PULLMAN &COMLEY

Texts, Lies and Footballs: Tom Brady, “Deflategate," and What's Next?

Working Together

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Since we last discussed “Deflategate," New England Patriots Quarterback Tom Brady appealed his four-game suspension resulting from the NFL’s finding that he had committed “conduct detrimental to the league,” based on 1) his “probable” role of being “at least generally aware” that Patriots personnel were involved in the intentional deflation of footballs prior to the AFC Championship Game between the Patriots and the Indianapolis Colts, and 2) his failure to cooperate with the NFL’s investigation (conducted by Attorney Ted Wells). Under applicable provisions of the collective bargaining agreement [“CBA”] between the NFL and the National Football League Players Association [“NFLPA”], NFL Commissioner Roger Goodell assigned himself to serve as hearing officer to hear Brady’s appeal of Goodell’s decision (none of this is a typo). The appeal hearing took place before Goodell on June 23, 2015, and on July 28, 2015, Goodell affirmed Goodell’s decision suspending Brady.

Two interesting events occurred in connection with that decision: 1) Goodell relied heavily on Brady’s apparent destruction of his cell phone, which may have contained records sought during the investigation, but which only came to the attention of the NFL during the appeal process (i.e. after Goodell’s original decision to suspend Brady), and 2) before the ink had dried on the decision, and before Brady and the NFLPA could file an application to vacate Goodell’s decision, the NFL preemptively went to court to seek confirmation of the decision.

How do the new developments affect the outcome?

1. ***Destroyed cellphone=bad for Brady?*** The revelation that Brady had his cellphone destroyed (he didn’t do it himself, but directed an assistant to take care of it) is a PR bombshell and may be legally significant. Generally, during a workplace investigation, an employee may be subject to discipline for failing to cooperate by withholding relevant information, and the employer may draw an adverse inference as to what the employee may be hiding. In a court proceeding, the destruction of evidence in violation of a requirement to preserve it can create a presumption that the missing evidence would have been adverse to the party that destroyed the evidence. In order to obtain the benefit of this presumption (“spoliation”), a party must demonstrate that 1) the evidence was destroyed knowingly, and 2) the destroyed evidence was relevant to the party's claim or defense.

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Whatever their motivation, Brady’s actions in causing the cellphone to be destroyed when replaced were clearly intentional. Goodell generally would be within his rights to draw an adverse inference that any messages stored on the phone would have been harmful to Brady’s claims of innocence. In response, Brady and the NFLPA assert that the issue of the destroyed cellphone is a red herring in that the NFL already has all the relevant evidence that could have been stored on that phone, since 1) the NFL has the texts/records from the participants in the alleged scheme to deflate footballs and other club officials, and 2) Brady’s attorney supplied the NFL with all of the text/phone numbers that would have been in the phone, based on billing records. Furthermore, Brady now asserts that he was never told by investigator Wells that he would face discipline for failure to turn over cellphone related evidence. Either truthfully or as a convenient post hoc justification, Brady testified at the June 23 hearing that had he known that he was facing a suspension for the failure to turn over electronic communications, he would have turned them in (over the advice of counsel). When participating in investigations, I generally inform targets that the failure to provide relevant information may lead to both an adverse inference and an independent basis for discipline; it would be a surprise if Wells did not give a similar warning. Stay tuned.

2. So why is the NFL suing when it “won”? Goodell’s decision on Brady’s appeal is viewed as the equivalent of an arbitration award issued pursuant to a CBA, and it is therefore subject to review in the federal courts under the federal Labor Management Relations Act [“LMRA”]. Under the LMRA, the party that “won” at arbitration can file a motion to confirm the arbitration award; the party that “lost” can file a motion to vacate (or modify) the arbitration award. Usually, the party that lost files first. In a preemptive strike, however, the NFL filed first its action to confirm the decision, in a federal court in Manhattan. Why? One word: venue. The NFL assumed that the NFLPA and Brady would seek to overturn the decision in a federal court in Minnesota, which has had jurisdiction over such NFL-related lawsuits in the past, and in which the NFL has lost many high profile cases. And indeed, that is where the NFLPA filed its motion to vacate the arbitration award, but not until after the NFL’s action had already been filed in Manhattan. The court in Minnesota then transferred the NFLPA’s case to Manhattan in light of the “first filed rule.” Advantage in the battle to play on the most favorable turf: NFL.

3. What will happen wherever this game is played? A party challenging an arbitration award has a heavy burden. Judges do not want to step on the toes of arbitrators, since they wish to encourage parties to voluntarily submit their disputes to arbitration, whether pursuant to a CBA or otherwise. In light of this deference, a court is highly unlikely to disturb Goodell’s factual findings concerning the conduct at issue. *Major League Baseball Players Ass'n v. Garvey,* 532 U.S. 504, 509 (2001) (noting that “improvident, even silly, factfinding” does not provide a basis for a reviewing court to refuse to enforce an arbitration award). Thus, Patriots fans hoping that the appeal to the courts will result in the exoneration of their team or their quarterback will likely be greatly disappointed.

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However, notwithstanding the mutterings by some so-called sports law pundits, the NFLPA’s burden is by no means impossible. In overturning the NFL's discipline of Adrian Peterson, Judge David Doty (of the U.S. District Court for the District of Minnesota) succinctly noted:

1. It is proper to vacate/overturn an arbitration award where the award “fails to draw its essence from the CBA or is contrary to the plain language of the CBA.”
2. The essence of the CBA is derived not only from its express provisions, but also from the “industrial common law.” The industrial common law includes “past practices of the industry and the shop,” *i.e.,* “the law of the shop,” and “the parties' negotiating history and other extrinsic evidence of intent.”
3. The “law of the shop” necessarily includes prior arbitration awards.

