Broadway's 'Hamilton' Teaches Lessons To Employers

Insights
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A recent controversy over the hit Broadway show "Hamilton" can teach employers a valuable lesson about hiring and making other employment decisions. The producers of the show were accused of discriminatory hiring practices when a casting call sought "nonwhite" performers to appear for auditions. Although no legal action was initiated, the situation can offer guidance to employers regarding when (if ever) you can take protected categories such as race, national origin, age, religion, or gender into account when making personnel decisions.

Popular Broadway Show Seeks "Nonwhite" Performers

In August 2015, a new Broadway show burst onto the scene and captured the attention of the musical theater world. The unlikely subject of this modern musical, featuring rap and hip-hop songs, was founding father Alexander Hamilton. The show, titled "Hamilton," has played to sold-out audiences since its debut and has captured numerous awards, including a Grammy Award for best musical theater album.

One of the elements that makes the show unique is that, while the costumes and set design reflect the 18th century, the actors portraying the historical figures such as Hamilton, Thomas Jefferson, and George Washington are all played by African-American, Latino, and other actors with ethnically diverse backgrounds.

Owing to its enormous popularity, in January 2016 the producers began planning a national tour for "Hamilton." In anticipation of a run in Chicago, San Francisco, Los Angeles, and London, the show put out a casting call for actors and actresses to fill the key roles. The audition notice sought "nonwhite men and women, ages 20s to 30s." Although that posting appeared on the show website for months, a news report about the alleged 'reverse racism' contained in this hiring notice sparked a controversy in late March 2016.

Attorney Believes Casting Call Was Discriminatory

A New York City civil rights attorney complained that the casting call violated the city's strict Human Rights Law. Speaking to CBS New York, the attorney said, "What if they put an ad out that said, 'Whites only need apply?' Why, African-Americans, Latinos, and Asians would be outraged." He cited to the city law that makes it unlawful for an employer to make a decision about a job candidate because of race (much like federal law).

The "Hamilton" producers responded to the allegation by affirming their commitment to a diverse cast. One producer stated that it was "essential to the storytelling of 'Hamilton' that the principal roles – which were written for nonwhite characters – be performed by nonwhite actors." He cited to the concept of bona fide occupational qualifications, which allows racial characteristics to be taken into consideration when making hiring decisions in certain artistic situations.

Bowing to some pressure from the actors' union (and perhaps due to the burgeoning media controversy), the show amended the casting call to include language encouraging people of all ethnicities to audition. Given that no formal charges of discrimination have yet been filed with any city, state, or federal agencies, this controversy may have already blown over without any lasting impact. However, employers across the country could learn important lessons about hiring using "Hamilton" as a guide.

What Are BOFQs?

The legal theory cited by the show's producer – bona fide occupational qualifications, or BFOQs – is not restricted to the artistic world. Public and private employers across many industries have relied upon the concept to make otherwise-discriminatory employment decisions and escape legal liability. However, this exception is incredibly narrow and should be used quite sparingly, after careful consideration and consultation with your legal counsel.

Simply put, a BFOQ is a quality or attribute of a candidate that you can take into consideration when making a decision about hiring or retention of a specific applicant or employee. In any other context, using such a characteristic would be blatant and straightforward illegal discrimination. After all, a combination of federal, state, and local laws generally prohibit you from considering an applicant's race, national origin, age, gender, religion, or other similar qualities when making any employment decisions.

However, using the BFOQ defense, employers can legally discriminate in limited circumstances. Title VII, for example, permits employers to consider religion, gender, or national origin in those certain instances where reasonably necessary to the normal operation of the particular business or enterprise. However, courts have interpreted the BFOQ exception very narrowly.

When Can Employers Use The BFOQ Defense?

So when can an employer use a BFOQ and avoid liability? In the artistic context, it is often easy to properly apply the exception. In the case of "Hamilton," if the very purpose of the musical is to portray historical figures in a multicultural setting, the show would probably prevail if a legal challenge is made. If you are putting on a show or making a movie, you are generally permitted to make hiring decisions based on otherwise protected classes – seeking a woman for a lead female role, for example, or seeking to hire an older male when casting for a grandfather. But outside of an artistic context, the issue becomes much murkier.

