tools
 23 “quickly analyze large number of applications automatically”). Like traditional employment
 24 agencies, Workday’s system then purportedly makes a judgment about whether a candidate is
 25

26 ⁷ *See also Riesgo v. Heidelberg Harris, Inc.*, 36 F. Supp. 2d 53, 54 (D.N.H. 1997) (discussing
 27 employment agency that “recruit[ed], screen[ed], and refer[red] temporary employees to client
 28 companies”); *Sciarra v. DaMar Staffing Sols. of Indianapolis, Inc.*, No. 1:07-cv-1580, 2009 WL
 10719817, at *1 (S.D. Ind. Aug. 21, 2009) (discussing employment agency that “screen[ed] and
 refer[red] job candidates to client/employers seeking to fill positions”).

1 qualified or suitable for a particular job opening. FAC ¶ 38 (alleging that “Workday determines
2 which candidates to recommend based on the demonstrated interests of its client-employer in certain
3 types of candidates”). Like traditional employment agencies, Workday’s screening tools allegedly
4 then either reject the candidate or refer them to an employer for further consideration. FAC ¶ 94
5 (“Workday’s website states that it can ‘reduce time to hire by automatically dispositioning or
6 moving candidates forward in the recruiting process.’”); FAC ¶ 99 (“Workday embeds artificial
7 intelligence (‘AI’) and machine learning (‘ML’) into its algorithmic decision-making tools, enabling
8 these applications to make hiring decisions.”). And the alleged “Workday branded cognitive
9 assessment or personality tests” candidates take are akin to traditional pre-referral tests. FAC ¶ 8.

10 In short, because Mobley has plausibly alleged that Workday actively is engaged to a
11 significant degree in the services of traditional employment agencies, he has sufficiently pleaded that
12 Workday is an employment agency. *See* Pauline T. Kim, *Manipulating Opportunity*, 106 Va. L. Rev.
13 867, 915 (2020) (“[j]ob-matching platforms perform the exact same functions [as traditional
14 employment agencies], except that they leverage more data and use sophisticated computer
15 algorithms to aid the matching process,” and thus, “should easily meet the definition of an
16 employment agency”).

17 In urging a contrary result, Workday first argues that it does not engage in employee-
18 procurement activities because *screening* employees is not equivalent to *procuring* employees, and
19 Workday does not “actively recruit or solicit applications.” [ECF 50 at 10-11.] Neither point is
20 persuasive. As the authorities canvassed above demonstrate, courts have long recognized screening
21 and referral services as traditional functions of employment agencies. Workday fails to engage with
22 that body of caselaw, and the single unpublished district court decision on which it relies is readily
23 distinguishable.⁸

24 Furthermore, while some employment agencies may recruit candidates, or “source” them as
25

26 ⁸ Workday relies on *Whitsitt v. Hedy Holmes Staffing Servs.*, No. 2:13-cv-00117, 2015 WL 5560119
27 (E.D. Cal. Sept. 21, 2015), *aff’d*, 671 F. App’x 1004 (9th Cir. 2016). That case, however, involved a
28 pro se plaintiff who merely alleged that a company “screened” his applications, but evidently
provided no further details. *Id.* at *3. *Whitsitt* thus stands for the unremarkable proposition that
conclusory allegations are insufficient.

