

## Ethics at the Intersection: AI and DEI in Hiring and Firing

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### Today's Goals

- » AI is everywhere, but it is still new and ever-changing. Along with everybody else, human resources and in-house legal departments are figuring out how to use it most effectively and efficiently.
- » Questions we will seek to address:
  - » What is employment-related AI? What does it actually do?
  - » How can AI benefit employers in hiring, firing, discipline, leave, and overall legal compliance?
  - » Where can AI go wrong, and how can employers respond to AI-created problems in a practical and ethical manner?

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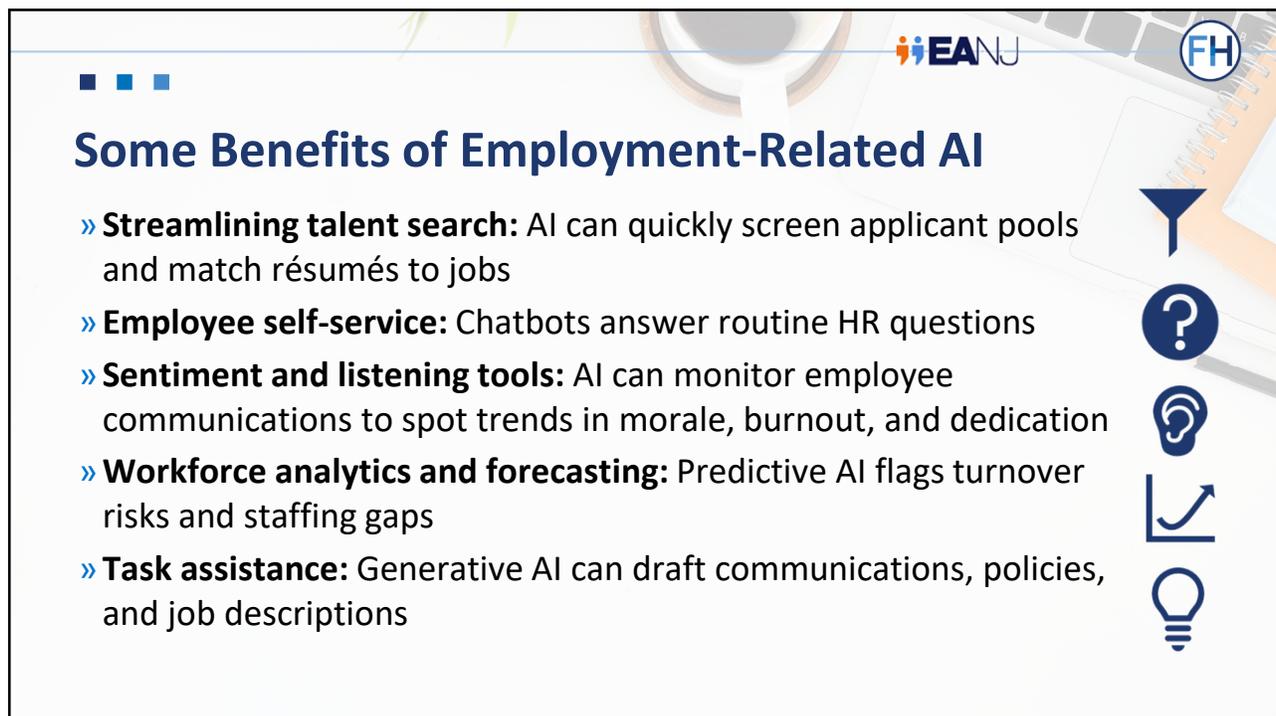
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**Current Employment-Related AI Technology**

- » **Generative AI:** Synthesizes information and creates summaries, job descriptions, policies
- » **Conversational AI:** Chatbots answer employees' HR-related questions
- » **Predictive AI:** Forecasts turnover, hiring needs, and performance trends
- » **Sentiment AI:** Interprets tone and emotion in intracompany chats and emails
- » **AI Matching & Recommendation Engines:** Job and candidate matching, internal mobility suggestions

