Winter 1999

# Antidiscrimination Laws & Artistic Expression

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Can antidiscrimination laws be extended to those who appear on screen? Can a white actor be rejected for a black role on the basis of race, when makeup would be sufficient to make him appear black? Can a broadcaster be legally compelled to hire a woman to play a male role when, properly disguised, she can appear to be male? Can a pregnant actress insist on playing a sex vixen, when clever shooting and body doubles can successfully hide her pregnancy?[1]

Under Title VII of the Civil Rights Act of 1964, it is generally an unlawful employment practice to discriminate against a person on the basis of race, color, religion, sex, or national origin.

State law is typically similar. Thus, for example, in California, the Fair Employment and Housing Act (FEHA), at Government Code section 12940, makes it "an unlawful employment practice, unless based upon a bona fide occupational qualification, . . . [f]or an employer, because of the race, . . . color, . . . or sex of any person, to refuse to hire . . . or to discharge the person from employment . . . ."

Title VII, FEHA, or equivalent provisions found elsewhere in federal and state law have been used by employees to state claims for discrimination based on gender,[2] pregnancy,[3] race,[4] physical condition,[5] and age.[6] It has been stated that "public policy . . . is to prohibit harassment and discrimination in employment on the basis of any protected classification."[7]

Against these statutes must be set the principle that speech designed to entertain has historically been protected under the First Amendment.[8] As the Court observed in *Burstyn*, it cannot be doubted that communications designed to entertain, such as motion pictures, "are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political doctrine to the subtle shaping of thought which characterizes all artistic expression."[9]

It is equally well established under the U.S. Constitution that editors have the authority to make decisions about content without government interference. Thus the Supreme Court has warned against "intrusion into the function of editors"[10] and has recognized that, "for better or for worse, editing is what editors are for."[11] As the court said in *Olivia N.*, "Applied to the electronic media, the First Amendment means that it is the broadcaster that has the authority to make programming decisions."[12]

Obviously, the entertainment industry can have no general claim to immunity from antidiscrimination laws. It has no right to take race, or age, or gender into account in hiring writers, stage crew, costumers, or makeup artists. But may it take such otherwise protected classifications into account in hiring and firing on-screen actors and actresses?

*Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*[13] suggests that the First Amendment should trump antidiscrimination laws when substantial free speech interests are present. In *Hurley*, Massachusetts, pursuant to a public accommodations statute prohibiting discrimination on the basis of sexual orientation, required the private organizers of the St. Patrick's Day parade in Boston to include a group that the organizers had wished to exclude. The organizers maintained that the application of this antidiscrimination statute violated their First Amendment rights; but the lower courts concluded, among other things, that the First Amendment was not violated because the parade contained no particularized message. The Supreme Court held that no particularized message was required:

> [T]he Constitution looks beyond written or spoken words as mediums of expression. . . . Symbolism is a primitive but effective way of expressing ideas . . . . [A] narrow succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll.[14]

Even more important, the Court unanimously upheld the organizers' right to determine which contingents would or would not march in the parade:

> [The organizers'] claim to the benefits of [the] principle of autonomy to control one's speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day."[15]

The Court stated that the free speech right to autonomy was engaged even if its analogy to a composer gave the Council credit for a more considered judgment than it actually made. Similarly, it can be argued that television and movie producers, like the organizers of a parade, should be allowed to select the members of their ensembles on the basis of their appearance, in order to produce the expression they desire.[16]

This point is reinforced by *Hart v. Cult Awareness Network*.[17] The court concluded that the Cult Awareness Network, a group formed to monitor cults and educate the public about their harmful effects, had a First Amendment right, and a right under the California constitution, to exclude a member of the Church of Scientology, even if the Unruh Civil Rights Act were applicable. The applicant entertained views that were different from the Cult Awareness Network, and the court found a "substantial basis" in the record for the conclusion that admission of the applicant as well as other Scientologists would impede its ability to disseminate its preferred view.[18] The antidiscrimi-

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nation statute was trumped by the First Amendment interest.[19]