1 Mobley puts it, neither the statutory text nor the caselaw *requires* that an entity engage in candidate
2 recruitment to be an employment agency. As the EEOC has explained, an employment agency “need
3 not actively solicit the prospective employees or job applicants; it is enough if applicants come to
4 them.” EEOC, *CM-631: Employment Agencies*, § 631.1(b)(4). That is because the statutory phrase
5 “to procure employees” does not necessitate active solicitation or recruitment. To “procure” means
6 “[t]o obtain (something), esp. by special effort or means,” or “[t]o achieve or bring about (a result).”
7 Procure, *Black’s Law Dictionary* (11th ed. 2019); *see also Kentucky v. Biden*, 23 F.4th 585, 604 (6th
8 Cir. 2022) (“‘[P]rocure’ means ‘[t]o bring into possession; to acquire; gain; get; to obtain by any
9 means, as by purchase or loan.’” (first alteration added) (quoting *Webster’s New International*
10 *Dictionary* 1974 (2d ed. 1959))). Moreover, while Title VII, the ADA and the ADEA all prohibit
11 employment agencies and other covered entities from discriminating against “individual[s],” the
12 statutes’ definitional provisions speak more narrowly of employment agencies procuring, or bringing
13 about the acquisition of, “employees” or individuals that ultimately will be “employed by an
14 employer.” 42 U.S.C. § 2000e(f). Screening and referral activities (i.e., determining whether
15 particular candidates are qualified or suitable) achieve or bring about the acquisition of employees
16 and thus satisfy the statutory definition. While other common employment-agency functions like
17 recruitment may also meet the statutory definition as there is no archetypal employment agency, *see*
18 *supra* n.4, recruitment is neither the sole nor a requisite employee-procuring activity and is not
19 essential to statutory coverage.

20 Along the same lines, an employment agency’s screening and referral activities may take
21 place after an individual has already applied for a particular position with a particular employer. In
22 *Dumas*, for example, the plaintiff applied to a county personnel board for an assistant town clerk
23 position. 436 F. Supp. at 869. After the plaintiff applied, the personnel board administered an exam,
24 conducted an interview, and then referred the plaintiff to the town for further consideration by
25 placing her on “a list from which the position of assistant town clerk was to be filled.” *Id.* Although
26 the relevant screening and referral activities occurred post-application, the district court determined
27 that the personnel board was “clearly an ‘employment agency’ as envisioned by [Title VII].” *Id.* at
28 871.

1 Workday next argues that merely providing employers with algorithmic tools that allow *them*
2 to screen candidates does not make Workday an employment agency. [ECF 50 at 12-13.] After all,
3 Workday observes, if an individual uses a Microsoft Excel spreadsheet to calculate their taxes, that
4 does not make Microsoft a tax preparer. [ECF 50 at 13.] Whatever intuitive appeal that analogy
5 might have collapses under scrutiny. Mobley alleges that, unlike Microsoft in that hypothetical,
6 Workday’s screening system itself actively makes automated decisions to reject or advance job
7 candidates. *See* Pauline T. Kim & Matthew T. Bodie, *Artificial Intelligence and the Challenges of*
8 *Workplace Discrimination and Privacy*, 35 ABA J. Lab. & Emp. L. 289, 297 (2021) (“If a tech
9 platform actively intervenes to suggest or promote certain candidates or opportunities, or to facilitate
10 certain matches, ... it should be treated as an ‘employment agency’ under Title VII.”). Excel does
11 not make comparable decisions, actively or otherwise, about one’s taxes.⁹

12 Additionally, Mobley alleges that Workday’s algorithmic tools themselves cause or
13 contribute to the challenged discrimination, independent of the criteria used by individual employers.
14 As the Ninth Circuit has held in other contexts, online platforms cannot avoid liability when their
15 own design elements cause or contribute to unlawful discrimination. *See Fair Hous. Council of San*
16 *Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008) (en banc) (online
17 platform not entitled to immunity under Communications Decency Act, 47 U.S.C. § 230, where it
18 designed website in manner that “contributes materially” to alleged violations of Fair Housing Act).
19 Although Workday does not invoke immunity under Section 230, the Ninth Circuit’s reasoning in
20 *Roommates.com* applies with similar force to Workday’s argument here.

21 Finally, Workday suggests that an adverse ruling would have significant ramifications
22 because thousands of employers use its platform. [ECF 50 at 11.] As an initial matter, Workday cites

23 _____
24 ⁹ Analogously, the Internal Revenue Service has stated that “[a] firm that furnishes a computerized
25 tax return preparation service to tax practitioners is an income tax return preparer *when the program*
26 *used goes beyond mere mechanical assistance.*” Rev. Rul. 85-187, 1985-2 C.B. 338, 1985 WL
27 291469, at *1 (1985) (emphasis added); *see also* Susan C. Morse, *Do Tax Compliance Robots*
28 *Follow the Law?*, 16 Ohio St. Tech. L.J. 278, 283 n.13 (2020) (acknowledging that “[t]here is a
debate as to whether tax compliance robots should be treated as tax preparers,” but noting that “a
Revenue Ruling suggests that tax compliance robots could be tax preparers in some cases”). So even
if one were to entertain an analogy between applicant-screening software and tax-preparation
software, it would not help Workday at the pleading stage because its algorithmic tools (as Mobley
characterizes them) go beyond “mere mechanical assistance.”