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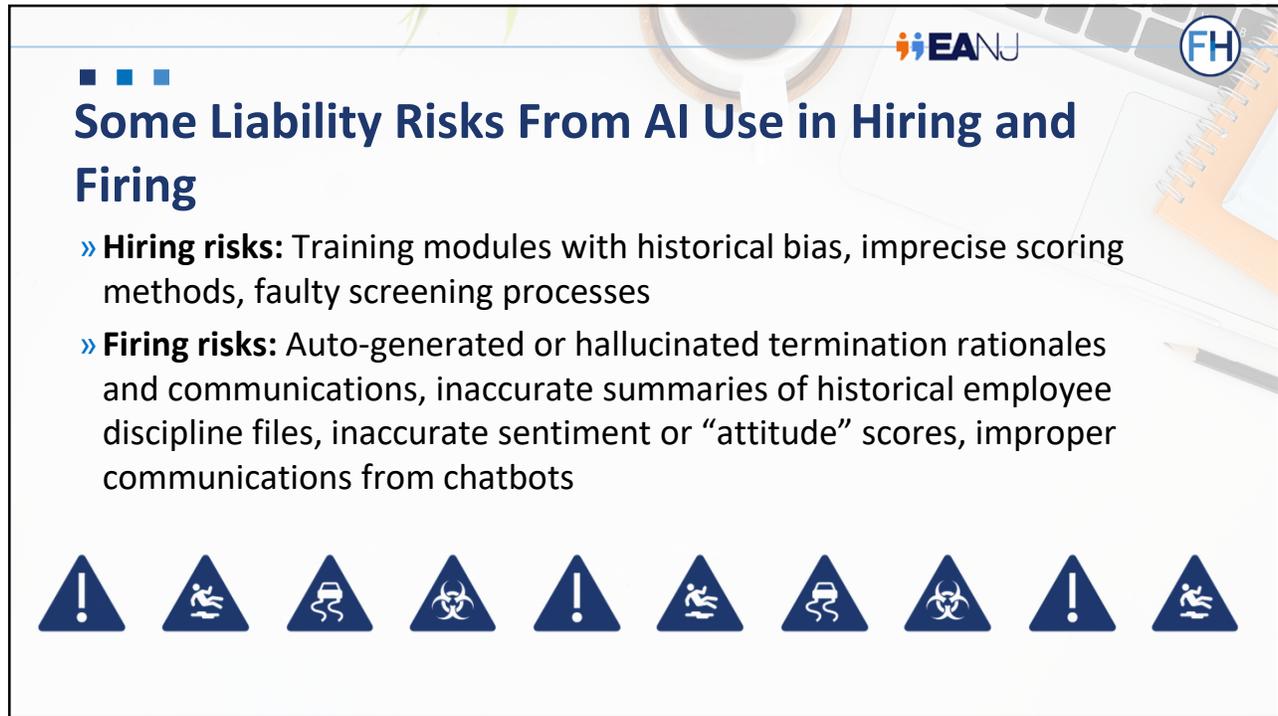
**Some Benefits of Employment-Related AI**

- » **Streamlining talent search:** AI can quickly screen applicant pools and match résumés to jobs
- » **Employee self-service:** Chatbots answer routine HR questions
- » **Sentiment and listening tools:** AI can monitor employee communications to spot trends in morale, burnout, and dedication
- » **Workforce analytics and forecasting:** Predictive AI flags turnover risks and staffing gaps
- » **Task assistance:** Generative AI can draft communications, policies, and job descriptions

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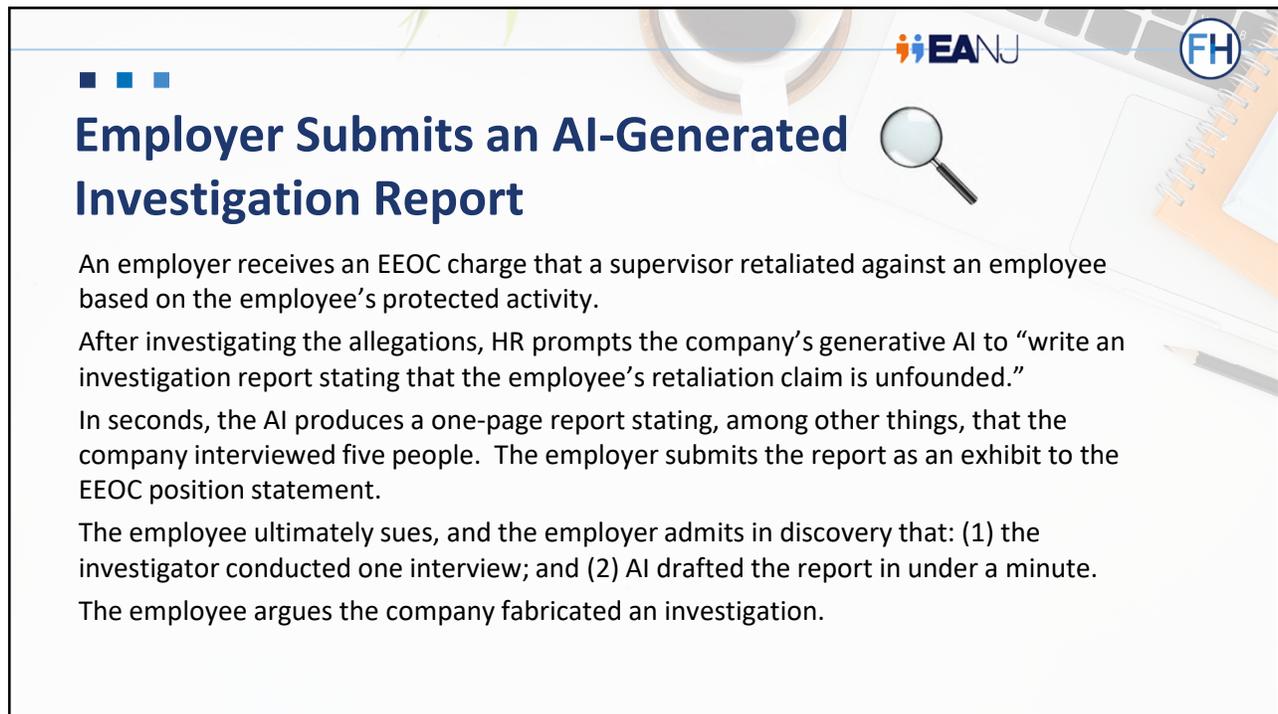
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## Some Liability Risks From AI Use in Hiring and Firing

- » **Hiring risks:** Training modules with historical bias, imprecise scoring methods, faulty screening processes
- » **Firing risks:** Auto-generated or hallucinated termination rationales and communications, inaccurate summaries of historical employee discipline files, inaccurate sentiment or “attitude” scores, improper communications from chatbots



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## Employer Submits an AI-Generated Investigation Report

An employer receives an EEOC charge that a supervisor retaliated against an employee based on the employee’s protected activity.

