

Flores, Firings, and Firefighters: Remedying the NFL's Discriminatory Hiring Process

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“I’m not Concerned with Your Liking or Disliking Me...All I Ask is
That You Respect Me as a Human Being.”

– Jackie Robinson¹

This paper analyzes and dissects the current state of affairs surrounding the NFL's alleged discriminatory hiring practices. Specifically, the discussion considers recent hiring discrimination allegations made against the NFL by former NFL Miami Dolphins Head Coach, Brian Flores.² Part I begins with a brief overview of the NFL's history of racist hiring practices and points to specific violations of the Rooney Rule, which requires each NFL team to interview at least one minority candidate for a vacant head coach position. Part II examines NFL hiring practices concerning current Title VII law. Next, Part III surveys recent discrimination cases that address discriminatory hiring practices against

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1. See Lonnie G. Bunch III, *Jackie Robinson's Legacy in a Changing America*, WASHINGTON POST (Apr. 19, 2013), https://www.washingtonpost.com/blogs/therootdc/post/jackie-robinsons-legacy-in-a-changing-america/2013/04/19/863693ac-a92f-11e2-b029-8fb7e977ef71_blog.html.

2. See Complaint at 2, *Flores v. Nat'l Football League, et al.*, No. 1:22-cv-0087 (S.D.N.Y. Feb. 22, 2022), alleging that the NFL's attempts to remedy racial discrimination in its hiring process is but a “disingenuous commitment to social equity.” Flores further alleges that even when a Black coach is hired, they are continually discriminated against and hindered by unfair terms of their employment.

firefighters similar to the issue arising from Brian Flores’ termination from his NFL coaching position. Finally, Part IV addresses remedies prescribed in those cases and analyzes whether they should apply here, if alternative remedies are more suitable, and what next steps the NFL—or the courts—must take to address the lack of diversity amongst NFL coaches.

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I. PERPETUAL NFL DISCRIMINATION AND THE ROONEY RULE

In the early 2000s, the National Football League (“NFL”) faced a grave diversity issue: out of thirty-two head coaches, only one was a minority.³ After reports exposed the NFL’s glaring lack of minority representation amongst head coaches, the league implemented the “Rooney Rule,” requiring all NFL teams to interview at least one minority candidate for open head coaching positions. Despite adopting this rule, the NFL did not achieve the diversity it sought.⁴ By the end of 2018, there were only three minority head coaches in the league before head coach Brian Flores of the Miami Dolphins was hired.⁵ By the 2022 season—after the Dolphins fired coach Flores—just three minority coaches

3. See Veronica Coyne, *The Rooney Rule: Is the NFL Doing Enough to Increase Minority Head Coaches?*, 27 SPORTS LAWYERS J. 205, 205-206 (2020).

4. *Id.* at 205.

5. Ken Belson, *The N.F.L.’s Minority Head Coaching Ranks Are Thinning*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/sports/nfl-minority-head-coaches.html>.

remained, only one of whom was Black.⁶

The Rooney Rule is plagued by a lack of guidance and enforceability. Many teams employ the bare minimum in complying with the rule and many teams have been accused of subterfuge to merely demonstrate compliance.⁷ Some teams' attempts to avoid hiring minorities are slight and go unnoticed by the public, while others are more egregious. This lack of compliance points to a pervasive discrimination issue in the League. This discrimination is substantiated by empirical statistics: nearly 70% of NFL players are Black, but only 12% of all NFL coaches hired since 1989 have been Black.⁸ (See *Figure 1* below for a graphic detailing this disproportionate statistical anomaly.) While this paper's impetus is primarily Brian Flores' firing and his subsequent lawsuit, the following section highlights several instances of recent alleged racially discriminatory practices in the NFL.

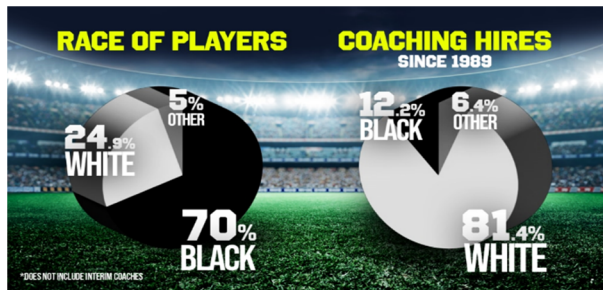


Figure 1. A breakdown of Black players and coaches in the NFL.⁹

A. Tennessee Titans

Veteran NFL coach Ray Horton, who is Black, alleged that an interview for the Tennessee Titan's head coaching position in 2016 was nothing but a farce.¹⁰ While the Titans claimed that their search was an "open and competitive process," the coach they hired instead of Horton, Mike Mularkey, admitted on a recent podcast that the team ownership informed him that Mularkey already had the job prior to Rooney Rule interviews.¹¹ As of 2022, Horton has joined Brian Flores in his lawsuit against the NFL.¹²