Selecting Employees Because Of Race

If you are a law enforcement agency setting up an undercover sting operation to infiltrate a white supremacist gang, for example, you can probably feel comfortable restricting applicants to white males using a business necessity argument. But beyond that, it is nearly impossible for race to be legally considered when making a hiring or staffing decision. In fact, Title VII does not even include "race" as one of the traits that it considers covered by the BFOQ defense.

Using Age As A BFOQ

One of the more common uses of the BFOQ defense involves age restrictions. Although the Age Discrimination in Employment Act and state laws generally prohibit age discrimination, mandatory retirement ages have been upheld as proper applications of the BFOQ defense when employers can demonstrate the reasonableness and business justification of the restriction. For example, police officers, firefighters, airline pilots, cab drivers, and transit workers are often precluded from continuing in their service after a certain age due to safety reasons.

Religious Beliefs As A BFOQ

Religious institutions can lawfully restrict the hiring of certain positions by faith, depending on a variety of factors relating to the nature of the job and the mission of the position. However, rather than employing a BFOQ defense, most religious entities that restrict hiring in this regard rely on specific religious exemptions contained in the law (such as the ministerial exception, as most recently described by the Supreme Court in 2012).

There have been some unique examples of non-religious companies lawfully restricting applicants for certain positions through a BFOQ defense. These generally center on jobs that will be performed overseas and in situations where the host countries have local rules or traditions barring individuals from activities due to religion. For example, a famous federal court case from the 1980s upheld a company's business practice of only hiring Muslim helicopter pilots who would be assigned to work in Saudi Arabia because local law provided for the beheading of non-Muslims who entered that holy area.

National Origin As A BFOQ

Much like race, it is very difficult to legally make a hiring decision because of an applicant's national origin. The availability of the BFOQ defense is very narrow in these circumstances. The Supreme Court has noted that certain positions within a foreign corporation doing business in the United States, for example, might be lawfully restricted to applicants of a particular national origin. However, in order to prevail, the employer would need to prove that the need for great familiarity of the language, culture, customs, and business practices of that country could be demonstrated to be sufficiently necessary to satisfy the BFOQ standard such that only a person from that country could do the job.

Gender As A BFOQ

The EEOC's Guidelines on gender as a BFOQ have remained virtually unchanged since 1965. They note that, outside of artistic situations where authenticity in the role is required, it would be extremely difficult to justify selecting a candidate because of gender.

In one of the more famous Supreme Court cases dealing with this area, 1981's *Johnson Controls* case, the Court held that employers could not restrict women from working in potentially hazardous positions if they so choose just because the jobs might cause damage to reproductive organs.

There are some rare examples where positions can be restricted by gender, however. Prison guards or other officers at a correctional facility, psychiatric health care specialists, locker room attendants, and custodians in single-sex facilities are examples where employers have been permitted to lawfully employ a BFOQ defense when discriminating on account of gender.

Can You Take Customer Preference Into Account?

Generally, you cannot justify a BFOQ defense due to customer or client preference of a certain protected class. Just because your customers might expect your server or massage therapist to be a female, or expect your lobby attendant or salesperson to be male, you are not permitted to rely solely on those stereotypical assumptions when making hiring and staffing decisions.

There are limited instances where customer preference can be taken into account, but the exception is likewise extremely narrow. The defense will only work in situations where personal physical privacy would be violated by the presence of the opposite gender (locker room attendants, for example), or when a certain characteristic is necessary for the business to perform its primary function or service (the Playboy Club hiring Playboy Bunnies, for example).

Conclusion: BFOQs Are Applied Narrowly

If you take anything from this example, it's that BFOQs are not your standard employment defense tactic. You should not rely on this theory as an effective technique to defend your average discrimination claim, and you should not employ it in hiring or staffing situations without giving careful consideration to the law.

If you can achieve your hiring goals with a broader hiring net without fundamentally altering your business, you should consider avoiding this path altogether and making your decision without taking protected classes into account. While smash Broadway shows might be able to avoid legal liability, you might not be so lucky.

If you have any questions about this situation or how they may affect your business, please contact your Fisher Phillips attorney.

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