In the Matter of

Aon Consulting, Inc.

Complaint and Request for Investigation, Injunction, and Other Relief

Submitted by American Civil Liberties Union Foundation

I.   **Introduction**

1. The American Civil Liberties Union Foundation ("ACLU") respectfully submits this complaint to the Federal Trade Commission ("FTC") regarding the unfair and deceptive acts and practices of Aon Consulting, Inc. ("Aon"). Aon makes marketing claims about its products that are false and deceptive, and engages in practices that are unfair to both workers and employers.

2. Aon designs, sells, and administers online assessments to employers across a wide range of industries for use in hiring and other employment processes. Several of these assessments, however, discriminate on the basis of disability and/or race. In particular, this complaint alleges at least three Aon products are deceptively marketed and discriminate based on protected characteristics:

   - Algorithmically driven **Adaptive Employee Personality Test ("ADEPT-15")** adversely impacts autistic people, otherwise neurodivergent people, and people with mental health disabilities such as depression and anxiety because it tests for characteristics that are close proxies of their disabilities—characteristics which are likely not necessary for essential job functions for most positions—and their disabilities are likely to significantly impact the scores they receive for those characteristics.

   - ADEPT-15 underpins Aon's video interviewing tool, **vidAssess-AI**, which incorporates the risk of discrimination inherent in ADEPT-15 and exacerbates it through its use of artificial intelligence elements that are likely to discriminate on the basis of disability, race, and other protected characteristics.

   - **gridChallenge**, a gamified cognitive assessment tool, has disparities on the basis of race, and may also unfairly screen people out based on disability.

3. The problems with Aon's assessments stand in stark contrast to the misleading claims that Aon repeatedly and explicitly makes in its marketing to employers that its assessments are "bias-free," "fair," have "no adverse impact," and "increase diversity." Aon also claims that ADEPT-15 was

"developed from the ground up" for "minimal" demographic differences based on disability, despite there being no indication that Aon took even basic reasonable measures to assess or address ways the test poses a high risk of discriminating against autistic people, neurodivergent people, or people with mental health disabilities such as anxiety and depression. And in its candidate-facing materials providing instructions to people who will be undergoing its assessments, Aon explicitly states that "there is no possibility of bias—for or against specific candidates—either during the test or during the evaluation of answers," greatly increasing the risk that people with disabilities will not know they may need to ask for accommodations or alternative processes. Aon's marketing of its assessments is thus a deceptive act or practice in violation of Section 5 of the FTC Act.

4. Aon is also engaging in unfair acts or practices under Section 5 in its sale of discriminatory assessments to employers, its deceptive marketing of these tools, and its failure to take reasonable measures to assess or address the discriminatory harms that deployment of its assessments would have on workers. Aon's practices cause or are likely to cause substantial injury to both workers and employers. Workers who are assessed through these tools in hiring and other employment processes face the potential loss of critical employment opportunities due to discrimination based on legally protected characteristics and not whether they are qualified for the job, with substantial negative economic impacts both on an individual and systemic level. Employers using these tools may lose out on qualified candidates based on disabilities and/or race, resulting in a less diverse, less competitive workforce. Employers also open themselves up to liability under employment discrimination laws: employers have a legal obligation to ensure that they do not discriminate in their hiring and other employment practices, and Aon's deception in marketing these assessments increases the likelihood that employers, particularly smaller businesses without extensive resources, will fail to sufficiently vet the assessments.

5. For the reasons detailed herein, the FTC should open an investigation into Aon's practices, issue an injunction, and provide such other relief as is necessary and appropriate.

II.   Parties

6. The ACLU is a nationwide, non-profit, non-partisan organization of nearly 2 million members dedicated to defending the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws. Through its Racial Justice Program, Disability Rights Program, Women's Rights Project, and other divisions, the ACLU has brought numerous agency actions and cases in state and federal court aimed at eradicating barriers to economic opportunities, both those created through traditional sources of discrimination and through newer technologies.[1] The

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[1] *See, e.g.*, Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law, American Civil Liberties Union, ACLU of Southern California, ACLU of Northern California, & Upturn, Liapes v. Facebook, Inc., 95 Cal. App. 5th 910 (Cal. Ct. App. 2023) (No. A164880); Brief of The American Civil Liberties Union Foundation, The Lawyers' Committee for Civil Rights Under Law, The National Fair Housing Alliance, & The Washington Lawyers' Committee for Civil Rights & Urban Affairs, as *Amici Curiae* Supporting Appellant and Reversal, Opiotennione v. Bozzuto Management Company, et al., No. 21-1919 (4th Cir. *appeal docketed* Aug. 23, 2021); Brief of The American Civil Liberties Union Foundation, Free Press, The Lawyers' Committee for Civil Rights Under Law, & The National Fair Housing Alliance as *Amici Curiae* Supporting Appellant and Reversal, Vargas, et al., v. Facebook, Inc., No. 21-16499, 2023 WL 6784359 (9th Cir. Oct. 13, 2023); Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law & The National Fair Housing Alliance in Support of Plaintiffs-Appellants' Appeal for Reversal, Henderson v. Source for Public Data, L.P., 53 F. 4th 110 (4th Cir. 2022); Complaint, Legal Aid Chicago v. Hunter Properties, Inc., No. 23-4809 (N.D. Ill. filed Jul. 25, 2023); *Facebook EEOC Complaints*, ACLU, (Sept. 25, 2019), https://www.aclu.org/cases/facebook-eeoc-complaints.

ACLU also engages in advocacy to push for federal agencies to use the full scope of their authority to address the ways that technologies can exacerbate existing discrimination and unfairness in areas of employment and other economic opportunities, including providing comment or testimony before the FTC, Equal Employment Opportunity Commission ("EEOC"), Department of Labor, and others.[2]

7. The ACLU, together with co-counsel, has filed class-wide charges of discrimination before the EEOC against Aon and an employer using Aon's ADEPT-15 and gridChallenge. The charges were brought on behalf of a biracial (Black/white) autistic job applicant with mental health disabilities who encountered the assessments during the employer's application process. The charges allege violations under the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII") and are currently pending before the EEOC.[3]

8. Aon is a corporation with an address of 200 E. Randolph St, Chicago, IL 60601.[4] Aon provides a range of "human capital" consulting, products, and services for corporations in the United States, including in areas such as hiring, workforce development, wage and benefits structures, and others. Aon designs, markets, and administers numerous assessment tools used in hiring and other employment processes, which are the subject of this complaint.

III.   Factual Background

1.   The Assessments that Aon Markets

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[2] *See, e.g.*, Letter from the National Women's Law Center & American Civil Liberties Union to The Hon. Julie A. Su, Acting Secretary of Lab., U.S. Dep't of Lab. (Mar. 1, 2024) (on file with authors), https://nwlc.org/wp-content/uploads/2024/03/NWLC-and-ACLU-Letter-to-DOL-re-AI-EO-03012024.pdf; Comment re: Commercial Surveillance ANPR, R111004 from the American Civil Liberties Union to the Federal Trade Commission, Office of the Secretary (Nov. 21, 2022) (on file with author), https://www.aclu.org/sites/default/files/field_document/aclu_comment_ftc_anpr_nov_2022_final.pdf; Testimony of ReNika Moore, Director of the Racial Justice Program, American Civil Liberties Union before the U.S. Equal Emp. Opportunity Comm'n in a hearing entitled *Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier* (Jan. 31, 2023), https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new/moore; Comment re: Tenant Screening Request for Information, Docket No. FTC-2023-0024 from the American Civil Liberties Union to the Federal Trade Commission, Office of the Secretary & Consumer Financial Protection Bureau (Nov. 21, 2022) (on file with author), https://www.aclu.org/wp-content/uploads/2023/07/2023.05.30-ACLU-Comment-to-FTC-CFPB-Tenant-Screening-RFI.pdf.

[3] This complaint largely focuses on ADEPT-15 and gridChallenge—with more minimal discussion of the other tools sold by Aon—because the ACLU has conducted the most investigation in regard to those tools in conjunction with its charges of discrimination to the EEOC. Nevertheless, we have identified similar problems with several other tools sold by Aon, and the FTC should investigate all of Aon's assessment products that it markets in the U.S. Likewise, this complaint does not address in depth the ways that Aon's assessments may and likely do discriminate against people with disabilities other than the disabilities with which our client was diagnosed and we encourage the FTC to consider the ways these tools are likely causing harm beyond that addressed here. Finally, this complaint addresses particular problems with the specific tools discussed and should not be read as an exhaustive discussion of problems that may exist with these tools or any other tools sold or marketed by Aon with respect to their validity, reliability, or any other matter.

[4] Aon Consulting, Inc., the subject of this complaint, is a corporation within a large multi-national professional services corporation named Aon. Throughout this complaint, we refer to Aon Consulting, Inc. as Aon.

9. Aon sells assessments to employers that it markets as tools to evaluate workers and enable employers "to make better talent selection and development decisions," including in both early and later stages of an employer's hiring process, in making decisions about promotions, and identifying employees for management and leadership roles.[5] In the hiring process, a core touted utility of assessments is to quickly "screen out applicants prior to more resource-intensive hurdles (e.g., resume screening, interviews, etc.)" in order to "save time, energy, and money."[6] For example, Aon's marketing highlights one company that screened out 62% of applicants based on its assessment.[7]

10. Aon's assessments are widely used both domestically and globally, across industries, by companies of various sizes, and for all levels of positions.[8] Aon states that, annually, it administers "more than 30 million assessments in over 40 languages across 90 countries."[9] Aon has the second largest share of the pre-hire assessment market globally.[10]

11. Although information is not readily available online about all of the companies that purchase and use Aon's assessment products in the United States in particular, Aon's website notes that its pre-hire assessment customers include corporations such as Outcome Health, Deloitte, Procter & Gamble, Sunglass Hut, Vodafone, BAE Systems, Burger King, and Siemens, all of which are incorporated or do business in the United States.[11] Other sources list Salesforce, LinkedIn, Jones Lang Lasalle, Cognizant Technology, Slalom Consulting, Starbucks, Shell, Amazon, Microsoft, Ernst & Young, and Marsh & McLennan as customers of Aon's pre-employment assessments,[12] and the applicant on whose behalf ACLU filed EEOC charges against Aon was assessed using Aon assessments for a job at a mid-sized company headquartered in the United States.[13]

12. Aon offers a variety of different assessments to employers, including its personality assessment ADEPT-15, cognitive assessments, such as gridChallenge and other tests for numerical or deductive reasoning, its video interviewing tool vidAssess-AI, and more job specific tools such as job simulations and coding assessments, some of which Aon says leverage algorithmic systems or artificial intelligence ("AI") to administer and score the assessments.[14]

2. Aon Deceptively Markets Its Assessments as Bias-Free, Fair, Without Adverse Impact, and Increasing Diversity

[5] *Talent Assessment Products and Tools*, AON, https://www.aon.com/en/capabilities/talent-and-rewards/talent-assessment-products-and-tools (last visited May 22, 2024); *Pre-Hire Talent Assessment*, AON, https://www.aon.com/en/capabilities/talent-and-rewards/pre-hire-talent-assessment (last visited May 22, 2024).

[6] *Pre-Hire Talent Assessment*, *supra* note 5.

[7] *Id.*

[8] *Id.*; *see On Aon Podcast: Methodology to Predict Employee Performance for the LPGA*, AON (Aug. 5, 2023), https://www.aon.com/en/insights/podcasts/on-aon-episode-52-methodology-to-predict-employee-performance-for-the-lpga ("Aon's assessments can help businesses across industries identify their potential for success.").

[9] *Talent Assessment Products and Tools*, *supra* note 5.

[10] *Pre-Employment Assessment*, 6SENSE, https://6sense.com/tech/pre-employment-assessment (last visited May 29, 2024).

[11] *Pre-Hire Talent Assessment*, *supra* note 5; *Explore Assessment Solutions*, AON, https://assessment.aon.com/en-us/ (last visited May 22, 2024).

[12] *AON*, 6SENSE, https://6sense.com/tech/pre-employment-assessment/aon-market-share (last visited May 22, 2024); *AON Assessment Test: Your Comprehensive Guide and Expert Tips*, TESTHQ (Mar. 18, 2024), https://www.testhq.com/blog/aon-assessment-test.

[13] *See supra* note 3.

[14] *Talent Assessment Products and Tools*, *supra* note 5; *Explore Assessment Solutions*, *supra* note 11.

    i. Aon Makes Deceptive Claims that Its Assessments Have no Adverse Impact, are Bias-Free and Fair, and Promote Diversity

13. Aon's websites, blog posts, and promotional fact sheets repeatedly market its assessments as having no adverse impact, as being bias-free or reducing bias, as improving diversity, as developed to be culturally responsive, and as suitable for evaluating people with disabilities. Aon often prominently touts these claims as one of the main selling points for its assessments and makes these claims without qualification or disclaimers. For example, multiple product webpages include a summary of the supposed benefits of Aon's assessment products as "fair[] for all: no adverse impact," or offering "fair and unbiased selection."

What does Aon's Assessment Solutions provide you with?

- Fairness for all: no adverse impact
- Assessments are highly relevant to test takers
- Smartphone-optimized assessments
- Highly valid and robust products
- Available in multiple languages
- Industry experience and references

Driver Recruitment: Measure job-essentials competencies for commercial drivers and machine operators, AON, https://assessment.aon.com/en-us/driver-recruitment (last visited May 11, 2024).

What does Aon's Assessment Solutions offer?

- Fairness for all: no adverse impact
- Seamless integration into your HRIS/ATS
- Great candidate experience
- Scientifically sound behavioral assessments
- Gamified and mobile-first assessments
- A huge range of ability and skills assessments
- High completion rates
- Highly valid and robust products
- Experienced psychologist consultants
- Available in multiple languages

Talent Assessments for Trainee and Apprentice Selection: Attract, evaluate and support trainees and apprentices, AON, https://assessment.aon.com/en-us/hiring-trainees-apprentices (last visited May 11, 2024).

Aon's Early Careers Testing Solution

- Fair and unbiased selection
- Seamless integration with your HRIS / ATS
- Great candidate experience
- Gamified and mobile-first graduate assessments
- High completion rates
- Highly valid and robust products
- Available in multiple languages
- Experienced I/O psychologist advisory

Early Careers Hiring Solutions: How to recruit and develop emerging talent, AON, https://assessment.aon.com/en-us/early-careers-hiring-solutions (last visited May 11, 2024).

14. Beyond these summary descriptions of the benefits of its products, Aon's emphasis on the bias-free nature of its assessment tools is reflected throughout its marketing. On one webpage, Aon states that valid talent assessments are "bias-free," meaning that "candidates are selected objectively." In a blog post titled *Enhance Your Hiring Process With Pre-Hire Assessments*, Aon says pre-hire assessments "mitigate bias in the hiring process." Specifically, Aon suggests that pre-hire assessments reduce hiring biases based on first impressions because "we bring our biases to the table when making decisions—including hiring decisions" whereas Aon's assessments are "objective." And, on another webpage, Aon claims that talent assessments are "**scientifically proven not to have bias for or against any groups of applicants**" (emphasis in original)— language found on multiple Aon webpages—and are "culturally-agnostic." Aon claims that assessing for behaviors and personality traits can ensure employers are selecting "the best candidates regardless of race, class, gender or other irrelevant factors."

Using digital assessment tools with a rigorous test design, extensive piloting and continual data analysis ensure that tests are bias-free. Using those within a hiring journey means that candidates are selected objectively.

Talent Assessment: 5 Compelling Reasons to Get Started, AON, https://assessment.aon.com/en-us/blog/talent-assessment-5-compelling-reasons-to-get-started (last visited May 12, 2024).

Pre-Hire Assessments Mitigate Bias in the Hiring Process.

Although we'd all like to think we're great judges of character, hiring based on first impressions introduces bias. The trouble is, with only a resume, an interview and gut instinct, we aren't good judges of character.

Why are we so poor at doing this on our own? Bias is to blame: We bring our biases to the table when making decisions — including hiring decisions.

- **Confirmation bias**: We downplay or ignore anything that contradicts our preconceived ideas.

- **Attribution bias**: Certain attributes dictate skills.