6. Marca English, *Black Coaches NFL: How Many Black Coaches Are in the NFL?*, MARCA (Feb. 22, 2022, 4:09 P.M.), <https://www.marca.com/en/nfl/2022/02/02/61fa9e54268e3e03548b45ce.html>.

7. Coyne, *supra* note 3, at 209.

8. See Michael Harriot, *Black Coaches Are Better: A Statistical Breakdown of the NFL's Racism*, THE GRIO (Feb. 11, 2022), <https://thegrio.com/2022/02/11/black-coaches-statistical-breakdown-nfl-racism/>.

9. *Id.*

10. See Zach Barnett, *Former Titans Head Coach Mike Mularkey Says Team Skirted Rooney Rule in Hiring Him*, FOOTBALLSCOOP (Apr. 7, 2022), <https://footballscoop.com/news/mike-mularkey-rooney-rule-tennessee-titans-nfl-lawsuit>.

11. *Id.*

12. See Tom Schad, *Ray Horton, Steve Wilks Join Brian Flores' Discrimination Lawsuit*

B. Seattle Seahawks

In 2010, the Seattle Seahawks interviewed Leslie Frazier. However, Frazier himself later accused the team of only interviewing him to satisfy the Rooney Rule. Many speculated that the Seahawks had already decided to hire Pete Carroll as their new head coach.¹³ This raised concerns about racism because Frazier was among the best defensive coordinators in the league at the time¹⁴ (a weighty advantage for a head coaching position) and likely only received an interview because he was Black. While this purported discrimination was evident to many, the NFL examined Seattle's hiring practices and concluded that the team complied with the Rooney Rule and that there was no wrongdoing.¹⁵ The processes used behind NFL investigations of potential Rooney Rule violations are unknown at this point, with an NFL spokesman stating only that all teams with openings "complied" with the Rooney Rule that year.¹⁶

C. Detroit Lions

The agent for the Detroit Lions' former defensive coordinator, Teryl Austin, alleged that the Lions only interviewed Austin to satisfy the Rooney Rule with no intention actually of hiring him.¹⁷ On top of that, Austin has been interviewed for top coaching positions by NFL teams eleven times and has yet to receive a single offer.¹⁸ In the last 19 years, interviews for coaches of color for head coaching positions in the NFL were typically limited amongst a small number of candidates who have been interviewed by multiple teams, but never been offered a head coaching position.¹⁹ As Austin described it, he felt that he was being interviewed merely to satisfy the Rooney Rule requirements and not

Against NFL, USA TODAY (Apr. 7, 2022), <https://www.usatoday.com/story/sports/nfl/2022/04/07/brian-flores-lawsuit-ray-horton-steve-wilks-nfl/9493568002/>.

13. See Bob Warja, *Seattle Seahawks Coaching Search Proves Rooney Rule Is a Joke*, BLEACHER REPORT (Jan. 10, 2010), <https://bleacherreport.com/articles/323748-seattle-seahawks-coaching-search-proves-that-rooney-rule-is-a-joke>.

14. See Leslie Frazier, PRO FOOTBALL REFERENCE, https://www.pro-football-reference.com/coaches/FrazLe0.htm#all_coaching_history (last visited March 14, 2023).

15. See John Shipley, *Minnesota Vikings' Leslie Frazier Second-Guesses Interview. Was He Seattle's Token Black Candidate?*, PIONEER PRESS (Nov. 12, 2015, 10:47 AM), <https://www.twincities.com/2010/08/09/minnesota-vikings-leslie-frazier-second-guesses-interview-was-he-seattles-token-black-candidate/>.

16. See *id.*

17. See Dave Birkett, *Agent: Detroit Lions Conducted Sham Interview with Teryl Austin After Jim Caldwell Firing*, USA TODAY (Feb. 3, 2022, 12:59 P.M.), <https://www.freep.com/story/sports/nfl/lions/2022/02/03/detroit-lions-teryl-austin-interview-rooney-rule-jim-caldwell/6647135001/>.

