KAUFMAN | DOLOWICH

Beneath The Headlines, Flores v. NFL Is An Employment Discrimination Case, Conduct Detrimental, author Charles Ben Bergin, Esq.

For all of the intrigue of (alleged) six-figure tanking bonuses, and clumsily-arranged meet-cutes on James Bond villain mega-yachts, Flores et al. v. The National Football League, et al., (S.D.N.Y.) is, at heart, an employment discrimination suit. The Complaint sets forth the kind of employment discrimination claims that the Southern District of New York sees every day – granted, few complaints that SDNY feature screenshots of a 69 year old man with nine Super Bowl rings panic-texting like a teenager who sent a message about the girl he likes to his crush instead of his friend.

In essence, the Complaint alleges that the NFL discriminates against African Americans by denying them head coaching (and other senior coaching) positions, that the Miami Dolphins illegally fired Flores because of his race, and that the New York Giants and Denver Broncos illegally failed to hire him on account of his race. The claims are made under Section 1981 of the Civil Rights Act (which outlaws intentional discrimination based upon an employee's race, as well as retaliation in connection with same) along with similar New York and New Jersey statutory employment discrimination claims. Once Flores has filed similar complaints with the U.S. Equal Employment Opportunity Commission and the New York City Commission on Human Rights (if he has not already) he will likely amend his Complaint to include claims arising from Title VII of Civil Rights Act claims.

Title VII cases rise or fall on the McDonnell Douglas burden-shifting analysis (so-named for McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Under that analysis, Flores will have to make a prima facie showing that: (i) he is a member of a protected class; (ii) he was qualified for the position; (iii) he suffered an adverse employment action; and (iv) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. If Flores is able to meet all four prongs, the burden shifts to the defendants to set forth legitimate, non-discriminatory reasons to support the employment decision. Should they do so, the burden shifts back to Flores to show that the reasons given by the defendants were merely pretexts for discrimination.

There should be little doubt that Flores meets the first three prongs. As an African American he is a member of a protected class; he is remarkably well qualified, as even his harshest critic would be hard-pressed to deny his exceptional over-achievements as head coach of a moribund Dolphins team; and he was unquestionably fired by the Dolphins/passed over by the Giants and Broncos. The case against the teams, therefore, will likely turn on the fourth question – which ultimately comes down to: was Flores fired/passed over because of race, or for some other, legitimate reason?

Ironically, Flores' complaint appears to dare the Dolphins, at least, to move for pre-discovery dismissal. He (with much publicity) provides them with at least two non-discriminatory reasons for his termination: (i) his refusal to breach tampering rules by meeting with Tom Brady an unnamed quarterback for a strawberry and tomato-free lunch; and (ii) his refusal to participate in the Dolphins' taking scheme. In other circumstances "the employee refused to comport with our business model, undermined our efforts to secure a highly-coveted recruit, and destroyed our long-term business strategy" would seem like a solid non-discriminatory reason for termination. But Flores appears to be gambling – not unreasonably - that the Dolphins are unlikely to have an interest in giving credence to the allegations, it being the first rule of tanking that you don't ever admit you're tanking.

Sensational as they may be, this is not to minimize the allegations made against the NFL. The claims regarding the failings of the Rooney Rule, the insider-trading and king-making that (allegedly) allows a small handful of (old, white) men to control who gets to head coach in the NFL, and the astonishing (if well known) contrast between the use that the NFL has for the bodies of young black men (70% of players) versus the interest it has in awarding them positions of power and authority (0 owners, 1 head coach at the time of filing) are not mere window-dressing. The scope of Title VII includes a prohibition on disparate impact discrimination: even if Flores is unable to show intentional discrimination, he may have a case if the defendants' practices have a discriminatory outcome – such as disproportionately excluding African Americans from head coaching positions.

A pre-trial conference is currently scheduled for March 18, 2022, though that may be adjourned as the defendants have until April 11, 2022 to respond to the Complaint.

Charles "Ben" Bergin is an associate at Kaufman Dolowich Voluck. His practice focuses on labor and employment law, business litigation, immigration law and general liability defense. He has a background in entertainment law, sports law, insurance litigation and

coverage. He was named a 2020 and 2021 New York Metro “Rising Star” in the field of “Business Litigation”.