

Broadway Ruling Puts Discrimination Claims In The Limelight

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Does the First Amendment right to free speech permit an employer to hire or fire an employee based on race? On its face, the proposition may seem absurd, especially as we approach the 60th anniversary of the Civil Rights Act — including its landmark Title VII provision — this July.

On March 7, the U.S. District Court for the Southern District of New York held that a Broadway musical's casting decisions — specifically, replacing one actor with another of a different race — are immune from challenge in a decision that could have far-reaching implications throughout the entertainment industry.

In *Moore v. Hadestown Broadway LLC*, the plaintiff, a Black woman, alleged race discrimination and retaliation under federal and New York state law against her former employer, the producer of the Tony Award-winning musical *Hadestown*.

The court dismissed the plaintiff's race discrimination claims, finding that the employment decisions at issue were shielded by the *Hadestown* producers' First Amendment rights.

As described in the complaint, *Hadestown* faced a backlash over conveying a perceived "white savior" narrative in its production, which featured a white actor — playing Orpheus in an adaptation of the myth of Orpheus and Eurydice — rescuing the play's all-Black chorus from the underworld Hades; the plaintiff was a member of the chorus.

Hadestown allegedly sought to diversify its chorus roles in order to avoid unintentionally conveying the "white savior" narrative. The decision to diversify the cast allegedly resulted in the plaintiff's termination and her replacement by a white actor.

The court found that Hadestown's constitutional affirmative defense — specifically, that its casting decisions are shielded by the First Amendment — was meritorious, especially because the casting in this case actually "affected the story Hadestown was telling on-stage," and "decisions about what story to tell ... fall squarely within the protection of the First Amendment."

Therefore, Hadestown's casting decisions, even though they were employment decisions, were nonetheless "inherently expressive because they are tied to the story [Hadestown] intends to tell," specifically not a story about a white man rescuing a group of Black individuals.

Further Implications for Employers

The Hadestown decision is the latest in just a handful of court cases that have applied the First Amendment to the selection, hiring and casting of individuals in expressive and artistic contexts.

Indeed, the Moore court noted that "there is surprisingly little case law addressing the extent to which casting of creative performances qualifies as speech protected by the First Amendment."

While slim, this body of case law nonetheless paints a compelling picture of the core expressive nature of casting decisions in a range of contexts.

For example, the Moore court found instructive a somewhat similar case from the television industry: *Claybrooks v. American Broadcasting Companies Inc.*, in the U.S. District Court for the Middle District of Tennessee, decided in 2013.

In that case, two plaintiffs, both Black men, sued the producers of the popular reality dating show "The Bachelor" after unsuccessfully applying to be the titular groom-to-be in that show's 2012 season.

The plaintiffs alleged that up to the time of the lawsuit, all the bachelors — and bachelorettes, for that matter — on the show had been white, with mostly white contestants as well.

The plaintiffs sued under Title 42 of the U.S. Code, Section 1981 — which, among other things, guarantees individuals of different races the equal right "to make and enforce contracts."

They alleged that the producers intentionally refused to cast nonwhite bachelors and bachelorettes to avoid the "controversy stemming from an interracial romance" and to convey the message "that only all-white relationships are desirable and worthy of national attention."

As in *Moore*, the Claybrook court found that the defendant producers could assert a First Amendment affirmative defense as a basis for obtaining dismissal of the plaintiffs' claims.

Although the producers denied the plaintiffs' allegations of race discrimination, the court found that, even accepting the plaintiffs' allegations as true, the First Amendment nonetheless protected the producers' casting choices, even if they included intentional discrimination on the basis of race.

Finding that "casting decisions are part and parcel of the creative process behind a television program," the court held that the First Amendment protects "against the application of anti-discrimination statutes to that process."

That is to say, even if "The Bachelor" and "The Bachelorette" did intend to convey the message that interracial relationships were undesirable — which, again, the defendants categorically denied — "the First Amendment protects the right of the producers of these Shows to craft and control those messages, based on whatever considerations the producers wish to take into account," the court said.