18. See *id.*

19. See Tom Shad, *Often Interviewed, Never Hired: How Hot-Shot NFL Head Coaching Candidates Go Cold*, USA TODAY (Jan. 18, 2023, 9:50 AM), <https://www.usatoday.com/story/sports/nfl/2023/01/12/do-nfl-teams-head-coach-vacancies-shortchange-coaches-color/10994631002/>.

because he was being considered seriously for the position.²⁰

Ultimately, the NFL still has a discrimination problem within its hiring practices. Several complaints from Black assistant head coaches about sham interviews caused a change to the rule in 2018.²¹ The NFL amended the Rooney Rule to make it “fair[er]” by further encouraging teams to maintain records of interviewing minority candidates.²² Despite these changes, the NFL continued to conclude that teams were acting within the bounds of the rule. However, the Fritz Pollard Alliance, which “promotes diversity in NFL coaching,” has concluded that the facts surrounding certain NFL interviews overwhelmingly pointed to violations of the rule.²³ The “dismal” diversity numbers in the NFL received heightened scrutiny after the Miami Dolphins terminated Brian Flores after two winning seasons.²⁴

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND FLORES’ COMPLAINT

In Flores’ complaint, he stated that he would file a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission²⁵ so that he could file an action under Title VII of the Civil Rights Act of 1964.²⁶ By analyzing the NFL’s history of discriminatory hiring practices, Flores’ allegations, and similar case law, the strength of Flores’ claims can be evaluated.

A. *Establishing a Prima Facie Case against the NFL*

Under the U.S. Code, it is unlawful for an employer to refuse to hire any individual based on their race, color, or national origin.²⁷ To establish a *prima facie* case of discrimination under Title VII, a plaintiff must demonstrate that (1) they are in a protected class, (2) they were qualified for the position, (3) they were subject to an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination.²⁸

20. See Birkett, *supra* note 17.

21. See Coyne, *supra* note 3, at 213–14.

22. See *id.*

23. See Paul Gutierrez, *John Wooten Decries NFL’s Ruling that Raiders Honored Rooney Rule*, ABC NEWS (Jan. 18, 2018, 1:36 P.M.), <https://abcnews.go.com/Sports/john-wooten-decries-nfls-ruling-raiders-honored-rooney/story?id=52473636>.

24. See Scott Neuman, *Why a 20-Year Effort by the NFL Hasn’t Led to More Minorities in Top Coaching Jobs*, NPR (Feb. 3, 2022, 1:23 P.M.), <https://www.npr.org/2022/02/03/1075520411/rooney-rule-nfl>.

25. See Complaint, *supra* note 2, at 9, *Brian Flores v. The National Football League, et al.*, (S.D.N.Y. 2022) (1:22-cv-00871). A complete breakdown of this process can be found at Filing a Charge of Discrimination, U.S. EQUAL OPPORTUNITY COMMISSION, <https://www.eeoc.gov/filing-charge-discrimination> (last visited June 14, 2023, 6:19 P.M.).

26. Complaint, *supra* note 2, at 9; see also 42 U.S.C. § 1981a (outlining damages in cases of intentional employment discrimination).

27. 42 U.S.C. § 2000e-2 (a).

28. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, MISSING PINCITE (1973), *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) and *Liebowitz v. Cornell*

The plaintiff's burden of proving this *prima facie* case—in this instance, Flores's—is not onerous and is even described as “minimal” by the Second Circuit.²⁹

If a court finds that Flores presented a *prima facie* case of discrimination, the NFL and its teams would bear the burden of demonstrating that their actions were not discriminatory.³⁰ This is a *procedural burden shift*. The courts would then require the NFL to prove that it had “a strong basis in evidence” to justify its race-conscious actions.³¹ Additionally, the Court would need to assess the credibility of the NFL's position as to the validity of their hiring processes, promotion practices, and how they conduct Rooney Rule investigations into team hiring practices.³²

Considering each element individually, Flores' allegations present a robust assault on the NFL. First, as a Black man, Flores is a protected class member.³³ Second, Flores has numerous years of NFL coaching experience to demonstrate his qualifications for a head coaching position.³⁴ In 2004, Flores began his coaching career as a scouting assistant with the New England Patriots under Bill Belichick.³⁵ After several years as a scout and special teams assistant, the Patriots promoted Flores to their safeties coaching position.³⁶ He eventually became their linebackers coach.³⁷ During this period, Flores helped coach multiple Super Bowl winning teams.³⁸ This experience arguably made him well-qualified to become a head coach in the NFL, and he signed on as the head coach of the Miami Dolphins in 2019.³⁹

Univ., 584 F.3d 487, 498 (2d Cir. 2009) (setting forth the foundation for establishing a *prima facie* case in Title VII discriminatory treatment cases).

