

PUBLICATION

Lessons From the Ezekiel Elliott Arbitration

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As most football fans know, the NFL suspended Dallas Cowboys' star running back Ezekiel Elliott for the first six games of the 2017 – 2018 season for violating the league's personal conduct policy. His suspension was based on accusations of domestic violence against his ex-girlfriend on five occasions in 2016. The NFL conducted an investigation into the allegations, and though Elliott was never criminally charged, the NFL found that there was "substantial and persuasive evidence" of the abuse. Based upon the investigative report, NFL Commissioner Roger Goodell issued the six-game suspension. The NFL Players Association (NFLPA) took the matter to arbitration pursuant to their collective bargaining agreement with the NFL.

In a strange legal twist, on August 31, 2017, the NFLPA filed a petition in the U.S. District Court for the Eastern District of Texas to vacate the arbitration award *before* the arbitrator had even issued a decision. The following day, the NFLPA sought an injunction against the NFL in an effort to allow Elliott to play while the court was considering its petition to vacate. As grounds for such relief, the NFLPA alleged that the League orchestrated a conspiracy to punish Elliott over unsubstantiated allegations that did not even lead to any criminal charges. On September 5, 2017, the arbitrator ruled that the NFL had complied with its personal conduct policy in punishing Elliott and upheld the suspension. Despite the arbitrator's ruling, on September 8, 2017, Texas federal judge Amos L. Mazzant (ironically the same judge that overturned to Department of Labor's overtime law) granted the injunction, allowing Elliott to play while the court considers whether to vacate the arbitrator's decision. Judge Mazzant agreed with the NFLPA that Elliott was not granted a fair hearing by the arbitrator, finding that "a cloud of fundamental unfairness followed Elliott," and that "[d]ue to such fundamental unfairness, the court's intervention is justified." The NFL is now appealing the court's injunction.

Arbitration decisions are seldom overturned, and this very public case illustrates what can go wrong with arbitration. Many companies have arbitration agreements in place with their employees, customers or suppliers, and arbitration can be a more efficient and less costly way to decide disputes. The usual standard to overturn an arbitration decision is "if the award is the product of fraud, corruption, or serious misconduct by the arbitrator." In fact, Judge Mazzant found that the facts of the Elliott arbitration, including those noted above, constituted "serious misconduct."

The big takeaway here is that even if you have binding arbitration clauses in place, you still have to make sure any arbitration ends up enforceable – more specifically, that it considers available evidence fairly and does not start out in favor of one side or the other. Since there is usually at least some right of the employer to select an arbitrator (whether that right is conditioned or otherwise restricted or not), it is critically important that you select the right one. An arbitration that is later overturned is going to end up costing more money and time than just going to court in the first place.

Compass Point: Employers should consult with experienced labor and employment counsel to make sure their arbitration clauses are well-drafted and to get advice regarding specific arbitrators to utilize if and when the time comes for arbitration.