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Whitewashed Runways: Employment Discrimination in the Fashion Modeling Industry

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Whitewashed Runways: Employment Discrimination in the Fashion Modeling Industry

Vanessa Padula*

Racial disparities are rampant in the fashion industry. This article explores how existing antidiscrimination law can be used to combat this problem and highlights the delicate balance between First Amendment rights and anti-discrimination law. The article also examines recent and proposed changes in state law designed to protect the fashion models’ legal rights. The article also compares U.S. employment law with employment law in the United Kingdom and European Union and suggests which legal concepts from those jurisdictions would help fight discrimination in the fashion industry if they were adopted in the U.S. Lastly, the article recommends regulatory changes designed to educate fashion models about their legal rights and ensure that models from underrepresented backgrounds are given the opportunity to audition for roles.

* J.D. Fordham University School of Law. The author would like to thank Professor Tanya Hernandez and Professor Ali Grace Marquart for their invaluable insight and guidance.
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INTRODUCTION

“We are just not doing black girls right now.” Model Marcia Mitchell thought the head of her modeling agency was joking when he spoke those
words, but he was serious.² Not once had she thought that “not being white” would play a role in her agency’s decision to drop her as a model.³ Unfortunately, this reality is not uncommon for models of color today.⁴ The fashion industry is often regarded as socially progressive, an industry that is always looking for the next big thing and is “reflective” of changing social norms.⁵ In the past years, however, the fashion modeling industry has been criticized for being the exact opposite.⁶ Fashion modeling remains a career in which discrimination on appearance is both commonplace and generally accepted.⁷ It is an industry where your appearance and oftentimes skin color not only determine whether you will be hired, but also whether you will move up in the ranks.⁸ Critics both inside and outside of the industry pressure modeling agencies, designers and casting directors to continue in fashion’s socially progressive footsteps by diversifying the runways to reflect a more realistic and inclusive definition of beauty.⁹

The battle once fought behind the scenes using whispering voices is now at the forefront of the fashion law world.¹⁰ As journalist Robin Givhan phrased it, “diplomacy has shifted to confrontation.”¹¹ The legal issue at dispute here is whether fashion models in the United States are afforded any protection from race discrimination. This Article examines the legal issues and obstacles surrounding racial diversity in the fashion modeling industry and compares the laws of several jurisdictions on these matters. Although many forms of modeling lack diversity, including print and on-camera, my research focuses on diversity among fashion runway models.¹² Part I of this Article defines and describes the fashion modeling industry and discusses the ongoing battle for runway diversity. Part II begins with a survey of the relevant laws in the United States and the legal protections extended to models under the current system. Part II then compares and contrasts the laws of other jurisdictions and discusses

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2. Id.
3. Id.
6. Id.
7. Oduok, supra note 4.
8. Id.
11. Id.
12. Id.
the benefits and shortcomings of implementing similar concepts in the United States. Part III summarizes my findings and makes recommendations accordingly.

I. FASHION MODELING

By definition, fashion modeling “consists of showing clothes on a runway or posing for photographs.”13 Runway models, specifically, perform the task of walking in fashion shows or posing in presentations that designers organize to introduce and display their newest collections to the public.14 The work of some models begins before the runway show, as they work with designers as “fit models” to try on the designs and may even serve as the designers’ “muse” to inspire upcoming collections.15

The world of fashion modeling is not an easy one to enter or excel in.16 Getting signed by a modeling agency is a crucial step for most models to enter the industry.17 Many models will sign fixed-term, exclusive contracts to be represented by their new agency.18 These agreements classify the model as an independent contractor of the agency and permits the agency to collect a commission on every job the model books during the contract’s term.19 Therefore, these contracts are highly valuable to the agency.20 Aware that many young models are anxious to be signed, agencies are often accused of taking advantage of models’ weak bargaining power.21 Many times the agency reserves the right to terminate these contracts for any reason, such as the model gaining as little as a centimeter around her hips.22

Once models are signed, the agency can book them for jobs based on client necessity.23 Casting begins when clients reach out to a modeling agency with a description of the type of model they need.24 The description could be of something simple like a model with a particular hair color, or it could be of the model’s overall look, such as “edgy.”25 The agency then reaches out to any of its models fitting the requested description, and interested models attend a casting to meet the client.26 Once the models meet with the client, the client

14. Id. at 159.
15. Id.
17. Simmerson, supra note 13, at 157.
18. Id.
19. Id.
20. Id.
21. See Brown, supra note 9.
22. Id.
24. Id.
25. Id.
26. Id.
decides whether to cast one of the models in their show.\(^{27}\) For runway shows, the designer and casting director are usually in charge of selecting the models.\(^{28}\) If a model is booked, the client will pay the agency and the agency will in turn directly distribute the model’s portion of the earnings.\(^{29}\)

### A. Race in the Fashion Modeling Industry

When a new trend gains significant recognition, it is often referred to as the “new black.”\(^{30}\) That is no surprise, considering that the color black has traditionally dominated the world of fashion.\(^{31}\) On the runway, however, white has remained a constant theme when it comes to the ethnicity of models.\(^{32}\) In the 1980s and early 1990s, designers including Versace and Yves Saint Laurent regularly cast models of color in their fashion shows.\(^{33}\) African American supermodels like Tyra Banks, Naomi Campbell, and Iman walked in the same shows as their white counterparts, Cindy Crawford and Linda Evangelista.\(^{34}\)

Unfortunately, the trend of designers regularly casting models of color decreased in the 1990s.\(^{35}\) The so-called “heroin chic” began to replace the traditional notion of the beautiful model.\(^{36}\) This fashion movement consisted of “used-up, worn out” looking, white models that resembled drug addicts in appearance.\(^{37}\) During this time, models featured “pale translucent skin” and often looked “bored and jaded.”\(^{38}\) While some claimed that the new and sought-after look had nothing to do with drugs, others argued that the fashion industry was pushing an unhealthy image.\(^{39}\) Either way, the heroin chic movement dyed the runways a “whiter shade of pale” and further perpetuated what some have described as the industry’s “not-so-hidden bias towards skinny white girls.”\(^{40}\)