In a similar vein the Washington Supreme Court held an antidiscrimination statute unconstitutional as applied to a claim of free press. Washington's Fair Campaign Practices Act prohibits employers from discriminating against employees for their political activity. The *News Tribune* transferred an employee from her position as education reporter to that of swing shift copy editor because she had been politically active. The reporter sued, maintaining that the Act barred such discrimination, and the Washington Supreme Court agreed.[20] Nonetheless, the court held the statute was unconstitutional as applied to the *News Tribune*. The court stated that "editorial integrity and credibility are core objectives of editorial control and thus merit protection under the free press clause."[21] "If a newspaper cannot be required to publish a particular reporter's work, how can it be constitutionally required to employ the individual as a reporter?"[22] The court concluded: "Choosing an editorial staff is a core press function, at least when that choice is based on editorial considerations."[23]

The same analysis ought to apply to on-screen performers—choosing the ensemble of actors and actresses of a television production is a core editorial function. If an antidiscrimination statute cannot constitutionally be applied on behalf of reporters for their off-the-job activities (which cannot be seen in the pages of the newspaper), such a statute ought not constitutionally to be applicable to compel producers to hire, or to continue to employ, persons in protected classifications where appearance is deemed by the producer to be relevant.

There are, of course, numerous cases where antidiscrimination laws have been used to open up clubs and associations. None of these cases, however, involved any serious claim of expressive (as contrasted with associational) rights. The seminal case involving clubs and associations is *Roberts v. United Jaycees*.[24] The national organization of Jaycees sought to sanction local Jaycees in Minnesota for admitting women. The Minnesota Department of Human Rights ruled that any imposition of sanctions would violate the state's prohibition of gender discrimination in places of public accommodations. The Jaycees argued that the department's ruling violated the First Amendment.[25]

The Supreme Court in *Roberts* concluded that the Jaycees "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association"[26] and also concluded that there was no basis in the record for the claim that admission of women would "impede the organization's ability to disseminate its preferred views."[27] Significantly, the *Roberts* court noted that the Act imposed "no restriction on the organization's ability to exclude individuals with ideologies or philosophies different from its existing members."[28]

The cases following *Roberts* similarly do not involve substantial claims of expressive rights. *New York State Club Associations v. City of New York*[29] upheld a facial challenge to New York City's antidiscrimination law as applied to clubs deemed to be public. The court observed that some associations might be able to make a showing that their expressive rights were violated, but no showing appeared in the record about any of the clubs covered by the law. *Board of Directors of Rotary International*[30] upheld the sex discrimination aspects of the Unruh Act as applied to Rotary Clubs, finding that the Rotary's protected service activities would likely be strengthened, not weakened, and suggesting in dictum that any slight impact would be justified. *Hishon v. King & Spalding*,[31] a sex discrimination case in which a woman sought to be considered as a partner in a law firm, found no indication that the law firm's ability to fulfill expressive functions would be inhibited by consideration of the petitioner for partnership on her merits. *Warfield v. Peninsula Golf and Country Club*[32] invalidated sex discrimination by a golf and country club, noting there was "no appreciable effect on its members' freedom of expressive association." Finally, in *Bohemian Club v. FEHC*[33] the Bohemian Club sought to overturn an order requiring it to cease its practice of refusing to consider women for employment. The court of appeal upheld the order against a First Amendment attack based on rights of intimate association. It specifically stated, however, that it "need not address the question of whether the Club's 'expressive' right of association would be infringed because the thrust of the Club's argument is that the presence of women would destroy the intimate all-male atmosphere."

*Roberts* does contain dictum that infringement on the rights to associate for expressive purposes can be justified by compelling state interests, unrelated to the expression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. That language, however, was in the context of clubs and associations where the members' views were not different from those of the association. So understood, the chance of a significant impact on expressive association would be slight. Any broader reading of the *Roberts* dictum would seem to be foreclosed by the unanimous ruling in *Hurley*. In commenting on the clubs and association cases, the Court in *Hurley* made it clear that antidiscrimination laws seeking to open up clubs and associations must give way if enforcing them would "trespass on the organization's message."[34]

Taken together, these cases strongly indicate that on-screen performances cannot constitutionally be included within the scope of antidiscrimination laws, and that producers cannot be required by antidiscrimination statutes to select and use actors and actresses whose appearances are not in their view right for the part, or would require alterations in filming and presentation which impact their subjective artistic judgment.[35]

No arm of the government, whether the legislature, the judge, or the jury, ought to be able to override these expressive choices. The producers right to control the casting process—"to tailor the speech"—ought to be protected by the First Amendment.