- **Affinity bias**: We ascribe positive attributes or infer greater potential to someone because they remind us of ourselves.

- **Anchoring bias**: We give more weight to things than they merit.

- **The halo effect**: We put too much stock in first impressions.

But there's good news. We can compensate for human nature by adding assessment tools and test results into the mix. Pre-hire assessments measure objective, job-relevant criteria. They allow you to make the best hiring decision — without relying on fallible gut instincts.

Enhance Your Hiring Process With Pre-Hire Assessments, AON, https://assessment.aon.com/en-us/blog/enhance-your-hiring-process-with-pre-hire-assessments (last visited May 12, 2024).

An Emphasis on Inclusiveness

You need to use talent assessments that are scientifically **proven not to have bias for or against any groups of applicants.** A fair assessment isn't biased in its content, administration, response or assumptions. It should be culture-agnostic. Applicants across races, ethnicities and generational cohorts should all have equal opportunity to perform well.

Hiring for behaviors and personality traits helps your organization pinpoint the best candidates regardless of race, class, gender or other irrelevant factors. Assessments give you the opportunity to make hiring decisions that can increase your organizational diversity. This widens your graduate talent pipeline and helps you bring in a more diverse cohort of graduates.

7 Components of a Successful Campus Recruitment Process, AON, https://assessment.aon.com/en-us/blog/7-components-of-a-successful-campus-recruitment-process (last visited May 13, 2024).

Outstanding Talent Assessments For Graduates to Win the Best

Recruiting Generation Z has become more competitive than ever. Become an employer of choice for graduates by making the time candidates spend with you as engaging as possible.

Aon's assessment solutions empowers talent leaders to strengthen their early talent recruitment programs with a suite of recruiting assessments designed just for this purpose. Make selection decisions solely on job-relevant criteria and bring in a more diverse cohort of early career talent and expand your talent pool. You need graduate assessments tools that are scientifically proven not to have bias for, or against, any groups of applicants based on irrelevant factors.

Early Careers Hiring Solutions: How to recruit and develop emerging talent, AON, https://assessment.aon.com/en-us/early-careers-hiring-solutions (last visited May 11, 2024).

Effective Volume Hiring

Volume hiring is about giving all applicants a fair chance, recognizing potential and knowing who to move forward fast. You need objective hiring processes that support your employer brand. Aon's assessment solutions allow you to give all applicants a fair chance while helping you find the strongest candidates fast.

Master Volume Hiring: Implement objective hiring processes that support your employer brand, AON, https://assessment.aon.com/en-us/volume-hiring (last visited May 13, 2024).

15. Aon also makes multiple claims that assessments are designed to *improve* diversity and inclusion. In a blog post, for example, Aon says that "the latest talent assessment trends have moved . . . toward supporting a more diverse and inclusive hiring process," and that "[o]bjective assessments focus on the job's requirements and the candidate's attributes, and they're regularly retested to ensure they remain that way." In describing a case study, Aon goes on to say that "candidates reporting disabilities [demonstrate] a similar pass rate to candidates who [don't] report having disabilities." These claims are especially reflected in their marketing materials related to

recruitment. On various websites, Aon says that its tools help employers recruit "diverse cohort[s]" and "build a more diverse workforce," and that they are "fair," "inclusive," "free from adverse impact," and can "improve diversity." Aon also claims that "prejudices are excluded," and assessment tools "automatically lead to a more diverse hiring or development process."

Trend #4: Designing Assessments to Improve Diversity and Inclusion

Fostering diversity and inclusion remains a high priority for talent leaders. Diverse workforces can tap into a wealth of perspectives and experiences to drive business results. Producing objective assessments has always been imperative for assessment designers, but the latest talent assessment trends have moved even further toward supporting a more diverse and inclusive hiring process.

Objective assessments focus on the job's requirements and the candidate's attributes, and they're regularly retested to ensure they remain that way.

After implementing the new assessment, BAE Systems saw a relative increase of 5.2% in the number of female applicants. The company also saw a relative increase of 3.3% in the number of racially and ethnically diverse applicants. Additionally, candidates reporting disabilities demonstrated a similar pass rate to candidates who didn't report having disabilities.

6 Talent Assessment Trends to Improve Your Future Readiness, AON, https://assessment.aon.com/en-us/blog/6-talent-assessment-trends-to-improve-your-future-readiness (last visited May 11, 2024).

Hourly Rated/Volume Hiring

Well-designed assessments can help you identify candidates who can learn quickly, adapt to change, and thrive in the role, reducing turnover in these critical roles.

- Develop reliable success profiles and criteria.
- Improve candidate engagement.
- Offer fair and inclusive assessments free from adverse impact.
- Increase self-selection and motivation through realistic job previews.

Learn more about Volume Hiring

Graduates and Early Careers

How do you attract, engage and hire today's talent for tomorrow's challenges? Assessments can help you:

- Identify best-fit candidates to improve the quality of hire.
- Shrink time-to-hire and save resources.
- Improve diversity and expand access to hard to find talent.
- Boost your employer brand by delivering an outstanding candidate experience.

Data-driven Talent Acquisition Solutions: Using Assessment tools to engage candidates and win best-fit talent, AON, https://assessment.aon.com/en-us/talent-acquisition (last visited May 12, 2024).

Reason 3: Talent Assessments Support Diversity

Making better hiring decisions requires organizations to attract a broader talent pool to build a more diverse workforce.

Fair talent assessments are based on the requirements of the job and the job-relevant skills of the applicant. Prejudices are excluded. The use of talent assessments in personnel selection thus automatically lead to a more diverse hiring or development process.

Talent Assessment: 5 Compelling Reasons to Get Started, AON, https://assessment.aon.com/en-us/blog/talent-assessment-5-compelling-reasons-to-get-started (last visited May 12, 2024).

16. Aon also downplays how its assessment tools may impact people with disabilities. In one guide to prospective test-takers, Aon instructs that "[o]nline assessment is highly objective. Due to the fact that no supervisors or invigilators are needed, **there is no possibility of bias—for or against specific candidates**—either during the test or during the evaluation of answers." (emphasis added).

Why is online assessment being used more frequently?

Online assessment has some very clear benefits over more traditionally administered assessments where candidates were asked to complete assessments face to face. Online assessment is highly objective. Due to the fact that no supervisors or invigilators are needed, there is no possibility of bias – for or against specific candidates – either during the test or during the evaluation of answers. Online assessment can predict, with a relatively high degree of accuracy, how suitable a candidate is for a specific position. The results' automated evaluation saves both time and money. From a company's point of view, the relatively limited amount of time required is one of the main attractions. This enables the inclusion of a large number of candidates in the pre-selection process.

All You Need to Know About Taking Part in an Online Assessment, Aon, https://assessment.aon.com/aon.assessment/media/files/factsheets/All-You-Need-to-Know_Practice.pdf (last visited May 11, 2024).

17. Several pages later in the same guidance, Aon notes that online assessments "can be challenging for people with disabilities," but solely discusses ways that an assessment may be inaccessible for people with physical disabilities, such as "visual or motor impairment," not that the tests themselves may measure characteristics that are impacted by disabilities. Aon notes that disabled people can ask for "special arrangements" with the employer "to ensure an accurate and fair assessment of all candidates," and that in some cases "disadvantages can be overcome with technical aids or equipment, or by changing computer settings."

I have a disability. What should I do?

Participation in online assessment can be challenging for people with disabilities. For people who have visual or motor impairment, or any other disability, special arrangements must be made with the organization that has invited you to complete the assessment. This is to ensure an accurate and fair assessment of all candidates. In some cases, disadvantages can be overcome with technical aids or equipment, or by changing computer settings.

If you are uncertain whether you can take part in the online assessment because of your disability, you should contact the company that has invited you to complete the assessment. Under EU law, people with disabilities have a right to protection and facilitation by the employer. This also applies to the application process. Different countries and regions have similar rulings.

All You Need to Know About Taking Part in an Online Assessment, Aon, https://assessment.aon.com/aon.assessment/media/files/factsheets/All-You-Need-to-Know_Practice.pdf (last visited May 11, 2024).

18. Furthermore, Aon often suggests that these tools *promote* accessibility in hiring, specifically touting how the tools are useful for people with disabilities. For example, in one blog post on hosting a virtual assessment, Aon claims that one of the benefits of virtual assessments is that they "make hiring more accessible" by giving more candidates "access to virtual assessments, especially candidates with disabilities." Yet there is no mention of ways that these assessments can discriminate against people with other disabilities such as autism or mental health disabilities.

Make Hiring More Accessible

More candidates have access to virtual assessments, especially candidates with disabilities or who aren't able to travel for interviews. To increase accessibility, use virtual assessment software that is available across devices and can be implemented easily, even with basic technology.
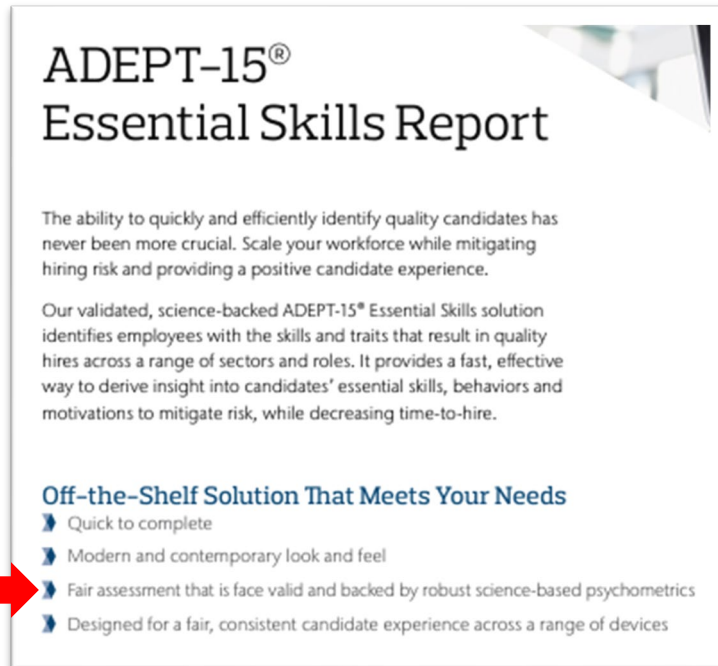
A Complete Guide to Hosting a Virtual Assessment, AON, https://assessment.aon.com/en-us/blog/complete-guide-to-hosting-a-virtual-assessment (last visited May 11, 2024).

ii. Aon Makes Deceptive Claims that ADEPT-15 is Fair and Has Been Designed to Minimize Bias Based on Disability

19. In addition to the marketing claims described above pertaining to Aon's assessment tools in general, Aon also makes deceptive claims about specific assessments. Aon actively markets ADEPT-15 as "fair" and claims that it was "developed from the ground up" to be "culture-free," and to "have minimal demographic (ethnic, cultural, gender, **disability status**, etc.) differences." (emphasis added).

Rooted in Science

Relies on modern data science and psychometric techniques to mitigate socially desirable responses and other attempts to 'game' the test to ensure accurate prediction of on-the-job behavior.

Impactful

Is useful for addressing a wide variety of your organization's most pressing human capital challenges, including identifying, selecting, promoting and developing high performers.

Globally Relevant and Fair

Developed from the ground up to be globally accurate, 'culture-free', and have minimal demographic (ethnic, cultural, gender, disability status, etc.) differences.

ADEPT-15: Adaptive Employee Personality Test, AON, https://assessment.aon.com/aon.assessment/media/files/factsheets/adept-15-fact-sheet.pdf (last visited May 11, 2024).

ADEPT-15 Essential Skills Report, AON,
https://assessment.aon.com/aon.assessment/media/files/Shop%20Documents/FLY-ADEPT-15-Essential-Skills-Report-US-7243-web.pdf (last visited May 12, 2024).

20. In a blog post that discusses personality testing more generally with a link to Aon's ADEPT-15 webpage in the first paragraph, Aon states that algorithmic assessment solutions "counter unfair bias." Without an assessment, Aon says, hiring decisions are based on "arbitrary" or "unrelated" factors and requirements. Assessments, on the other hand, allow employers to "objective[ly]" compare candidates without basis on "identifying factors or subgroups." Aon likewise claims that personality traits "don't discriminate against particular groups," helping employers "achieve greater diversity." By including a link to Aon's ADEPT-15 webpage, Aon creates a strong implication that its own personality test provides these same benefits and does not discriminate.

Counter Unfair Bias

Sophisticated assessment solutions, powered by algorithms, are driving the changes needed to transform talent selection and enable more diverse recruiting.

Without assessments, hiring decisions are often based on arbitrary requirements or unrelated factors. Assessments enable employers to compare job applicants' personality profiles and competencies to job specifications and organizational demands.

Personality traits aren't typically dictated by other identifying factors or subgroups. Requiring a four-year degree could eliminate candidates from lower socioeconomic backgrounds, for example.

Personality traits and behaviors provide more objective measures of success, and they don't discriminate against particular groups. Using workplace personality tests as part of a candidate selection process can help achieve greater diversity.

Using Workplace Personality Tests to Predict Job Success, AON, https://assessment.aon.com/en-us/blog/using-workplace-personality-tests-to-predict-job-success (last visited May 13, 2024).

iii. Aon Makes Deceptive Claims that vidAssess-AI is Fair and Reduces Bias

21. On its landing page describing vidAssess-AI, Aon markets its AI-driven virtual video interviewing platform as "fair" and "minimiz[ing] human bias."

Revolutionize Video Assessments

Assessing a candidate's fit for a role based on an interview has always been a challenge. With different interviewers asking different questions each time, it's impossible to score candidates on a fair and objective scale, or to glean insights from an inconsistent process.

Explore Aon's Video Interviewing Tool

Aon's Video Interviewing Tool

Virtual Interviews taken to the next level: vidAssess-AI scans the words spoken by interviewees in their responses and then codes or scores them in each competency area. We focus on speech to text only and use a natural language-processing artificial intelligence. Thereby we minimize human bias and ensure a legally-defendable, fair and transparent process. Candidates today expect greater flexibility and fairness from your interview process.

> **Diversify Your Talent Pool**
>
> A diverse workforce is created by blending skills, knowledge, experience, language and approaches and is a tangible value for any organization. Live interviews can run off-course and stray away from job-related questions — opening your interview process up to potential bias.
>
> Whether you select questions from our database or develop your own, our solution allows you to set questions ahead of time so your interviews remain consistent and job-relevant. Assess candidates solely based on job-relevant strengths to consistently choose the best person for each role.

Video Interviewing Solution: Making remote hiring more efficient with data-driven video assessments, AON, https://assessment.aon.com/en-us/video-interviewing-solution (last visited May 13, 2024).

22. These claims are repeated throughout Aon's marketing materials related to its video interviewing platform. In one blog post about video assessments, Aon touts this technology as being an effective way for hiring managers to reduce bias. In another blog post, Aon states that video interviews allow employers to ensure "a consistent interview experience" between multiple candidates which "increases perceptions of the objectivity and fairness" of the process.

> Video interviews give HR more control over the interview process. Live face-to-face interviews are especially susceptible to bias. Hiring managers who haven't been trained as interviewers are at greater risk of going off-script and asking questions that could elicit personal information they don't need to know.
>
> A video interview, delivered asynchronously, relies on preset questions so that each candidate has the same experience. Since each candidate is answering the same questions, they can be scored objectively against each other — without the hiring manager's interactions creating opportunities for bias.

The Complete Guide to Video Assessments & Video Interviews, AON, https://assessment.aon.com/en-us/blog/video-assessment-guide (last visited May 13, 2024).

> The interview stage is especially prone to bias because hiring managers often revert to small talk or unstructured interviews that elicit the wrong information. Using video interviews allows you to deliver a consistent interview experience to each candidate, which increases perceptions of the objectivity and fairness of your process.

How to Improve Employer Branding Through Virtual Assessments, AON, https://assessment.aon.com/en-us/blog/improve-employer-branding-through-virtual-assessments (last visited May 13, 2024).

23. Discussing vidAssess-AI in a case study, Aon claims that "[h]iring managers, aided by the AI scoring program, can compare candidates fairly and objectively." Aon emphasizes that this technology is careful to avoid "introducing bias" by not recording and scoring visual cues because that technology is not yet advanced enough.