1 no authority for the novel proposition that an entity can be too big to qualify as an employment
 2 agency. In any event, that appeal to consequence has no bearing on whether Workday satisfies the
 3 statutory definition as a conceptual matter. If, as Mobley alleges, Workday actively performs
 4 traditional employee-procurement tasks, then the statutory definition compels a finding that
 5 Workday is an employment agency. That remains true whether Workday performs those tasks for
 6 one employer or thousands of employers. More to the point, if Workday’s algorithmic tools in fact
 7 make hiring decisions (and on the scale Mobley suggests), it would be all the more important to
 8 ensure that Workday complies with federal anti-discrimination law.

9 **B. Mobley has plausibly alleged that Workday is an indirect employer.**

10 Title VII and the ADEA make it unlawful for “an employer” to discriminate against “any
 11 individual,” 42 U.S.C. § 2000e-2(a), 29 U.S.C. § 623(a), and the ADA similarly makes it unlawful
 12 for “an employer” to discriminate against “a qualified individual” with a disability, 42 U.S.C.
 13 §§ 12111(2), 12112(a). Even when an entity is not a plaintiff’s employer, it may still be liable as an
 14 “indirect employer,” a theory of liability also known as “third-party interference.” *See* EEOC
 15 Compliance Manual § 2-III(B)(3)(a) (Aug. 2009).¹⁰ The leading case on this theory is *Sibley*
 16 *Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). There, the D.C. Circuit held that
 17 entities “who are neither actual nor potential direct employers of particular complainants,” may
 18 nonetheless be held liable under Title VII when they “control access to such employment and ...
 19 deny such access by reference to invidious criteria.” *Id.* at 1342. Applying that holding, the court
 20 concluded that a hospital could be liable to a male nurse, whom it did not employ, for blocking his
 21 access to female patients who wished to employ him. *Id.* at 1339-40, 1342-44.

22 Simply put, “*Sibley* and its progeny extended Title VII coverage to indirect employers when
 23 those employers discriminated against and interfered with the employees’ relationship with their
 24 employers.” *Anderson v. Pac. Mar. Ass’n*, 336 F.3d 924, 931 (9th Cir. 2003). The Ninth Circuit has
 25 long recognized this doctrine. *See Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019, 1021
 26 (9th Cir. 1983) (“We agree with the District of Columbia Circuit that it would contravene Congress’s
 27

28 ¹⁰ Available at <https://www.eeoc.gov/laws/guidance/section-2-threshold-issues>.

1 intent in Title VII to permit a covered employer to exploit circumstances peculiarly affording it the
 2 capability of discriminatorily interfering with an individual’s employment opportunities with another
 3 employer, while it could not do so with respect to employment in its own service.” (cleaned up)).¹¹

4 Here again, accepting Mobley’s allegations as true, Workday exercised sufficient control
 5 over his and other applicants’ access to employment opportunities to qualify as an indirect employer.
 6 Like the hospital in *Sibley Memorial*, Workday purportedly acts as a gatekeeper between applicants
 7 and prospective employers. Mobley alleges that “a prospective employee can only advance in the
 8 hiring process if they get past the Workday platform[’]s screening algorithms.” FAC ¶ 98. Mobley
 9 further alleges that the employers to which he applied “exclusively use Workday, Inc. as a screening
 10 platform for talent acquisition and/or hiring,” FAC ¶ 49, which meant that “[t]he Workday platform
 11 is the only way to gain employment with these employers,” FAC ¶ 92. According to Mobley’s
 12 allegations, Workday’s algorithmic tools (and the underlying artificial intelligence powering them to
 13 provide the alleged screening and referral services) dictate whether applicants are referred to—and
 14 thus considered by—these employers. *Cf. Shehadeh v. Chesapeake & Potomac Tel. Co. of Md.*, 595
 15 F.2d 711, 722 (D.C. Cir. 1978) (“The considerations articulated in *Sibley Hospital* apply with equal
 16 force to discriminatorily-motivated propagation of adverse references.”). To the extent Workday
 17 offers assessments and tests, those would likewise give the platform significant control over whether
 18 an applicant advances in the hiring process. *See Ass’n of Mexican-Am. Educators v. State of Cal.*,
 19 231 F.3d 572, 582 (9th Cir. 2000) (en banc) (although State of California did not employ teachers,
 20 “by requiring, formulating, and administering” a skills test as a condition of employment, the state
 21 “‘interfered’ to a degree sufficient to bring it within the reach of Title VII”); *Vanguard Just. Soc.*
 22 *Inc. v. Hughes*, 471 F. Supp. 670, 696 (D. Md. 1979) (defendant was potentially liable under *Sibley*
 23 *Memorial* doctrine where it “exercised substantial authority and discretion in the area of testing of
 24 applicants for entry level positions”). Accordingly, Mobley has sufficiently alleged that Workday is