29. Norton v. Sam's Club, 145 F.3d 114, 118 (2d Cir. 1998) (citing Scaria v. Rubin, 117 F.3d 652, 654 (2d Cir. 1997) (per curiam)).

30. United States v. Brennan, 650 F.3d 65, 93 (2d Cir. 2011).

31. See Margerum v. City of Buffalo, 28 N.E.3d 515, 519 (N.Y. 2015).

32. See *id.* at 519–20.

33. See Mitchell v. N. Westchester Hosp., 171 F. Supp. 2d 274, 278 (S.D.N.Y. 2001) (stating that “there is no dispute” regarding a Black man being a member of a protected class).

34. While coaching experience does not guarantee a head coaching position in the NFL, this experience is persuasive and measurable compared to other intangible traits that teams consider when hiring a head coach. See Andrew Brandt, *What's Going On In That Coaching Interview? Inside the Firing-and-Hiring Process*, SPORTS ILLUSTRATED (Jan. 14 2020), <https://www.si.com/nfl/2019/01/08/head-coaching-interview-hiring-firing-process-offseason-behind-scenes>.

35. See *Brian Flores*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/coaches/FlorBr0.htm> (last visited May 1, 2022); Bill Belichick is currently the greatest head coach to ever grace the NFL.

36. *Id.*

37. *Id.*

38. Will Graves, *Former Patriots Assistant, Dolphins Head Coach Brian Flores Hired by Steelers Amid NFL Lawsuit*, WCVB BOSTON, <https://www.wcvb.com/article/brian-flores-hired-by-steelers-february-19-2022/39147151>.

39. See Alain Poupart, *Flores Flashback: The Day He Became Dolphins Head Coach*, FANNATION (Feb. 4, 2022, 2:23 P.M.), <https://www.si.com/nfl/dolphins/news/miami-dolphins-flashback-to-the-day-brian-flores-was-hired-as-head>.

Third, Flores was fired following a winning season, an unusual occurrence in the NFL but more likely to happen to Black head coaches.⁴⁰ In fact, in the history of the NFL, 23.5% of Black head coaches were fired from winning teams, while only 6.9% of white coaches were fired from winning teams.⁴¹ Flores was then allegedly subjected to “sham” interviews similar to those discussed above while searching for a new coaching position with the Denver Broncos and the New York Giants.⁴² In his complaint, Flores alleged that the substance of the Broncos interview implied he was not actually being considered as a coach and that he only received the interview because the team had to interview a minority to comply with the Rooney Rule.⁴³ Flores also alleges that he received a text that proves the Giants had already hired a white coach before his interview for the head coach position.⁴⁴ Egregious or outrageous acts, which could include conducting interviews while having already hired someone for the job, prove the requisite intent in a Title VII claim.⁴⁵

Finally, Flores potentially meets the burden to establish that NFL hiring practices—in this instance, his firing and subsequent interviewing ordeal—give rise to the inference that racial discrimination is at play. When faced with allegations regarding discriminatory hiring practices and non-compliance with the Rooney Rule, the NFL often opted to side with the teams in its internal (and closed procedure) investigations without finding any wrongdoing.⁴⁶ The NFL has never found a team to violate the Rooney Rule based on conducting interviews with minorities to merely demonstrate compliance as opposed to serious consideration. In fact, only the Detroit Lions have been found to violate the Rooney Rule after failing to interview any minority candidate in 2003.⁴⁷

B. Potential Punitive Damages Against the NFL

These NFL-conducted investigations implicate another Title VII factor:

coach#:-:text=On%20Feb.,Rams%20in%20Super%20Bowl%20LIII.

40. David Berri, *Black NFL Coaches Appear Much More Likely to be Fired with a Winning Record*, FORBES (Jan. 2, 2018, 3:33 P.M.), <https://www.forbes.com/sites/davidberri/2018/01/02/black-head-coaches-in-the-nfl-are-much-more-likely-to-be-fired-with-a-winning-record/?sh=392ff4af1cb8>.

