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LESSONS FOR THE NFL AND EMPLOYERS FROM "DEFLATEGATE"

Working Together

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To begin with, full disclosure: I am a lifelong New England Patriots fan (and season ticket holder). However, as an attorney I am trained to be objective. The aftermath of the "Deflategate" investigation should be of interest to both sports fans and employers, and represents a cautionary tale for both a popular sports league and the workplace in general.

The National Football League hired Attorney Ted Wells to conduct an investigation into allegations that Patriots personnel were involved in the intentional deflation of footballs prior to the AFC Championship Game between the Patriots and the Indianapolis Colts. After several months, Wells issued a report indicating that it was "more probable than not" that Patriots equipment personnel were involved in the intentional alteration of footballs and that Patriots Quarterback Tom Brady "more probably than not" was "at least generally aware" of these activities. Based upon these findings, the NFL via Commissioner Roger Goodell has meted out harsh punishment, suspending Brady for four games (one quarter of a season), fining the Patriots $1 million, and taking away two high draft picks.

While the Patriots had little recourse with regard to the punishment of the team, Brady is contesting his suspension. The collective bargaining agreement negotiated by the NFL Players Association (NFLPA) and NFL management gives surprisingly limited rights to players contesting certain league discipline. An appeal of discipline imposed by Commissioner Goodell is made to (drum roll, please) Goodell, who may then appoint a "designee" to serve as hearing officer, or (drum roll, please) appoint himself to serve as the hearing officer.

But all is not lost for Brady. While Goodell has actually chosen himself to serve as the hearing officer (and has rejected a request by the NFLPA that he select a neutral arbitrator) for Brady's appeal, an NFL hearing officer's decision is still subject to review in the federal courts via an application to vacate the arbitration award. And in the past, when an independent hearing officer has been appointed, or via court review, Goodell has suffered some high profile rebukes of his erratic imposition of discipline.

1. Goodell's imposition of discipline on members of the New Orleans Saints for the so-called "**Bountygate**" scandal was largely overturned by the hearing officer (who happened to be Commissioner Goodell's predecessor, Paul Tagliabue). Tagliabue noted that like any arbitrator, 1) he reviewed the discipline "for

consistency of treatment, uniformity of standards for parties similarly situated and patent unfairness or selectivity," and 2) he considered the "rules of the shop" in the NFL, namely, "the patterns of operations and practices of all 32 NFL teams as they have evolved over the years." In vacating all of the suspensions of players, Tagliabue noted that the NFL "has not previously suspended or fined players for some of the activities in which these players participated and has in the recent past imposed only minimal fines on NFL Clubs - - not players - - of a mere $25,000 or less." Tagliabue's concern with discipline being administered evenhandedly is similar to what arbitrators consider in assessing whether there is "just cause" for discipline.

1. After Bountygate, the next Goodell defeat concerned the discipline of former Baltimore Ravens Running Back **Ray Rice**. After a video emerged suggesting (but not definitively proving) that Rice had had a physical altercation with his fiancée, Goodell suspended Rice for two games. This decision was subject to almost universal condemnation for being too lenient. In response, Goodell admitted that he "did not get it right." When a new (more damning) video of the same altercation emerged, Goodell then suspended Rice indefinitely. The NFLPA challenged the discipline, largely on double jeopardy grounds, and indicated that the second video did not reveal anything that Rice had not already admitted to Goodell during the investigation. Goodell designated Retired U.S. District Court Judge Barbara Jones to serve as hearing officer on Rice's appeal. Jones concluded that the collective bargaining agreement did not impose a "just cause" requirement upon the implementation of the discipline at issue. However, Jones still found that discipline must be "fair and consistent," and as such determined that Goodell's decision was an abuse of discretion. Jones found that the NFLPA had demonstrated that Rice did not mislead Goodell during the original investigation; therefore, the imposition of a second suspension based upon the same incident, and the same known facts about that incident, was arbitrary.

1. The final chapter in Goodell's trilogy of reversals is the **Adrian Peterson** case. Peterson, a running back for the Minnesota Vikings, was involved in detestable acts of physical abuse involving his four-year-old son. The NFL sought to discipline Peterson, but apparently in imposing an unpaid suspension for the remainder of the 2014 football season, the NFL tried to impose retroactively a new policy regarding "Personal Conduct" that authorized more serious discipline than had previously been allowed. When the NFLPA challenged the discipline, Goodell appointed a former NFL executive (Harold Henderson) to serve as the hearing officer. In a somewhat perfunctory decision, Henderson rejected attempts by the NFLPA to convince him to recuse himself due to his ties to the NFL and Goodell and his "evident partiality," summarily rejected the appeal on the merits regarding the length of the discipline, and rejected in a conclusory manner claims that the NFL was improperly imposing retroactively a new policy. The NFLPA then sought to vacate the "arbitration" award in federal court. Courts are generally reluctant to overturn arbitration decisions. Nevertheless, in this case the federal court (via Judge David Doty) ruled in favor of