One travel firm worked with Aon to introduce video interviewing and a more objective, AI-driven assessment process. The firm benchmarked "what great looks like" by assessing current employees. The competencies identified in this process formed the basis for the assessment redesign.

Using AI-driven software, like Aon's vidAssess platform, employers can identify positive and negative indicators in the candidate's responses. Hiring managers, aided by the AI scoring program, can compare candidates fairly and objectively. (The platform does *not* record and score visual cues as there is no evidence that the technology is advanced enough to make this a valid approach without introducing bias.)

When introducing AI in assessment processes, employers must prioritize transparency. Candidates should never have to guess how an AI algorithm is scoring them.

6 Talent Assessment Trends to Improve Your Future Readiness, AON, https://assessment.aon.com/en-us/blog/6-talent-assessment-trends-to-improve-your-future-readiness (last visited May 11, 2024).

3. Contrary to Its Marketing, ADEPT-15, vidAssess-AI and gridChallenge Have a High Risk of Being Discriminatory

24. While Aon explicitly and repeatedly markets its assessments as "bias-free," "fair," "objective," and having "no adverse impact" and a means to "improve diversity," the technical documentation and other publicly available material for several of Aon's assessments, including ADEPT-15, vidAssess-AI and gridChallenge, reflect that this marketing is false. In fact, each of these assessments carry a high risk of discrimination on the basis of disability, race, and/or other protected characteristics.

i. ADEPT-15 Carries a High Risk of Discriminating Against Autistic People or Otherwise Neurodivergent People and People with Mental Health Disabilities

a. How ADEPT-15 Works

25. ADEPT-15 purports to measure 15 constructs of personality—constructs like what Aon terms "Awareness," "Positivity," "Liveliness," "Sensitivity," or "Drive"—to predict future job performance.[15][16] Aon claims that ADEPT-15 is "modular" and can be broadly applicable across industries and "all functions and roles and at all levels in an organization," with a choice to use all 15 of the personality dimensions or a subset.[17]

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[15] *ADEPT-15 Technical Documentation*, AON 13–15 (Nov. 11, 2022), https://perma.cc/5SHQ-S8XN. This technical documentation, and any other Aon technical documentation cited in this complaint with a Perma.cc or Adobe web link, was previously available on Aon's Norwegian assessment support portal at https://aonassessment.deskpro.com/no/downloads/testdokumentasjon. At some point after the ACLU filed charges with the EEOC against Aon, Aon disabled the link. We are unaware of any other public sources from which the documentation is available.

[16] In addition to "constructs," Aon frequently uses the terms "aspects," "dimensions," and "traits" to refer to the features of personality ADEPT-15 purports to measure. For clarity, in this complaint, we use the term "constructs."

[17] *ADEPT-15 Technical Documentation*, *supra* note 15, at 3–4.

26. Aon also states that, when used "as a screening assessment, it can be configured to focus on fit with the organization's culture or values, fit with a particular job, or, more generally, to screen for personality traits most strongly related to successful performance across jobs in an organization."[18] It is unclear from publicly available information how that configuration occurs in practice.

27. ADEPT-15 presents the test-taker with pairs of two statements, which are generally paired to be at the same level of "social desirability," which Aon purports can reduce "faking" by test-takers.[19] The test-taker must select which statement they agree with more and indicate how strongly they agree with the chosen statement. There is no option to agree or disagree with both statements or to skip a question.[20]

28. ADEPT-15 is a computer adaptive test ("CAT") where the pairs of statements that assessment-takers are presented with are algorithmically tailored to each applicant, selecting item pairs based on previous responses.[21] Models underpinning ADEPT-15 use adaptive algorithms to analyze an applicant's answers and attempt to estimate particular trait or construct levels as the assessment is conducted, and to determine which statement pairs to show next. Aon states that there are more than 1,000 unique personality statements used for ADEPT-15 and that there are hundreds of thousands of possible pairings of personality statements.[22]

29. There is minimal public information showing the specific personality statements found in ADEPT-15, but the limited information available reflects that the personality statements are often personal inquiries that are not contextualized to behavior or attitudes in the workplace. For example, the ACLU's client who filed an EEOC charge against Aon recalls encountering statements on ADEPT-15 such as "I tend to avoid large groups of people," "I have difficulty controlling my emotions," "I don't know why I get angry sometimes," as well as a statement that, as discussed *infra*, is tied to traditional medical understandings of autism, "I have difficulty determining how someone feels by looking at their face."[23]

30. The following images are screenshots from a non-interactive example of ADEPT-15 that Aon has made publicly available and demonstrate the kinds of personality statements that appear on ADEPT-15 and the format of the assessment:[24]

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[18] *Id.* at 92.

[19] *See id.* at 19, 25–26 (noting that "Balancing the items in terms of social desirability prevents examinees from responding solely on the basis of which statement is more desirable" and describing Aon's process for determining "social desirability" for each statement).

[20] Aon Assessment Solutions, *ADEPT15 – Demo Aon Assessment*, YOUTUBE (Sept. 3, 2020), https://www.youtube.com/watch?v=vw5R-DZydVE.

[21] *ADEPT-15 Technical Documentation*, *supra* note 15, at 17–18.

[22] *Id.* at 3, 34.

[23] These representations are based on our client's recollections of the statements he encountered, so the precise wording may differ from what ADEPT-15 actually showed.

[24] *Demo Aon Assessment*, *supra* note 20.

You simply need to indicate which one you agree with more.

	Agree	Slightly Agree		Slightly Agree	Agree	
Once I have achieved a goal, I allow myself time to enjoy my success.	○	○	△	○	○	I like to have something challenging to work towards.
If given several tasks to complete in a short period of time, I would feel good if I completed most of them.	○	○	△	○	○	My persistence has led me to finish tasks others may not have thought possible.
I work very well as part of a group.	○	○	△	○	○	In general, I tend not to let a bad experience ruin my day.
I enjoy talking to people.	○	○	△	○	○	I sympathize with people who are having a bad day and always try my best to make them feel better.
People sometimes follow my lead because I seem sure of myself.	○	○	△	○	○	I often stay calm during stressful situations.

You simply need to indicate which one you agree with more.

	Agree	Slightly Agree		Slightly Agree	Agree	

It is important to know what you are good at and what you are not good at.
○ ○ △ ○ ○
I am usually aware of how I react to things and how that impacts others.

I do not mind using flattery to get ahead because I believe others do the same.
○ ○ △ ○ ○
Sometimes, I need a push to get started on my work.

At work, I prefer not to take on a leadership role if I am not ready for it.
○ ○ △ ○ ○
I do best when things are consistent and predictable.

I am willing to select a challenging work assignment I can learn a lot from.
○ ○ △ ○ ○
I sometimes take longer to do things because I focus on the details.

When things get stressful, it is easier for me to stay calm than it is for other people.
○ ○ △ ○ ○
We have all been angry at times, so it is easy to understand why some people yell.

31. After the assessment is complete, Aon can provide a variety of information on the assessment results to the employer for use in its employment decisions, including scores on the various components of Aon's personality framework, scores for prediction of components of various aspects of the position, overall fit scores for the position, and even interview scripts for questions the employer can ask based on the assessment results if the candidate moves forward in the process.[25]

      b.   Contrary to Aon's Representations, ADEPT-15 Has a High Risk of Discriminating Against Autistic People and People with Mental Health Disabilities Such as Depression and Anxiety

32. Both with respect to what ADEPT-15 tests and how it tests, ADEPT-15 poses numerous concerns for discrimination on the basis of disability that belie Aon's marketing claims that its assessments

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[25] *See* Joe Krsul & Scott Sands, *Sales Talent Assessment: When, Where, and Why You Should be Utilizing a Structured Approach*, SALES MGMT. ASS'N 11 (Aug. 11, 2016), https://salesmanagement.org/web/uploads/pdf-renamed-by-uzzal/be9ecd1e979891b48f35667d0c242cdc.pdf; *Question Guide for ADEPT-15*, AON, https://attachments-eu1-cloud-deskpro-com.s3.amazonaws.com/files/29169/675/674673PSXZQTWGHRNWRBN0-Question-guide-for-ADEPT-15.pdf?dl=1 (last visited May 23, 2024).

are "fair" and "bias-free," and that ADEPT-15 in particular has been designed to minimize bias on the basis of disability.

1. Autism and Mental Health Diagnoses Are Likely to Negatively Impact Scores on ADEPT-15

33. Fundamentally, the personality constructs that ADEPT-15 uses are closely tied to characteristics commonly associated with autism and mental health diagnoses, making it likely that autistic people and otherwise neurodivergent people and people with mental health diagnoses will be disadvantaged on ADEPT-15 as compared to test-takers without these disabilities.

34. A comparison of some of the few statements available to us from ADEPT-15 to statements used in tools designed to screen or assess for autism illustrate the overlap between the relevant characteristics. Table 1 compares some of the ADEPT-15 statements with some of the statements used in the Autism Spectrum Quotient ("AQ")[26] and the Ritvo Autism Asperger Diagnostic Scale—Revised ("RAADS-R"),[27] both of which are screening tools commonly used by clinicians in the diagnostic process as part of a broader assessment battery to aid in the identification of autistic traits and support a diagnosis. Upon information and belief, the statements on these tools are also similar to those appearing on other standardized clinical questionnaires used for autism assessment.[28]

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[26] Simon Baron-Cohen et al., *The Autism-Spectrum Quotient (AQ): Evidence from Asperger Syndrome/High-Functioning Autism, Males and Females, Scientists and Mathematicians*, 31 J. AUTISM & DEV. DISORDERS 5, 14–17 (2001), https://doi.org/10.1023/A:1005653411471. The AQ is available at https://novopsych.com.au/assessments/diagnosis/autism-spectrum-quotient.

[27] Riva Ariella Ritvo et al., *The Ritvo Autism Asperger Diagnostic Scale-Revised (RAADS-R): A Scale to Assist the Diagnosis of Autism Spectrum Disorder in Adults: An International Validation Study*, 41 J. AUTISM & DEV. DISORDERS 1077, 1078–81 (2011), https://doi.org/10.1007/s10803-010-1133-5. The RAADS-R is available at https://novopsych.com.au/wp-content/uploads/2023/02/adult-autism-spectrum-assessment-RAADS-R.pdf.

[28] *See, e.g.*, John N. Constantino, *(SRS-2) Social Responsiveness Scale, Second Edition*, WPS, https://www.wpspublish.com/srs-2-social-responsiveness-scale-second-edition.

Table 1

ADEPT-15	Autism Spectrum Quotient (AQ)	Ritvo Autism Asperger Diagnostic Scale—Revised (RAADS-R)
"I have difficulty determining how someone feels by looking at their face."	"I find it easy to work out what someone is thinking or feeling just by looking at their face." "I find it difficult to work out people's intentions."	"It can be very hard to read someone's face, hand and body movements when they are talking." "It is difficult for me to understand how other people are feeling when we are talking." "It is very difficult for me to understand when someone is embarrassed or jealous."
"I tend to avoid large groups of people." "I do not think it is important for me to socialize with others very much."	"I prefer to do things with others rather than on my own." "I find social situations easy." "I enjoy social occasions."	"I often don't know how to act in social situations." "I'd rather go out to eat in a restaurant by myself than with someone I know." "It can be very intimidating for me to talk to more than one person at the same time." "I like having a conversation with several people, for instance around a dinner table, at school or at work." "I feel very comfortable with dating or being in social situations with others." "I like to be by myself as much as I can."
"I enjoy talking to people."	"I enjoy social chit chat." "I enjoy meeting new people."	"I enjoy spending time eating and talking with my family and friends." "I like to talk things over with my friends."

ADEPT-15	Autism Spectrum Quotient (AQ)	Ritvo Autism Asperger Diagnostic Scale—Revised (RAADS-R)
"I sympathize with people who are having a bad day and always try my best to make them feel better."	"I find it difficult to imagine what it would be like to be someone else."	"I am a sympathetic person." "I understand when friends need to be comforted." "I cannot imagine what it would be like to be someone else." "I am an understanding type of person." "I am considered a compassionate type of person."
"I do better when things are consistent and predictable."	"It does not upset me if my daily routine is disturbed." "New situations make me anxious." "I prefer to do things the same way over and over again." "I enjoy doing things spontaneously."	"I get extremely upset when the way I like to do things is suddenly changed." "I like things to be exactly the same day after day and even small changes in my routines upset me."
"I have been told on occasion that I offended someone without even realizing it."	"Other people frequently tell me that what I've said is impolite, even though I think it is polite."	"Sometimes I offend others by saying what I am thinking, even if I don't mean to." "I am often surprised when others tell me I have been rude." "I am often told that I ask embarrassing questions."

35. Similarly, ADEPT-15's inquiry into "difficulty determining how someone feels by looking at their face," directly parallels another measure widely used by clinicians for autism assessments called the Reading the Mind in the Eyes Test ('RMET"), which specifically purports to measure the

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ability to interpret emotions and mental states from looking at the photos of the eye region of faces.[29]

36. The similarity in the statements used in ADEPT-15 to tools used clinically is a product of the overlap between the characteristics associated with the medical understanding of autism and the constructs that ADEPT-15 purports to measure.

37. For example, ADEPT-15 tests for a construct that Aon calls "Awareness," which is Aon's version of an "emotional intelligence" construct. Yet "emotional intelligence" models include characteristics that are closely related to a core cluster of characteristics in the medical understanding of autism pertaining to differences in social interaction and communication,[30] and, in fact, "Social Awareness" is one of the variables measured in one of the most widely used clinical tools for autism assessment.[31] That cluster of characteristics in the medical understanding of autism also has significant overlaps with other ADEPT-15 constructs, such as Aon's "Liveliness," which "focuses on the extent to which someone is outgoing, energetic, and socially confident."[32]

38. Other constructs in ADEPT-15 overlap with the other core cluster of characteristics for the medical understanding of autism pertaining to very strong interests in specific topics and a focus on routine.[33] For example, Aon's construct of "Flexibility" "measures the extent to which someone is flexible, adaptable, and open-minded."[34]

39. Similarly, Aon's "Positivity" construct ("the extent to which someone is happy, optimistic, and resilient") and its "Composure" construct ("the extent to which someone is composed, calm, and relaxed")[35] overlap with characteristics of depression and anxiety (which can be disabilities in and of themselves and are also common comorbidities for autistic people)[36] and other mental health disabilities.

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[29] Simon Baron-Cohen et al., *The "Reading the Mind in the Eyes" Test Revised Version: A Study with Normal Adults, and Adults with Asperger Syndrome or High-functioning Autism*, 42 J. CHILD PSYCH. & PSYCHIATRY 241, 243–247 (2001), https://doi.org/10.1111/1469-7610.00715.

[30] *Compare e.g.*, Reuven Bar-On, *The Bar-On Model of Emotional-Social Intelligence (ESI)*, 18 PSICOTHEMA 13, 14 (2006), https://www.psicothema.com/pdf/3271.pdf (describing "emotional intelligence" as a "cross-section of interrelated emotional and social competencies, skills and facilitators that determine how effectively we understand and express ourselves, understand others and relate with them, and cope with daily demands"), *with* AMERICAN PSYCHIATRIC ASSOCIATION, *Autism Spectrum Disorder Diagnostic Criteria*, *in* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5-TR 56, 56–58 (2022) (listing "[p]ersistent deficits in social communication and social interaction" as one of two clusters of criteria for autism, including in "social-emotional reciprocity," "non-verbal communication used for social interaction," and "developing, maintaining, and understanding relationships").

[31] *SRS-2™: Social Responsiveness Scale™, Second Edition*, PAR, https://www.parinc.com/Products/Pkey/426 (last visited May 24, 2024) (listing "Social Awareness" of one of five treatment subscales measured by SRS-2, described *supra* note 28).

[32] *ADEPT-15 Technical Documentation*, *supra* note 15, at 14.

[33] *See* AMERICAN PSYCHIATRIC ASSOCIATION, DSM-5-TR, at 56–58 (listing second core cluster of characteristics for autism diagnoses as "restricted, repetitive patterns of behavior, interests, or activities," including at least two of "stereotyped or repetitive motor movements, use of objects, or speech," "insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior," "highly restricted, fixated interests that are abnormal in intensity or focus," and "hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment").