41. *See id.*

42. Complaint, *supra* note 2, at 6–8; *see discussion supra* Part I.

43. Madeline Coleman, *Flores Alleges Elway, Broncos Held ‘Sham’ Interview to Suffice Rooney Rule*, SPORTS ILLUSTRATED (Feb. 1, 2022), <https://www.si.com/nfl/2022/02/01/brian-flores-broncos-sham-interview-rooney-rule>.

44. Dan Lyons, *Bill Belichick’s Purported Text Mistake a Key Part of Brian Flores Lawsuit*, SPORTS ILLUSTRATED (Feb. 1, 2022), <https://www.si.com/nfl/2022/02/01/brian-flores-lawsuit-nfl-giants-bill-belichick-texts-daboll>.

45. *See Robinson v. Instructional Sys., Inc.*, 80 F. Supp. 2d 203, 209 (S.D.N.Y. 2000).

46. *See Douglas C. Proxmire, Coaching Diversity: The Rooney Rule, Its Application and Ideas for Expansion*, AM. CONST. SOC. FOR L. AND P. 5 (Dec. 2008).

47. Monte Pool, *Numbers Prove Why NFL’s Rooney Rule Should Be Discarded*, NBC SPORTS (Feb. 10, 2022), <https://www.nbcsports.com/bayarea/49ers/numbers-prove-why-nfls-failed-rooney-rule-should-be-discarded>.

when employers committing discriminatory acts are familiar with anti-discrimination laws and practices, this establishes an inference of knowledge or reckless disregard of anti-discrimination law that justifies an award of punitive damages.⁴⁸ Among the available remedies, punitive damages are arguably within reach should Flores succeed in his claims. In *Kolstad v. American Dental Association*, the Supreme Court noted that eligibility for punitive damages is not only in terms of an employer's "egregious" misconduct.⁴⁹ A jury may even grant punitive damages when a defendant's conduct is motivated by evil intent or when the conduct involves "reckless or callous indifference to the federally protected rights of others."⁵⁰

The Court further posits that defendants who are unaware of the law or reasonably believe that their "discrimination satisfies a bona fide occupational qualification defense" would not give rise to an award of punitive damages.⁵¹ The very fact that the NFL conducts Rooney investigations into teams is proof that they are aware of potential discrimination. So, Flores should not face too high a standard in his attempt to elicit punitive damages if the NFL is found to be aware of any potential discrimination and a court dismisses any bona fide occupational qualification defense. Flores would not need "an additional showing of outrageous conduct" if he can prove that the NFL showed "reckless disregard for the matter."⁵²

With this understanding of what it would take for Flores to succeed in his Title VII claims against the NFL, this paper will now consider available and potential remedies, beginning with similar cases and the remedies courts have awarded to wronged parties.

III. PUTTING OUT THE FIRE OF DISCRIMINATION – REMEDIES, THE NFL, AND CASELAW

A. Title VII Remedies

The Supreme Court has heard several cases regarding the award of remedies under Title VII. The Court noted that Title VII has two primary goals: (1) to achieve equality of employment opportunities and (2) to make victims of unlawful discrimination whole for their injuries.⁵³ The Court found that Congress intended to give courts discretionary power in awarding remedies in Title VII cases to provide complete relief.⁵⁴ Courts have rewarded remedies such as back

48. See *Parrish v. Sollecito*, 280 F. Supp. 2d 145, 152–53 (S.D.N.Y. 2003).

49. See *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534–35 (1999).

50. *Id.* at 536.

51. *Id.* at 536–37.

52. *Id.* at 537–38.

53. See Larry M. Parsons, *Title VII Remedies: Reinstatement and the Innocent Incumbent Employee*, 42 VAND. L. REV. 1441, 1447–48 (1989).

54. *Id.* at 1448.

pay, reinstatement, retroactive seniority, compensatory and punitive damages,⁵⁵ and attorney's fees and costs.⁵⁶ This section will consider which of these remedies are likely to be available to Flores if he were to win his case.⁵⁷

B. Potential Reinstatement as Head Coach?

One preferred remedy of courts in Title VII cases is reinstatement. This involves restoring the wronged party to the position from which the defendant fired them or to that which the defendant prevented them from assuming.⁵⁸ The Supreme Court established a presumption in favor of immediate reinstatement when appropriate for Title VII victims.⁵⁹ However, while reinstatement arguably closely restores the victim to their original status, it is not always more beneficial than the alternative remedies. First, an inevitable animosity and antagonism will arise between the employer and employee.⁶⁰ Another often-overlooked repercussion of this remedy is the displacement of any incumbent who has since staffed the position.⁶¹ Considering that the Dolphins have already replaced Flores and that he has taken another job—albeit not a head coach position—with another NFL team, reinstatement here seems like an unsuitable remedy.⁶²