After investigating the allegations, HR prompts the company’s generative AI to “write an investigation report stating that the employee’s retaliation claim is unfounded.”

In seconds, the AI produces a one-page report stating, among other things, that the company interviewed five people. The employer submits the report as an exhibit to the EEOC position statement.

The employee ultimately sues, and the employer admits in discovery that: (1) the investigator conducted one interview; and (2) AI drafted the report in under a minute. The employee argues the company fabricated an investigation.

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## AI Causes the Employer to RIF the Wrong People

An AI model ranks employees for use in a reduction in force (“RIF”). The model:

- » Identifies employees with recent medical leave or adjusted schedules as “unstable”
- » Fails to account for RIF’s potential disparate impact on older employees
- » Does not flag any employee who had filed a recent protected complaint

As a result, AI’s RIF list includes numerous older workers, many high performers who happened to take recent medical and parental leaves, and several employees who recently lodged internal complaints.

Relying on the AI RIF list, the employer executes the RIF. Numerous employees sue, and discovery reveals that AI was solely responsible for creating the list.

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## Sentiment AI Labels Internal Communications About Pay as “Negativity”

An employer begins using an AI “workforce morale” model, which analyzes employee sentiment to identify potential workplace risks.

- » The model begins flagging communications between two employees such as:
- » “We need better hours and better pay”; and
- » “We should talk to the team about fairness”

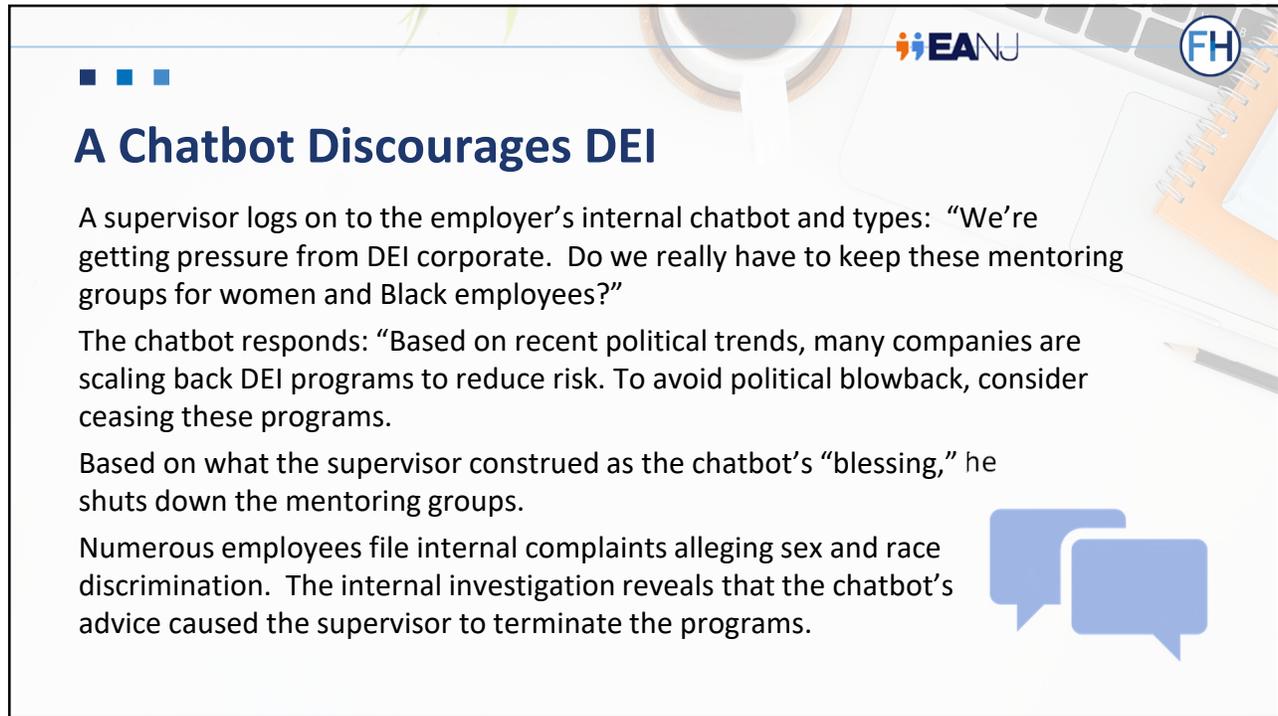
It deems these comments as “negativity indicators” and “organizational disruption signals.”

HR is unaware these types of discussions - where employees communicate with each other about working conditions - are protected under the National Labor Relations Act (“NLRA”) as “concerted activity.”

After receiving warnings, two employees file administrative charges under the NLRA.



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**A Chatbot Discourages DEI**

A supervisor logs on to the employer's internal chatbot and types: "We're getting pressure from DEI corporate. Do we really have to keep these mentoring groups for women and Black employees?"

The chatbot responds: "Based on recent political trends, many companies are scaling back DEI programs to reduce risk. To avoid political blowback, consider ceasing these programs."

