Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NFL Race Bias Suit Shows A Good Playbook Isn't Enough

By **Vin Gurrieri**

Law360 (February 3, 2022, 11:09 PM EST) -- A Black former Miami Dolphins head coach's blockbuster suit accusing the NFL of systemic discrimination demonstrates that even employers with strong policies aimed at boosting diversity can get flagged for bias violations if those policies aren't carefully applied, experts say.

Brian Flores filed his Manhattan federal court class action against the league weeks after being controversially fired by the Dolphins and days after he was passed over for a job as head coach of the New York Giants in favor of Brian Daboll, a white coach from the Buffalo Bills' staff.

The suit includes claims that the number of Black head coaches in the NFL is woefully out of step with the league's predominantly Black player population, despite the NFL's so-called Rooney Rule, which requires teams to interview at least two external minority candidates for head coaching positions. Flores also alleges that his interview with the Giants was a sham to comply with the Rooney Rule because text messages he received from New England Patriots head coach Bill Belichick indicated the decision to hire Daboll had already been made.

Regardless of whether Flores' suit proves to be successful, employment attorneys say his claims show the danger that lurks for employers when there is a chasm between their diversity policies and the way hiring and promotion decisions are actually made.

"I am interested to see what happens with this particular case, but really hope that it doesn't deter employers who are actually wanting to find policies that will make a difference," said Christine Webber, co-chair of plaintiffs-side firm Cohen Milstein Sellers & Toll PLLC's civil rights and employment practice.

While many companies follow through on enforcing their diversity policies, Webber said there "are plenty that just see it as 'check-a-box,'" in which they "establish a policy and call it good."

"Companies are all over the place, but far too many, I would say, [believe] establishing a policy is like, 'OK, now we can say we have a policy so, you know, we're fine,' without really doing the work needed to educate their managers and set up systems that will actually be effective," Webber said. "There are companies that look fine on paper, but the paper just doesn't reflect what's really happening on the ground for employees."

Here, experts look at four lessons employers can learn from Flores' bias suit against the NFL.

Crafting Policy Is Just the Start

As American businesses increasingly bolster their often-public efforts to foster diverse workplaces, the first step is having policies and plans in place for how to achieve their goals.

However, as Flores' case against the NFL shows, employers that seek the benefit of improving workplace diversity but don't follow through on making sure a policy is applied as designed open themselves to various kinds of discrimination claims.

"Most employers who are implementing these programs are prepared to assume that risk. But this is not an area where employers can go in a slapdash fashion," said Steven Suflas of management-side firm Ballard Spahr LLP, who added that employers must analyze the composition of their workforce and then tailor a program to its needs and goals.

Those legal risks might include a person who, like Flores, goes through the hiring process and later claims it was a facade for the company to just check off that it interviewed candidates of diverse backgrounds, according to Suflas.

On the flip side of the coin, employers may also open themselves up to claims from nonminority candidates who believe they were unfairly passed over as part of a company's effort to diversify itself, according to Trina Fairley Barlow, co-chair of employer-side firm Crowell & Moring LLP's labor and employment practice.

"I think the greatest issue is claims that the most qualified person wasn't hired and all the discrimination claims that would arise out of scenarios where people are saying the diversity policy is being used in a way that doesn't elect the most qualified person," Barlow said. "And we see that all the time."

Ultimately, Barlow said a best practice for employers is to regularly assess how well their diversity, equity and inclusion policies are working in practice and tweak them over time as needed based on what they find.

"The important approach is to ensure that the intent of the policy … is reflected in the protocols and practices used to implement the policy," Barlow said.

"So if the intent is to increase the pool of racially diverse candidates, for example, like we saw in the Flores case, then there should be steps taken [toward] implementing the policy to ensure that it reflects the intended goal," she added. "Because if this doesn't happen, then it of course opens the door for discrimination lawsuits like we've seen here."

Carefully Consider How Rooney Rule Analogues Are Imposed

One particular aspect of Flores' suit that has spurred a firestorm is the attention it has placed on the Rooney Rule, a standard the league adopted in 2003 for teams to interview minority candidates for head coaching positions and later for senior-level front office and other high-level jobs.

Although it is only a rule that applies to the NFL, many American businesses, including **numerous law firms**, have modeled the league's approach and adopted analogous standards for themselves in an effort to increase the number of applicants from diverse backgrounds who are considered for open positions.

But as Flores' case shows, having such a policy means little if the people making hiring decisions treat it as a nuisance or an afterthought.

"The Rooney Rule, just like any other diversity initiative rule, is just a rule. And so it takes committed leadership to make sure the rule is not simply pro forma like we saw in the NFL case or a check-the-box exercise, and that's where 'speak-up' culture is key," Barlow said. "A policy initiative is only as strong as the leaders who are willing to speak up and hold stakeholders accountable for living up to the company's values and culture."

Marc Bernstein, chair of the New York employment law department at management-side firm Paul Hastings LLP, similarly said that employers that adopt a version of the Rooney Rule are undercutting themselves if they aren't sincere that they'll abide by it when the time actually comes to hire someone.

"To the extent a company is doing it in name only and not truly exploring diverse candidates in good faith — I think that can of course be problematic and undermines the very purpose of the rule," Bernstein said.

Make Sure the Lid on Decisions Is Tight

A separate component of Flores' suit that employment lawyers point to as being instructive for employers was the coach's citation of text messages he received from Belichick accidentally congratulating Flores on being hired by the Giants.

The text chain, which Flores used as support for his claim that his Giants interview was a sham, appeared to show that Belichick mistook Flores for Daboll since they share the same first name.

While the factual anecdote is specific to Flores' case, attorneys say it's become increasingly common for flippant texts to become centerpieces of discrimination cases — particularly since people are less guarded than they would be through more formal modes of communication.

"People say in texts and emails what they would never say in a letter, but of course it has the same legal effect," Suflas said. "So that informality sucks people into saying things that are dumb, and we're seeing that across the entire gamut of employment litigation both ways. Those texts hurt employers and those texts hurt plaintiffs."

Aside from texts, Suflas also said it's "not good" if employers, for example, have hiring decision makers exchange notes stating that their minds are already made up about hiring someone even though more interviews are scheduled.

"The whole issue of texting is a larger development in the process of employment litigation. But [when] you're in the middle of a hiring process, and now you've got loose communications, that's never good," he said.

Cut Off Rogue Decision Makers

Regarding the allegation in Flores' suit that he was rejected for the Giants job before his interview ever took place, Cohen Milstein's Webber said it's the sort of thing she sees happen when there is an opening for people to make decisions outside a company's hiring protocols without incurring consequences.

While a policy on paper may be worthwhile for nudging people to truly consider a broader pool of candidates than they otherwise might, Webber said its effectiveness hinges on whether an employer enforces it and "keep[s] people from making decisions outside the system."

The ways rogue actors can do so, she said, may be by drafting job announcements in such a way that they match the credentials of a preferred candidate or by conducting interviews "that are really for show."

To avoid that and make sure rules are being followed, employers can consider things like tying a portion of a manager bonus to complying with a variety of policies, specifically those that address diversity, and having equitable compensation among members of their team, according to Webber.

"I think the other thing is [to] listen to their employees and actually make it safe for employees to give them feedback, because employees tend to sort of see where the gaps fall between [an] announced policy and what's happening in practice," Webber said. "That's information that employers can use to tweak their systems and make improvements. But they're not going to get that feedback if their response to information is to get defensive and shut it down and allow managers to retaliate against those who bring the issues to their attention."

--Editing by Abbie Sarfo and Bruce Goldman.
