EIGHTEENTH ANNUAL
LABOR ARBITRATION CONFERENCE

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Newport Marriott Hotel

OFF-DUTY MISCONDUCT

Moderator: Mary Ellen Shea, Arbitrator
Amherst, Massachusetts

Speakers: Michael D. Chittick, Esq.
Adler Pollock & Sheehan, P.C.
Providence, Rhode Island

Thomas R. Landry, Esq.
Krakow, Souris & Landry, LLC
Boston, Massachusetts
Off-Duty Misconduct

I. The intersection of work and an employee’s “private life”

II. General Arbitral Standard: Proof of off-duty misconduct, even when serious or criminal, does not justify automatic discharge. The employer must show a demonstrable effect on its business. The employer must demonstrate some meaningful nexus between the off-duty conduct and the employee’s employment.

A. What does it mean to be “off-duty”
   1. Did activity occur during working hours?
      a. Employee break-time
   2. Did activity occur on the employer’s property?
      a. What if the employee is in a “cloud”

B. Nexus test
   1. Harm to the employer’s business (direct evidence required?)
      a. Economic harm
      b. Reputation
      c. General considerations
         i. nature of employer’s business
         ii. nature of grievant’s employment
         iii. nature of the conduct
         iv. level of publicity
   2. Adverse effect on the employee’s ability to perform his or her job
      a. Job abandonment
      b. Required licensing and clearances
   3. Leads other employees to refuse to work with the offender
C. Don’t forget “just cause”

D. Impact of federal and state law

1. Constitutional-protected speech

2. State laws restricting discharge or discrimination against employees for engaging in “lawful activity” off the employer’s premises and outside of work hours. (CA, CO and NV)

3. Medical marijuana laws

4. Smoking or use of tobacco products (RIGL 23-20.10-14)

5. “Ban the box” laws

6. Protected concerted activity

E. The Union’s duty of fair representation

III. Application of the off-duty misconduct standard


- CBA between NFL Management Council (NFLMC) and NFL Players Association (NFLPA) is somewhat unique in that it addresses the NFL Commissioner’s authority to discipline players for off-field (i.e., off-duty) misconduct that is “detrimental to the integrity of, or public confidence in, the game of professional football.”

- The “Player Conduct Policy” issued by the NFL Commissioner’s Office pursuant to the rights granted to the NFL under the CBA further empowers the Commissioner to impose disciplinary action on players for off-field conduct that does not result in a criminal conviction “if the credible evidence establishes that [a player] engaged in conduct prohibited by” the Player Conduct Policy

Facts

In July 2016, just prior to the start of Ezekiel Elliott’s standout rookie season with the Dallas Cowboys, Columbus, Ohio police investigated claims by Elliott’s now ex-girlfriend that he had physically abused her on five occasions that month. The Columbus police ultimately concluded that there was insufficient evidence to establish probable cause to arrest Elliott, due to conflicting and inconsistent accounts of the relevant evidence.
The NFL, however, assigned its director of investigations and special counsel for investigations to conduct a separate, independent investigation concerning the domestic violence allegations made against Elliott by his ex-girlfriend. The NFL’s investigation was extensive and included numerous witness interviews. Elliott’s ex-girlfriend was interviewed six times. The investigation resulted in a report issued by the NFL on June 6, 2017. The report summarized the evidence that had been compiled by the investigators; however, it did not contain the investigators’ conclusions regarding the evidence, nor a specific recommendation concerning any discipline to be imposed on Elliott. A meeting among Elliott, his agents and representatives for the NFL and NFLPA was held, at which meeting the NFL’s special counsel for investigations presented the report’s findings. The NFL chose not to have its other investigator, the director of investigations, attend the meeting. The special counsel for investigations summarized the report’s findings; specifically, she represented that of the five separate instances of abuse alleged by Elliott’s ex-girlfriend, only one had been found to be not credible.

Based on the investigators’ findings, the Commissioner, pursuant to his authority under the CBA, decided to suspend Elliott without pay for the first six games of the 2017 NFL season for using “physical force against a woman in the context of an intimate relationship.” The Commissioner based his disciplinary decision “on a combination of photographic, medical, testimonial and other evidence” that he considered “sufficiently credible . . . to establish the facts, even allowing for concerns . . . about [Elliott’s ex-girlfriend’s] credibility.”

Arbitration

Elliott, through his authorized collective bargaining representative, the NFLPA, and pursuant to the applicable CBA, filed for arbitration to appeal his suspension. Pursuant to the arbitration provisions of the CBA, the Commissioner has the unique authority to either appoint himself as arbitrator (as he famously – or infamously – did in the Tom Brady “Deflategate” case last year) or to designate another arbitrator to hear the case. In the Elliott case, the Commissioner elected to designate Harold Henderson to serve as arbitrator. After a three-day hearing, Arbitrator Henderson affirmed the suspension and denied Elliott’s appeal.