Foregoing the option of reinstatement, Flores will likely look to the courts to provide alternative remedies, including different measures of damages and potentially back pay. Back pay is rewarded based on “income [an employee] would have otherwise earned but for the discrimination.”⁶³ However, a proper remedy will likely depend on judicial alterations to the NFL's actual hiring practices. At the underwhelming rate by which the NFL is progressing in hiring minority head coaches and considering the ineffectiveness of the Rooney Rule, this can only be achieved by defeating the NFL in court. This will depend on whether Flores can mount an attack sufficient to challenge the NFL's hiring practices, if the NFL can stave off the attack, and if the courts, in potentially

55. *See id.*

56. *See Parsons supra* note 53 at 1448-1449; *see also 24A West's Legal Forms, EMPLOYMENT* § 3:11 (4th) (discussing available judicial remedies for Title VII violations) and § 9:33. *Damages and remedies—Punitive and compensatory damages under Title VII, LEGAL GUIDE TO HUMAN RESOURCES* § 9:33 (noting that Title VII plaintiffs may recover punitive damages and amounts up to \$300,000 for an employer with 500 or more employees).

57. An exhaustive analysis of every one of the different options will prove lengthy and beyond the scope of this paper.

58. *See Parsons, supra* note 53, at 1443.

59. *See id.* at 1449.

60. *See id.* at 1443.

61. *See id.*

62. Sky Sports, *Miami Dolphins Hire Mike McDaniel as New Head Coach to Replace Brian Flores*, (July 2, 2022), <https://www.skysports.com/nfl/news/12118/12535057/miami-dolphins-hire-mike-mcdaniel-as-new-head-coach-to-replace-brian-flores>.; Brooke Pryor, *Pittsburgh Steelers Hired Brian Flores 'Because He's a Qualified Coach,' Art Rooney II Says*, ESPN (Mar, 29 2022), https://www.espn.com/nfl/story/_/id/33625354/pittsburgh-steelers-hired-brian-flores-qualified.

63. U.S. Equal Employment Opportunity Commission, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R. PART 1614 (EEO-MD-110), 11-2 (2015).

siding with Flores, will effectuate substantial change in NFL hiring policies.

Because Flores must show that race was a substantial factor in the NFL's discriminatory practices, a court will examine how the NFL hires head coaches and the credentials considered across teams. By comparing recent discrimination cases involving firefighters to Flores' case, namely whether the methods fire departments employed in their hiring processes had a disparate impact on Black candidates, it is possible to anticipate how a court will rule on Flores' claim.

C. The NFL's Hiring Process

The hiring process for a head coach position is somewhat obscure. Each team hires their coaching staff using different methods and criteria, so pinpointing constant motifs across hiring criteria can prove challenging.⁶⁴ After a team conducts due diligence for a potential hire, most administer the interview process by examining coaching candidates' visions for the team, their commitments to specific players and player types, and their willingness to work with young players or rely on veterans.⁶⁵

Additionally, search firms have become increasingly involved in the head coach hiring process.⁶⁶ These firms seek out candidates for respective teams to facilitate a "good fit" between an NFL team and a head coach. Firms look for coaches that possess intangibles the team seeks, making it difficult to define which qualities these firms use as hiring criterion. However, despite utilizing search firms to assist in the hiring process, the public is still in the dark when it comes to the NFL's actual criteria for head coach hiring—some teams even hire head coaches because of their "no-nonsense attitude," high energy, or willingness to allow the team's ownership direct control over players and game management.⁶⁷ Obviously, a majority of candidates will have extensive experience coaching at the college and professional level to fill the NFL's coveted thirty-two head coach positions, but the public knows little beyond those requirements.⁶⁸

While exact NFL head coach job descriptions are hard to come by—teams do not precisely advertise in local newspapers—some consistent tasks comprise the job. This non-exhaustive list includes responsibilities such as postgame analysis, press relations, oversight of coaching staff, drafting and trading players,

64. See Andrew Brandt, *What's Going On In That Coaching Interview? Inside the Firing-and-Hiring Process*, SPORTS ILLUSTRATED (Jan. 14 2020), <https://www.si.com/nfl/2019/01/08/head-coaching-interview-hiring-firing-process-offseason-behind-scenes>.