Since heroin chic, there has been little movement away from the predominance of white females on the runway.\(^{41}\) Every season, the blog Jezebel
calculates the percentage of white models walking the runways of New York Fashion Week, compared to models of other races.\textsuperscript{42} In Fall of 2013, the statistics were: 79.98% white, 8.08% black, 8.1% Asian, 3.19% Latina.\textsuperscript{43} The season’s runways were compared to a “Greenwich country club.”\textsuperscript{44} That same season, the demographics of the four major fashion week runways (New York, London, Milan, and Paris), featured close to 88% white models.\textsuperscript{45}

This racial disparity has a negative economic effect on models of color who must constantly compete for the small number of spots available to them.\textsuperscript{46} Models of color also suffer because agencies are less likely to sign them in the first place since they have a lower earning potential than white models.\textsuperscript{47} There is a common misconception that runway models are paid well, but unfortunately this is rarely the case.\textsuperscript{48} In 2010, the median salary for models was $32,920.\textsuperscript{49} Although top models can earn millions, many others get paid very little or nothing at all.\textsuperscript{50} Being paid “in trade,” in clothing or accessories, is not uncommon for new models.\textsuperscript{51} Due to low wages and payment in trade, some models end up indebted to their agency since it controls the model’s finances.\textsuperscript{52} In a world where it is already difficult to make a living, not being white can make it all the more challenging.\textsuperscript{53}

This disparity appears to result from the industry’s current casting practices. Oftentimes casting directors set aside only one or two spots for “ethnic models.”\textsuperscript{54} And, in fact, the only reason they even set aside these spots is because they do no want to “get in trouble” with critics who view their all-white runways as racist.\textsuperscript{55} Once this “ethnic” spot is filled, models of color are told they cannot be cast because they have already found their “black girl” for the show.\textsuperscript{56} Even when models of color are casted, it is usually to fulfill one of

\begin{itemize}
  \item \textsuperscript{42} Kate Dries, \textit{New York Fashion Week Was Chock-Full of White Models. Again.}, \textit{Jezebel} (Sept. 17, 2013, 3:40 PM), jezebel.com/new-york-fashion-week-was-chock-full-of-white-models-1326813852.
  \item \textsuperscript{43} \textit{Id.}
  \item \textsuperscript{44} Wyma, \textit{supra} note 34.
  \item \textsuperscript{45} \textit{Id.}
  \item \textsuperscript{47} \textit{Id.}
  \item \textsuperscript{49} \textit{Id.}
  \item \textsuperscript{50} \textit{Id.}
  \item \textsuperscript{51} \textit{Id.}
  \item \textsuperscript{52} Simmerson, \textit{supra} note 13, at 161.
  \item \textsuperscript{53} Marquart, \textit{supra} note 16.
  \item \textsuperscript{54} Wyma, \textit{supra} note 34.
  \item \textsuperscript{55} Wilson, \textit{supra} note 5.
  \item \textsuperscript{56} \textit{Id.}
\end{itemize}
two stereotypical roles. The first is the African tribal look, where women are often featured with tribal painting and baldheads. The second, the “Anglo” look, consists of longhaired weaves and European features. Once these few stereotypical roles are filled, not many options are left for models of color who want to further their careers. Some models are even told that their best options are off the runway altogether, in modeling black hair care products.

Some believe that there are economic reasons behind the industry’s discriminatory casting practices. While “it used to be about fashion,” it has turned into being “about business.” This argument is based on the idea that models of color are not hired more because “black don’t sell.” The more prevalent argument, however, appears to be that in fashion, race is viewed as any other aesthetic feature, such as hair and eye color. Some have even gone so far as to describe race as a “paint chip,” like another color on the vast Pantone scale designers often use. For example, when Alber Elbaz, a designer for Lanvin, presented five black women walking down the runway together as the finale for his show, it was described as “purely aesthetic.” The problem with this view is that it treats models as nothing short of mannequins that happen to be painted in the designer’s shade of choice.

For many reasons, the aesthetic features of race cannot and should not “be wholly separated from the baggage of oppression, inequality, prejudice, and stereotypes.” These discriminatory casting practices go beyond aesthetics and can have a negative impact on society’s views of minority groups. For example, Hollywood films consisting of mainly white actors can shape social norms worldwide by distorting the images of minority groups. The fashion industry does the same by featuring so few models of color in non-stereotypical roles. This distortion not only leads to “identity harm” within the groups themselves, but it can also negatively impact social interaction between people of different races.

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57. Oduok, supra note 4.
58. Id.
59. Id.
60. Id.
61. Id.
63. Givhan, supra note 10.
64. Oduok, supra note 4.
66. Id.
67. Id.
68. Id.
70. Id.
71. Id.
B. The Industry’s Response, or Lack Thereof

At first glance, it appears as though the industry evades the issue of race discrimination by pretending to “play dumb.”\(^{72}\) The overarching problem appears to be that there are “no obvious repercussions” for this lack of diversity.\(^{73}\) Regardless of whether the reasoning is aesthetic or economic, many play the blame game and point the finger at someone else.\(^{74}\) Those in charge of casting claim that there are not more women of color in their shows because the modeling agencies do not present them with those options.\(^{75}\) The other side argues, however, that agencies do not have more models of color on their rosters because designers and casting directors are not casting them in their shows.\(^{76}\) Since agencies earn commission based on models’ fees, they are less likely to sign models of color since they will not earn as much.\(^{77}\)

