

FALSE START ON THE OFFENSE- Why the 5th Circuit Flagged the NFLPA for Illegal Procedure in the Ezekiel Elliott Case

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After further review, the ruling of a Texas district court was overturned by the 5th Circuit Court of Appeals on Oct. 12, 2017, with the Court of Appeals vacating an injunction order that kept Dallas Cowboys running back Ezekiel Elliott on the field, and mandating the dismissal of his case against the NFL. The Court of Appeals opinion cleared the way for Elliott to begin serving a six game suspension.

Elliott was suspended in August for allegedly assaulting an Ohio woman on multiple occasions in July 2016. The incidents were reported to the Columbus Police Department, which investigated alongside the city prosecutor. Although the prosecutor “generally believed” the complainant’s account of “all of the incidents,” Elliott was not arrested and criminal charges were not pursued.

An NFL player does not need to be charged with a crime to face discipline under the league’s personal conduct policy. Merely engaging in prohibited conduct—which includes actual or threatened violence against another person—can subject a player to discipline. The league thus conducted its own investigation of the allegations against Elliott.

NFL investigators interviewed a dozen witnesses, including the complainant, examined photographic evidence, and reviewed thousands of text messages. The league had medical experts opine on the complainant’s injuries, and consulted with a number of independent advisors, including a former player, a former Attorney General, a former U.S. Attorney, and the CEO of an anti-violence initiative.

Elliott denied the allegations, and presented his own account of the events to the investigators and advisors, in which he raised concerns about the complainant’s credibility and motives.

NFL Commissioner Roger Goodell reviewed the evidence and acknowledged the conflicting versions of events, but ultimately concluded that Elliott “used physical force that caused injuries” to the complainant’s face, neck, arms, wrists, hands, hips, and knees. Goodell found that there was no dispute that Elliott and the complainant “were together in the same location on the dates identified,” and that there was no evidence that the injuries were caused by someone else, as Elliott had suggested. Goodell detailed his conclusions in an Aug. 11, 2017, letter, which also announced the six game suspension.

Pursuant to the NFL’s collective bargaining agreement with the NFLPA, Elliott contested Goodell’s decision in an arbitration proceeding, over which former NFL executive Harold Henderson presided from Aug. 29 to 31.

It was during the arbitration hearing that Elliott’s counsel first learned that one of the league’s lead investigators—Kia Roberts—“had concerns about the accuser’s credibility” and concluded there was insufficient evidence to discipline Elliott. Others on the investigative team disagreed, but Roberts’ opinions and conclusion did not make it into the comprehensive investigative report, and may not have been shared with Goodell prior to his issuance of the disciplinary decision. While Elliott’s lawyers were permitted to cross-examine Roberts at the hearing, their requests to compel the testimony of both Goodell and the complainant were denied by the arbitrator. The parties concluded the hearing on Aug. 31, with the arbitrator set to release his decision in the following days.

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Also on Aug. 31—the same day the parties concluded the hearing—the NFLPA filed a lawsuit on Elliott’s behalf, seeking to vacate the expected decision on the grounds that Elliott did not receive a fair hearing, as required by the CBA. When it filed the lawsuit, the NFLPA also filed a motion for an injunction, seeking the immediate stay of Elliott’s suspension. However, the NFLPA did not file suit in New York, where the league offices are based and the arbitration was held. It filed instead in the Eastern District of Texas, not far from the Cowboys’ home stadium in Arlington.

The arbitrator released his decision on Sept. 5, siding with the NFL and upholding Goodell’s suspension of Elliott. On the same day, the Texas court held its hearing on the NFLPA’s injunction request. Three days later, on Sept. 8, the Texas court issued its opinion granting the injunction request, and ruling that the arbitrator’s refusal to compel the attendance and testimony of Goodell and the complainant, “effectively deprived Elliott of any chance at a fundamentally fair hearing.” The court’s order enjoined the NFL from enforcing the suspension, which meant that Elliott could play in the Cowboys’ week 1 game against the rival New York Giants.