65. See *id.*

66. See *id.*

67. See Jim Moye, *Punt or Go for the Touchdown? A Title VII Analysis of the National Football League's Hiring Practices for Head Coaches*, 6 UCLA ENT. L. REV. 105, 126 (1998).

68. See Clayton Browne, *NFL Career Requirements*, CHRON (June 29, 2018), <https://work.chron.com/nfl-career-requirements-14121.html>.

game planning, practice supervision, schemes, formations, and hirings.⁶⁹ But among the tasks that comprise basic head coach responsibilities, teams also look for qualities such as emotional intelligence, self-regulation, empathy, communication skills, and political ability in their candidates, which individual teams weigh differently.⁷⁰

Because the NFL head coach hiring process is arbitrary and inscrutable, the hiring process is shrouded from the public. While this may protect NFL teams from public scrutiny to some degree, Title VII calls for the elimination of arbitrary barriers to employment when such barriers result in unjust discrimination.⁷¹ The Court has reasoned that people often consider underlying, non-arbitrary reasons in a business setting, but when “all legitimate reasons” for refusing to hire someone have been invalidated, it is likely that discrimination is at play and a remedy is necessitated.⁷² However, the Court also acknowledges that “[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.”⁷³ A court will likely be hesitant to mandate any sort of hiring process for NFL head coaches out of deference to the expertise of the NFL in an admittedly subjective process. The following section will contrast the NFL’s opaque hiring system with ones addressed by the courts.

D. Firefighter Discrimination

This section will review several cases that focused on racially discriminatory hiring practices and end by contrasting these processes with the NFL’s current hiring system.

First, around 2013, the United States sued the City of New York and asserted discriminatory treatment claims arising from the New York Fire Department’s reliance on written exams when selecting firefighters.⁷⁴ The City had a very low percentage of Black firefighters and a higher percentage of white firefighters passed the written exams compared to the percentage of Black firefighters.⁷⁵ The Court eventually held that while the exams to select firefighters were “facially neutral,” the case should be remanded for inquiry into the disparate impact of the test.⁷⁶ The court relied on the fact that the exam used

69. See Andrew Garda, *A Detailed List of an NFL Coach’s Responsibility*, BLEACHER REPORT (June 9, 2013), <https://bleacherreport.com/articles/1666834-a-detailed-list-of-an-nfl-coachs-responsibility>.

70. See Tom Lewand, *Beyond X’s and O’s: Future Head Coaches Need These Intangibles*, THE 33RD TEAM (Jan. 11, 2022), <https://www.the33rdteam.com/future-head-coaches-need-these-intangibles/>.

71. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

72. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

73. *Id.* at 578.

74. See generally, *United States v. City of New York*, 717 F.3d 72 (2d Cir. 2013).

75. See *id.* at 78.

76. See *id.* at 89.

in the hiring process was designed to be a neutral hiring method.⁷⁷ Although minorities may not have performed as well on the exam as their white counterparts, the court refused to grant summary judgment on the claim that these results were based on the test's inherent racial unfairness.

Second, in 2009, firefighters sued Connecticut city officials for refusing to certify the results of promotional exams because the firefighters felt it would have a disparate effect on Black firefighters trying to be promoted.⁷⁸ While this case treads the waters of permissible Title VII race-based employment action, the pertinent details revolve around the City's actual hiring practices.⁷⁹ The Court noted that Title VII is not intended to cause employers to abandon their fair workplace hiring methods, such as hiring exams, in favor of outright racial balancing.⁸⁰ Instead, the Court stated that Title VII allows employers to administer tests or practices designed to provide a "fair opportunity for all individuals, regardless of their race."⁸¹

Third, Black firefighters brought a Title VII claim against the Chicago fire department, alleging that the written test used in the City's hiring process discriminated against Black applicants.⁸² The issue at hand was that qualified Black applicants to the fire department were disparately impacted by the test because a disproportionate number of them were excluded from "well qualified" categorization.⁸³ Thus, a group of Black applicants belonging to the "qualified" group alleged that the fire department was utilizing the antiquated test to prevent the hiring of Black firefighters, and the Supreme Court found that this group had a claim under Title VII.⁸⁴

These firefighter cases address different facets of Title VII and prolific, racially discriminatory hiring practices. However, each case has an underlying theme in stark contrast with the NFL's discriminatory hiring practices. Chiefly, in each of these cases, the hiring practices in question were based on tangible factors such as test scores where the tests were available for judicial examination.⁸⁵ Nevertheless, when filling one of the thirty-two available head coaching positions, the NFL's hiring practices are anything but open to scrutiny. This not only protects the NFL from judicial oversight regarding their hiring practices, but upholds a system in which only the NFL can police its teams'

77. *See id.*

78. *See generally*, Ricci v. DeStefano, 557 U.S. 557 (2009).