Many different groups within the fashion industry have brought attention to the need to diversify the runway. Diane von Furstenberg, President of The Council of Fashion Designers of America (CFDA), promoted racial diversity in casting and encouraged other designers to do the same.\(^{78}\) Other designers, such as Givenchy’s Riccardo Tisci, have also spoken publicly about the issue.\(^{79}\) Tisci refers to the practice of casting only white models as “lazy,” claiming that designers think “it’s easier” because it is what they have been doing for so long.\(^{80}\) Casting directors have also called out for diversity in the industry as a whole.\(^{81}\) James Scully, who casts runway shows for well known designers such as Tom Ford, says that some runways are so white that he “can’t even concentrate on the clothes” because the casting decisions bother him.\(^{82}\) “It feels deliberate,” he says.\(^{83}\)

Some models have criticized the fashion industry’s “racism”\(^{84}\) and publicly stated that their race negatively impacted their ability to book jobs.\(^{85}\) Models Naomi Campbell and Iman have actively pointed out specific designers who fail to diversify their shows.\(^{86}\) They recently teamed up with activist Bethann Hardison to “declare war” on racist acts within the modeling industry.\(^{87}\) They launched various social media campaigns against designers

\(^{72}\) Givhan, supra note 65.
\(^{73}\) Wilson, supra note 5.
\(^{74}\) Id.
\(^{75}\) Givhan, supra note 10.
\(^{76}\) Wyma, supra note 34.
\(^{77}\) Id.
\(^{78}\) Wilson, supra note 5.
\(^{79}\) Id.
\(^{80}\) Id.
\(^{81}\) Id.
\(^{82}\) Id.
\(^{83}\) Id.
\(^{84}\) Oduok, supra note 4.
\(^{85}\) Covert, supra note 46.
\(^{86}\) Oduok, supra note 4.
\(^{87}\) Id.
they believed to be racist in hopes of hurting their sales until they change their practices. Hardison also wrote an open letter to the CFDA in September of 2013 demanding “a change in the status quo.” The letter listed names of designers whose runways are “basically all white” and argued that regardless of whether the industry intended to be racist, their actions amounted to that effect.

The issue of racial disparity in fashion modeling goes beyond the industry as this inequality affects society as a whole. This lack of diversity fails to embrace the culturally diverse world we live in by establishing “archaically narrow definitions of beauty and an impoverished aesthetic of sameness.” These images affect women of all ages by setting “the tone for how women are expected to look.” From a young age, many girls form their ideas of beauty around famous models. Former African American model Veronica Webb explains that the importance of diversity rests on the idea that women feel beautiful when they see models that look like them. “It makes women feel they belong.”

Unfortunately, due to the industry’s current casting practices, many women of color are left with very few models to look up to for this sense of belonging.

C. Why the Silence?

In any other industry, a hiring decision could not be based on the color of the applicant’s skin without being labeled discriminatory. So why have models kept quiet when faced with this discrimination? Some describe the relationship between models and their industry as plagued by a “climate of fear.” With so many struggling models in the industry, they “often feel easily substitutable and replaceable.” As a result of this fear, models are often scared to speak out or bring claims against industry executives. Even if claims are brought, models may not be willing to risk their reputations for a court payout. In 2004, a case brought against modeling agencies for price fixing was settled for nearly $22 million, to be divided among models who had contracted with the defendant agencies. The court had such a difficult time finding models to come forward and collect the settlement that millions of dollars ended up going
to charity instead. Some speculated that the majority of the models may not have come forward out of fear of hurting their professional reputations. Indeed, many models are even afraid to ask their agency to pay them at all because of the power the agency has over their career.

II. LEGAL ANALYSIS

Although often regarded as a glamorous and exclusive industry, fashion modeling in the United States is tainted by serious labor and employment concerns. Furthermore, fashion modeling is oftentimes an international career, exposing models to employment and labor issues in various jurisdictions. As the debate around employment issues in the modeling industry increased in recent years, commentators have compared U.S. laws to the laws of other jurisdictions. In this Part, I compare and contrast various employment and discrimination laws concerning fashion models in various jurisdictions.

A. Domestic Legal Barriers

1. Independent Contractor v. Employee Status

In the United States, each state has a different common law standard for distinguishing independent contractors from employees. On a federal level, however, no single standard exists in evaluating this status. Federal courts have previously used two different tests. The first, an economic realities test, relies heavily on the workers’ dependence on the business. The second test, considered a hybrid test, takes into account factors of the economic realities test, as well as the factual control of the business over the worker. In the context of employment discrimination under Title VII of the Civil Rights Act of 1964, most federal courts use the hybrid test to determine a worker’s employment status.

In applying the hybrid test, courts traditionally looked at eleven factors to determine whether the plaintiff was an employee: 1) the occupation itself, specifically whether there was supervision over the work; 2) the skills required;
3) whether the equipment used belonged to the “employer;” 4) the length of the working relationship; 5) the payment method; 6) the method of termination; 7) whether the worker had annual leave; 8) whether the work provided was “an integral part of the business;” 9) whether there were retirement benefits for the worker; 10) whether the “employer” paid Social Security taxes; and 11) the intentions of both parties.\textsuperscript{113} For example, in Wilde v. County of Kandiyohi, the court held that the plaintiff in a Title VII case was an independent contractor despite certain factors that suggested she was an employee.\textsuperscript{114} The court reasoned that in choosing her own schedule and the services she would provide, the plaintiff maintained significant control, thus remaining an independent contractor.\textsuperscript{115}