Subsequent Litigation

Despite the arbitration decision denying Elliott’s appeal, Elliott has played all season as the result of first, a preliminary injunction issued by a federal district judge for the Eastern District of Texas, and subsequently, pursuant to a temporary restraining order issued by U.S. District Judge Paul A. Crotty of the United States District Court for the Southern District of New York. In granting the NFLPA’s requests to stay the discipline imposed on Elliott by the Commissioner and affirmed by Arbitrator Henderson, the federal courts in Texas and New York largely relied on the notion that Elliott did not receive a “fundamentally fair” arbitration hearing. However, on October 30, 2017, Judge Crotty’s colleague, U.S. District Judge Katherine Polk Failla, denied the NFLPA’s request to convert
the TRO into a preliminary injunction. In her decision, Judge Failla expressed skepticism that the “fundamental fairness” standard of review for labor arbitration decisions concerning discipline urged by the NFLPA is appropriate, and cited the well-established, and significantly more deferential, standard of review typically utilized by courts when reviewing labor arbitration decisions. With this backdrop, Judge Failla determined that the NFLPA had failed to meet its burden to justify continued injunctive relief, and therefore denied the NFLPA’s request for a preliminary injunction staying Elliott’s suspension. Accordingly, unless the Second Circuit Court of Appeals issues an order vacating Judge Failla’s ruling prior to this Sunday’s NFL games, Elliott will start serving his six-game suspension on Sunday, November 5.

B. *Terzian v. Lombardi, as Treasurer for City of Providence*

**Facts**

Boghos Terzian was a laborer for the City of Providence Water Department and a member of the Laborers’ Union, Public Employees Union No. 1033. In August 2007, while off duty, Terzian was arrested by the Providence police and charged with three counts of felony assault with a dangerous weapon and one count of possessing a pistol without a license. Based on the criminal charges, the City suspended Terzian without pay. The union grieved Terzian’s suspension. After proceeding through steps 1 and 2 of the grievance procedure, the City and union agreed to hold the grievance in abeyance pending the outcome of the criminal proceedings.

In May 2008, a jury found Terzian guilty of all four criminal charges against him. Terzian was sentenced to eight years at the ACI, with one year to serve and seven years suspended. Thereafter, in September 2008, the City notified Terzian and the union that it would hold a pre-termination hearing due to Terzian’s conviction. At the pre-termination hearing, the union argued that the hearing should be continued because procedural due process required Terzian to be present. The union also argued that it was inappropriate for the City to terminate Terzian’s employment because there was no nexus between Terzian’s off-duty misconduct and his job or the workplace.

The City rejected the union’s arguments and terminated Terzian’s employment on October 31, 2008. In its letter informing Terzian of his termination, the City stated that Terzian’s incarceration and resultant unapproved absences rendered him “unable to report to work and perform his job duties.”

**Terzian’s “Hybrid” Labor Action**

The union grieved Terzian’s termination, but ultimately decided not to pursue the matter in arbitration. Terzian, having been released from prison, sued the City and his union in a so-called “hybrid” action: he simultaneously claimed that the
City breached the CBA by terminating his employment and that the union violated its duty of fair representation to him by declining to take the grievance contesting his termination to arbitration. In a decision rendered on May 28, 2015, Rhode Island Superior Court Judge Brian Van Couyghen granted summary judgment to the City and the union, reasoning, in part, as follows:

“[Terzian] was convicted of a violent felony and missed at least six months of work due to his incarceration without excusal. Thus, [Terzian] has not demonstrated that the Union’s decision or action was so far outside the range of reasonableness as to be wholly irrational. To the contrary, the Union made the entirely reasonable decision not to pursue arbitration given the seriousness of [Terzian’s] criminal conviction and incarceration resulting in a prolonged, unexcused absence from work.”

The “Twist” – Terzian’s Convictions Vacated by RI Supreme Court

Terzian appealed the Superior Court’s decision granting summary judgment in favor of the City and the union and the case is now pending before the Rhode Island Supreme Court. While at first blush it would appear that the City and union should have a near “slam dunk” victory, the Supreme Court has thrown the parties a potentially nasty curve ball: on June 23, 2017, the Supreme Court vacated the judgments of conviction against Terzian and remanded the matter to the Superior Court for a new trial. The Supreme Court ruled that much of the incriminating evidence on which Terzian’s convictions were based was obtained via a warrantless entry and search into his home by the Providence police, in violation of his rights under the Fourth Amendment to the United States Constitution and Article 1, Section 6 of the Rhode Island Constitution.

What Now?

Because the convictions against him have now been vacated by the Rhode Island Supreme Court, from a criminal law perspective Terzian has not been convicted of anything, let alone a felony. Moreover, as the criminal case stands now, Terzian was essentially wrongfully imprisoned at the ACI.

How, if at all, does the development in Terzian’s criminal case affect his hybrid labor action against the City and his union?

The City based its termination decision on Terzian’s inability to report to work due to his incarceration at the ACI. Now that the Supreme Court has vacated the convictions on which Terzian’s incarceration was based, is the City able to maintain its stated grounds for termination?

What if the City now took the position that regardless of whether or not Terzian’s incarceration at the ACI was right or wrong, Terzian’s termination was nevertheless justified on the basis of Terzian’s off-duty misconduct (even though that misconduct has not resulted in a criminal conviction)? Would the City be on solid footing with this argument?
What about Terzian’s duty of fair representation claim against the union – did the Supreme Court breathe new life into this claim when it vacated the criminal convictions?

Should the union have known that the convictions were based on dubious evidence?

Should unions be charged with the responsibility of monitoring criminal proceedings in which its members are defendants, if the outcome of those proceedings is likely to affect the member’s employment status?