[34] *ADEPT-15 Technical Documentation*, *supra* note 15, at 14.

[35] *Id.* at 15.

[36] Matthew J. Hollocks et al., *Anxiety and Depression in Adults with Autism Spectrum Disorder: A Systematic Review and Meta-Analysis*, 49 PSYCH. MED. 559, 570 (2018), https://doi.org/10.1017/S0033291718002283 ("[B]oth anxiety and depression are prominent and common in adults with a diagnosis of ASD.").

40. The inherent overlap between ADEPT-15 personality constructs and characteristics that are closely related to diagnostic criteria for autism and/or to mental health disabilities such as depression and anxiety means that people with such disabilities are likely to be disadvantaged on tests using these measures. Indeed, researchers have repeatedly found that autistic people and otherwise neurodivergent people score lower on measures of so called "emotional intelligence" as do people with PTSD, depression, and anxiety.[37]

41. Likewise, numerous studies have been conducted on how autistic people and people with various mental health disabilities score on the Five Factor Model of Personality ("FFM"),[38] the personality model on which ten of fifteen of Aon's constructs are based, finding that people with these disabilities tend to score at the extreme ends of the scales on several FFM-based traits. For example, a 2019 meta-analysis found that autism correlates with higher scores on "Neuroticism"[39] (the model for Aon's "Positivity" and "Composure" constructs), lower scores on "Extraversion" (the model for Aon's "Liveliness"), lower scores on "Openness to Experience" (the model for Aon's "Flexibility") and lower scores on the remainder of the FFM domains of "Conscientiousness" and "Agreeableness."[40] Another meta-analysis found that depression and

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[37] Elif Gökçen et al., *Sub-threshold Autism Traits: The Role of Trait Emotional Intelligence and Cognitive Flexibility*, 105 BRITISH J. PSYCH. 187 (2013), https://doi.org/10.1111/bjop.12033 ("Many aspects of social and emotional functioning that appear to be impaired in ASD … are encompassed by trait [emotional intelligence] … [O]ur findings show that there is considerable overlap between ASD constructs and various aspects of trait emotional intelligence."); Erin Robinson et al., *Big Five Model and Trait Emotional Intelligence in Camouflaging Behaviors in Autism*, 152 PERSONALITY & INDIVIDUAL DIFFERENCES, Jan. 2020, at 2–3, 6–7, https://discovery.ucl.ac.uk/id/eprint/10081968/2/Petrides%20Traits%20and%20autism.pdf (finding negative correlations between autistic traits and trait emotional intelligence and discussing other research showing same); K.V. Petrides et. al., *A Comparison of the Trait Emotional Intelligence Profiles of Individuals With and Without Asperger Syndrome*, 15 AUTISM 671, 678–80 (2011), https://www.psychometriclab.com/adminsdata/files/Autism%20-%20Trait%20EI%20(2011).pdf (finding significantly lower trait emotional intelligence scores for people diagnosed with Aspergers Syndrome); Pablo Alejandro Pérez-Diaz et al., *Invariance of the Trait Emotional Intelligence Construct Across Clinical Populations and Sociodemographic Variables*, FRONTIERS PSYCH., Apr. 2022, at 1, 2, https://doi.org/10.3389/fpsyg.2022.796057 (reporting emotional intelligence measures negatively predict "multiple clinical criteria, such as depression, stress, anxiety"); Katrin Janke, et al., *Emotional Intelligence in Patients With Posttraumatic Stress Disorder, Borderline Personality Disorder and Healthy Controls*, 264 PSYCHIATRY RSCH. 290, 295 (2018), https://www.sciencedirect.com/science/article/abs/pii/S0165178117315949?dgcid=api_sd_search-api-endpoint (finding that patients with PTSD have impairments in emotional intelligence).
[38] The FFM is a commonly used personality model that defines personality in five "domains" of "Openness to Experience," "Conscientiousness," "Extraversion," "Agreeableness," and "Neuroticism." *ADEPT-15 Technical Documentation*, *supra* note 15, at 10–16. ADEPT-15 categorizes personality into 15 general constructs, ten of which are based on the FFM ("Conceptual", "Flexibility", "Structure," "Drive," "Assertiveness," "Liveliness," "Sensitivity," "Cooperation," "Composure," and "Positivity") and five of which are not ("Humility," "Awareness," "Mastery," "Power," and "Ambition"). *Id.*
[39] The link between "Neuroticism" and several mental health disabilities is readily evident from its definition: "the tendency to experience unpleasant emotions easily, such as anger, anxiety, depression, or vulnerability." *ADEPT-15 Technical Documentation*, *supra* note 15, at 10.
[40] *See* Jennifer Lodi-Smith et al., *Meta-Analysis of Big Five Personality Traits in Autism Spectrum Disorder*, 23 AUTISM 556 (2019), https://doi.org/10.1177/1362361318766571.

anxiety were correlated with high scores on "Neuroticism" and low scores on "Conscientiousness" as well as correlations with several other mental health conditions.[41][42]

42. Moreover, ADEPT-15 is not "fair" or "objective" because it impacts employment decisions without accurately reflecting a neurodivergent person's skills or abilities. For example, autistic people or people with other similar disabilities are likely to have a different pattern of response than neurotypical people, including being more likely to answer psychological test items in a literal or "suggestible" way.[43] Since neurodivergent people have different ways of processing information, the constructs purportedly measured in ADEPT-15—at least as they are normed[44] based on responses from the general population—may not accurately reflect a neurodivergent

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[41] Roman Kotov et al., *Linking "Big" Personality Traits to Anxiety, Depressive, and Substance Use Disorders: A Meta-Analysis*, 136 PSYCH. BULL. 768, 799 (2010), https://doi.org/10.1037/a0020327; *see also* Kelly Cahill Timmons, *Pre-Employment Personality Tests, Algorithmic Bias, and the Americans with Disabilities Act*, 125 PENN ST. L. REV. 390, 426–28 (2021), https://elibrary.law.psu.edu/pslr/vol125/iss2/2/ (listing studies finding high "Neuroticism" and low "Conscientiousness" scores for people with anxiety and depression; higher "Neuroticism" and "Openness" and lower "Extraversion," "Conscientiousness," and "Agreeableness" for people with bipolar disorder; high "Neuroticism" for people diagnosed with various personality disorders; and low "Extraversion" for people diagnosed with "avoidant personality disorder, obsessive-compulsive personality disorder, and schizotypal personality disorder").

[42] In fact, the relation between FFM personality constructs and the realm of mental health conditions is evidenced by the growing use of FFM in medical settings, as reflected in the current version of the DSM-5-TR, which includes an Alternative Model of Personality Disorders using "personality dimensions with clear ties to basic personality structure from the FFM to make personality disorder diagnoses." *See* Arturia Melson-Silimon et al., *Personality Testing and the Americans with Disabilities Act: Cause for Concern as Normal and Abnormal Models Are Integrated*, 12 INDUS. & ORG. PSYCH. 119, 120 (2019). According to the DSM-5-TR, "knowing the level of an individual's personality functioning and his or her pathological trait profile also provides the clinician with a rich base of information and is valuable in treatment planning and in predicting the course and outcome of many mental disorders in addition to personality disorders." AMERICAN PSYCHIATRIC ASSOCIATION, *Clinical Utility of the Multidimensional Personality Functioning and Trait Model*, *in* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5-TR 894, 894–895. Notably, one of the assessments upon which ADEPT-15 is based and from which Aon drew statements for development of ADEPT-15 is the NEO-PI, a tool commonly used both in employment and clinical settings. *See* Paul T. Costa & Robert R. McCrae, *The Five-Factor Model of Personality and Its Relevance to Personality Disorders*, 6 J. PERSONALITY DISORDERS 343 (1992), https://guilfordjournals.com/doi/10.1521/pedi.1992.6.4.343; *see NEO-PI-3 (TM):NEO Personality Inventory – 3™*, SIGMA ASSESSMENT SYSTEMS, INC., https://www.sigmaassessmentsystems.com/assessments/neo-personality-inventory-3/ (last visited May 24, 2024); *see also* Paul T. Costa, Jr. & Robert R. McCrae, *Revised NEO Personality Inventory™: Combined Interpretive Report*, PAR, https://paa.com.au/wp-content/uploads/2018/07/NEO-PI-R-Combined-Interpretive-Report-Sample.pdf (last visited May 24, 2024) (sample of a NEO Personality Inventory report that includes a section "intended for use in clinical populations only.").

[43] Jada Wiggleton-Little, *Screening Out Neurodiversity*, KENNEDY INST. ETHICS J., Oct. 2022, at 1, 15–16, http://dx.doi.org/10.1353/ken.2023.a899458; Marilyn A. Sher & Caroline Oliver, *Assessment of Self-Report Response Bias in High Functioning Autistic People*, 30 PSYCHIATRY, PSYCH. & L. 229, 232 (2023), https://doi.org/10.1080/13218719.2021.2006097.

[44] "Norming" an assessment "makes it possible to give an assessment result meaning, by allowing the comparison of an individual's score with a relevant reference group." *ADEPT-15 Technical Documentation*, *supra* note 15, at 93–94. In other words, norms make it easier to determine whether a score is below, at, or above average. *Id.* Aon represents that the norms that are usually most appropriate are general adult population norms, which it used in the development of its assessment. *Id.* The use of the "general adult population" norm may not accurately reflect the experiences of people with disabilities, undermining ADEPT-15's validity.

person's ability to do a job or otherwise reflect the various strengths and strategies that they may bring to a given job role. [45][46]

43. Thus, contrary to Aon's marketing that its assessments have "no adverse impact" and are without "bias,"[47] autistic people and otherwise neurodivergent people and/or people with mental health disabilities such as depression and anxiety are likely to score at the extreme ends of the test and be harmed in employment processes that utilize it. Indeed, Aon's own test interpretation documents show that people at the extreme ends of the scoring scale are flagged by Aon as potential problems for employers.[48]

2. Aon Did Not Take Basic Reasonable Measures to Develop ADEPT-15 to "Have Minimal Differences" Based on Disability Status

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[45] *See e.g.* Marilyn A. Sher & Caroline Oliver, *Assessment of Self-Report Response Bias in High Functioning Autistic People*, 30 PSYCHIATRY, PSYCH. & L. 229, 241 (2023), https://doi.org/10.1080/13218719.2021.2006097 (finding that failing to design or validate a self-report measure for use with an autistic population may result in conclusions from that measure that are "inaccurate and lack empirical support"); Rachael Davis & Catherine J. Crompton, *What Do New Findings About Social Interaction in Autistic Adults Mean for Neurodevelopmental Research?*, 16 PERSPS. ON PSYCH. SCI. 649, 649–653, https://doi.org/10.1177/1745691620958010 (describing research showing that since social-cognition assessments are based on nonautistic social interactions and norms, "it is … unsurprising that autistic people often perform significantly more poorly than nonautistic people on frequently used social-cognition measures. Furthermore, it is increasingly evident that performance of autistic people on measures of nonautistic social cognition are unlikely to accurately predict a person's real-world functional and social skills.").

[46] This also casts serious doubt on Aon's frequent claims that its assessments are "legally defensible." *See, e.g.*, *Talent Assessment Products and Tools*, *supra* note 5; *see also Mobile-Enabled Assessments*, AON, https://www.aon.com/human-capital-consulting/consulting/mobile-enabled_assessments (last visited May 24, 2024). Under the ADA, an assessment that tends to screen out people with disabilities is legally defensible only in the limited scenario where such a test is job-related and consistent with business necessity, defined as being "carefully tailored to measure the [applicant's] ability to perform the essential functions" of a position, i.e. the "duties" of the position. *See, e.g.*, *Gwendolyn G. v. Donahoe*, Appeal No. 0120080613, 2013 WL 8338375, at *8 (E.E.O.C. Dec. 23, 2013) (quoting H.R. REP. No. 101-485, pt. 2, at 36 (2d Sess. 1990), as reprinted in 1990 U.S.C.C.A.N. 303, 353–55); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 996 (9th Cir. 2007). ADEPT-15 is marketed to employers as being relevant for all industries, and "all functions and roles and at all levels in an organization," and it is hard to imagine that most positions, let alone all positions, have duties for which the kind of personality characteristics ADEPT-15 purports to measure are necessary. *See ADEPT-15 Technical Documentation*, *supra* note 15, at 4. Aon's assessment suite for evaluation of drivers and industrial machinists, which includes ADEPT-15, is just one case in point: it seems unlikely that any conceivable combination of ADEPT-15 constructs would be deemed to be sufficiently tied to the duties of those positions to meet the standard to defend an employer from liability where the assessment screens out an autistic person or someone with mental health disabilities from a job opportunity. An employer raising this defense must also show that the screened-out applicant is unable to perform the essential functions of the job with a reasonable accommodation. 42 U.S.C. § 12113(a) (defense to screen out claim is that the test is shown to be job-related and consistent with business necessity, and "such performance cannot be accomplished by reasonable accommodation"); 29 C.F.R. § 1630.15(b)(1). This is an exceedingly high threshold for an employer to reach. *See generally* Aaron Konopasky, *Pre-Employment Tests of "Fit" Under the Americans with Disabilities Act*, 30 REV. L. & SOC. JUST. 209 (2021).

[47] *See supra* pp. 5–8.

[48] *See* Aon, *ADEPT-15 Interpretation Guide*, OSF 3–4, https://osf.io/kczy8 ("Scores on the far ends of the scale should be considered carefully as they are more rare and tend to represent stronger preferences than scores in the middle."; "Interpreting Extreme Scores: Sometimes when people are under stress and pressure, there can be a tendency to overuse certain behaviors—this is when they could become a problem."). Document subject to Creative Commons By Attribution 4.0 International License. The Creative Commons By Attribution 4.0 International License is available at https://creativecommons.org/licenses/by/4.0/legalcode.en.

44. While Aon claims that it "developed [ADEPT-15] from the ground up to…have minimal demographic (ethnic, culture, gender, **disability status**, etc.) differences,"[49] the technical documentation reflects otherwise. Under the ADA, the term "disability" includes "a physical or mental impairment that substantially limits one or more major life activities," and implementing regulations make clear that "it should easily be concluded that" autism as well as mental health conditions such as "major depressive disorder, bipolar disorder, post-traumatic stress disorder" will substantially limit major life activities and thus are disabilities.[50] In its technical documentation—spanning 166 pages and including what Aon describes as a "detailed summary" of its work on ADEPT-15—the only step Aon mentions taking to ensure its tool does not discriminate on the basis of disability was that it submitted the ADEPT-15 pool of statements to "outside attorneys" to flag questions for revision or removal that could raise concerns about disability status, and tellingly, the only examples given for the kinds of statements flagged through that review involved language that was ableist for physical disabilities, such as "items referring to 'seeing,' 'speaking,' or 'hearing,'" not disabilities pertaining to neurodiversity or mental health.[51]

45. Furthermore, the technical documentation gives no indication that Aon took even the most basic, reasonable measures that experts in industrial and organizational psychology have prescribed to begin to address discrimination in the use of personality assessments for autistic people, otherwise neurodivergent people, or people with mental health disabilities.[52] For example, there is no indication that Aon engaged psychology experts (or other subject matter experts such as clinical psychologists or autistic people themselves) with an understanding of autism, neurodiversity or mental health disabilities to conduct a sensitivity review to identify and remove individual statements (e.g. "I have difficulty determining how someone feels by looking at their face") that may be particularly closely related to a test-taker's neurodiversity or mental health diagnoses.[53] Such a review should also include an evaluation of whether a given item will elicit different information for a person with a disability than for a person without. Industrial and organizational psychologists have recognized that failure to conduct such a review risks including statements that activate emotional responses in test-takers, undermining the ability of the test to measure the constructs it purports to measure, and raising concerns for test-takers that the

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[49] *ADEPT-15: Adaptive Employee Personality Test*, *supra* p. 13 (emphasis added).

[50] 42 U.S.C. § 12102(1)(A); 29 C.F.R. § 1630.2 (j)(3)(iii).