79. *See id.* at 580 (discussing the lack of permissibility under Title VII for an employer to take race-based adverse employment actions to avoid disparate impact liability).

80. *See id.* at 582.

81. *See id.* at 584–585.

82. *See generally*, Lewis v. City of Chicago, 560 U.S. 205 (2010).

83. *See id.*

84. *See generally*, James Steinmann, *Nothing Inevitable About Discriminatory Hiring: Lewis v. City of Chicago and a Return to the Text of Title VII*, 44 LOY. L.A. L. REV. 1307 (2011).

85. *See* City of New York, *supra* note 74; Ricci, *supra* note 78; Lewis, *supra* note 82 (outlining the criteria for firefighter hirings such as a physical abilities test, background check, medical examination, and drug test).

policies (the same way they “police” teams in conformity with the Rooney Rule).

IV. REMEDYING THE NFL’S DISCRIMINATION PROBLEM AND MAKING FLORES WHOLE

Flores requests in his complaint several remedies from the Court. Among them is a demand for remuneration for loss of opportunity, reputation, mental anguish, punitive damages, and attorneys’ fees. Flores also seeks a declaratory judgment that the NFL’s actions and practices violate the law and injunctive relief for the current hiring practices.⁸⁶

A. *Flores’ Case Against the NFL*

Flores should be able to mount a successful Title VII claim against the NFL and satisfy the necessary elements for a *prima facie* case of discriminatory hiring practices. However, Flores’ greatest obstacle remains his burden of proving that race was a substantial factor ingrained in the NFL team’s hiring practices. Flores’ case will almost certainly revolve around the fact that he possessed the necessary skills, and perhaps even the right “intangibles,” needed to succeed as an NFL head coach, but that teams mistreated him because of his race.

Bolstering his case further is damning evidence against the NFL, such as instances where teams overtly shirked the Rooney Rule and merely used it as a ruse, and the fact that such a disproportionate ratio of players are Black while coaching has remained predominantly white.⁸⁷ Regardless of the underlying reasoning, Flores possessed the skills and qualities needed for an NFL head coach; the only question remains whether his termination resulted from racial impetus or valid business judgment. Ultimately, Flores should be able to present his case in a way that will, at the very least, open the door to judicial intervention into the NFL’s discriminatory hiring practices.

B. *The NFL’s Defense*

Now that Flores has filed his complaint, the NFL must respond to the allegations. Their defense will need to rebut the inferences drawn from his complaint and posit that they had a bona fide business reason for their hiring decisions. Although merely speculation, there are some potential defenses that they may deploy.

First, the NFL might argue that, because a head coach position is so unique, it is unlike any other position in corporate America. In that sense, the intangible qualities that each team seeks lend to the fact that what they are looking for in a candidate is not always quantifiable. With this argument, the NFL may contend that, while some hiring and firings may seem like discrimination or based on race, they are a product of teams’ hiring based upon the specific candidate’s

86. See Complaint, *supra* note 2.

87. See *supra* Figure 1.

individual qualities.

Second, the NFL can argue that in Flores' case, his job performance necessitated his firing, all the while chalking up his poor interviewing experiences to individual teams' mismanagement. The NFL could argue that because head coach positions are demanding and vital to a team's success, it is imperative that the team finds a candidate who is a perfect fit in their eyes.

C. An End to the Madness

Regardless of how Flores' case ends, the NFL's hiring practices must change. While the Rooney Rule has been in place since 2003, the dismal minority representation amongst coaches has persisted. To better enforce the Rooney Rule and address the lack of representation amongst coaches, a change in the status quo is needed. As one suggestion, the courts may require a quantifiable method for hiring, upon which teams will base their head coaching hires, not unlike the standardized tests given to NFL quarterbacks. While the lack of representation in the NFL is stark and obvious, their hiring processes remain obscure and arbitrary, and must be overcome to remedy the apparent racism at play.