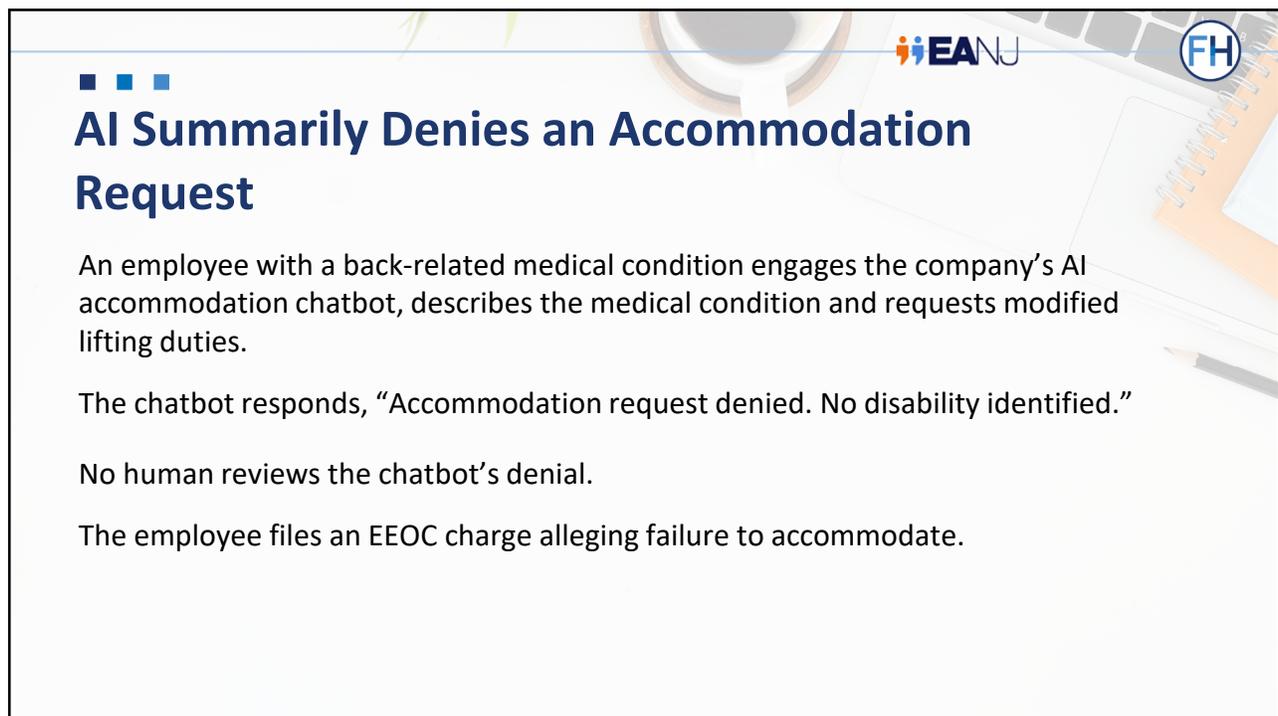
Based on what the supervisor construed as the chatbot's "blessing," he shuts down the mentoring groups.

Numerous employees file internal complaints alleging sex and race discrimination. The internal investigation reveals that the chatbot's advice caused the supervisor to terminate the programs.



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**AI Summarily Denies an Accommodation Request**

An employee with a back-related medical condition engages the company's AI accommodation chatbot, describes the medical condition and requests modified lifting duties.

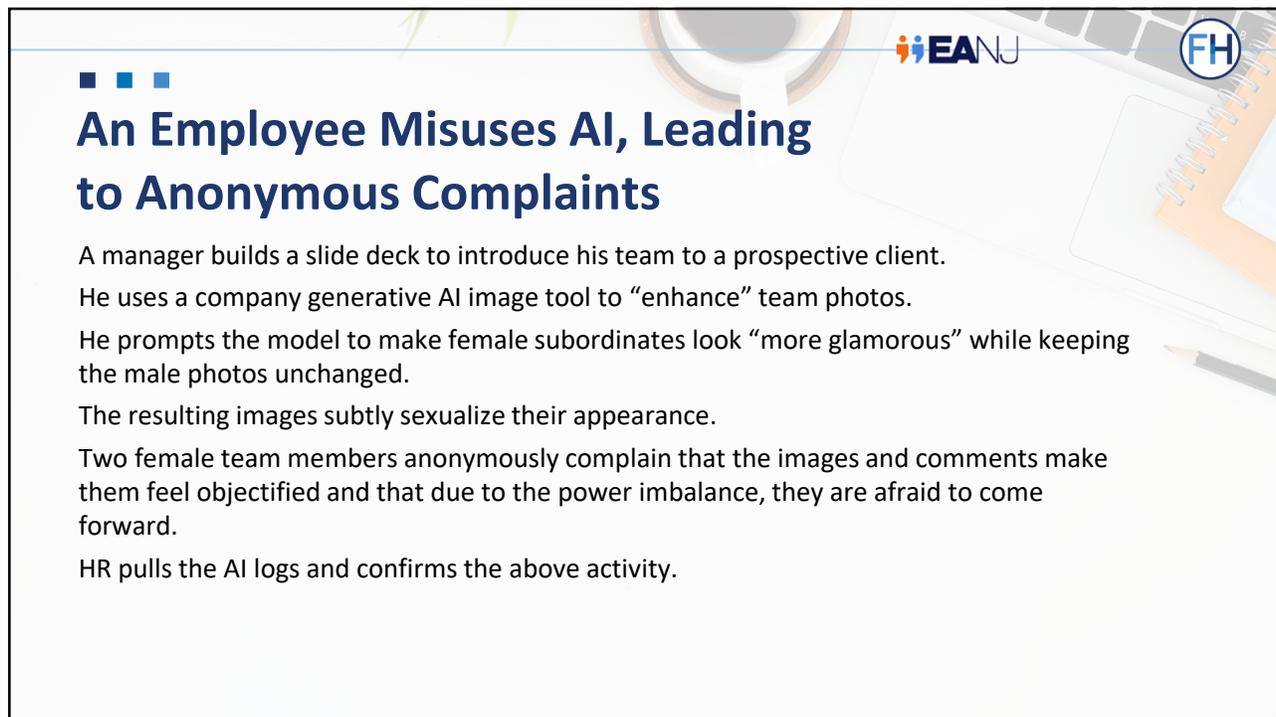
The chatbot responds, "Accommodation request denied. No disability identified."