[51] *ADEPT-15 Technical Documentation*, *supra* note 15, at 28 ("Outside attorneys reviewed each statement to ensure that it was fair and unbiased in relation to gender, race, national origin, and disability status. Many of the legal comments and revisions focused specifically on addressing concerns about disability status. For example, items referring to 'seeing', 'speaking', or 'hearing' were either modified to be more general (e.g., 'noticing' or 'communicating') or were removed from the statement pool. In all cases, statements that could not be revised to satisfy legitimate legal concerns were removed from further consideration.").

[52] *See, e.g.*, Jone M. Papinchock et al., *Potential Impact of Disabilities and Neurodiversity on the Constructs Measured by Selection Procedures*, *in* TALENT ASSESSMENT: EMBRACING INNOVATION AND MITIGATING RISK IN THE DIGITAL AGE 250, 259 (Tracy Kantrowitz et al. eds., 2023).

[53] *Id.* at 250, 255 (describing sensitivity review of items that may be affected by neurodiversity as a "highly recommended, and in some situations, a necessary methodological step in test development" and giving examples of experts who may be helpful for such reviews such as industrial and organizational psychologists, clinical psychologists, or experts in educational measurement); *see also The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, EEOC (May 12, 2022), https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence [hereinafter EEOC AI Guidance] ("if an employer is developing pre-employment tests that measure personality, cognitive, or neurocognitive traits, it may be helpful to employ psychologists, including neurocognitive psychologists, throughout the development process in order to spot ways in which the test may screen out people with autism or cognitive, intellectual, or mental health-related disabilities.").

inclusion of such statements means they would not be welcomed at the employer or that their disability will be revealed through their answers.[54]

46. All of these issues are heightened through ADEPT-15's use of an algorithm to adjust the statements pairs based on an assessment-taker's previous answers, which is designed to "intelligently administer items in a way that results in an examinee with a high trait level receiving more items targeting this level, while a candidate with a lower trait level will receive items targeting a lower level."[55] This means that autistic people and other neurodivergent people—who may be more likely to register high or low trait levels because the characteristics commonly associated with their disabilities inherently overlap with some of the traits measured by ADEPT-15 and because Aon recommends using the test with norms that represent the general population[56]—may be likely to get more extreme questions that target their high or low trait level and score at the extreme ends of the scale.[57]

c. vidAssess-AI Exacerbates the Risk of Discrimination in ADEPT-15

1. How vidAssess-AI Works

47. vidAssess-AI allows employers to administer interviews asynchronously—candidates record video responses to selected interview questions—and the interviews can be analyzed and scored using AI.[58]

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[54] For example, instead of the choice being "a function of the examinee's trait levels on each personality dimension," it might be a function of the current state of their disability, or their desire to mask such a disability. *See, e.g.*, Papinchock et al., *supra* note 52, at 250, 257–60 ("Is error introduced when some test takers respond based on preference and others respond based on their current level of psychological disorder? The answer is undeniably 'yes.' Would the reliability of the responses be the same for the two groups? The answer is indisputably 'no.'").

[55] *ADEPT-15 Technical Documentation*, *supra* note 15, at 17.

[56] *Id.* at 93–94.

[57] There is also reason to question some of the repeated claims that Aon makes with respect to ADEPT-15 being reliable. *See, e.g.*, *ADEPT-15 Technical Documentation*, *supra* note 15, at 76 ("ADEPT-15 is a reliable assessment of personality that provides consistent score results[.]"). Indeed, in one blog post, Aon informs employers that "vendors should be able to provide proof of their tests' reliability. A perfect reliability score is a coefficient of 1.00, but no test is perfectly reliable. However, you shouldn't invest in tools with a coefficient of less than 0.7[,]" implying to consumers that its tests would meet that mark. *Finding the Right Workplace Personality Test Provider*, AON, https://assessment.aon.com/en-us/blog/finding-the-right-workplace-personality-test-provider (last visited May 24, 2024). However, Aon's test-retest reliability assessment of ADEPT-15 constructs—where Aon had the same assessment-takers complete ADEPT-15 twice two weeks apart and compared their scores on each administration—failed to do so, as 10 out of 15 of the ADEPT-15 constructs produced reliability coefficients below 0.7. *ADEPT-15 Technical Documentation*, *supra* note 15, at 39 (Table 5). The lowest reliability coefficient Aon reported was .44, *id.*, for the "Awareness" construct, which is especially notable given the overlap between this personality construct and the tools used for autism diagnoses, discussed in more detail *supra* pp. 17–26. Three additional coefficients for various ADEPT-15 constructs were .57 or below. *Id.*

[58] *Video Interviewing Solution*, *supra* p. 15.

48. vidAssess-AI relies on ADEPT-15 for its personality model.[59] While technical documentation is not publicly available for vidAssess-AI, research authored by one of vidAssess-AI's developers[60] reflects that Aon links particular questions posed to candidates to specific ADEPT-15 personality constructs, and vidAssess-AI scores candidates' responses by associating elements of the content of candidates' spoken responses, such as use of particular words or phrases, with those constructs. The "far extreme" for each construct of ADEPT-15 is represented, meaning that segments of candidates' responses can be classified as either a "positive" or "negative" indication of one or more ADEPT-15 constructs.

49. As described by Aon, the processing and scoring of candidates' video responses by vidAssess-AI proceeds in two general steps: the tool "converts video responses from speech to text and then applies a natural language processing ["NLP"] artificial intelligence for scoring results." [61][62] The following image from an Aon promotional video illustrates a sample interview transcript generated from a video interview response with phrases used by the applicant tagged with green and red circles for positive and negative indicators respectively for particular ADEPT-15 constructs:[63]

[59] Richard T. Justenhoven, *Looking for c(l)ues. How visual cues can help predict personality traits in video interviews* 96 (2023) (dissertation, Freie Universitaet Berlin (Germany)), https://refubium.fu-berlin.de/bitstream/handle/fub188/37886/Dissertation_Justenhoven.pdf?sequence=3&isAllowed=y ("vidAssess scoring uses the underlying ADEPT15 model[.]"); *Video Interviewing Solution*, *supra* p. 15 ("Our client-independent AI model is enabled and linked with our award-winning validated personality model.").

[60] This research is Justenhoven Dissertation, *supra* note 59, at 89–97 (discussing how vidAssess-AI works and noting that further details about vidAssess-AI can be found in United States Patent Publication No US2021/0233030 titled 'Systems and Methods for Automatic Candidate Assessments in an Asynchronous Video Setting,' which lists Richard Justenhoven as an inventor. U.S. Patent No. US 2021/0233030 A1 (filed July 29, 2021), https://ppubs.uspto.gov/dirsearch-public/print/downloadPdf/20210233030).

[61] *The Complete Guide to Video Assessments & Video Interviews*, *supra* p. 15.

[62] For more background on the field of Natural Language Processing, *see, e.g.*, DANIEL JURAFSKY & JAMES H. MARTIN, SPEECH AND LANGUAGE PROCESSING: AN INTRODUCTION TO NATURAL LANGUAGE PROCESSING, COMPUTATIONAL LINGUISTICS, AND SPEECH RECOGNITION (3d ed. draft 2024), https://web.stanford.edu/~jurafsky/slp3/ed3bookfeb3_2024.pdf.

[63] Aon Assessment Solutions, *AI Augmented Video Scoring by Aon*, Aon Assessment Solutions, YOUTUBE (Aug. 3, 2020), https://www.youtube.com/watch?v=N9ngNWaLViw. A nearly identical illustration is contained in the patent for vidAssess-AI. *See* U.S. Patent No. US 2021/0233030 A1, *supra* note 60, at fig. 12.
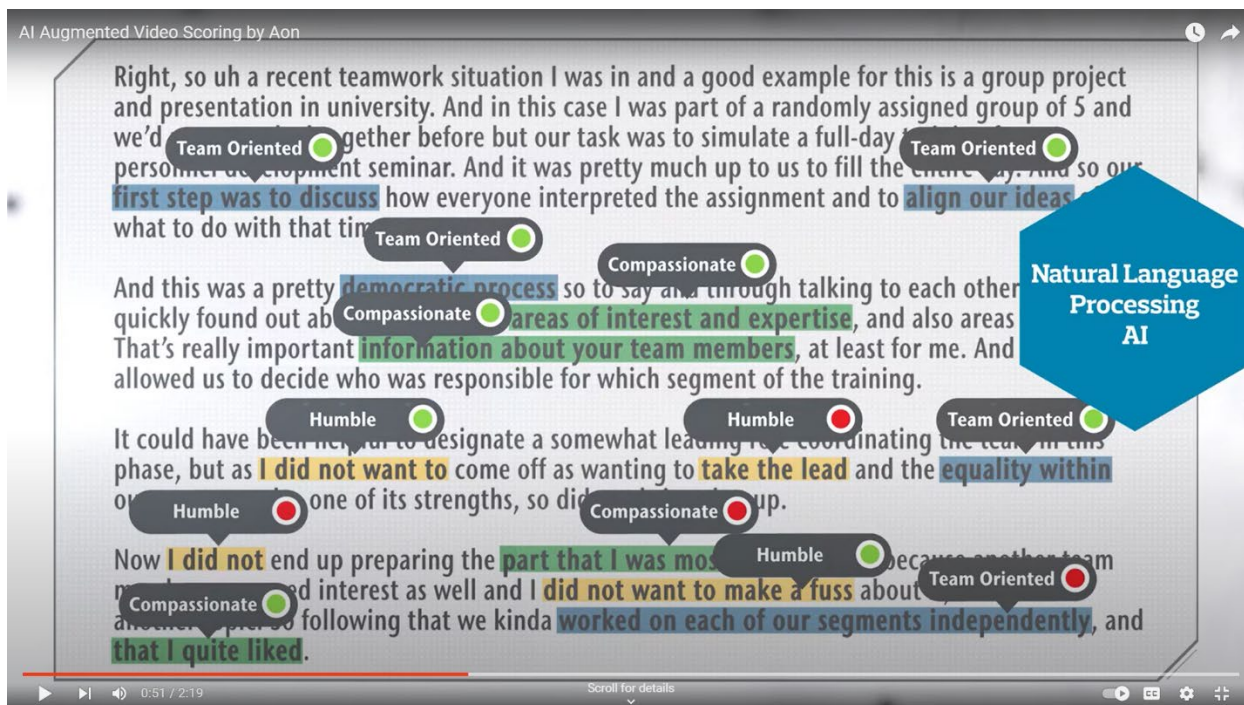
50. vidAssess-AI scores can be reported back to employers in a variety of formats.[64]

2. vidAssess-AI Has a High Risk of Discrimination on the Basis of Disability, Race, and Other Protected Characteristics.

51. Aon claims that vidAssess-AI is "fair" and can "minimize human bias."[65] However, through its reliance on ADEPT-15, vidAssess-AI replicates the discrimination inherent in ADEPT-15, and through its use of AI to assess candidates, vidAssess-AI risks exacerbating this discrimination.

52. Fundamentally, vidAssess-AI seeks to associate candidates' responses to interview questions with ADEPT-15 personality constructs, which as previously established, inherently overlap with characteristics that are closely related to diagnostic criteria for autism and to mental health disabilities. Further, vidAssess-AI seeks to classify segments of candidates' responses as representing the "extreme" levels of ADEPT-15 personality constructs; given that autistic people and otherwise neurodivergent people or people with mental health disabilities are likely to score at the extreme ends of ADEPT-15, this means these populations may be especially likely to have worse outcomes with vidAssess-AI.

53. These issues are exacerbated through the use of machine learning ("ML") and AI for converting speech to text and analyzing text in line with purported personality constructs, both of which present serious potential for further discrimination.

54. First, independent research over the last several years indicates that several popular state of the art systems for automatically transcribing speech to text—sometimes referred to as automated speech recognition ("ASR") systems—perform significantly worse at transcribing the speech of Black

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[64] *See* Justenhoven Dissertation, *supra* note 59, at 96–97.
[65] *Video Interviewing Solution*, *supra* p. 15.

speakers compared to white speakers.[66] Research has also found that automated speech recognition systems can perform worse for a variety of other groups of speakers, including speakers whose first language is not English[67] and speakers with speech disabilities and other disabilities.[68]

55. According to research authored by one of vidAssess-AI's creators, the specific system leveraged by vidAssess-AI for transcribing speech to text is IBM Watson,[69] and independent research in 2020 found that an automated speech recognition system developed by IBM exhibited an error rate for Black speakers approximately twice that of white speakers.[70] While it is unknown whether Aon leverages the same version of IBM's ASR systems for vidAssess-AI as the version evaluated in this independent research, the transcripts produced of candidates' video responses that are subsequently analyzed and scored using AI may be less accurate for Black speakers compared to white speakers.

56. Likewise, versions of the NLP model Aon uses and customizes to associate candidates' words, phrases, and sentences with various ADEPT-15 dimensions[71] has been shown to produce racially

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[66] *See* Allison Koenecke et al., *Racial disparities in automated speech recognition*, 117 PROC. OF THE NAT'L ACAD. OF SCI. 7684 (2020), https://www.pnas.org/doi/epdf/10.1073/pnas.1915768117; *see generally*, Mikel K. Ngueajio & Gloria Washington, *Hey ASR System! Why Aren't You More Inclusive?: Automatic Speech Recognition Systems' Bias and Proposed Bias Mitigation Techniques. A Literature Review, in* HCI INTERNATIONAL 2022 – LATE BREAKING PAPERS: INTERACTING WITH EXTENDED REALITY AND ARTIFICIAL INTELLIGENCE (Jessie Y. C. Chen et al. eds., 2022), https://arxiv.org/pdf/2211.09511; Alicia Beckford Wassink et al., *Uneven success: automatic speech recognition and ethnicity-related dialects*, 140 SPEECH COMMC'N 50 (2022), https://www.sciencedirect.com/science/article/abs/pii/S0167639322000486; Joshua L. Martin & Kevin Tang, *Understanding Racial Disparities in Automatic Speech Recognition: The Case of Habitual "be"* (Interspeech Conf., 2020), https://www.isca-archive.org/interspeech_2020/martin20_interspeech.html.

[67] *See, e.g.*, May Pik Yu Chan et al., *Training and typological bias in ASR performance for world Englishes* (Interspeech Conf., 2022), https://www.isca-archive.org/interspeech_2022/chan22b_interspeech.pdf.

[68] *See, e.g.*, Ming Tu et al., *The relationship between perceptual disturbances in dysarthric speech and automatic speech recognition performance*, 140 J. OF THE ACOUSTICAL SOC'Y OF AM. 416 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6909999/; Abraham Glasser et al., *Deaf, Hard of Hearing, and Hearing perspectives on using Automatic Speech Recognition in Conversation in* PROCEEDINGS OF THE 19TH INTERNATIONAL ACM SIGACCESS CONFERENCE ON COMPUTERS AND ACCESSIBILITY (2017), https://arxiv.org/pdf/1909.01176; Anhong Guo et al., *Toward fairness in AI for people with disabilities SBG@a research roadmap*, SIG ACCESS: SPECIAL INTEREST GROUP ON ACCESSIBLE COMPUTING (2020), https://www.researchgate.net/publication/339631380_Toward_fairness_in_AI_for_people_with_disabilities_SBGa_research_roadmap; Julio C. Hidalgo Lopez et al., *Quantifying and Improving the Performance of Speech Recognition Systems on Dysphonic Speech*, 168 OTOLARYNGOLOGY–HEAD AND NECK SURGERY 1130 (2023), https://pubmed.ncbi.nlm.nih.gov/36939576/; Matthew L. Rohlfing et al., *Hey Siri: How Effective are Common Voice Recognition Systems at Recognizing Dysphonic Voices?* 131 THE LARYNGOSCOPE 1599 (2020), https://pubmed.ncbi.nlm.nih.gov/32949415/; Joel Shor et al., *Personalizing ASR for Dysarthric and Accented Speech with Limited Data*, *in* PROCEEDINGS OF THE ANNUAL CONFERENCE OF THE INTERNATIONAL SPEECH COMMUNICATION ASSOCIATION, INTERSPEECH (2019), https://arxiv.org/abs/1907.13511.

[69] Justenhoven Dissertation, *supra* note 59, at 94 ("an openly available speech-to-text service by IBM Watson is leveraged to generate a written transcript of what the interviewee said.").

[70] *See* Koenecke, *supra* note 66, at 7685 (Fig. 1).