Although some states have enacted legislation designating fashion models as employees,\textsuperscript{116} on a federal level, models in the United States are still generally considered independent contractors having “commission-based contracts” with their agencies.\textsuperscript{117} The few states that have addressed models’ employment rights have had contradicting opinions. In In re Barnes, a New York case regarding a model’s right to collect unemployment insurance benefits, the court held that the model was an employee of her modeling agency.\textsuperscript{118} The court reasoned that factors such as the agency’s control over the models’ work schedule and behavior, as well as their ability to negotiate on her behalf went beyond an independent contractor relationship.\textsuperscript{119} However, a California court came to a different conclusion in Zaremba v. Miller.\textsuperscript{120} Here, the court used a test similar to the federal hybrid test and determined that the model was an employee of her agency’s client, a photographer, on a fixed-term basis.\textsuperscript{121} The photographer’s control over the model’s assignment, such as attire, hours, location, and her “every movement,” played a role in the court’s decision.\textsuperscript{122} Furthermore, the photographer’s ability to terminate the working relationship upon the model’s disobedience also indicated that he represented her employer.\textsuperscript{123}

Since Title VII is a federal statute, a model’s status as an employee under state law does not determine whether she will be covered under Title VII.\textsuperscript{124} If a federal court decides that the working relationship is not that of an employer and an employee, then the independent contractor will not be able to make an

\textsuperscript{114} Wilde v. Cnty. of Kandiyohi, 15 F.3d at 106.
\textsuperscript{115} Id.
\textsuperscript{116} N.Y. Lab. Law § 511 (McKinney).
\textsuperscript{117} Johnson, supra note 23, at 839.
\textsuperscript{118} In re Barnes, 216 A.D.2d 619 (1995).
\textsuperscript{119} Id.
\textsuperscript{121} Id. at 5.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} 190 Employment Law Counselor Article I.
employment discrimination claim under Title VII. Based on the hybrid test used by most federal courts to determine an employee’s status, it appears more likely that models are employees of the agency’s clients rather than of the agency itself, as explained in Zaremba v. Miller. Although the agency does have control over the model’s finances, the agency plays a mostly managerial role. Once the agency books a job for a model, the client takes control over the assignment. Some models have equated their relationship with their agency to that of a “staffing agency” rather than an employer. This managerial role that the agency plays does not fulfill many of the factors that courts look at in determining employment status. Nonetheless, designers and photographers, as clients, exercise far-reaching control over models.

2. Title VII

Under Title VII, an employer cannot discriminate against an employee based on religion, sex, national origin, race, or color. Discriminatory practices covered by the statute include: refusing to hire or promote an employee; firing an employee; or segregating or classifying an employee based on any of the attributes listed above. In order for an employee to establish a case of employment discrimination under Title VII, they must provide evidence that the classification was a “motivating factor” in a decision made by their employer that adversely affected them.

a. The Bona Fide Occupational Qualification Exception

One affirmative defense for employers under Title VII is the bona fide occupational qualification exception (BFOQ). This exception allows employers to intentionally discriminate in certain “narrowly defined instances.” National origin, religion and sex are all grounds for a BFOQ defense; race and color, however, are not. To successfully prevail on a

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125. Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica, 361 F.3d 1, 6 (1st Cir. 2004).
126. Marquart, supra note 16.
128. Marquart, supra note 16.
129. Id.
130. Mitchell, supra note 1.
131. Marquart, supra note 16.
132. Id.
134. Id.
135. Robinson, supra note 69, at 29.
137. Id.
138. Id.
BFOQ defense, the employer must show that the attribute on which their decision was based would “substantially interfere” with the plaintiff’s performance in the workplace.\textsuperscript{139} For example, in the context of sex, the test depends on whether “the essence of the business operation would be undermined by not hiring members of one sex exclusively.”\textsuperscript{140}

Economic loss alone would not likely justify discrimination under a BFOQ defense, in part because it would frustrate the purpose of the statute.\textsuperscript{141} If all employers claimed only economic arguments based on customer preference or expectations, Title VII would not prevail in many cases due to customer’s sexist or racist attitudes.\textsuperscript{142} Courts have generally recognized a BFOQ defense only when it relates to the safety of customers or employees, the performance of necessary tasks, the authenticity of the goods or services, or the privacy of patrons.\textsuperscript{143} For example, sex discrimination in casting an actor or actress for a role is acceptable under the BFOQ exception if it is “necessary for the purpose of authenticity or genuineness.”\textsuperscript{144}

\textbf{b. Race as a BFOQ in the Entertainment and Modeling Industries}

The question of whether race should qualify as a BFOQ in certain circumstances has been raised before in the United States.\textsuperscript{145} This is particularly true for the news and entertainment industries, where hiring decisions based on race are not uncommon.\textsuperscript{146} Screenwriters typically specify the race of their characters and casting directors tend to stick to these descriptions when looking for actors.\textsuperscript{147} For example, when actors audition to play the role of an African American historical figure, directors often look to actors of color for a more realistic portrayal of the role.\textsuperscript{148} In the news context, an undercover reporter covering the Ku Klux Klan may be hired for the job only if he or she is white, since a black reporter may not be successful in performing the job, considering the circumstances.\textsuperscript{149}

Additionally, some argue that race should be a BFOQ when relating to role models for children.\textsuperscript{150} For example, African American male teachers teaching African American male children can provide a positive role model.\textsuperscript{151} Similarly, in the news and entertainment industries, having minority

\begin{footnotesize}
\begin{itemize}
\item[139.] Id. at 477–78.
\item[140.] Robinson, supra note 69, at 31.
\item[141.] Frank, supra note 136, at 481.
\item[142.] Robinson, supra note 69, at 32.
\item[143.] Frank, supra note 136, at 484.
\item[144.] Sex as a Bona Fide Occupational Qualification, 29 C.F.R. § 1604.2 (2014).
\item[145.] See Frank, supra note 136.
\item[146.] Id. at 498.
\item[147.] Robinson, supra note 69, at 7.
\item[148.] Frank, supra note 136, at 495.
\item[149.] Id. at 495.
\item[150.] Id. at 501.
\item[151.] Id.
\end{itemize}
\end{footnotesize}
spokespersons can help minority children relate to and follow the positive examples of these role models. 152 Although these examples would likely fall under the performance or authenticity categories that the court allows for a BFOQ defense, these practices are still viewed as unlawful since Title VII has not been amended to include race as a BFOQ. 153