NFLPA v. NFL, 2015 WL 795253, at *5 (D. Minn. Feb. 26, 2015). Notwithstanding the NFL’s repeated efforts to pooh-pooh precedent and assert that “each case stands on its own,” one cannot ignore prior rulings and practices in discipline cases.

The NFLPA will argue that Goodell’s decision violated the “law of the shop,” in that the punishment given to Brady was disproportionate to past decisions, and based upon a flawed process. Much of the road map for the NFLPA comes from an arbitration decision by Paul Tagliabue (who, ironically, previously served as NFL Commissioner) in the New Orleans Saints’ so-called “Bountygate” scandal, in which Tagliabue largely overturned Goodell’s imposition of player suspensions. As in that case, the NFLPA will assert here that discipline cannot be arbitrary, and cannot be inconsistent with policies, past practice and NFL precedents involving discipline. Not surprisingly, the NFLPA has expressly relied upon the Bountygate and Adrian Peterson rulings. The NFLPA may also assert that there was insufficient proof that 1) the footballs were intentionally deflated, and/or 2) Brady was involved in directing that footballs be deflated below the lower limits. But, based upon the prior NFL discipline cases, the NFLPA’s and Brady’s best strategy will be to focus on the contention that even if reasonable minds can disagree as to whether there were any nefarious acts, and even giving deference to Goodell’s findings, the punishment is arbitrary and capricious (and contrary to the “law of the shop”).

The NFLPA will also argue that Commissioner Goodell was not sufficiently impartial, in light of his position as Commissioner, and his role in the instigation and conduct of the investigation and the issuance of the initial decision, and that Goodell therefore should not have served as the appeals hearing officer. The NFL correctly observes that the CBA specifically permits the Commissioner to serve as the appeals hearing officer, so that the CBA allows some degree of partiality. While it is extremely helpful to the NFL that the CBA explicitly authorizes the Commissioner to serve as the hearing officer, it may not be completely dispositive, as there is court precedent supporting the NFLPA’s position. For example, a court in New York previously found that then-Commissioner Tagliabue’s “position as Commissioner, together with his past advocacy of a position in opposition to plaintiffs' position, deprive[d] him of the necessary neutrality to arbitrate these claims” and that “to find for plaintiffs herein, the Commissioner would have to reverse certain positions he previously strongly

advocated.” *Morris v. New York Football Giants, Inc.*, 575 N.Y.S.2d 1013, 1016-17 (Sup. Ct. 1991). The NFLPA is making the same assertions with respect to Goodell vis-à-vis Brady, and has indeed cited this case.

4. What happens while the court cases are pending? What is most immediately important to Brady and his fans is getting an injunction staying the enforcement of the arbitration ruling/suspension while the litigation is pending. To do so, Brady will have to show that 1) in the absence of an injunction, he will suffer “irreparable harm,” 2) he is likely to succeed on the merits, and 3) a “balancing of the equities” tips his way.

As a management attorney, I would usually assert that the harm from the imposition of employee discipline is not irreparable since if the employee wins, he can get back pay for the period of suspension. But pro athletes are not your typical employees. For example, when enjoining the suspensions of two Minnesota Vikings players, a U.S. District Court Judge (again, in the District of Minnesota!) noted that player suspensions could affect a team’s chances, and that the failure to make the playoffs and its effect on the players, teams, and fans is not compensable monetarily and therefore constitutes irreparable harm. The judge also noted “the undisputed brevity and precariousness of the players' careers in professional sports, particularly in the NFL.” *NFLPA v. NFL*, 598 F. Supp. 2d 971, 982 (D. Minn. 2008). Thus, I expect Brady to be able to meet this burden of establishing irreparable harm.

Whether Brady can meet his burden of establishing a “likelihood of success on the merits” is a tougher call. In Vikings’ case, the court found that the player’s showing of a likelihood of success need not be that strong in light of the “serious questions at issue,” and the balance of the equities tipped toward the players since their appeals would become moot while they served the suspensions they were challenging. Brady may be able to convince a court that an injunction should enter since 1) he suffers more in the absence of an injunction than the NFL does if an injunction is granted, and 2) he raises “substantial questions” on the merits of his attempt to set aside Goodell’s decision.

So is there a teachable moment here?

The short answer may be “**no**.” What has transpired over the last six months has been good for no one except the lawyers, regardless of whether you are 1) a management attorney (as I am) or a union supporter, 2) a Patriots fan (again, guilty as charged) or hater, or 3) a person who feels that the alleged actions are serious and go to the “integrity of the game” and larger ethical issues in society, or (on the other hand) a person who feels what might have happened is mere gamesmanship akin to Gaylord Perry’s spitball, a curved hockey stick, or even Shaquille O’Neal playfully admitting that that he used to “let the air” out of basketballs.

I have stated before that I would never advise a client to follow the NFL as a model for employment disciplinary decisions. I have not changed my mind. Wearing both my management attorney and Patriots fan hats (which pull in opposite directions), it still appears to me that the NFL overreacted to a minor issue and is replaying its prior misadventures in employee discipline. On the other hand, destroying a cellphone with arguably relevant evidence during an investigation is just plain stupid (at the very least), even if the cellphone

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actually did not actually contain any relevant evidence. Even if Brady objected to having to turn over the phone’s content, and even if there was no need for the NFL to have the phone, it is obvious that it would have been more prudent to preserve the phone. Employees do owe their employers full cooperation during an investigation; a court (not Brady) should have been the entity eventually deciding if the phone really contained relevant evidence. A court implicitly will now have to decide which is worse: 1) a sports league that demonstrably does not have a clue about basic labor law when it comes to employee discipline, or 2) a star player who somehow believed that he could unilaterally determine the definition of full cooperation with an investigation of alleged wrongdoing.

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