[71] Justenhoven Dissertation, *supra* note 59, at 95 ("The classification model that is used within vidAssess[-AI] is a Bidirectional Encoder Representations from Transformers or BERT[.]" (citing Jacob Devlin et al., *BERT: Pre-training of Deep Bidirectional Transformers for Language Understanding*, *in* PROCEEDINGS OF THE 2019 CONFERENCE OF THE NORTH AMERICAN CHAPTER OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS: HUMAN LANGUAGE TECHNOLOGIES, VOLUME 1 (LONG AND SHORT PAPERS) (2019), https://arxiv.org/pdf/1810.04805)).

biased and sexist associations, including bias towards Black names.[72] Independent research has also established that versions of this model can produce outputs that exhibit implicit and explicit racial bias and bias towards people with disabilities or about disabilities, including autism.[73]

57. Thus, Aon's claims with respect to the fairness of vidAssess-AI are misleading.[74]

d. gridChallenge Carries a High Risk of Discrimination on the Basis of Race and Disability, As Do Other Aon Cognitive Assessments

1. How gridChallenge Works

58. gridChallenge is a cognitive ability test that specifically assesses working memory, which Aon describes as "the ability to actively maintain and process information in the presence of distractions or while performing cognitively demanding tasks."[75] Aon states that gridChallenge is "broadly applicable for use" in selection "across regions and job levels" and "across jobs in an organization."[76] gridChallenge requires assessment-takers to complete nine "items," which are each comprised of a "target icon" and a "distractor task."[77] "Target icons" include memorizing the location and order of highlighted circles or arrows, featured among a disorganized array of circles or on a grid, in a very short amount of time. In between displaying the highlighted shapes and asking the assessment-taker to recall the correct location and order, the test presents a "distractor task" such as assessing whether a pattern is symmetrical or whether connected dots form a particular shape.[78] The items shown to gridChallenge test-takers are automatically

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[72] Independent research has found that BERT's classifications can exhibit racist and sexist biases. *See* Yi Chern Tan & L. Elisa Celis, *Assessing Social and Intersectional Biases in Contextualized Word Representations*, *in* ADVANCES IN NEURAL INFORMATION PROCESSING SYSTEMS 32 (H. Wallach et al. eds. 2019), https://arxiv.org/abs/1911.01485.

[73] *See, e.g.*, Pranav Narayanan Venkit et al., *A Study of Implicit Bias in Pretrained Language Models against People with Disabilities*, *in* PROCEEDINGS OF THE 29TH INTERNATIONAL CONFERENCE ON COMPUTATIONAL LINGUISTICS 1328 (Nicoletta Calzolari et al. eds. 2022), https://aclanthology.org/2022.coling-1.113/ (finding that "even when disability is not discussed explicitly, word embeddings and PLMs [pre-trained language models] consistently score sentences with words associated (in the pretrained vector space) with disability more negatively than sentences containing words with no association to PWD [people with disabilities]. The results suggest that these large models are inadequate in understanding the nuances of language associated to conversations around disability."); Pranav Narayanan Venkit et al., *Automated Ableism: An Exploration of Explicit Disability Biases in Sentiment and Toxicity Analysis Models*, *in* PROCEEDINGS OF THE 3RD WORKSHOP ON TRUSTWORTHY NATURAL LANGUAGE PROCESSING (TRUSTNLP 2023) 26 (Anaelia Ovalle et al. eds. 2023), https://aclanthology.org/2023.trustnlp-1.3.pdf (finding that versions of BERT "exhibit statistically significant explicit bias against PWD"); *see* Valentin Hofmann et al., *Dialect prejudice predicts AI decisions about people's character, employability, and criminality*, ARXIV 1 (2024), https://arxiv.org/pdf/2403.00742 (finding that a version of BERT—RoBERTa—and other language models "embody covert racism in the form of dialect prejudice" . . . including "exhibiting covert stereotypes that are more negative than any human stereotypes about African Americans ever experimentally recorded[.]"); Saad Hassan et al., *Unpacking the Interdependent Systems of Discrimination: Ableist Bias in NLP Systems through an Intersectional Lens*, *in* FINDINGS OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS: EMNLP 2021 (Marie-Francine Moens et al. eds., 2021), https://aclanthology.org/2021.findings-emnlp.267/ (finding that word predictions of a large-scale BERT language model exhibit ableist biases).

[74] Importantly, technical documentation assessing vidAssess-AI's validity, reliability, and potential for adverse impact has not been made publicly available, upon information and belief.

[75] *gridChallenge & GAME Technical Documentation*, AON 9 (Dec. 12, 2022), https://perma.cc/26S8-3SVA (citation omitted).

[76] *Id.* at 3.

[77] *See id.* at 18.

[78] *Id.*

randomly selected from a large pool of items. The following images are screenshots from a non-interactive example of gridChallenge and demonstrate the format of the gridChallenge assessment:[79]

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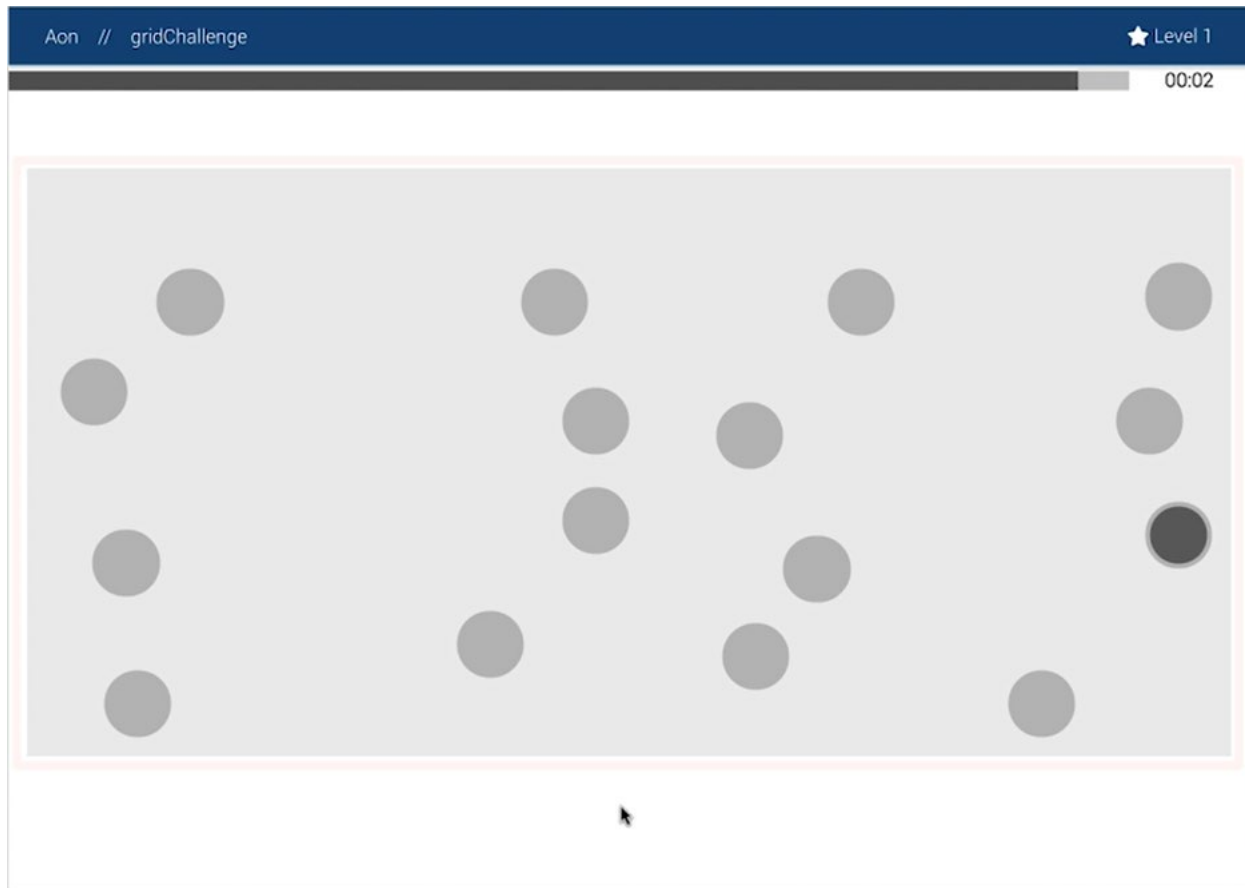
[79] Aon Assessment Solutions, *Working Memory: Test Grid Challenge Demo: Aon Assessment*, YOUTUBE (Feb. 1, 2021), https://www.youtube.com/watch?v=oRyLcRc3wXo.

00:07

Is it symmetrical?

yes   no

00:07
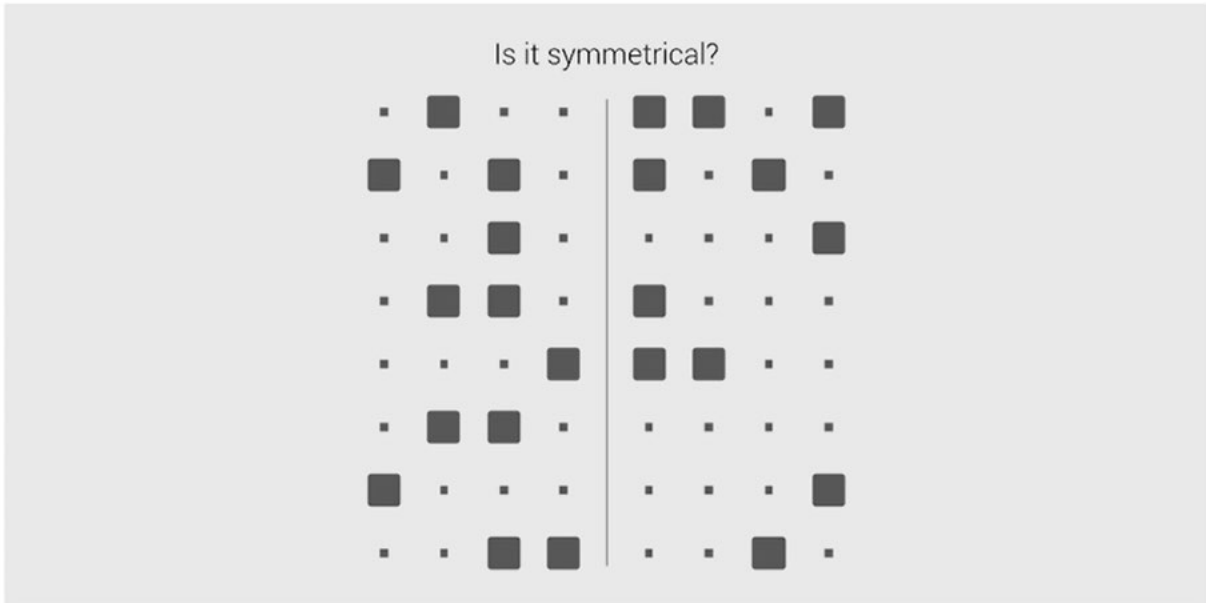
Rotated but identical?

yes   no

Correct?

yes   no

59. Beyond gridChallenge, Aon advertises that it sells more than a dozen other cognitive assessments, including "logic tests" and "aptitude and skills tests."[80] Aon states that these assessments are designed to measure various characteristics, including but not limited to deductive and inductive reasoning, language skills, or numerical reasoning, and many of these assessments are gamified.[81]

2. gridChallenge and Other Aon Cognitive Assessments Have a Risk of Discrimination Based on Race and Disability

60. Aon's claims that its assessments are "fair" and have "no adverse impact"[82] are contrary to data showing racial disparities in performance on gridChallenge and a high risk of discriminating against people with disabilities.

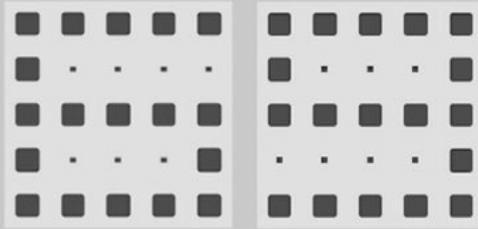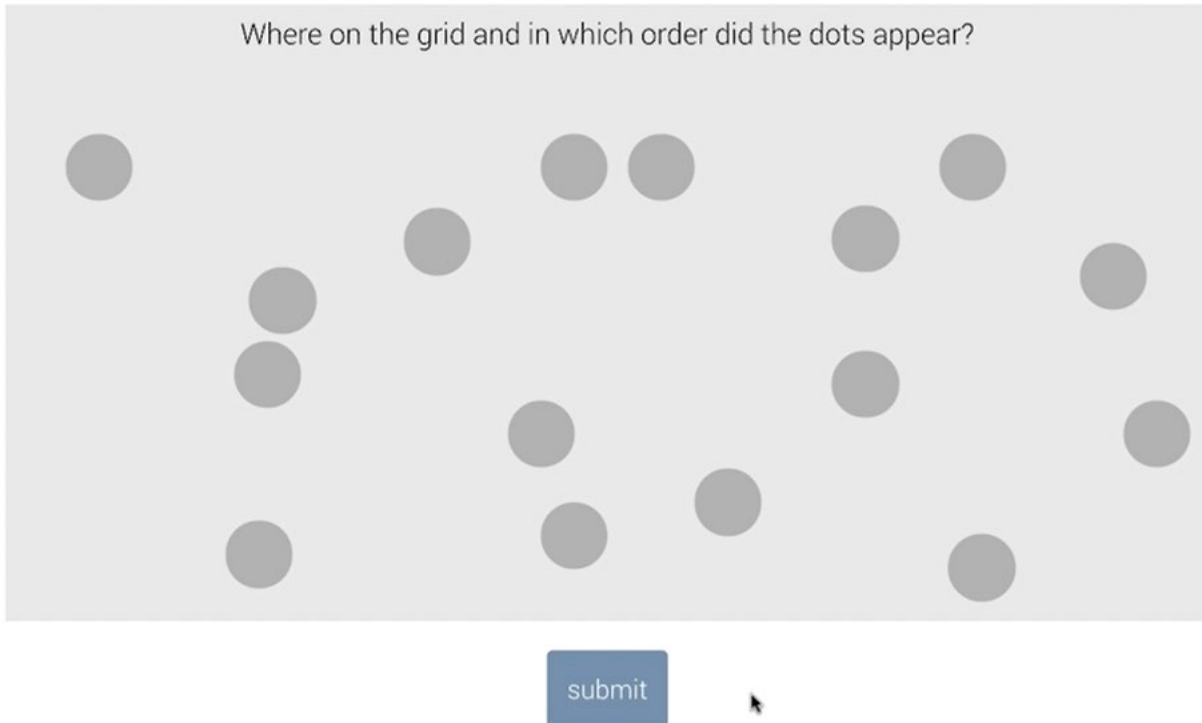61. Publicly available technical documentation for gridChallenge demonstrates disparities in average scores for assessment-takers of different races.[83] In a study of gridChallenge, Aon reported that assessment-takers who were Asian, Black, Hispanic or Latino, or of two or more ethnicities all

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[80] *Prepare for Your Online Assessment: Everything You Need to Know About Online Tests*, AON, https://assessment.aon.com/en-us/prepare-your-assessment#s6 (last visited May 27, 2024).

[81] *See id.*; *switchChallenge Technical Documentation*, AON 12 (Sept. 4, 2023), https://acrobat.adobe.com/id/urn:aaid:sc:va6c2:cbb51052-d421-4f9f-88e2-65ffe111e8fb; *gapChallenge & scales lst Technical Documentation*, AON 5 (Nov. 24, 2021), https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:384b413d-54a3-4ebd-989f-6160ab6b4604; *memoryChallenge Technical Documentation*, AON 9 (June 28, 2022), https://acrobat.adobe.com/id/urn:aaid:sc:va6c2:28dcad45-d992-4749-9c68-34c90c7762e8.

[82] *See supra* pp. 5–8.

[83] *gridChallenge & GAME Technical Documentation*, *supra* note 75, at 56–57.