25
 26 ¹¹ Although *Anderson* and *Gomez* were Title VII cases, the indirect employer theory applies in other
 27 contexts as well. *See* EEOC Compliance Manual § 2-III(B)(3)(a)(I) (discussing third-party
 28 interference claims under Title VII, ADA, and ADEA); *see also, e.g., Wilson v. Timec Servs. Co.,*
Inc., No. 2:23-cv-00172, 2023 WL 3436900, at *4 (E.D. Cal. May 12, 2023) (“[P]laintiffs have
 sufficiently pled that defendant ... was their indirect employer under Title VII, ... and the ADA.”).

1 an indirect employer. *See also* Kim, *supra*, at 917-19.

2 In resisting this conclusion, Workday argues that it does not exert “control over its
3 customers,” who “are not required to use Workday tools and are free to stop using them at any time.”
4 [ECF 50 at 14.] This response misses the point. The hospital in *Sibley Memorial* was an indirect
5 employer even though it too did not control its patients, who were not required to use that hospital
6 and were free to seek care elsewhere. As that outcome illustrates, the relevant inquiry is not whether
7 the defendant controls the plaintiff’s prospective employer, but whether the defendant can control or
8 interfere with the plaintiff’s *access* to that employer. In many cases, the defendant’s ability to
9 interfere—or the “circumstances peculiarly affording it the capability of discriminatorily
10 interfering,” *Sibley Mem’l*, 488 F.2d at 1341—may arise from its own voluntary business
11 relationship with the prospective employer.

12 Workday also argues that it “has no control over any premises, no power over day-to-day
13 operations, no right to supervise, and no ability to force a customer to make decisions in the hiring
14 process or otherwise.” [ECF 50 at 14.] But nothing in *Sibley Memorial* or its progeny suggests that
15 an indirect employer’s ability to interfere must manifest itself in these ways. To the contrary, as the
16 EEOC has explained, “[t]he nature of the control exercised by the third party will always be a
17 product of each specific factual situation,” and it is therefore “difficult to provide a general rule that
18 will fit every case.” EEOC, *Policy Statement on control by third parties over the employment*
19 *relationship between an individual and his/her direct employer* (May 20, 1987).¹²

20 **C. Mobley has plausibly alleged that Workday is an agent of employers.**

21 Under Title VII, the ADA, and the ADEA, the term “employer” includes “any agent of” an
22 employer. 42 U.S.C. §§ 2000e(b), 12111(5)(A); 29 U.S.C. § 630(b). Relying on this clause, several
23 circuits have reasoned that an employer’s agent may be held independently liable for discrimination
24 under some circumstances. *See DeVito v. Chicago Park Dist.*, 83 F.3d 878, 882 (7th Cir. 1996);
25 *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 17 (1st
26 Cir. 1994); *Williams v. City of Montgomery*, 742 F.2d 586, 588-89 (11th Cir. 1984); *Spirt v. Tchrs.*

27 _____
28 ¹² Available at <https://www.eeoc.gov/laws/guidance/policy-statement-control-third-parties-over-employment-relationship-between>.

