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(L-R) Scott Badami of Fox Rothschild and Jeffrey Campolongo, of Law Office of Jeffrey Campolongo. Courtesy photo

COMMENTARY

Case Alleging Systemic Race Discrimination Against NFL Allowed to Proceed in Federal Court

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Employment Law

By Jeffrey Campolongo and Scott Badami | April 24, 2023 at 11:37 AM

In a case that drew significant media attention because of the long simmering and ultimately explosive nature of the claims, last year this column reported on the racial discrimination class action lawsuit filed by Brian Flores, the former head coach of the NFL's Miami Dolphins against the Dolphins, the league and several other NFL teams (the Denver Broncos, New York Giants and Houston Texans). In short, Flores asserts he was discriminated against because of his race, that the Dolphins wrongly attempted to lose games to obtain a better draft position, and that other teams only interviewed him as a sham to get around the NFL's "Rooney Rule," which requires a minority candidate be interviewed before hiring certain senior positions. The Flores complaint, as well as detailed reporting over the past few years, has shined an unflattering light on the less than stellar hiring and promotion of Black coaches by NFL teams.

As we noted last year, the NFL promptly moved to dismiss the case and to refer the claims to private NFL arbitration (in which Commissioner Roger Goodell could be the decision-maker) because of language in Flores' employment contract with the Dolphins. While Flores initially was the only plaintiff, he was joined a couple of months later by two other Black coaches—Steve

Wilks and Ray Horton.

Wilks asserts the Arizona Cardinals did not give him a legitimate chance to succeed during a single season as head coach in 2018, while Horton claims the Tennessee Titans only went through a fake interview process with him in 2016 and that the team had no real interest in hiring him. As with the claims made by Flores, the NFL sought to compel the allegations from Wilks and Horton to private arbitration.

In a split decision issued last month, U.S. District Court Judge Valerie Caproni of the Southern District of New York concluded that while Flores can bring his systemic discrimination claims against the Texans, Giants and Broncos in federal court, she held that the employment contracts signed by Flores, Wilks and Horton required the claims against their respective former teams be decided through the NFL's arbitration process. See *Flores v. The National Football League,* Case No. 1:2022-cv-00871 (S.D.N.Y. Mar. 1, 2023). The court drew a critical distinction between the claims Flores, Wilks and Horton made against their former teams (for which they had employment contracts with specific language compelling arbitration of claims) as contrasted with Flores' allegations against the Broncos, Texans and Giants (teams for which he did not have any agreements).

Caproni was not convinced that Flores should be forced to arbitrate claims against teams for whom he never coached nor had an employment agreement. The "defendants' argument, taken to its logical extreme, would bind a coach forever to arbitration, even if he were never again employed by a team in the

NFL, so long as the NFL had a practice of inflicting similar harm on other coaches while that coach was under contract," the court wrote. There is no such thing as an "endless agreement to arbitrate future disputes" with distinct legal entities, Caproni wrote.

As for the teams for whom the plaintiffs were employed, the coaches could not avoid arbitration because of the binding nature of the arbitration provisions in their respective employment agreements. Flores and the other coaches argued that even if they agreed to arbitrate their claims against the teams and the NFL, the agreements are unconscionable, particularly because Goodell would serve as the arbitrator and has the discretion to alter the arbitration rules. That might seem like a logical argument under these circumstances, particularly where the commissioner acts as judge, jury and executioner. Unfortunately, that argument was tried and failed during the New England Patriots' "Deflategate" saga following the 2015 AFC championship. See *National Football League Management Council v. Nat'ional Football League Players Association,* 820 F.3d 527, 548 (2d Cir. 2016). The U.S. Court of Appeals for the Second Circuit rejected the argument that, as a matter of law, the NFL commissioner cannot fairly arbitrate claims regarding the NFL's conduct because the parties contracted to arbitrate claims before the NFL commissioner knew full well that the commissioner would have a stake both in the underlying discipline and in every arbitration brought."

In her ruling, Caproni also made clear she has serious problems with the NFL's history concerning minority hiring as she wrote that the NFL's "long history of systemic discrimination toward Black players, coaches and managers—are incredibly troubling." "This case shines an unflattering spotlight on the employment practices of National Football League teams," Caproni wrote. She also questioned why such a low number of Black men are head coaches in a league, like the NBA, where over 70% of its players are Black. By contrast, the percentage of NBA Black head coaches (43%) was more than 13 times than the percentage of NFL Black head coaches (3.1%), according to a report cited by the court.

Following the court's ruling, unsurprisingly, all sides attempted to spin the decision. The NFL was pleased that many of the claims from the three named plaintiffs will now be subject to private arbitration. But counsel for Flores noted as long as some of the claims against the other teams survived, the league will still be forced to defend its hiring practices in open court—with a judge and potentially a jury reviewing what took place. “We are pleased that Coach Flores’ class claims of systematic discrimination against the NFL and several teams will proceed in court and ultimately before a jury of his peers,” Flores’ attorney, Douglas Wigdor, said in a statement. “We are disappointed the court compelled arbitration of any claims before Goodell as he is obviously biased and unqualified to rule on these matters. We expect him to delegate those matters to a truly neutral arbitrator as a matter of fundamental fairness.”

Perhaps more significantly, the media will be closely following (and reporting) on the discovery process. As was evident when old emails from the Washington Commanders were leaked (involving former Raiders and

Buccaneers coach Jon Gruden, which portrayed Gruden in an extremely negative light), it is likely that other familiar names will be involved as Flores (who served as a senior defensive assistant/linebackers coach for the Pittsburgh Steelers in 2022 and who is now the defensive coordinator of the Minnesota Vikings for the 2023 season) attempts to prove his claims. The NFL has long resisted airing its laundry in public. This time, it may be unavoidable.

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