No human reviews the chatbot's denial.

The employee files an EEOC charge alleging failure to accommodate.

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## An Employee Misuses AI, Leading to Anonymous Complaints

A manager builds a slide deck to introduce his team to a prospective client.

He uses a company generative AI image tool to “enhance” team photos.

He prompts the model to make female subordinates look “more glamorous” while keeping the male photos unchanged.

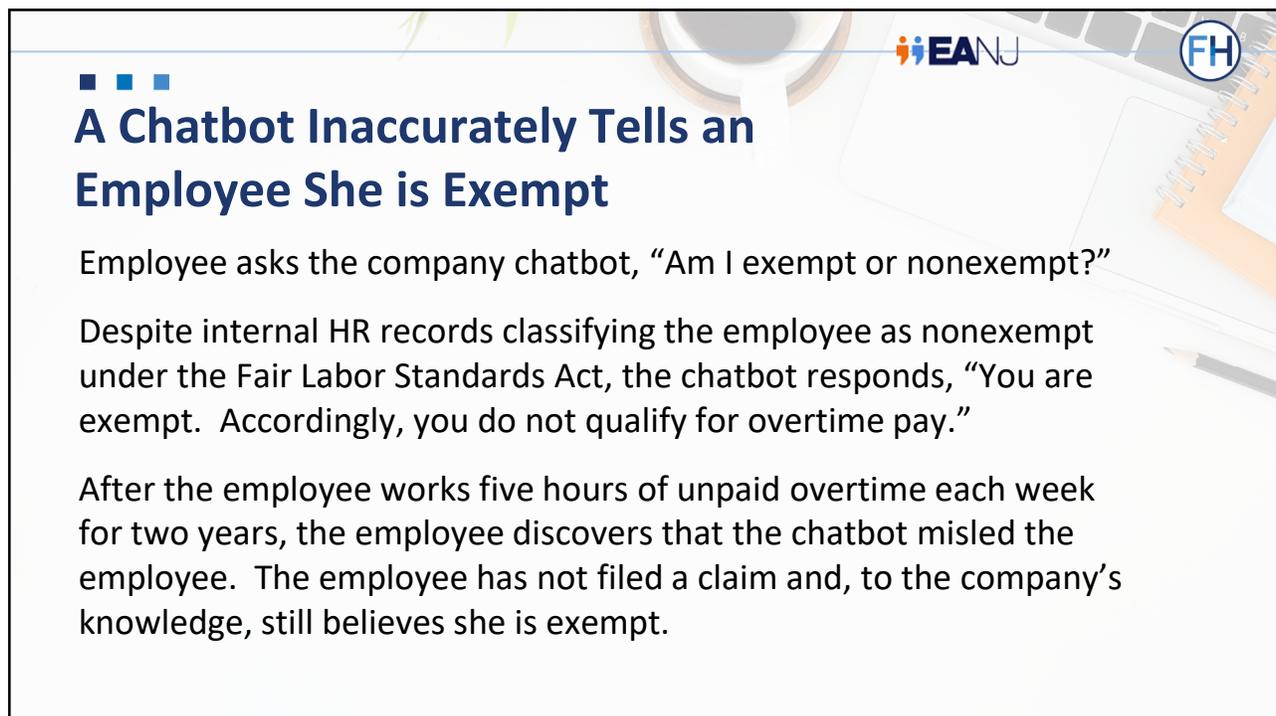
The resulting images subtly sexualize their appearance.

Two female team members anonymously complain that the images and comments make them feel objectified and that due to the power imbalance, they are afraid to come forward.

HR pulls the AI logs and confirms the above activity.

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## A Chatbot Inaccurately Tells an Employee She is Exempt