The legislative history of Title VII shows that Congress expressly rejected the inclusion of race under a BFOQ defense. This decision was based partially on the belief that discrimination based on race was more harmful than other types of discrimination. 154 The Congressmen opposed to a race BFOQ stated that allowing this would oppose the basic purpose of Title VII by establishing “a loophole that could well gut this title.” 155 Another reason Congress opposed this amendment was because they found it unnecessary. 156 They believed that in the context of the entertainment industry, the law would allow movie directors to discriminate on “physical appearance” and not race. 157 Currently, however, this is not the case. As described below, amending the statute to include race as a BFOQ in the entertainment and fashion industries could impose the harm that Congress intended to avoid by rejecting this in the first place.

3. Designers’ Rights Under the First Amendment

Although the scope of this paper does not allow for a full analysis of freedom of expression under the First Amendment, it is important to mention the argument that designers and casting directors engage in artistic expression when casting models for their shows. 158 In deciding what models to cast, many designers and casting directors strive to captivate the creative vision that inspired their latest collection. 159 Thus, a model may not be hired because she is not what the designer “aesthetically and artistically” envisioned. 160 Although this First Amendment claim may disparately affect models of color over white models, 161 it appears that some courts would agree with protecting this type of artistic expression. 162

The Supreme Court concluded that the motion picture industry is afforded a similar protection under the First Amendment. 163 Filmmaking is considered

152. Id.
153. Id.
154. Id. at 496.
155. Id. at 497.
156. Id.
157. Id.
158. Oduok, supra note 4.
159. Id.
160. Id.
161. Id.
artistic expression protected under the First Amendment’s right to free speech. It is possible many designers use similar reasoning to argue that it is their first amendment right to cast the models for their show. Similarly, it can be argued that just as the government cannot regulate an artist’s choice to paint something on a canvas, designers have the right to choose the canvas on which to display their art. Such reasoning ignores the fact that beyond a designer’s artistic expression exists an employee who is being paid to perform the labor of presenting the designer’s collection to the public. As such, failing to hire them based on the color of their skin should constitute an unlawful form of discrimination. The court in Claybrooks v. American Broadcasting Companies, a recently decided case regarding discriminatory casting in the context of artistic expression, however, held that the First Amendment trumps anti-discrimination statutes in certain cases.

The plaintiffs in Claybrooks sued for alleged discrimination in casting decisions for the show The Bachelor. The plaintiffs’ goals in bringing the claim included eliminating harmful racial stereotypes from television and seeking broader public acceptance of interracial relationships. The court held that the First Amendment barred these “laudable” goals to adopt a “race-neutral criteria” in television casting decisions. The court reasoned that casting decisions are key to the producers’ artistic vision and thus restricting these decisions would regulate the “end product” of the show itself. Thus, casting decisions were protected by the First Amendment’s freedom of speech, regardless of their discriminatory effect.

If similar reasoning were applied to the decisions made by designers in casting models for their shows, the First Amendment would likely cover the designers. Like the producers’ artistic vision in making casting decisions, which is protected in Claybrooks, designers envision their artistic collection and hire models that will promote that vision. If models of color do not fit that artistic tone, designers want to have the artistic freedom to hire models who conform to their vision. Since models influence the designer’s “end product” by displaying their collection to the public, being forced to hire

164. Id.
165. Id.
166. Id.
167. Claybrooks, supra note 162.
168. Id.
169. Id. at 1000.
170. Id.
171. Id. at 999.
172. Id.
174. Id.
models based on the color of their skin could arguably violate the designer’s artistic expression.\footnote{See Claybrooks, supra note 162.}

\section*{B. Implementing Comparative Principles: The Benefits and Shortcomings}

\subsection*{1. Models’ Employment Rights in France}

Unlike in the United States, the concept of “employment at will” does not exist in France.\footnote{Simmerson, supra note 13, at 164.} Under French law, an employer-employee relationship is generally based on an indefinite term.\footnote{EMPLOYMENT LAW IN EUROPE 406 (Constanze Moorhouse & Elizabeth Field eds., 2013).} Fixed-term contracts do exist in certain contexts, but in order for the relationship to be qualified as fixed-term, there must be a contract specifying this in writing.\footnote{Id. at 407.} Fixed-term contracts are entered into primarily to: “replace an employee who is on leave, for example, sick leave or maternity leave; deal with a temporary increase in business activity; perform seasonal tasks; or work in areas where it is usual not to employ under an indefinite-term contract.”\footnote{Id. at 406.} Employment contracts in France, whether indefinite- or fixed-term, can be discharged only under certain circumstances.\footnote{Id. at 424.}

Models in France are considered both independent contractors and employees.\footnote{Id.} Accordingly, they have two different contracts governing their relationship with their representative agency.\footnote{Id.} One contract deals specifically with the model’s work, while the other deals with the model’s right to his or her own image.\footnote{Simmerson, supra note 13, at 165.} Being employed by a modeling agency is a necessary step for models in France because unlike in the United States, they cannot work on a freelance or independent contractor basis.\footnote{See EMPLOYMENT LAW IN EUROPE, supra note 177, at 421.} As employees, models receive certain benefits and are subject to French labor laws, including protection from discrimination by their employer.\footnote{Id. at 166.}

Furthermore, models in France are offered protection under a government collective convention that applies to all modeling agencies.\footnote{Simmerson, supra note 13, at 165.} These protections include payment and salary conditions, as well as insurance coverage by the employing agency.\footnote{Id. at 166.} Another significant advantage given to models under the
employee context is job security compared to that of an independent contractor in the United States. In France, an employee may only be discharged from their position for a "real or serious cause." In contrast to models in the United States who can be fired by their agency for any or no reason at all, French labor laws provide much more security.

