

## Race Bias Cases Yielded These 2 Massive Verdicts In 2021

By **Amanda Ottaway**

*Law360 (December 15, 2021, 3:23 PM EST)* -- A Black worker's \$137 million discrimination verdict against Tesla grabbed the headlines in 2021, but a \$10 million award for a white executive fired by Novant Health also caught lawyers' attention.

Here's a look back at two high-profile losses for employers in race bias cases.

### Tesla Hit With 'Truly Stunning' Verdict in Golden State

On Oct. 4, a California federal jury awarded nearly \$137 million to a Black former Tesla subcontractor who had alleged that working in the company's Fremont factory in 2015 and 2016 was "a scene straight from the Jim Crow era."

During the weeklong trial, jurors heard testimony from several former Tesla subcontractors who said they heard the N-word used daily at the factory. Plaintiff Owen Diaz also took the stand, recounting persistent racial harassment that went unabated despite his complaints to his supervisors.

A raft of experts pointed to the Tesla jury's verdict as the most significant race bias decision of 2021.

"One of the things that we see all too often is that the verdicts awarded don't always match the egregiousness of the conduct, and here we saw a truly stunning verdict," said worker-side attorney Ali Harwin of Sanford Heisler Sharp LLP.

"Ultimately, it seems like this was a jury that really understood what the impact of this kind of racial discrimination was."

Employer-side attorney Bryan Hawkins, a Sacramento-based partner at Stoel Rives LLP, highlighted that the jury's verdict came even though Diaz was not a Tesla employee but came by way of a staffing company. Jurors found Tesla was a joint employer.

Hawkins said the verdict underscores that employers, particularly in the Golden State, should keep in mind that if they have third-party workers onsite, their "duties to those third parties are just the same as are your duties to your employees."

Harwin agreed. "People in general are getting a lot more savvy to the ways in which corporate entities use the niceties of corporate structures to try to evade responsibility," she said.

Diaz, his son and another plaintiff, Lamar Patterson, initially sued Tesla in California state court in 2017. Tesla removed the case to federal court, and eventually Diaz and Tesla went to trial.

Tesla has urged the court to strike down the jury's massive damages award, calling it unprecedented in U.S. bias law.

Employer-side Shipman & Goodwin LLP partner Dan Schwartz said even though the damages award will likely ultimately be downsized, that doesn't necessarily diminish the significance of the jury's decision. Particularly in light of the Black Lives Matter movement, the country has more of an understanding of how racial equity issues play out in the workplace, he said.

"I think it shows how a set of facts can really lead to a jury being upset at companies' actions or inactions, particularly with regard to race discrimination," he said.

The case is Diaz et al. v. Tesla Inc. et al., case number 3:17-cv-06748, in the U.S. District Court for the Northern District of California.

### **Jury Awards \$10M to Fired White Male Exec**

Several experts also pointed to a \$10 million North Carolina federal jury award for an ex-executive at Novant Health who claimed he was fired for being a white man, saying the case demonstrates the need to have a solid and lawful plan for diversifying a workforce.

Just a few weeks after the Tesla verdict, the jury granted a win on Oct. 26 to David Duvall, Novant's ex-senior vice president of marketing and communications, finding he had proved his race or gender played a role in his termination.

Duvall sued the North Carolina health network in November 2019, alleging the company fired him, despite high performance ratings, "as part of an intentional campaign to promote diversity in its management ranks" and in violation of Title VII of the Civil Rights Act.

His job was split in two and taken over by a white woman and a Black woman, he said.

Jason Schwartz, a Gibson Dunn & Crutcher LLP partner who represents employers, said he wouldn't be surprised to see more race bias lawsuits by white plaintiffs in the future.

"I think that more of those kinds of claims are the inevitable result of more robust diversity, equity and inclusion programs from companies," he said. "It doesn't mean that those claims are going to succeed. But I do think that you're going to see more disappointed job applicants or people who didn't get promotions or whatever it might be make that sort of claim."

Duvall was hired in August 2013 and let go in July 2018 five days before his fifth work anniversary would have triggered a more generous severance package, he said in his complaint. He said he was among seven white executives whom Novant replaced with women or Black men as part of a diversity push.

Novant meanwhile said in a September 2020 motion for summary judgment that Duvall's colleagues and underlings had described him as a disconnected, disengaged and even punitive leader, using the analogy that the company looked for senior executives "who are not just playing in the NFL but can get the

organization to the Super Bowl" and that Duvall wasn't cutting it.

Trina Fairley Barlow, an employer-side partner at Crowell & Moring LLP, said she too expects to see more such cases but noted that she thought Duvall's win was in some ways an outlier — it included evidence that showed, for example, every white leader in a certain category was removed from their job around a similar time.

"It's still a cautionary tale," she said.

"I think just like any type of discrimination case, documenting the real reasons for termination, and not conflating and allowing grayness there — that's why documentation is really important if the real reason for the termination is performance," Fairley Barlow said.

Diversifying the workforce without hiring based on race, gender or other protected characteristics means walking a fine line, but it can be done, Schwartz said. Documents and program materials should specify that the effort is to make opportunities available to all sorts of people, rather than making employment decisions based on race, he said.

"Companies are working very hard to make sure that they have a robust pipeline of diverse candidates, as they should," Schwartz said. "And so the fact that those candidates succeed, which is the whole point, is not evidence of any kind of race discrimination."

The case is Duvall v. Novant Health Inc., case number 3:19-cv-00624, in the U.S. District Court for the Western District of North Carolina.

—Additional reporting by Hannah Albarazi, Dave Simpson, Rachel Stone, Max Jaeger and Alexis Shanes.  
Editing by Aaron Pelc and Roy LeBlanc.