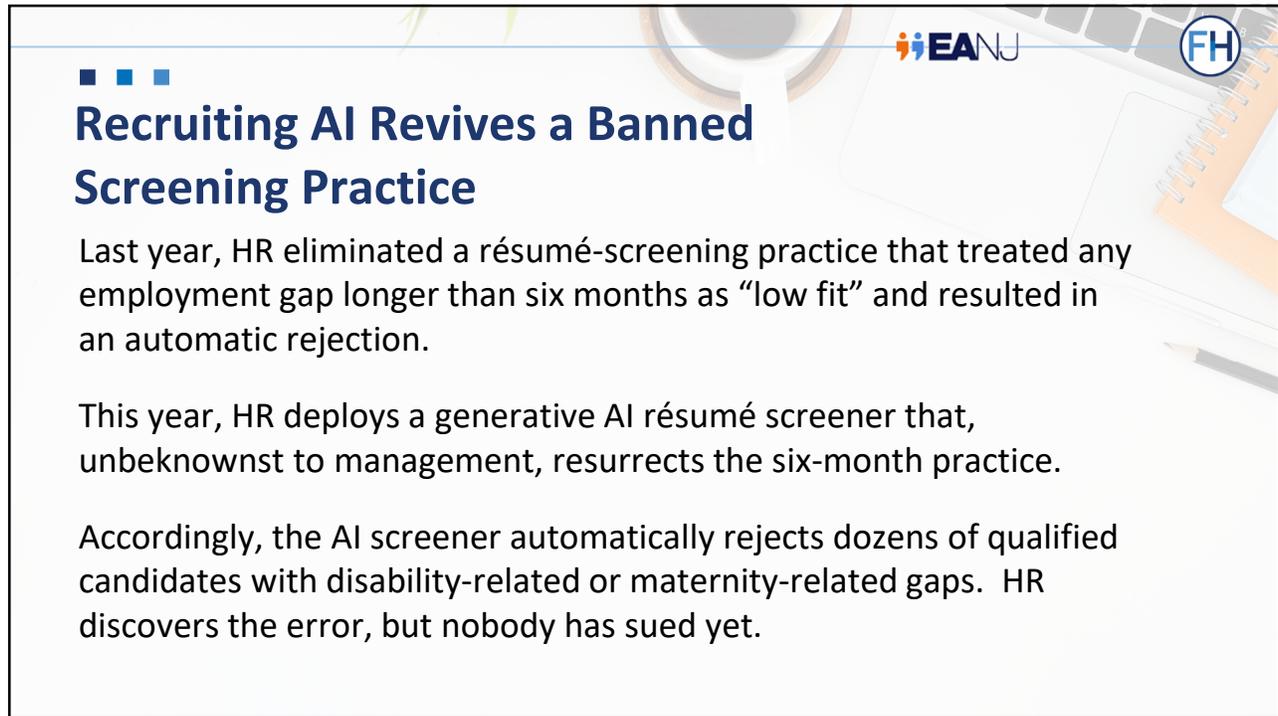
Employee asks the company chatbot, “Am I exempt or nonexempt?”

Despite internal HR records classifying the employee as nonexempt under the Fair Labor Standards Act, the chatbot responds, “You are exempt. Accordingly, you do not qualify for overtime pay.”

After the employee works five hours of unpaid overtime each week for two years, the employee discovers that the chatbot misled the employee. The employee has not filed a claim and, to the company’s knowledge, still believes she is exempt.

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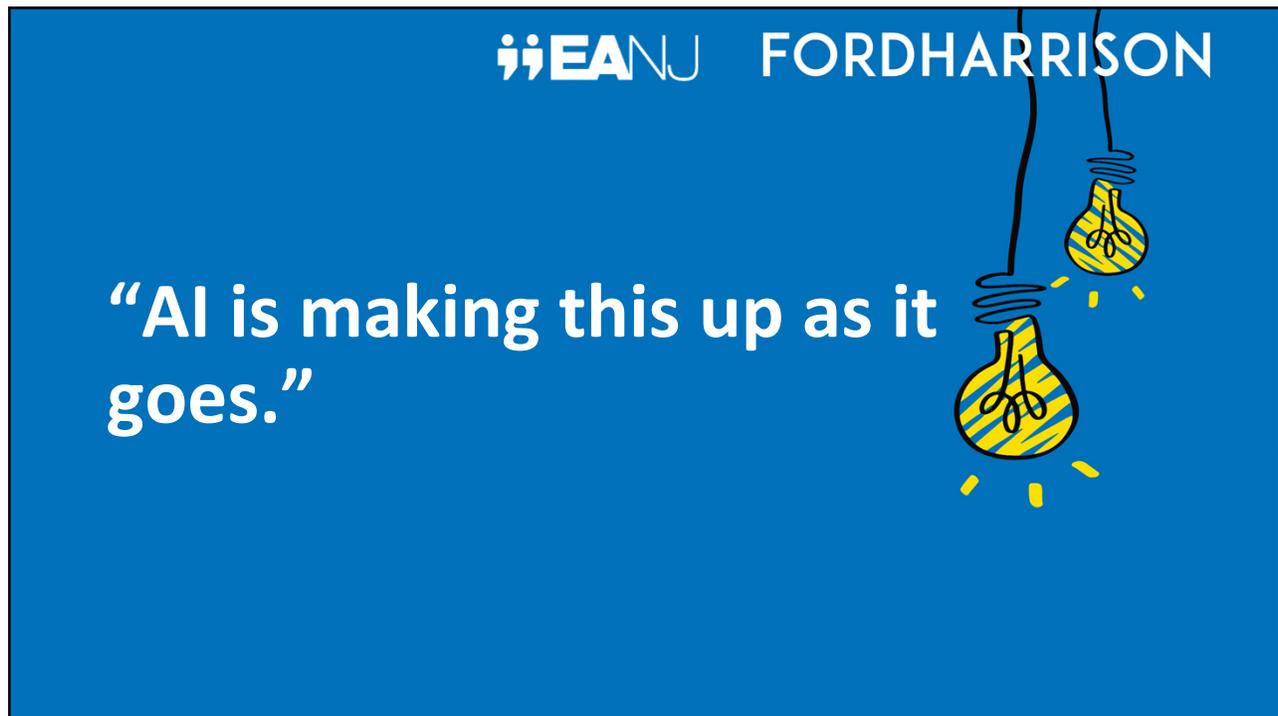
## Recruiting AI Revives a Banned Screening Practice

Last year, HR eliminated a résumé-screening practice that treated any employment gap longer than six months as “low fit” and resulted in an automatic rejection.

This year, HR deploys a generative AI résumé screener that, unbeknownst to management, resurrects the six-month practice.

Accordingly, the AI screener automatically rejects dozens of qualified candidates with disability-related or maternity-related gaps. HR discovers the error, but nobody has sued yet.