The system in France, which considers models employees for a fixed term and does not allow their agency to fire them during this term without cause, would be a significant step up from our current system. If models were considered employees in the United States on a federal level, they would gain many benefits under labor and employment laws. As employees, Title VII would apply to models, allowing them to file claims against their agency’s clients, as their employers, for failing to hire them based on race. Furthermore, the inability for models to be fired without “real or serious cause” in France offers protection for those who want to make claims against their agency’s clients for inappropriate behavior. In the United States, on the other hand, models are often afraid to speak up for fear of termination as retaliation for their actions. This would give models the sense of job security needed to file an employment claim without fear of losing their jobs as a consequence.

2. The European Union’s Version of the BFOQ

The European Union’s Race Directive governs the prohibition of race discrimination in many situations, including employment. Similar to Title VII in the United States, the Race Directive prohibits discrimination in the workplace based on race or national origin. There are, however, certain exceptions where discrimination based on race is permitted. Similar to the BFOQ exception under Title VII, the European Union’s Race Directive contains an exception for “genuine and determining occupational requirement(s).” The question of when race could be a genuine and determining occupational qualification has been addressed with respect to the entertainment industry in particular, where a black character’s role, such as that of a

188. *Id.* at 168.
189. *See Employment Law in Europe, supra* note 177, at 426.
192. *Id.*
195. *Id.*
196. *Id.*
198. EVELYN ELLIS & PHILIPPA WATSON, EU ANTI-DISCRIMINATION LAW 280 (2d ed. 2012).
200. *Id.*
of Othello, may be reserved for a black actor.\textsuperscript{201} The Preamble to the Race Directive explains that this exception shall only apply in “very limited circumstances.”\textsuperscript{202} This exception still allows for a broader interpretation compared to that of a BFOQ defense under Title VII, which in theory does not allow race to be considered at all.

As mentioned above, the question of whether Title VII should be amended to include race has been discussed at great length in the entertainment industry.\textsuperscript{203} Some of the same reasoning used in that context could extend to the modeling industry as well. Although the argument that race should be a BFOQ in the entertainment or modeling industry may have some valid points, it opens the door to the type of discrimination that the statute is trying to prevent.\textsuperscript{204} Many times, roles will go to white actors and actresses for similar economic reasons that runway jobs go to white models.\textsuperscript{205} Executives in the movie industry believe that actors of color will not bring in as much revenue as white actors.\textsuperscript{206}

Even if there were evidence suggesting that clothing modeled by white women tends to sell better than clothing modeled by women of color, race should still not be a basis for hiring.\textsuperscript{207} Part of the reason that these prejudices exist is because they have been furthered by the fashion industry itself through the lack of diversity in fashion modeling.\textsuperscript{208} For example, courts have been clear in expressing that a customer’s preference for “thin, pretty” flight attendants is precisely the type of prejudice that statutes like Title VII are “meant to overcome.”\textsuperscript{209}

Similar to the preference for thin, pretty flight attendants, “unconscious norms” about race in society may influence consumers preference of white models over black ones.\textsuperscript{210} It is possible that one of the reasons that it is difficult to move away from these preferences, however, is because the consumer has been taught that they should favor white models, since they are much more prevalent.\textsuperscript{211} If the BFOQ exception were being used to close the disparity on the runway, young women of color would see more models that look like them. Unfortunately, it is more likely that the BFOQ exception would be used to continue these discriminatory practices, further widening the disparity, rather than promoting diversity. For these reasons, amending Title

\begin{footnotesize}
\begin{enumerate}
\item[201.] Ellis, \textit{supra} note 198, at 382.
\item[203.] \textit{See} Frank, \textit{supra} note 136.
\item[204.] \textit{Id.} at 521.
\item[205.] Robinson, \textit{supra} note 69, at 8.
\item[206.] \textit{Id.}
\item[207.] \textit{Id.} at 62.
\item[208.] \textit{Id.}
\item[209.] \textit{Id.} at 63.
\item[210.] \textit{Id.}
\item[211.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
VII to include race as a BFOQ, as it is included in the European Union’s Race Directive, would frustrate Title VII’s purpose of changing biased social norms.

3. The United Kingdom’s Model Union

In 2009, the United Kingdom allowed models to become members of Equity, the British trade union. Models who joined have access to many benefits such as insurance and free legal advice. The Models Network, a network within Equity, allows models to brainstorm and lobby for improvements within the industry. Equity also established various industry regulations, such as minimum wage and a “Model Programme” which lists models’ rights during London Fashion week. Most recently, Equity established the “Ten Point Code” to regulate models’ rights at photo shoots. This system is the first of its kind for models and was described as a “pioneering campaign.” Although it has not specifically addressed the issue of race discrimination in the industry, the union would provide a strong platform to educate models on their legal rights when faced with discriminatory hiring practices.

Alternatively, models in the United States are not offered union support as they are in the United Kingdom. This further establishes a lack of protection in an “almost entirely unregulated industry.” Equity is an example of the kind of platform that could help models in the United States address important labor and employment issues, including discrimination. As model Sara Ziff explains, the standards established by Equity are encouraging, as they set a precedent for the kinds of benefits and reform that are both necessary and possible for models working in the U.S. With such protection, models who have faced racial discrimination could tell their stories and lobby for change with support from the union and without fear of risking their professional reputations.