Then, two years ago, the U.S. Court of Appeals for the Ninth Circuit held that the First Amendment shielded the Miss USA beauty pageant's decision to restrict its competition to cisgender women.

In *Green v. Miss United States of America LLC*, the plaintiff, a transgender woman who sought to compete in the pageant, claimed that this restriction ran afoul of the Oregon Public Accommodations Act's prohibitions against gender identity discrimination.

The court held in 2022 that beauty pageants are similar to theatrical productions and compared the pageant to the Broadway musical "Hamilton," noting that that production's decision to cast nonwhite actors as the Founding Fathers "was central to the message of the musical itself," and thus protected under the First Amendment.

Similarly, the court found that by excluding transgender women as eligible contestants, the pageant was making a choice as to how best to convey a particular message to its audience.

Accordingly, the pageant's decisions about which types of performers to cast — or, just as importantly, not to cast — even if discriminatory, were protected by the First Amendment.

Infringements on Speech Get "SLAPP'ed" Down in Hollywood

Home to Hollywood and the Fair Employment and Housing Act, California is no stranger to either casting decisions or zealous enforcement of anti-discrimination laws.

California employers that have been sued for allegedly discriminatory casting decisions have used a state law authorizing anti-Strategic Lawsuit Against Public Participation motions to strike such claims, which the state's anti-SLAPP law identifies as "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."

For example, in *Hunter v. CBS Broadcasting Inc.*, a California appeals court held in 2013 that CBS could use the state's anti-SLAPP law to strike age and gender discrimination claims under the FEHA.

The male plaintiff in this case alleged that the producer unlawfully passed him over for "younger attractive females" as on-air weather news anchors at two of CBS' local television stations.

While CBS denied taking applicants' gender or age — or, presumably, physical attractiveness — into account when hiring its on-air reporters, the California Second Appellate District nonetheless found that those hiring decisions "helped advance or assist" CBS' expressive activity under the First Amendment, noting that such selections "were essentially casting decisions."

Five years later, the U.S. District Court for the Central District of California cited *Hunter* in applying California's anti-SLAPP law against another reality dating show, "She's Got Game."

The plaintiff in *Taylor v. Viacom Inc.* was Los Angeles rapper Jayceon Taylor — better known by his stage name, The Game — who starred in "She's Got Game" and brought negligence claims against the defendants for casting a woman with alleged mental health problems and a criminal history as one of the show's contestants.

The defendants **successfully** moved to strike the lawsuit under the anti-SLAPP law, convincing the court that the "decision to hire [the woman] as a cast member for She's Got Game was an activity in furtherance of Viacom's exercise of free speech rights."

At least one court also has found that California's anti-SLAPP law can shield employment decisions in the music industry.

In *Symmonds v. Mahoney*, Glenn Symmonds had worked for years as a drummer for the singer Eddie Money before being diagnosed with cancer. After being laid off from Mahoney's band — and not later rehired with the rest of his bandmates — Symmonds brought a lawsuit alleging age and disability discrimination under the FEHA.

Mahoney filed an anti-SLAPP motion, and the Second Appellate District found that Mahoney's "selection of the musicians that play with him" did indeed further his free speech and expression rights as a musician. Comparing the facts to those in *Hunter*, the court also found hiring a particular drummer to be "analogous to" making a casting decision.

Conclusion

While race-conscious employment decisions have come under increased scrutiny since the U.S. Supreme Court's decision last year in *Students for Fair Admissions Inc. v. Harvard*, overturning affirmative action in higher education, the Moore decision and the other cases discussed above are important reminders of the nuances involved in hiring, which can itself be a form of artistic expression.

And, as any superfan of "The Godfather" knows, some of the producers of that iconic film preferred Laurence Olivier, George C. Scott and even television comedian Danny Thomas for the role of Vito Corleone over the incomparable Marlon Brando — who was director Francis Ford Coppola's singular choice.

Plainly, a number of courts are recognizing that casting decisions such as these have a significant impact on the ideas, emotions and even the narrative conveyed in a story or performance, and they are zealously protecting those creative decisions with all the might of the First Amendment.

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