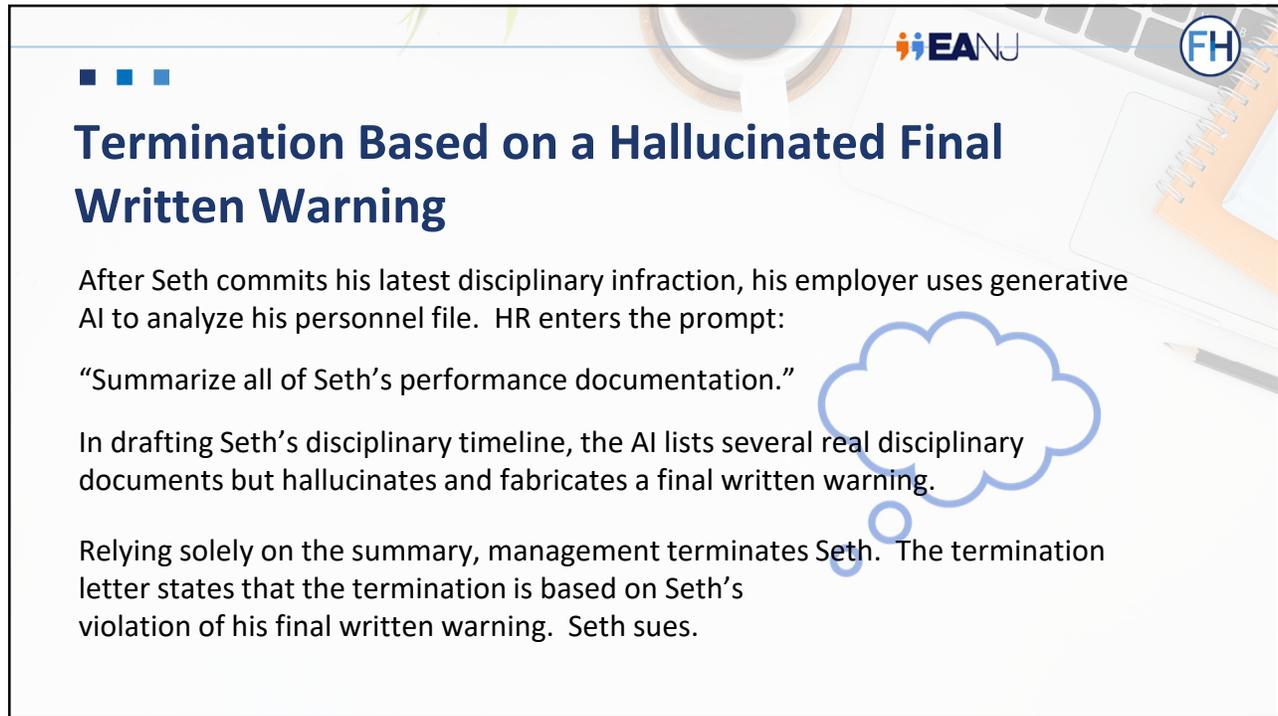
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**“AI is making this up as it goes.”**

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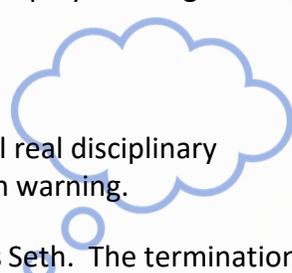
**Termination Based on a Hallucinated Final Written Warning**

After Seth commits his latest disciplinary infraction, his employer uses generative AI to analyze his personnel file. HR enters the prompt:

“Summarize all of Seth’s performance documentation.”

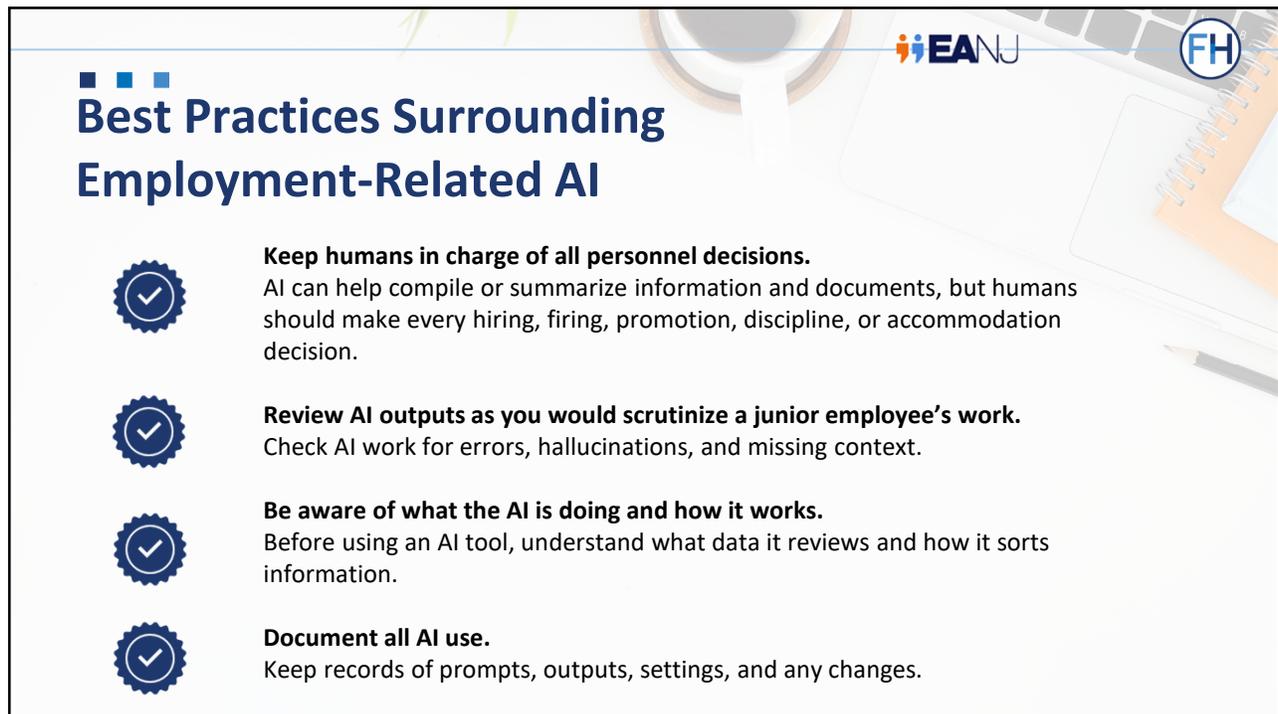
In drafting Seth’s disciplinary timeline, the AI lists several real disciplinary documents but hallucinates and fabricates a final written warning.