III. Recommendations

Unfortunately, models in the United States are not afforded much legal protection against race discrimination because of their status as independent contractors. Following the French example, implementing laws and regulations designating models as employees would provide models with more protections

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214. *Id.*
215. *Id.*
216. *International Unions*, supra note 212.
217. *Id.*
218. Ziff, supra note 106.
219. *Id.*
220. *Id.*
and rights in the workplace. For this to succeed in the context of race discrimination, race should not be included in the BFOQ defense as it would weaken racial discrimination claims and ultimately undercut the Title VII’s purpose.

Although designating models as employees would grant them rights and benefits not afforded to independent contractors, the idea may encounter trouble under Title VII. Due to the Supreme Court’s previous decisions on artists’ First Amendment Rights, I believe that fashion designers’ rights to artistic expression under the First Amendment would trump many models’ Title VII claims. The recent Claybrooks case exhibits the argument where requiring “race-neutral criteria” in casting decisions may be barred by the First Amendment.

Additionally, the fear of being blacklisted in the fashion industry is an obstacle for models in making Title VII claims. Even if current practices were illegal under Title VII based on a model’s employment status, the fear of tainting their future careers would likely stop them from bringing claims against designers. In Europe, for example, despite the French Government’s effort to extend more rights to models, the number of models of color on an international level remains low. French designers have presented many collections without using any models of color during Paris Fashion Week. For instance, the highly sought after brand Céline did not use a single model of color for any of its 259 looks spanning over eight runway shows in four years.

The underlying reason for this appears to be models’ fear of risking their careers by voicing concerns against executives in the industry. As described earlier, models remained silent on other important issues such as the lack of benefits and a failure to pay due to similar fears. The first step in promoting runway diversity is to aid models in overcoming this fear so they may speak freely and publicly about their experiences. I recommend raising further awareness on models’ rights in the workplace and increasing pressure from within the industry.

Furthermore, I recommend extending models the right to unionize formally, as the United Kingdom has done. This would give models the necessary platform to organize and demand fair treatment under labor and employment laws. Lastly, the fashion industry should implement self-governed

221. Basham, supra note 163.
222. See Claybrooks, supra note 162.
223. See Simmerson, supra note 13, at 169.
224. Id.
225. Wilson, supra note 5.
226. Id.
227. Wilson, supra note 5.
228. Simmerson, supra note 13, at 169.
229. Id. at 162.
regulations on castings. Designers and casting directors should not be permitted to use discriminatory casting practices, such as turning away all models of color from a casting call altogether. By self-governing, the fashion industry could promote runway diversity without putting the responsibility in the hands of the models, who may not be willing to risk speaking out.

A. Court of Public Opinion

1. Education

In order for members of the fashion industry and the general public to be more involved, there must be educational efforts relating to models’ rights in the workplace. Awareness is one of the most important steps in resolving the various employment issues that models face. Many models are unaware of their rights under the law and the legal protections available to them. Even in jurisdictions where they are considered employees, models consider themselves independent contractors because that is what the industry communicates to them. The protections afforded to models as employees in these jurisdictions will continue to go unused until they learn about their status under the law. Some designers may even be unaware that their practices are considered discriminatory.

Raising awareness and educating members of the industry and general public would be a step towards changing the status quo. Hearing stories from models of color about their struggles in the industry would open the discussion and show the public how these discriminatory practices are damaging on an individual level. Models have used their voice to raise awareness for other systematic abuses in the industry, such as sexual harassment. If models united in collectively sharing their struggles with discrimination it would help humanize them to the public. Those who claim that models should quit complaining because they are just “paid to look good” could see that models face various systematic abuses and “deserve the same rights and protections as anyone else.”

Additionally, raising awareness of discriminatory practices could lead to social activism and affect the market. As mentioned above, Hardison has teamed up with former models in social media campaigns against designers

230. Id. at 198.
231. See id. at 195–96.
232. Id. at 196.
233. Id.
234. Marquart, supra note 16.
235. Oduok, supra note 4.
236. Id.
237. Id.
who discriminate. If black celebrities joined in on calling out designers who did not feature models of color in their shows, the messages would reach the masses.\(^\text{239}\) Making consumers aware of designers that discriminate against minorities could lead them to think twice before purchasing items created by one of these designers.\(^\text{240}\) Reaching the general public through social media could hurt the designers’ pockets, thereby persuading them to change their casting policies.\(^\text{241}\)

2. Industry Pressure and Regulations

Beyond education and raising awareness, there needs to be pressure from within the industry to eliminate discriminatory practices. There has been some movement towards this from designers and casting directors speaking out publically about runway diversity.\(^\text{242}\) As previously mentioned, Scully has been outspoken about the issues, calling out well-known designers such as Dior, Chanel and Louis Vuitton.\(^\text{243}\) Shortly after Scully’s remarks about Dior’s discriminatory casting, their runway show featured six models of color, a first for the designer.\(^\text{244}\) Some have speculated that this change in casting was an answer to Scully’s scrutiny.\(^\text{245}\) If designers pay attention to the negative publicity they receive from other members in the industry, they could feel pressured to change their casting procedures once and for all.\(^\text{246}\)

Diane Von Furstenberg, President of the Council of Fashion Designers of America, has also spoken openly about the need for runway diversity and regularly casts various models of color in her shows.\(^\text{247}\) The CFDA has been active in protecting models’ rights in the workplace on many occasions.\(^\text{248}\) For example, their Health Initiative, which promotes a healthy lifestyle for models, features guidelines for the industry and warning signs of eating disorders in models.\(^\text{249}\) They have also worked with models in adopting policies for backstage privacy during New York Fashion Week.\(^\text{250}\) Adopting a similar initiative to battle discrimination in the industry would be beneficial in setting guidelines for runway casting and in showing models that designers support them and their right to fair casting practices. For the current practices to

\(^{239}\) Oduok, supra note 4.

\(^{240}\) Wilson, supra note 5.