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scored lower than white assessment-takers on average.[84] The largest difference in average scores compared to white assessment-takers was for Black assessment-takers.[85]

62. In practice, gridChallenge's adverse impact on selection outcomes will depend on several factors, including the cut-off score used by employers in connection with gridChallenge—the number at or above which an assessment-taker's score is considered passing and below which an assessment-taker's score is considered failing—as well as whether the outputs of gridChallenge are combined with the outputs of other selection tools.

63. However, research has repeatedly demonstrated that disparities in average scores of the magnitude found for gridChallenge can give rise to substantial disparities in selection outcomes, including violations of the four-fifths rule and other statistical or practical significance measures commonly used by courts for assessing adverse impact in selection contexts and Title VII analyses.[86]

64. gridChallenge also has a high risk of discriminating based on disability. Several meta-analyses have found that autistic people score significantly lower on various measures of working memory compared to individuals in the general population.[87] Other studies have found that individuals with various mental health disabilities may also score lower on measures of working memory

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[84] *Id.*

[85] *Id.* at 57 (Table 43: Aon reported that Black assessment-takers scored, on average, .48 standard deviations lower than white assessment-takers in the study sample, that assessment-takers of two or more ethnicities scored .38 standard deviations lower than white test-takers on average, Hispanic or Latino assessment-takers scored .37 standard deviations lower than white test-takers on average, and Asian assessment-takers scored .35 standard deviations lower than white test-takers on average).

[86] *See, e.g.*, Paul R. Sackett & Jill E. Ellingson, *The Effects of Forming Multi-Predictor Composites on Group Differences and Adverse Impact*, 50 Personnel Psych. 707, 712 (1997), https://lesacreduprintemps19.wordpress.com/wp-content/uploads/2012/12/the-effects-of-forming-multie28090predictor-composites-on-group-differences-and-adverse-impact.pdf (noting that "It is informative, though perhaps disheartening, to note that even *d* values commonly viewed as small (e.g., the value of 0.2 used to designate a small effect by Cohen, 1988) can produce violations of the four-fifths rule at a variety of commonly occurring selection ratios. Note also that the *d* value of 1.0, commonly observed between Blacks and Whites on cognitive ability measures, produces violations of the four-fifths rule at all but the very highest selection ratios.") As discussed, *supra* note 85, disparities in average scores of the magnitudes reported for Black, Hispanic or Latino, Multiracial, and Asian assessment-takers relative to white test-takers on gridChallenge could thus all lead to adverse impact in selection outcomes in violation of the four-fifths rule in practice.

[87] *See, e.g.*, Abdullah Habib et al., *A meta-analysis of working memory in individuals with autism spectrum disorders*, 14 PLoS ONE 1 (2019), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0216198; Suneeta Kercood et al., *Working memory and autism: A review of literature*, 8 Rsch. in autism spectrum disorders 1316 (2014), https://www.researchgate.net/publication/264313002_Working_memory_and_autism_A_review_of_literature.

capacity.[88] gridChallenge and other cognitive assessments are also likely to have an adverse impact on people with various cognitive disabilities.[89][90]

65. Publicly available technical documentation indicates that other cognitive assessments developed by Aon likewise produced substantial disparities in average scores among assessment-takers of different races, particularly for Black assessment-takers as compared with white assessment-takers.[91]

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[88] *See, e.g.*, Tim P. Moran, *Anxiety and Working Memory Capacity: A Meta-Analysis and Narrative Review*, 142 PSYCH. BULL. 831 (2016), https://web.archive.org/web/20190304183941id_/http://pdfs.semanticscholar.org/ca5a/f77642fcf63aac6873a4b3323e5b6a4a49ad.pdf; Katherine E. Vytal et al., *The complex interaction between anxiety and cognition: insight from spatial and verbal working memory*, 7 FRONTIERS IN HUM. NEUROSCIENCE 1 (2013), https://doi.org/10.3389/fnhum.2013.00093; Hannah R. Snyder, *Major depressive disorder is associated with broad impairments on neuropsychological measures of executive function: A meta-analysis and review*, 139 PSYCH. BULL., 81 (2013), https://doi.org/10.1037/a0028727.

[89] *See, e.g.*, Pradeep Kumar Gupta & Dr. Vibha Sharma, *Working Memory and Learning Disabilities: A Review*, 4 INT'L J. OF INDIAN PSYCH. 111 (2017), https://www.researchgate.net/profile/Pradeep-Gupta-18/publication/318585137_Working_Memory_and_Learning_Disabilities_A_Review/links/597178540f7e9b25e86066d0/Working-Memory-and-Learning-Disabilities-A-Review.pdf ("[s]tudies have indicated that deficits in working memory are a common feature of a wide range of developmental disorders and specific learning difficulties" including ADHD, Dyslexia, and others).

[90] As noted with respect to ADEPT-15, *see supra* footnote 46, for many positions, it will be difficult for an employer to prove that gridChallenge and other cognitive assessments are job-related and consistent with business necessity under the ADA, defined as being "carefully tailored to measure the [applicant's] ability to perform the essential functions" of a position, i.e. the "duties" of the position, and even if that is proven, the employer must show that the applicant could not do the job for which they were screened out with reasonable accommodations. *See, e.g.*, *Gwendolyn G.*, 2013 WL 8338375, at *8; *Bates*, 511 F.3d at 996. Thus, for most positions, gridChallenge and other cognitive assessments are likely not "legally defensible" contrary to Aon's claims. *See, e.g.*, *Talent Assessment Products and Tools*, *supra* note 5; *see also Mobile-Enabled Assessments*, *supra* note 46.

[91] These assessments included another Aon working memory assessment called memoryChallenge, deductive logical reasoning assessments gapChallenge and switchChallenge, inductive logical reasoning assessments scales clx and scales ix, information processing assessment scales clues, English language proficiency assessments scales-It-e and scales-It-e (basic), and various versions of a numerical reasoning assessment, scales numerical (compact) and a verbal reasoning assessment, scales verbal (compact). *See memoryChallenge Technical Documentation*, *supra* note 81, at 24; *see gapChallenge & scales lst Technical Documentation*, *supra* note 81, at 43; *see switchChallenge Technical Documentation*, *supra* note 81, at 34–35; *see scales clx Technical Documentation*, AON 33 (Sept. 13, 2023), https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:14230d84-0c4c-4f53-89b0-e9c903e3c80a; *see scales ix Technical Documentation*, AON 27 (Dec. 06, 2021), https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:b0304d10-24a9-4356-8a71-7241e8baeadc; *see scales clues Technical Documentation*, AON 34 (Jan. 6, 2022), https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:b4679c01-0d63-431e-b92f-b37c570def97; *see scales lt Technical Documentation*, AON 54, 56 (Apr. 6, 2023), https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:f02739b2-a7f3-4a7a-8bf1-a9d0d423e986; *see scales numerical & verbal (compact) Technical Documentation*, AON 45, 47, 50 (May 17, 2022), https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:e1cd093a-4314-4d01-94a9-5fabee70271b. Importantly, technical documentation is not publicly available for all of the "logic tests" and "aptitude and skills tests" Aon lists on its website. *See Prepare for Your Online Assessment: Everything You Need to Know About Online Tests*, *supra* note 80. While this complaint discusses tools for which technical documentation is publicly available, the tools for which documentation is not available may also have a disparate impact on the basis of race.

66. In several instances, including for Aon's deductive logical reasoning assessment called switchChallenge and Aon's information processing assessment called scales clues, the effect size of these disparities is "large" even by Aon's own standard for characterizing racial disparities.[92]

67. Thus, the technical documentation clearly contradicts Aon's marketing that its tests have "no adverse impact."[93]

68. This is particularly troubling in light of recent research casting doubt on the long-held belief in the industrial and organizational psychology field—trumpeted by Aon in its marketing[94]—that cognitive ability assessments are the single best predictor of job performance, finding that estimates of their validity have been substantially and improperly inflated.[95] In light of this new research, as well as long-established evidence regarding the adverse impact of cognitive ability assessments, researchers in the field have called for the role of cognitive ability assessments in selection processes to be seriously reconsidered.[96][97]

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[92] When assessing adverse impact for these assessments, Aon generally quantifies disparities in average scores for assessment-takers of different races using a measure of effect size called Cohen's d, which is computed as the difference in mean scores between two groups divided by the pooled standard deviation. Aon interprets effect sizes—where larger effect sizes indicate greater magnitude of disparities—using the following heuristic: $d = 0.2$ is a "small" effect size, $d = 0.5$ is a "medium" effect size and $d = 0.8$ is a "large" effect size. *See, e.g.*, *gridChallenge & GAME Technical Documentation*, *supra* note 75, at 56; *see, e.g.*, *memoryChallenge Technical Documentation*, *supra* note 81, at 20; *see, e.g.*, *scales clues Technical Documentation*, *supra* note 91, at 32; *see, e.g.*, *gapChallenge & scales lst Technical Documentation*, *supra* note 77, at 39. Aon reported that Black assessment-takers scored, on average, .86 standard deviations lower than white assessment-takers in the study sample for scales clues [*see scales clues Technical Documentation*, *supra* note 91, at 34 (Table 20)] and 1.21 standard deviations lower than white assessment-takers in one study sample for switchChallenge [*see switchChallenge Technical Documentation*, *supra* note 81, at 34 (Table 17)], effect sizes that would be considered "large" using the heuristic Aon relies on.

[93] *See supra* pp. 5–8.

[94] For example, Aon advertises that "[c]ognitive ability tests are powerful predictors of job performance and long-term professional success" and that "[c]ognitive ability has long been touted as a key predictor of an employee's job performance. Countless employers have made vastly important decisions based on that belief." S*ee Ability and Skills Assessments*, AON https://assessment.aon.com/en-us/ability-and-skills-assessments#:~:text=Cognitive%20ability%20tests%20are%20powerful,saving%20your%20time%20and%20theirs (last visited May 28, 2024); *Using Workplace Personality Tests to Predict Job Success*, *supra* p. 14.

[95] *See* Paul R. Sackett et al., *Revisiting Meta-Analytic Estimates of Validity in Personnel Selection: Addressing Systematic Overcorrection for Restriction of Range*, 107 J. APPLIED PSYCH. 2040, 2040 (2022), https://psycnet.apa.org/record/2022-17327-001. That now questionable belief was fundamental to Aon's development of gridChallenge. *gridChallenge & GAME Technical Documentation*, *supra* note 75, at 10 ("If working memory capacity is 'the single best predictor of general cognitive ability,' and general cognitive ability is currently the single best predictor of job performance, then working memory capacity should also be a valid predictor of job performance.") (citations omitted).

[96] *See, e.g.*, Stephen A. Woods & Fiona Patterson, *A critical review of the use of cognitive ability testing for selection into graduate and higher professional occupations*, 97 J. OCCUPATIONAL AND ORGANIZATIONAL PSYCH. 253 (2024), https://psycnet.apa.org/record/2024-21892-001; Patrick Gavan O'Shea & Adrienne Fox Luscombe, Human Resources Research Organization (HumRRO), *Is Cognitive Ability the Best Predictor of Job Performance? New Research Says It's Time to Think Again*, SOC'Y FOR INDUS. AND ORGANIZATIONAL PSYCH. (Dec. 27, 2022), https://www.siop.org/Research-Publications/Items-of-Interest/ArtMID/19366/ArticleID/7232/Is-Cognitive-Ability-the-Best-Predictor-of-Job-Performance-New-Research-Says-It%E2%80%99s-Time-to-Think-Again.

[97] In addition to its claims that its tools are "legally defensible", *see supra* note 46, Aon also repeatedly makes claims in its marketing that its assessments are "valid," *see, e.g.*, *Driver Recruitment*, *supra* p. 5 (claiming Aon assessments are "highly valid"); *Talent Assessment*, *supra* p. 6 (same); *Early Careers Hiring*, *supra* p. 6 (same), both of which are highly questionable with respect to gridChallenge. Generally, under Title VII law, where a selection procedure has a significant discriminatory impact based on race or any other protected characteristics, the employer must show that it is "valid" by showing that the procedure is a business necessity and job-related. Criterion-related

IV. Legal Section

1. Section 5 of the FTC Act Prohibits Unfair and Deceptive Acts and Practices

69. Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce" and empowers the FTC to prevent corporations from engaging in such acts or practices.[98]

70. A corporation engages in a deceptive act or practice when "there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[99] In analyzing whether a practice is deceptive, the FTC considers "(1) what claims are conveyed in the ad; (2) whether those claims are false or misleading; and (3) whether the claims are material."[100]

71. An act or practice is unfair when it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[101] The FTC may consider public policy in making its unfairness determination, however public policy cannot be the primary basis for the determination.[102]

72. The term "consumer" is not limited to individual purchasers of goods or services, but also includes businesses as well as workers who may be harmed by corporate acts or practices "in contexts involving their employment or independent contractor status," including workers applying for jobs.[103]

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validity evidence is a key measure the EEOC and the courts consider when determining if an assessment is job-related. *See* Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295, 38312 (1978) (codified at 29 C.F.R. § 1607.1–.16); Bazile v. City of Houston, 858 F.Supp.2d 718, 726 (S.D. Tex. 2012). Yet it is unclear whether Aon conducted any criterion-related validity testing for gridChallenge. In over 70 pages of technical documentation for gridChallenge, that Aon says "describes the research conducted during its development, and provides evidence supporting its reliability and validity," Aon solely describes conducting criterion-related validity testing for gridChallenge's predecessor GAME and does not indicate that it conducted such testing on gridChallenge itself. *gridChallenge & GAME Technical Documentation*, *supra* note 75, at 2, 41–45. If in fact Aon did not do criterion-related validity testing for gridChallenge, employers using it would not be able to show that the test is valid, as Aon's own testing suggests that there are meaningful differences between gridChallenge and GAME, such that criterion-related validity studies for GAME cannot be used to establish the criterion-related validity of gridChallenge. *See gridChallenge & GAME Technical Documentation*, *supra* note 75, at 39–41. We take no position here on whether Aon's validation testing for gridChallenge, GAME, or any other Aon assessments is otherwise sufficient to establish validity.

[98] 15 U.S.C. § 45 (a)(1), (2).
[99] *FTC Policy Statement on Deception*, FTC 2 (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.
[100] Opinion of the Commission, Intuit Inc., FTC Docket No. 9408, 36 https://www.ftc.gov/system/files/ftc_gov/pdf/d09408_commission_opinion_redacted_public.pdf.
[101] 15 U.S.C. § 45(n).
[102] *Id.*
[103] Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, (Aug. 22, 2022), https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security#footnote-67-p51277 (citing cases in which FTC used its enforcement authority to protect workers); Decision and Order, Ceridian Corporation, FTC Docket No. C-4325, 2,

2. **Aon Engaged in Deceptive Acts or Practices**

73. Aon engaged in deceptive acts or practices in violation of Section 5 of the FTC Act, both from the perspective of reasonable consumers who are employers and reasonable consumers who are workers.

      i.   **Aon Makes Deceptive Claims That Are Misleading to Employers as Consumers**

74. Aon markets its assessments directly to employers for use in hiring and other employment processes, and Aon's marketing would mislead a reasonable employer consumer into believing that its assessments are fair and non-discriminatory, including on the basis of disabilities such as autism and/or mental health disabilities and on the basis of race and other protected characteristics.

75. Aon makes repeated, express claims that its assessments are "fair" and have "no adverse impact"[104]—in some instances using that claim as its first point in marketing its products to employers. [105] In addition to these explicit claims, Aon also implies throughout its marketing that its tools do not have adverse impact, such as when Aon claims that its tools help companies improve diversity in their hiring.[106] Both express and implied claims may be deceptive.[107] Given that Aon repeatedly makes both express and implied claims that its products are "fair" and "without adverse impact," the FTC should conclude that Aon intended to convey that message and that this interpretation is therefore presumptively reasonable.[108]

76. Moreover, Aon explicitly mentions both race and disability in its marketing as among the characteristics on which its tools do not discriminate, claims that its assessments have no adverse impact without disclaimers or qualification, and markets its assessments as being "fair to all."[109] Therefore, Aon conveys to employer consumers that its products do not discriminate based on any of the characteristics protected under federal, state or local employment discrimination laws, which include both race and disabilities such as autism and/or mental health diagnoses. Indeed, Aon goes so far as to say that one of its tools— ADEPT-15—was "developed from the ground up" for "minimal" demographic differences based on race and disability.[110] Any reasonable

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https://www.ftc.gov/sites/default/files/documents/cases/2011/06/110615ceridiando.pdf (order pursuant to the FTC Act including within the definition of consumer "any employee of respondent, or any individual seeking to become an employee"); Decision and Order, Lookout Services, Inc., FTC Docket No. C-4326, 2 https://www.ftc.gov/sites/default/files/documents/cases/2011/06/110615lookoutdo.pdf (same); Decision and Order, Rite Aid Corporation, FTC Docket No. C-4308, 118 https://www.ftc.gov/system/files/ftc_gov/pdf/DE019-StipulatedOrderforPermanentInjunctionandOtherRelief.pdf (order pursuant to the FTC Act including within the definition of consumer an "'employee,' and an individual seeking to become an employee").