The NFL appealed the Texas court’s decision to the 5th Circuit Court of Appeals. The issue on appeal was *not* whether Elliott had been deprived of a fair hearing. Rather, it was whether the Texas court had the power to adjudicate Elliott’s case in the first place.

Federal labor law has long held that a party cannot file a lawsuit to enforce rights under a collective bargaining agreement—and a court cannot exercise jurisdiction over such a lawsuit—until the grievance procedures under that collective agreement have been fully exhausted. Outside of a few limited exceptions, the failure to exhaust those grievance procedures—and in this case receive the arbitrator’s final decision—strips a court of the power to adjudicate the case.

The NFLPA contended that one of those exceptions applied, and that it didn’t have to wait for the arbitrator’s decision before filing suit because the NFL repudiated the grievance process when the arbitrator refused to compel the testimony of Goodell and the complainant. But as the Court of Appeals noted, for the “repudiation” exception to apply, “the NFL would have had to completely refuse to engage in the process.” Since that was not the case here, the exception did not apply.

The 5th Circuit Court of Appeals sided with the NFL and held that since the NFLPA filed the Texas action on Aug. 31, six days before the arbitrator issued his opinion, the Texas court did not have jurisdiction to adjudicate the matter and issue the injunction. The Court of Appeals stated:

The NFLPA’s lawsuit on Elliott’s behalf was premature. The procedures provided for in the collective bargaining agreement between the NFL and NFLPA were not exhausted. The parties contracted to have an arbitrator make a final decision. That decision had not yet been issued.

As there was no final decision, Elliott had not yet exhausted the contracted-for remedies.

The Court of Appeals vacated the injunction and ordered the Texas court to dismiss the NFLPA’s case, and the league announced immediately that the suspension would be enforced.

This dispute is far from over. Now that the arbitrator has issued his opinion and the arbitration process is final, the NFLPA can re-file its claims and a court will not have the same jurisdictional issues. The problem for the NFLPA and Elliott is that on Sept. 5, immediately after the arbitrator issued his opinion, the NFL filed suit in a New York federal

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court seeking to confirm the award issued in the just-concluded arbitration proceeding. The judge in the New York case informally stayed the case, pending the decision of the 5th Circuit Court of Appeals. Once the 5th Circuit made its decision, the NFL sent notice to the New York court seeking to lift the informal stay, and proceed with its case in New York.

The significance of the NFL's New York filing is that the NFLPA, if it now chooses to re-file, will likely have to do so in New York. If it tries to re-file in Texas, the matter will likely be transferred to New York so that the cases—which deal with the same issues—can be consolidated in order to avoid inconsistent results. Given the deference afforded to arbitration decisions generally, and the NFL's precedent for success in New York in the Tom Brady "Deflategate" case, the NFLPA is probably not thrilled with the thought of proceeding in New York.

This is likely why the NFLPA threw a Hail Mary pass on Friday, when it gave notice that it intends to seek a rehearing of its appeal before a full panel of the 5th Circuit Court of Appeals, instead of the three judge panel that issued the opinion on Thursday. These requests are rarely granted, unless the opinion clearly conflicts with another opinion of the same circuit or the U.S. Supreme Court, or it "involves a question of exceptional importance." The NFLPA made the same request of the 2nd Circuit in the "Deflategate" case, and was denied. It remains to be seen how the 5th Circuit will rule, but the NFLPA is facing an uphill battle.

If the 5th Circuit bats down the Hail Mary pass, the NFLPA could seek to have the case reviewed by the U.S. Supreme Court, another Hail Mary, or it could re-file its case anew in New York. Elliott's attorneys have given no indication that they plan to walk away from the dispute.

One thing is certain, protracted litigation will be harmful to all parties involved. The NFL may want to avoid the distraction and bad press and reach a compromise resulting in a reduced suspension. On the other hand, emboldened by the results in the Brady case, confident proceeding in New York, and unwilling to appear weak on domestic violence issues, the NFL may refuse to compromise, and take its chances in court.