\(^{241}\) Id.

\(^{242}\) Id.

\(^{243}\) Id.

\(^{244}\) Wyma, supra note 34.

\(^{245}\) Id.

\(^{246}\) Wilson, supra note 5.


\(^{248}\) Ziff, supra note 238.


\(^{250}\) Ziff, supra note 238.
change, it needs to be clear that even if discrimination is not illegal, it is “socially unacceptable” and will not be tolerated by members of the industry.  

B. Allowing Models to Unionize

The establishment of a similar system to the United Kingdom’s Equity Union would be beneficial to models in the United States in many ways. With regards to employment and labor issues, the union could serve as a platform for models to voice their concerns, without the fear of retribution.  In 2012, an advocacy group called the Model Alliance was founded by model Sara Ziff, to address many of the issues that would be covered by a union.  The Model Alliance, while not a union, serves as a “platform for models and leaders in the fashion industry to organize” with the hope of significantly improving working conditions for models. It works by educating its members on important issues in the industry and providing support for models by giving them “a voice in their workplace.” The alliance also provides a reporting service for models to contact attorneys to receive advice.

The Model Alliance’s efforts have been successful on various issues, including successfully lobbying for the reform of child labor laws, which are of grave concern in the industry. Their petition to protect child models was followed by proposed legislation that passed the New York State Legislature in 2013. Additionally, they created the “Models’ Bill of Rights,” which helps to educate models on their workplace rights and aids them in demanding “fair treatment” from agencies and their clients. The alliance has also teamed up with the CFDA to improve working conditions for models at New York Fashion Week.

The efforts made by the Model Alliance regarding many legal issues, and their continued success, is an example of the kind of advocacy needed for runway diversity. While the alliance would provide a great platform to discuss race discrimination in casting decisions, it is still only an advocacy group. If the industry has already gained so much from the Alliance’s efforts, formally unionizing as they do in the United Kingdom would further enhance models’ rights and legal protections in the workplace.
C. Regulatory Changes in the Fashion Industry

The finger pointing game between designers, casting directors and other members of the industry is a sign that no one wants to take responsibility for the lack of diversity. Regardless of who points to whom, it is not enough to blame one party or the other when the effort is lacking in the industry as a whole. The bottom line is that designers and casting directors do not want to be forced to hire particular models – regardless of their skin color.\(^{261}\) Instead of forcing them to hire anyone, or implementing a quota system, I would propose that the focus be placed on equal opportunity for competition between models. By allowing models of color to compete for the same jobs as white models, they would no longer have to settle for stereotypical roles of “jungle themes”\(^{262}\) and black hair care products.\(^{263}\)

Although it is true that some agencies do not offer many options other than white models,\(^{264}\) this is not true of all agencies. In analyzing various agencies’ latest show packages, which are presented to designers and casting directors as the agency’s options for runway models, it is apparent that most agencies do have models of color for designers to include in their shows. For example, Ford Models featured three models of color in their twenty-five-model show package.\(^{265}\) IMG Models, with one of the larger show packages last season, featured around ten models of color out of sixty-eight.\(^{266}\) Furthermore, implementing regulations on minorities in casting calls would also incentivize agencies to sign more models of color.

In order to achieve these new casting regulations, there would have to be a movement towards self-imposed industry regulations, supported by organizations of the industry like the CFDA and the Model Alliance. Other industries, like professional sporting leagues, have implemented diversity initiatives that could be helpful in this situation.\(^{267}\) For example, the National Football League (“NFL”) instituted the “Rooney Rule” in 2003 through the NFL’s Committee on Workplace Diversity’s research concerning the “lack of minority coaches in the league.”\(^{268}\) The rule, voluntarily implemented by NFL teams, states that at least one minority candidate must be interviewed when hiring senior coaches.\(^{269}\) While NFL teams are still in control of the process by making the ultimate hiring decisions, minorities are given a fair chance to

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261. Wilson, supra note 5.
262. Trebay, supra note 247.
263. Oduok, supra note 4.
267. Basham, supra note 163, at 586.
268. Id. at 587.
269. Id.
compete in the hiring process. If teams choose not to interview any minority candidates, they will be fined $500,000. The Rooney rule has proved to be quite successful. When the rule was implemented in 2003 only six percent of coaches were minorities, compared to twenty-two percent in 2011.

Similar to these efforts by the NFL for creating racial diversity in leadership positions, the fashion industry could use “pseudo-legal, voluntary solutions” instead of fighting this battle in the courtroom. Although implementing a system similar to the Rooney Rule in the modeling industry may not immediately create more jobs for models of color, it would allow for increasingly fair competition and hopefully broaden the industry’s definition of beauty. Before the Rooney Rule, coaches were not given the chance to interview, and therefore did not have the opportunity to get into these coaching positions. Similarly, models of color are often not given the chance to try on the clothes and walk down a casting runway. My proposition is not that designers be forced to hire certain models, but that women of color be given a chance to compete before they are turned down. This system would not infringe on designers’ First Amendment rights by forcing them to hire someone who does not fit their aesthetic or artistic vision. It would, however, strive to broaden this vision by including models of different races, in turn creating more options for models of color and ending the industry’s bias towards white girls once and for all.

Additionally, giving models of color a chance to compete for jobs that have traditionally gone to white models could help advance their careers through less stereotypical roles. Being cast in a single fashion show could catapult these models to a level of stardom, taking them mainstream while slowly challenging the current racial disparity in the industry. This proposal asks that designers drop their discriminatory “one black girl” per show hiring policy and start giving models, regardless of race, a chance to win a spot on their runways.

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270. Id.
271. Id. at 588.
272. Id. at 589.
273. Id. at 586.
274. Wyma, supra note 34.
275. Marquart, supra note 16.
276. Oduok, supra note 4.