[104] *See supra* pp. 5–8.

[105] *See FTC Policy Statement on Deception*, *supra* note 99, at 2 ("In cases of express claims, the representation itself establishes the meaning.").

[106] *See supra* pp. 5–17.

[107] *See* Opinion of the Commission, Intuit Inc., *supra* note 100, at 37–38.

[108] *See FTC Policy Statement on Deception, supra* note 99, at 3 ("To be considered reasonable, the interpretation or reaction does not have to be the only one. When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation. An interpretation will be presumed reasonable if it is the one the respondent intended to convey.") (citations omitted).

[109] *See supra* pp. 5–16.

[110] *See supra* pp. 12–13.

consumer would understand that to mean that the assessments do not violate common legal standards for measuring adverse impact or bias under anti-discrimination laws.

77. Representations are likely to mislead if they are false or through innuendo, and Aon's express and implied claims with respect to the fairness of its assessments are false in multiple ways. As described above, contrary to Aon's marketing claims:

- ADEPT-15 is unfair and has an adverse impact on autistic people or people who are otherwise neurodivergent and people with mental health disabilities such as depression and anxiety because it tests for characteristics that are closely related with their disabilities and their scores are likely to reflect their disabilities, thereby adversely impacting their employment prospects.[111]

- While Aon explicitly claims that it designed ADEPT-15 to minimize disability discrimination, it failed to take even minimal measures to do so, such as avoiding constructs that closely overlap with characteristics commonly associated with the medical understanding of autism or other disabilities, or engaging experts with an understanding of autism, neurodiversity, or other mental health disabilities to conduct a sensitivity review.[112]

- ADEPT-15 is unfair because there is no indication that it accurately reflects a neurodivergent person's skills or abilities, as it apparently does not account for how neurodivergent people may process information and interpret statements differently than people who are not neurodiverse.[113]

- vidAssess-AI carries a high risk of discrimination for the same reasons as ADEPT-15, as vid-Assess is grounded in ADEPT-15, but is also likely to have adverse impact because it incorporates versions of AI and ML models that have been shown to discriminate based on race, gender, disability, and other protected characteristics.[114]

- gridChallenge and several Aon cognitive assessments produced substantial disparities in mean scores based on race; thus the use of these tools can give rise to substantial disparities in selection outcomes in violation of Title VII and carry a high risk of discrimination for people with disabilities.[115]

78. Because Aon's false statements are capable of measurement, they are not puffing.

79. In considering whether Aon's statements are misleading from the perspective of a reasonable employer, the FTC should conclude that any consumer would be misled into believing that Aon's tools are fair and do not carry a high risk of discrimination, because Aon's claims are explicit and false on their face.

80. Moreover, the FTC considers whether reasonable consumers who are not the most sophisticated consumers are likely to be deceived.[116] Here, while employers are legally obligated to ensure that the assessments they use do not discriminate, including when using technologically complex assessments, that obligation to vet the tools that they procure does not take away from Aon's obligation to truthfully market its products. Aon's false claims are likely to mislead many

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[111] *See supra* pp. 17–32.
[112] *See supra* pp. 29–30.
[113] *See supra* pp. 22–30.
[114] *See supra* pp. 30–34.
[115] *See supra* pp. 34–41.
[116] *See FTC Statement on Deception, supra* note 99, at 10 n.20 ("An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers.")

employers—particularly smaller businesses with less resources—and lull them into performing less due diligence on Aon's assessments.

81. Finally, Aon's false claims regarding the fairness of its assessments are material, as they are likely to impact employers' purchasing decisions as consumers. Employers seeking to purchase assessments presumably are seeking to procure tools that work as advertised, that they believe will help them screen for qualified candidates without screening people out based on disabilities, race, and other protected characteristics, and that will not subject them to liability. Aon's deceptive claims regarding fairness are repeated, top-line marketing points precisely because Aon believes these points are important to employers in making their procurement decisions, making employers more likely to procure Aon's assessments.

82. Aon's acts and practices are thus deceptive from the perspective of employers as consumers.

ii. Aon Makes Deceptive Claims That Are Misleading to Workers as Consumers

83. In addition to the many deceptive claims discussed above, Aon also makes deceptive claims directed at current and prospective employees regarding the fairness of its assessments, to the detriment of those workers.

84. Workers who are instructed to undergo an Aon assessment as part of a hiring or other employment process are likely to come across the same false claims about the fairness of Aon's assessments that are directed at employer consumers, which readily come up through a simple web search for the assessment. But Aon also makes similar claims in worker-facing materials. For example, in its instructions to workers in a guide for how to prepare for the assessments, Aon tells workers that "[o]nline assessment is highly objective. Due to the fact that no supervisors or invigilators are needed, there is no possibility of bias—for or against specific candidates—either during the test or during the evaluation of answers."[117] Notwithstanding that Aon—many pages later in that document—tells workers that they can ask employers for accommodations if they have a disability, the discussion of requests for accommodations only mentions the ways that the methods of testing administration may be inaccessible for people with particular disabilities— such as for "visual and motor impairments"—and make no mention that *what* the assessment is testing can itself discriminate on the basis of autism, neurodiversity or mental health disabilities.[118] Moreover, Aon fails to provide workers with detailed information as to what its assessments measure and how it does so.

85. A reasonable worker would understand Aon's claims to mean that its tests generally do not discriminate based on protected characteristics, and that applicants can proceed with the test without fear of discrimination if they do not have physical or other disabilities that solely impact the accessibility of the testing administration.

86. For autistic workers, otherwise neurodivergent workers, or workers with mental health disabilities such as depression and anxiety, Aon's misinformation to workers on the danger of discrimination and its failure to provide clear information about what its assessments test and how they do so, may directly impact a worker's decision on whether to seek accommodations or alternative processes for which they have a right under the ADA.

87. Aon's acts and practices are thus deceptive from the perspective of workers as consumers.

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[117] *All You Need to Know about Taking Part in an Online Assessment*, *supra* p. 11, at 3.
[118] *Id.* at 8.

3. **Aon Engaged in Unfair Acts or Practices**

88. Aon also engaged in unfair acts or practices in violation of Section 5 of the FTC Act, which cause or are likely to cause substantial injuries both to workers and employers that they cannot reasonably avoid themselves and that are not outweighed by countervailing benefits to consumers or competition.

89. Aon engages in unfair acts or practices when it designs, markets, and administers discriminatory assessments; when it makes deceptive claims about its assessments that they are fair and do not discriminate; and when it fails to take reasonable steps to address the risks of harm to workers from the deployment of its assessments.[119]

i. **Aon's Acts or Practices Are Unfair to Workers**

90. Aon engages in acts or practices that cause or are likely to cause substantial injury to workers. Various kinds of harms can be deemed substantial, including but not limited to economic or monetary harms.[120] In addition to monetary harms, "discriminatory conduct may also result in forms of non-monetary injury that also constitute 'substantial injury.'"[121]

91. Here, Aon's assessments cause or are likely to cause substantial injury to workers, specifically autistic workers or workers who are otherwise neurodivergent or have mental health disabilities such as depression and anxiety, workers of color, and/or workers from other protected groups, because such workers are likely to be disadvantaged on the assessments as a result of protected characteristics. For example, autistic workers or workers who are otherwise neurodivergent or have mental health disabilities are likely to receive scores on ADEPT-15 at the extreme ends of the scale for various personality constructs, thereby harming their job prospects because they are weeded out of the process or ranked lower than other workers.[122][123] So too are Black workers and many disabled workers likely to score lower on gridChallenge. Use of Aon's assessments thus

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[119] Complaint for Permanent Injunction and Other Relief, FTC v. Rite Aid Corp, https://www.ftc.gov/system/files/ftc_gov/pdf/DE019-StipulatedOrderforPermanentInjunctionandOtherRelief.pdf (stating that Rite Aid caused and was likely to cause substantial injury to consumers in part because it "failed to take reasonable measures to prevent harm to consumers from its use of facial recognition technology.").

[120] *See FTC Policy Statement on Unfairness*, FTC (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness#top.

[121] *See, e.g., Joint Statement of Chair Lina M. Khan, Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya: In the Matter of Passport Auto Group, Commission File No. 2023199*, FTC 2 (Oct. 18, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/joint-statement-of-chair-lina-m.-khan-commissioner-rebecca-kelly-slaughter-and-commissioner-alvaro-m.-bedoya-in-the-matter-of-passport-auto-group.pdf.

[122] "Screen out occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result." EEOC AI Guidance, *supra* note 53.

[123] Notably, under the ADA, employers are also barred from making disability-related inquiries and/or subjecting applicants to medical examinations before they make a conditional job offer. 42 U.S.C. § 12112(d)(2). If an employer chooses to make a disability-related inquiry or use medical examinations after a conditional job offer is issued and rejects an applicant based on information they uncover, the employer would need to show that the reason for the rejection is job-related and consistent with business necessity and the candidate could not do the job with reasonable accommodations. *Id.*; *Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations*, EEOC (Oct. 10, 1995), https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical. ACLU takes the position that ADEPT-15 both makes disability-related inquiries and/or is a medical examination, and thus this is another way in which Aon's acts and practices are harmful to workers.

causes or is likely to cause substantial injury because it can result in a worker losing critical economic opportunities such as jobs or promotions, which means losing out on income, essential benefits such as health insurance, and potentially experiencing a host of secondary impacts on economic stability, health, and personal wellbeing.[124]

92. And in addition to the harm to the individual worker, use of Aon's assessments that exacerbate existing barriers to employment for people with disabilities, people of color, or people from other protected groups perpetuates systemic harm by exacerbating the wealth gap, perpetuating homogeneity in an industry, and broadly impacting the U.S. economy.[125]

93. Indeed, Aon is a major distributor and administrator of assessments, with its products marketed widely both domestically and globally across industries to companies of various sizes and for all levels of positions, and for employment processes ranging from intern selection to hiring to making decisions about promotions and identifying employees for management and leadership roles. Therefore, its assessments can directly impact a significant percentage of the U.S. labor force.

94. Finally, while not necessary to establish the substantial injury to consumers from the use of Aon's assessments, the FTC may also consider that combatting discrimination in employment is "established public policy," as reflected in anti-discrimination laws such as the ADA, Title VII, and others.[126]

95. Workers cannot reasonably avoid the harms from the use of Aon's discriminatory assessments because workers lack choice in what assessments employers utilize in their application processes and the harms are based on workers immutable characteristics.[127]

96. For disabled workers who encounter Aon assessments that may discriminate based on their disability, workers could potentially seek accommodations or alternative processes. However, many workers do not know that an assessment may discriminate against them based on disability prior to taking it,[128] and Aon's deceptive claims that its assessments lack bias and its failure to

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[124] In fact, some neurodivergent applicants may pull themselves out of hiring processes when they are asked to take a personality assessment like ADEPT-15 because of an understanding that it unfairly assesses them based on characteristics that overlap with their disability. This reflects a wide-reaching potential harm to workers even beyond the harms from employers' decisions based on the results of the assessments.

[125] *See, e.g.*, Carmen Sanchez Cumming, *The importance of anti-discrimination enforcement for a fair and equitable U.S. labor market and broadly shared economic growth*, WASHINGTON CENTER FOR EQUITABLE GROWTH (DEC. 21, 2021), https://equitablegrowth.org/the-importance-of-anti-discrimination-enforcement-for-a-fair-and-equitable-u-s-labor-market-and-broadly-shared-economic-growth/ ("By hurting the life and economic outcomes of workers who experience it, the unfair treatment of workers because of their race, gender, or other protected characteristics also reproduces longstanding inequities and robs the U.S. economy of talent that would otherwise make it more dynamic").

[126] 15 U.S.C.A. § 45(n); *Joint Statement of Chair Lina M. Khan, Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya In the Matter of Passport Auto Group*, *supra* note 121; Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-17; Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; Pregnant Workers Fairness Act, 42 U.S.C. § 21G.

[127] *See Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter: In the Matter of Napleton Automotive Group, Commission File No. 2023195*, FTC 3 (Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20Joined%20by%20RKS%20in%20re%20Napleton_Finalized.pdf (discussing that the injuries from discrimination were unavoidable "because affected consumers cannot change their status or otherwise influence the unfair practices.").

[128] *Joint Statement of Chair Lina M. Khan, Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya: In the Matter of Passport Auto Group*, *supra* note 121, at 2 (Black and Latino consumers charged higher fees "could not reasonably avoid this injury, because they typically had no way of knowing they were being charged more than their White counterparts.").

sufficiently explain to candidates what the assessments measure—itself an unfair practice—hinder their ability to do so. Moreover, for candidates who do not want to reveal their disability to employers, the only way to avoid the assessment is to withdraw from the job process altogether, and workers should not have to make that choice.

97. Finally, the harm to workers is not outweighed by any countervailing benefits to consumers or competition. Aon can develop, market, and administer products to assist employers in their hiring and employment processes that are truly designed from the ground up to be equitable and reduce discrimination based on race, disability, and other protected characteristics, instead of marketing products that exacerbate it, and can be truthful to workers about the risks of its products.

98. Moreover, in gauging the countervailing benefits of the discrimination in Aon's tools, the FTC can look to the framework provided by anti-discrimination law, which allows for an assessment that has an adverse impact to nevertheless be used by employers where it is a business necessity and job related (unless the applicant could do the job with a reasonable accommodation (ADA) or there is a less discriminatory alternative (Title VII)), and there is reason to conclude that Aon's products fail to meet those standards here.[129]

99. Aon's acts and practices are therefore unfair to workers.

ii.   Aon's Acts and Practices are Unfair to Employers

100. Aon's acts and practices are also unfair to employers. Aon's acts and practices cause or are likely to cause substantial injury to employers because employers purchase and use assessments that do not perform as advertised and that cost them qualified applicants who are screened out based on their disabilities, race, or other protected characteristics. This has negative impacts on the diversity in their workplace, which can reduce workplace productivity, creativity, workplace morale, and overall product quality. Moreover, in using Aon's discriminatory products, employers also open themselves up to liability, which has both economic and reputational harms.

101. These harms are not reasonably avoidable by employers themselves. As discussed above, all employers have an obligation to carefully vet their products and avoid discriminatory tools, and will be liable if they commit employment discrimination whether or not they are aware of the discriminatory nature of their tools. However, particularly for smaller businesses who may have limited resources to dive deep into the technical area of assessment design and validation, it can be difficult to do so, and Aon's claims that it is selling assessments that are fair and have no adverse impact unfairly lulls employers into believing that such a deep dive is not necessary.

102. Finally, as discussed above, there is no countervailing benefit to Aon designing products that are discriminatory or deceiving employers about their products, and Aon's assessments likely do not withstand scrutiny under traditional employment discrimination frameworks to assess business necessity and job relatedness.

103. Aon is therefore engaging in practices that are unfair to employers.

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[129] *See supra* notes 46, 90, 97.

V.   Request for Investigation and Prayer for Relief

104. The ACLU urges the FTC to do the following:

a. Initiate an investigation into Aon and make a determination that it is engaging in unfair and deceptive acts and practices in the marketing and sale of discriminatory assessments;

b. Enjoin Aon from continuing to make deceptive claims in the marketing of its assessments and require it to provide truthful information about the risks of using the products in employment decisions; and

c. Require Aon to pause sale or administration of its assessments for employment decisions until Aon takes steps to eliminate discrimination in its assessments, or discontinue the assessment products for which elimination of discrimination is not possible.

Respectfully submitted,

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