

What Would John Wilkes Booth Do? Mandatory COVID Vaxes for Actors

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Although the threat of COVID-19 (remember that?) seems to have diminished considerably over the past five years, once upon a time in Hollywood many production companies (along with other employers) required employees to be vaccinated upon pain of losing their job.

In early 2022, Apple Studios LLC conditionally offered actor Brent Sexton the role of U.S. President Andrew Johnson in its production of *Manhunt*, a limited series about the hunt for John Wilkes Booth following the assassination of Abraham Lincoln. One of the conditions for Sexton's casting was that he be fully vaccinated, in compliance with Apple's mandatory on-set vaccination policy. Sexton refused to get vaccinated, seeking an exemption on medical grounds. After considering Sexton's request, Apple ultimately decided that an unvaccinated actor could not safely be accommodated on set and withdrew Sexton's offer. Sexton sued Apple for disability discrimination and related claims.

In response, Apple filed a motion to strike Sexton's complaint under California's anti-Strategic Lawsuit Against Public Participation ("anti-SLAPP") law, which authorizes early dismissal of "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." The trial court denied Apple's motion, but the Court of Appeal [reversed](#), holding that (1) Apple's decision not to cast Sexton was in fact "protected expressive conduct" under the First Amendment; and (2) Sexton's claims lacked merit because, by remaining unvaccinated, he failed to meet the "safety" qualification required for the job he sought.

To Jab, or Not to Jab: That Is the Question

The Court found that Apple’s decision not to cast Sexton furthered free speech in two ways. First, the choice of how to portray Andrew Johnson—a controversial and important historical figure—was a creative endeavor in and of itself, with the selection of different actors “contribut[ing] to the public issue of how contemporary viewers might conceive of Johnson.” Second, by making vaccination mandatory on the *Manhunt* set, “Apple took a stand” on the still-live public debate about vaccination policy.

While legal protections for casting decisions is a remote issue for most employers, the second “speech” element that the Court identified in Apple’s conduct—its decision to make vaccines mandatory on the *Manhunt* set—has potentially sweeping implications. Noting that there is still “a public debate over vaccination policy,” the Court found that by implementing and enforcing an on-set vaccine mandate, Apple “contributed to public discussion of vaccination policy.”

“Safety” as a Bona Fide Occupational Qualification?

In addition to finding Apple’s actions protected as expressive conduct, the Court also concluded that Sexton’s discrimination claims failed on the merits. A key element for a meritorious employment discrimination claim is that the plaintiff must show that they are *qualified* for the position. Here, the Court found that, because Sexton was unvaccinated, he was not qualified for the job he sought. How this decision will be harmonized with established case law on religious and medical exemptions remains to be seen. As always, we will continue to monitor this topic for any updates. (In the meantime, *Manhunt* (which is excellent!) is still streaming, featuring actor Glenn Morshower in the role of Andrew Johnson.)

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