## Endnotes

1. The authors of this article represented Spelling Entertainment Group, Inc., in connection with the appeal from a trial court judgment in favor of Hunter Tylo, who was fired from the show "Melrose Place" when she became pregnant.

2. Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Stender v. Lucky Stores, Inc., 803 F. Supp. 259 (N.D. Cal. 1992).

3. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Badih v. Myers, 36 Cal. App. 4th 1289 (1995).

4. Hansborough v. Elkhart Parks & Recreation Dep't, 802 F. Supp. 199 (N.D. Ind. 1992); Northern Inyo Hosp. v. Fair Employment Practice Comm'n, 38 Cal. App. 3d 14 (1974).

5. Cook v. Rhode Island Dep't of Mental Health, 10 F.3d 17 (1st Cir. 1993); Angell v. Peterson Tract, Inc., 21 Cal. App. 4th 981 (1994).

6. Gallo v. Prudential Residential Servs., 22 F.3d 1219 (2nd Cir. 1994); Nidds v. Schindler Elevator Corp., 113 F.3d 912 (9th Cir. 1997).

7. Fiol v. Doellstedt, 50 Cal. App. 4th 1318, 1324 (1996).

8. Joseph Burstyn v. Wilson, 343 U.S. 495, 501-02 (1952); Winters v. New York, 333 U.S. 507, 510 (1948); Barrows v. Municipal Court, 1 Cal. 3d. 821, 824 (1970); Weaver v. Jordan, 64 Cal. 2d 235, 242 (1966); Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 493-95 (1981).

9. 343 U.S., at 501.

10. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974).

11. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973).

12. 126 Cal. App. 3d at 493; McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 999 (1988).

13. 515 U.S. 557 (1995).

14. *Id.* at 569.

15. *Id.* at 574.

16. For a pre-*Hurley* argument that artistic integrity and the right not to be discriminated against should be balanced on a case-by-case basis, *see* Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888 (1st Cir. 1988) (Bownes, J., concurring in part and dissenting in part) (where company cancelled performance contract due to fear of audience reaction to actress's political views, absolute defense of "artistic integrity" should not be available).

17. 13 Cal. App. 4th 777 (1993).

18. *Id.* at 790.

19. *See also* Curran v. Mount Diablo Council of the Boy Scouts of Am., 17 Cal. 4th 670, 722-27, 72 Cal. Rptr. 2d 410, 444-48 (1998) (Kennard, J., concurring) (highly doubtful that the state, consistent with the First Amendment, could force the Boy Scouts to accept a homosexual as an assistant scoutmaster, whose publicly expressed views conflict with the official position of the Boy Scouts, because of the expressive rights of the association). Justice Kennard, in *Curran*, quotes Professor William N. Eskrige of Georgetown University Law Center for the proposition that *Hurley* establishes, that "general antidiscrimination statutes will not be read expansively, beyond their clear application, when the broad reading would directly burden protected First Amendment rights." *Curran*, 17 Cal. 4th at 728, 72 Cal. Rptr. 2d at 449.

20. *Id.* at 540.

21. *Id.* at 540.

22. *Id.* at 539-40.

23. *Id.* at 544.

24. 468 U.S. 609 (1984).

25. *Id.* at 613-18.

26. *Id.* at 626.

27. *Id.* at 627.

28. *Id.*

29. 487 U.S. 1 (1988).

30. 481 U.S. 537, 548 (1987).

31. 467 U.S. 69, 78 (1984).

32. 10 Cal.4th 594, 629 n.12 (1995).

33. 187 Cal. App. 3d 1, 13 n.7 (1986).

34. *Hurley*, 515 U.S. at 580-81.

35. A narrower form of our argument might be that the bona fide occupational qualifications exception should be interpreted so as to avoid serious First Amendment issues in the artistic arena. However, in circumstances where race, gender, or another protected category is not considered to be a bona fide occupational qualification, the constitutional question would need to be squarely addressed.