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Peterson and the NFLPA and vacated Henderson's arbitration award. NFLPA v. NFL, 2015 WL 795253 (D. Minn. Feb. 26, 2015). While noting that substantial deference was owed to decisions by labor arbitrators, the court indicated that this power was not meant to permit the rubber stamping of awards. The court noted that it will vacate an arbitration award when it fails to "draw its essence" from the collective bargaining agreement. The court stated that this essence is derived not only from the CBA's express provisions, but also from the "past practices of the industry and the shop," i.e., the "law of the shop." The court then ruled that the "law of the shop" prohibits the retroactive enforcement of a new policy. The NFL has appealed Judge Doty's decision; the NFLPA has filed a motion for contempt against the NFL.

While Tagliabue, Jones and Doty traveled different legal paths, they all came to the same outcome. Discipline cannot be inconsistent with past practice and NFL precedents involving discipline, especially in light of the "law of the shop." Accordingly, do not underestimate Brady's chances of success in challenging his suspension. Prior enforcement of the rules concerning the integrity and alteration of the football led to a) a $20,000 fine against the San Diego Chargers in 2012 for a "sticky towel" that was used to assist players to better grip footballs during games, with no player being punished and b) a warning to the Minnesota Vikings and Carolina Panthers when they were caught placing football near heaters during a game, again with no player being punished. To the extent that Brady's suspension was partially based upon his refusal to turn over text messages and e-mails to investigators, such action may still be suspect in that prior refusals by players to turn over such evidence to the NFL did not lead to suspensions. Even disregarding the punishment imposed upon the Patriots as a team, a four game suspension of Brady emerges as harsh in the context of similar offenses. Tagliabue's reasoning in the Bountygate case would equally apply.

Without getting bogged down in a discussion of air pressure and contrary theories regarding the extent of deflation, and notwithstanding the existence of text messages of two Patriot equipment employees that are arguably damaging to Brady, it is not necessarily clear whether or to what extent the footballs were actually deflated. Indeed, the American Enterprise Institute has published a report finding that the Wells report was "unreliable" and that it is "unlikely" that the Patriots deflated the footballs. However, Brady's attorneys and the NFLPA could simply rely upon the facts contained in the Wells report and assert that there is insufficient proof that 1) the footballs were intentionally deflated, and/or 2) Brady was involved in directing that footballs be deflated below the legal limits. Also, based upon the prior Bountygate, Rice and Peterson decisions, the best strategy may be to assert that even if one accepts the findings of improper conduct, the harsh punishment is arbitrary and capricious (and contrary to the "law of the shop").

Lessons learned: The lack of consistency in enforcement and punishment of violations of an employer's policies can come back to haunt the employer. (See my partner Michael LaVelle's prior post on this subject here) As those who have had the experience of defending against discrimination complaints know, our Commission on Human Rights and Opportunities will specifically inquire as to "similar offenses" in the workplace and the discipline handed out. In the unionized/contractual workplace, the "just cause" standard for discipline relies upon (among other things) consistency in the application of discipline. Elkouri and

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Elkouri, How Arbitration Works (5th Ed. 1997). I would never advise a client to follow the NFL as a model for disciplinary decisions, as even the courts cite the NFL as the way not to act. Indeed, the Connecticut Superior Court cited to the Ray Rice decision in overturning discipline in a police department on double jeopardy grounds. Norwalk Police Union v. City Of Norwalk, 2014 WL 7745875 (Conn Super. 2014).

It is still baffling that a league as successful as the NFL is so inept in issues involving player discipline. It is as if Goodell: 1) makes up policies on the spot, and 2) reacts solely to fluctuating public opinion without regard to legal niceties. A reasonable person can assume that the harshness of the Brady punishment is a response to the perceived leniency of Goodell's initial punishment of Rice. It is also interesting to consider the difference between the approaches to discipline of former Commissioner Tagliabue (an attorney) and current Commissioner Goodell (who is not an attorney). While attorneys are often disparaged, this may be an example of a situation where attorneys provide some benefit in decision-making, so as to avoid costly and embarrassing legal battles that take place after a decision is made. Finally, the toxicity in the relationship between the NFL and the NFLPA cannot be good for any business. From my experience representing employers, respectful if not cordial personal relationships between management and union officials (while not always possible) are mutually beneficial in resolving workplace problems. While Tagliabue and former NFLPA leader Gene Upshaw had such a relationship, such a relationship is non-existent between current NFL management and the current NFLPA leadership, to the detriment of the NFL and its fans.

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