Conflicting State Laws in Racial Discrimination in NFL Hiring Case Cause Franchises to Demand Instant Replay Review

Conflicting state laws are at the heart of a class action suit alleging racial discrimination in NFL hiring practices. In July, Brian Flores, former Miami Dolphins' head coach and current Minnesota Vikings defensive coordinator and two other plaintiffs were given the green light to go to trial after a New York judge determined their contracts were not subject to mandated arbitration.

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Should the rules of football change based on which team is hosting the game? Conflicting state laws are the heart of a landmark class action suit in the Southern District of New York alleging racial discrimination in NFL hiring practices.

State Law v. Contractual Arbitration

Brian Flores, currently the defensive coordinator of the Minnesota Vikings, is the lead plaintiff in a class action suit alleging the National Football League and participating franchises violated 42 USC §1981—the Federal law which prohibits discrimination on the basis of race, color and ethnicity when making and enforcing contracts—by denying Black job candidates management and coaching positions due to discriminatory hiring practices.

Flores brought the lawsuit three years ago after he was fired by the Miami Dolphins, where he led the team to a 24-25 record over three years.

The basis for the discrimination claim is that the "Rooney Rule"—a regulation which mandates that NFL teams voluntarily interview at least one minority applicant for top coaching and management positions—is being undermined because these candidates are often interviewed after applicants have already been selected. *See* Plaintiff's Complaint, *Flores v., National Football League et al.*, 1:22-cv-00871 (VEC), Docket No. 1, at ¶¶12-13 (S.D.N.Y. Feb. 1, 2022).

The basis of venue in New York is that the New York Giants allegedly subjected Flores to such a sham interview. Specifically, Flores alleges he received a text message from Bill Belichick of the New England Patriots, congratulating him on being offered a position before he was even scheduled to be interviewed. *Id.* at ¶¶19-20.

Defendants maintained the plaintiffs' contracts require them to go to arbitration before filing a federal suit. In the U.S. Court of Appeals for the Second Circuit, interpreting an arbitration agreement requires first determining whether an agreement exists. *Meyers v. Uber Techs, Inc.*, 868, F.3d 66 (2d Cir. 2017).

The court must then determine whether the agreement is arbitrary, according to the relevant state law. *Contec Corp., v. Remote Sol, Co. LTD*, 398 F.3d 205 (2d Cir. 2005). At present, NFL contracts generally designate a franchise's home state as the relevant jurisdiction for choice of law purposes.

Flores sued teams in Denver, Miami, New York, and Houston for discriminatory treatment he received while coaching for New England and Miami. In July of this year, Judge Valerie Caproni of the Southern District of New York held only that Flores' claims against the Broncos, Giants and Texans could proceed to trial.

Generally, state laws hold that a contracting party is estopped from avoiding contractually mandated arbitration when bringing claims against a defendant and nonparty who jointly control their employment. *E.g.*, *Green v. Mission Health Cmtys., LLC*, 20-CV-439 (M.D. Tenn. Nov 13, 2020) (unpublished); *Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp 3d 1396 (S.D. Fla. 2014).

However, Judge Valerie Caproni interpreted Flores' claims against the Broncos under Massachusetts law—which holds that the ability to unilaterally alter an agreement without notice renders it unenforceable—because his contract with the Patriots was in effect when he interviewed with Denver. *Fawcett v. Citizens Bank, N.A.*, 297 F. Supp. 3d 213, 221 (D. Mass 2018).

Caproni also held that Flores' claims against the Giants and Titans could proceed because Commissioner Roger Goodell had failed to sign the applicable contract (Flores' contract with the Steelers), making that contract inoperative.

NFL defendants are appealing that ruling, arguing Massachusetts courts have instead held unilateral modification is only one factor to consider when determining if a contract is illusory and that this provision doesn't automatically preclude the formation of an enforceable contract. *Buttrick v. Intercity Alarms, LLC,* 2010 WL 2609364 (Mass. App. Ct. Jul. 1, 2010) (unpublished).

Meanwhile, the plaintiffs' have also recently appealed Judge Caproni's ruling, arguing that she did not accurately apply unconscionability doctrine, which would invalidate a contractual term "so outrageously unfair as to shock the judicial conscience." *Fl-CarrollWood Care LLC, v. Gordon*, 72 So. 3d 162, 165 (Fla. 2d D.C.A. 2011).

Plaintiffs' based this appeal on the fact that the NFL and its franchises, which can limit the number of recognized franchises and have no effective competitors, have unequal power over hiring football coaches (also called monopsony power, a market situation where there is only one buyer for goods or services).

As such, the plaintiffs argue arbitration would lack procedural safeguards because only the NFL will have the ability to effectively designate an arbitrator instead of a neutral party agreed to by both parties. *See* Plaintiff's Motion for Reconsideration, *Flores et al v National Football League et al.*, 22-cv-00871 (VEC), Docket No 80, at *5 (S.D.N.Y March 14, 2023).

Defendants Ultimately Calling the Play

Court observers should watch whether the appellate court follows defendants' interpretation of the Massachusetts law. This would effectively bring the contracts for all of the NFL franchises back into alignment regarding the enforceability of the arbitration agreements.

However, should plaintiffs prevail, individual NFL teams may begin redrafting their contracts to arbitrate in one central jurisdiction, similar to how credit card companies utilize Delaware Courts or cruise lines take advantage of favorable forum selection clauses.

Candidly, if this case goes to trial, the defendants' defensive line will be under significant pressure. Belichick's text messages, even if not offered for the truth of the matter asserted, *i.e.*, that the job had already been filled, will likely lead to unfavorable testimony as to why and who had given him an erroneous impression.

Additionally, a jury composed of denizens of Bronx and New York Counties, widely known as generally plaintiff-friendly jurisdictions, are unlikely to be sympathetic to NFL franchises. This is coupled with significant caselaw in the Southern District benefiting plaintiffs claiming racial discrimination in employment, where patterns of hiring, discharge and replacement extremely similar to those alleged in this case have yet to meet the burden of establishing discriminatory intent under 42 U.S.C. §1981, as well as the even more stringent New York State and New York City Human Rights Laws—also causes of actions alleged against the NFL defendants. *See Bautista v. PR Gramercy Square Condominium*, 642 F. Supp3d 441, 426 (S.D.N.Y. 2022).

But, as the fact that both parties appealed Judge Caproni's ruling makes clear, conflicting rules based on different states interpretations of contract laws is untenable.

Inherent in the defendants' filings is the same logic concerning judicial economy and reluctance to reopen contracts underlying the Federal Arbitration Act—specifically a general public policy which liberally favors arbitration over litigation and the "fundamental principle that arbitration is a matter of contract…on an equal footing with other contracts." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *see also Machado v. System4, LLC*, 20 N.E.3d 401, 407 (Mass. 2015) (noting Massachusetts state law also, "expresses a strong public policy favoring arbitration.") Having certain franchises more open to liability in hiring would alter their incentives relative to their competitors following the majority rule.

Regardless of the trial outcome, there are multiple factors that likely will drive the NFL to eliminate the ambiguity among its franchises, even in the face of an adverse verdict. As the plaintiffs themselves noted, they do not have significant bargaining power to prevent an industry-wide shift in contracts since there are only 32 NFL head coach positions available, all of which require the approval of the NFL commissioner. *Flores,* 22-cv-00871 (VEC), Docket No. 80, at *6.

Ultimately, the NFL defendants are the ones running the ball at this point in the litigation, even if the plaintiffs receive a favorable call.

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