Relying solely on the summary, management terminates Seth. The termination letter states that the termination is based on Seth’s violation of his final written warning. Seth sues.



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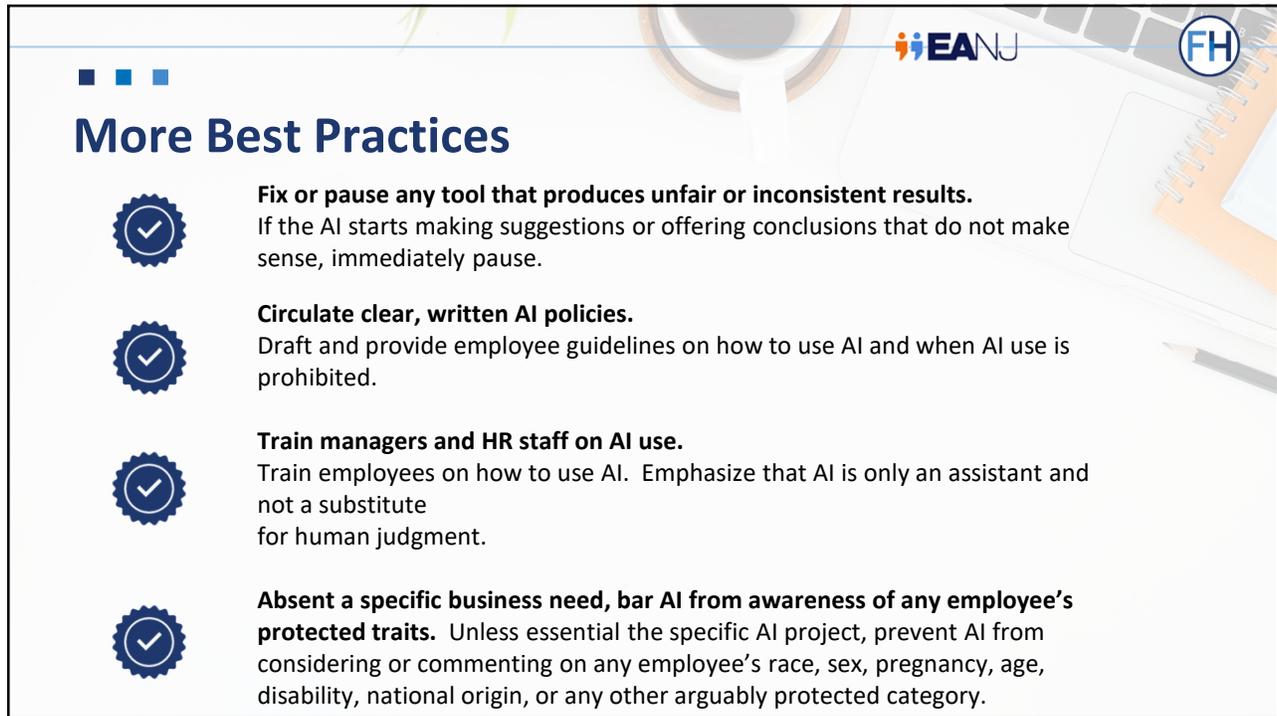
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**Best Practices Surrounding Employment-Related AI**

-  **Keep humans in charge of all personnel decisions.**  
AI can help compile or summarize information and documents, but humans should make every hiring, firing, promotion, discipline, or accommodation decision.
-  **Review AI outputs as you would scrutinize a junior employee’s work.**  
Check AI work for errors, hallucinations, and missing context.
-  **Be aware of what the AI is doing and how it works.**  
Before using an AI tool, understand what data it reviews and how it sorts information.
-  **Document all AI use.**  
Keep records of prompts, outputs, settings, and any changes.

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## More Best Practices

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**Fix or pause any tool that produces unfair or inconsistent results.**  
If the AI starts making suggestions or offering conclusions that do not make sense, immediately pause.
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**Circulate clear, written AI policies.**  
Draft and provide employee guidelines on how to use AI and when AI use is prohibited.
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**Train managers and HR staff on AI use.**  
Train employees on how to use AI. Emphasize that AI is only an assistant and not a substitute for human judgment.
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**Absent a specific business need, bar AI from awareness of any employee's protected traits.** Unless essential the specific AI project, prevent AI from considering or commenting on any employee's race, sex, pregnancy, age, disability, national origin, or any other arguably protected category.

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## QUESTIONS?

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