## Fact-Based Programming

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**Endnotes**

1. 57 Cal.App. 4th 795, 67 Cal.Rptr. 2d 305, 25 Media L. Rep. 2363 (1997), *rev. dismissed*, 79 Cal. Rptr. 2d 206, 965 P.2d 724 (1998).

2. *Polydoros*, 57 Cal. App. 4th at 803.

3. Of course, payments sometimes must be made to meet creative objectives, for entirely extralegal reasons. For example, a writer may desire to interview a person to learn more about his experiences, thoughts, or feelings.

4. Dora v. Frontline Video, Inc., 15 Cal.App. 4th 536, 542, 18 Cal.Rptr.2d 790, 21 Media L. Rep. 1398 (1993); Matthews v. Wozencraft, 15 F.3d 432, 438-39, 22 Media L. Rep. 1385 (1994) (portrayal of an individual's life story does not violate publicity rights).

5. Hicks v. Casablanca Records, 464 F. Supp. 426, 433, 4 Media L. Rep. 1497 (S.D.N.Y. 1978); Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 860, 160 Cal. Rptr. 352, 603 P.2d 454, 5 Media L. Rep. 2208 (1979).

6. *Polydoros*, 57 Cal. App. 4th at 799.

7. Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

8. Estate of Presley v. Russen, 513 F. Supp. 1339, 1359 (N.J.D.C. 1981).

9. Eastwood v. Superior Court, 149 Cal. App. 3d 409, 425, 198 Cal. Rptr. 342 (1984).

10. Virgil v. Time, 527 F.2d 1122, 1 Media Law Rptr. 1835, 1840 (9th Cir. 1975), *cert. denied* 425 U.S. 998 (1976).

11. 638 So.2d 826, 22 Media L. Rep. 1427, 1428 (1994).

12. *Virgil*, at 1841, citing cmt. (f) to RESTATEMENT (SECOND) OF TORTS § 652D (Tentative Draft Nov. 21, 1975).

13. Lee v. Penthouse Int'l Ltd., 25 Media L. Rptr. 1651 (1997).

14. *Cf.* Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 93 Cal.Rptr. 866, 483 P.2d 34, 1 Media L. Rep. 1737 (1971).

15. *See, e.g.*, Campbell v. Seabury Press, 614 F. 2d 395, 5 Media L. Rptr. 2612 (5th Cir. 1980) (account of plaintiff's home life and marriage to civil rights leader's brother had a logical nexus to matters of public interest in autobiography of the civil rights leader).

16. The U.S. Supreme Court has posed but never explicitly answered the question of whether, under the First Amendment, liability ever can be imposed for publication of truthful information. *See* REX S. HEINKE, MEDIA LAW § 4.6(A)(BNA 1994); ROBERT D. SACK AND SANDRA S. BARON, LIBEL, SLANDER AND RELATED PROBLEMS § 10.4.13.1(PLI 1994).

17. 654 F. Supp. 653, 658, 13 Media L. Rep. 2112 (S.D.N.Y. 1987).

18. *Davis*, 654 F. Supp. at 657.

19. Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 22 Media L. Rep. 2353 (4th Cir. 1994).

20. Some advise avoiding a name when a search comes up with zero similar names, on the assumption that the database is incomplete and at least one similar name likely exists.

21. For an opinion casting doubt on the reliability of disclaimers, *see* Bryson v. News Am. Pub., Inc., 174 Ill. 2d 77, 672 N.E.2d 1207, 25 Media L. Rep. 1321, 1327 (Ill. Sup. Ct. 1996) ("The fact that the author used the plaintiff's actual name makes it reasonable that third persons would interpret the story as referring to the plaintiff, despite the fictional label.").

22. Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1368, 7 Media L. Rep. 1785 (5th Cir. 1981).

23. 1 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 211[b] (1998).

24. *See* Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 565, n.8 & Appendix n.21 (1985).

25. Ringgold v. Black Entertainment Tele., 126 F.3d 70, 25 Media L. Rep. 2387 (2d.Cir. 1997); Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998).

26. Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 204, 5 Media L. Rep. 1814 (2d Cir. 1979).

27. Hunt v. National Broadcasting Co., 872 F.2d 289, 16 Media L. Rep. 1434 (9th Cir. 1988).

28. *Id.* at 295-96.

29. *Polydoros*, 57 Cal.App. 4th at 803.