1 *Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223
 2 (1983), *reinstated and modified on other grounds*, 735 F.2d 23 (2d Cir. 1984); *see also Raines v.*
 3 *U.S. Healthworks Med. Grp.*, 534 P.3d 40, 51 (Cal. 2023) (“These cases establish that an employer’s
 4 agent can, under certain circumstances, appropriately bear direct liability under the federal
 5 antidiscrimination laws.”); EEOC Compliance Manual § 2-III(B)(2)(b) (“An entity that is an agent
 6 of a covered entity is liable for the discriminatory actions it takes on behalf of the covered entity.”).

7 Importantly, as Workday itself acknowledges [ECF 50 at 15], an employer’s agent may be
 8 independently liable when the employer has delegated to the agent “functions [that] are traditionally
 9 exercised by an employer.” *Williams*, 742 F.2d at 589; *see also id.* (“Where the employer has
 10 delegated control of some of the employer’s traditional rights, such as hiring or firing, to a third
 11 party, the third party has been found to be an ‘employer’ by virtue of the agency relationship.”
 12 (citation omitted)); *DeVito*, 83 F.3d at 881 (employer’s agent potentially liable where agent
 13 “adjudicate[d] employment disputes on behalf of the [employer]”); *Carparts*, 37 F.3d at 17-18
 14 (agent of employer potentially liable where it “act[ed] on behalf of the entity in the matter of
 15 providing and administering employee health benefits”).¹³

16 Accepting Mobley’s allegations as true, Workday meets this requirement. Specifically,
 17 Mobley alleges facts suggesting that employers delegate control of significant aspects of their hiring
 18 processes to Workday. Again, according to Mobley, Workday’s screening system itself allegedly can
 19 either refer candidates for further consideration or instead reject them, in which case Workday would
 20 have the final say over the decision not to hire those rejected candidates. The EEOC’s own technical
 21 assistance states that a software vendor acts as an employer’s agent “if the employer has given [the
 22 vendor] significant authority to act on the employer’s behalf,” which “may include situations where
 23 an employer relies on the results of a selection procedure that the agent administers on its behalf.”
 24 EEOC, *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence*
 25 *Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964* (May 18,

26 _____
 27 ¹³ Workday suggests that the “ultimate question” is whether holding an employer’s agent liable is
 28 “consistent with notions of due process.” [ECF 50 at 15.] None of the decisions Workday cites on
 this front—nor any of the decisions cited here—uses the term “due process,” let alone holds that it is
 the “ultimate question” in determining whether an agent can be liable for its own discrimination.

2023);¹⁴ *see also* EEOC, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (May 12, 2022)¹⁵ (employer’s agents “may include entities such as software vendors, if the employer has given them authority to act on the employer’s behalf”).

Here, according to Mobley, Workday’s employer-clients rely on the results of its algorithmic screening tools to make at least some initial decisions to reject candidates. Accordingly, Mobley has sufficiently alleged that Workday is an agent of employers.

V. CONCLUSION

For the foregoing reasons, under the allegations set forth in the FAC, Mobley has sufficiently pleaded that Workday is subject to Title VII, the ADA, and the ADEA as an employment agency, indirect employer, or agent of employers. Accordingly, Workday’s motion should be denied to the extent it seeks dismissal on these grounds.

Dated: April 9, 2024

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

DARA S. SMITH
Assistant General Counsel

BY: /s/ Steven Winkelman
STEVEN WINKELMAN
Attorney
U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M Street N.E., 5th Floor
Washington, D.C. 20507
Telephone (202) 921-2564
steven.winkelman@eoc.gov

Attorneys for EEOC as Amicus Curiae

¹⁴ Available at <https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial>.

¹⁵ Available at <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>.

CERTIFICATE OF SERVICE

I certify that on April 9, 2024, I electronically submitted the foregoing Brief of the Equal Employment Opportunity Commission as Amicus Curiae, along with the Notice of Motion of the Equal Employment Opportunity Commission for Leave to File Accompanying Brief as Amicus Curiae, and [Proposed] Order, with the Clerk of Courts using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

DATED: April 9, 2024

BY: /s/ Steven Winkelman
STEVEN WINKELMAN
Attorney
U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel