

1-1-2013

Sleeping With the Enemy: The NFLPA and NFL's Lockout Side-Agreement Subjecting Cedric Benson to a Suspension for His Conduct During the Lockout Violated the Union's Duty of Fair Representation

José Marrero

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/lelb>

 Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Marrero, José. "Sleeping With the Enemy: The NFLPA and NFL's Lockout Side-Agreement Subjecting Cedric Benson to a Suspension For His Conduct During the Lockout Violated the Union's Duty of Fair Representation." *Labor & Employment Law Forum* 3, no. 2 (2013): 367-379.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Labor & Employment Law Forum* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

SLEEPING WITH THE ENEMY: THE NFLPA AND NFL'S LOCKOUT SIDE- AGREEMENT SUBJECTING CEDRIC BENSON TO A SUSPENSION FOR HIS CONDUCT DURING THE LOCKOUT VIOLATED THE UNION'S DUTY OF FAIR REPRESENTATION

JOSÉ MARRERO*

"I think he has way too much power."¹ Terrell Suggs' statement summarizes a growing attitude amongst players and fans who perceive the commissioner of the National Football League ("NFL," "League") as a dictator.² Legal scholars have also fearfully suggested that the commissioner's role as the prosecutor, judge, and jury constitutes broad power akin to that of a totalitarian regime.³

Through its ability to discipline players, the NFL has the power to fine or suspend players like Michael Vick for their actions off the field.⁴ The League has acquired this power over discipline through a provision in the collective bargaining agreement ("CBA") which allows the commissioner

* Trial attorney at the office of the Attorney General for the District of Columbia. JD, May 2012, American University, Washington College of Law ; B.S. Industrial and Labor Relations, 2007, Cornell University. I want to thank the wonderful staff of the *Labor and Employment Law Forum*, especially Jennifer Brown, Kyle deCant, Ben Iwasaki, Pascal Moleus, William Kudrle, and Josh Tucker for their work and advice on this piece. I am especially grateful to my parents for endlessly encouraging me and to Katherine Bosch, Dennis Tristani, and Greg Reyes for their daily support.

¹ Keith Van Valkenberg, *Power Mad*, ESPN (Dec. 28, 2012), http://espn.go.com/nfl/story/_id/8769645/has-nfl-commissioner-roger-goodell-power-gone-too-far-espn-magazine (reporting that many players on the Baltimore Ravens and Pittsburgh Steelers have taken issue with some of NFL Commissioner Roger Goodell's decisions to fine or suspend players).

² See *James Harrison Rips Roger Goodell*, ESPN (July 14, 2011, 8:29 AM), http://espn.go.com/nfl/story/_id/6764826/james-harrison-pittsburgh-steelers-blasts-roger-goodell-magazine-interview (referring to Goodell as "the devil" and "a dictator"); see also Tom Weir, *Brian Urlacher Puts 'Dictatorship' Tag on Roger Goodell*, USA TODAY (Nov. 19, 2010, 3:14 PM), <http://content.usatoday.com/communities/gameon/post/2010/11/brian-urlacher-roger-goodell-dictator/1> (quoting Brian Urlacher as labeling the NFL as a "dictatorship [because] if Goodell wants to fine you he's going to fine you").

³ Robert Ambrose, *The NFL Makes it Rain: Through Strict Enforcement of its Conduct Policy, the NFL Protects its Integrity, Wealth, and Popularity*, 34 Wm. Mitchell L. Rev. 1069, 1111 (2008).

⁴ *NFL Suspends Michael Vick Indefinitely*, CNN (Aug. 24, 2007), http://articles.cnn.com/2007-08-24/us/michael.vick_1_phillips-and-vick-bad-newz-kennels-animal-fighting-venture?_s=PM:US (noting that, when the NFL suspended Michael Vick indefinitely, Roger Goodell sent the quarterback a letter informing him that he was suspending him for "conduct that was not only illegal, but also cruel and reprehensible").

to address “conduct on the playing field . . . [and] conduct detrimental to the integrity of, or public confidence in the game of professional football.”⁵

However, the commissioner’s jurisdiction over discipline apparently extends beyond the boundaries of the NFL. The Constitution and By-Laws of the NFL authorize the commissioner to take appropriate steps when non-members of the League are guilty of conduct detrimental to the League or even to professional football.⁶ The League’s interpretation of this section of its Constitution—or of the CBA’s “conduct detrimental” provision—has recently been under serious scrutiny as a result of decisions to discipline individuals who were not employed by the League at the time of their alleged detrimental behavior.⁷ For example, the League cited to the broad provision when it suspended former Ohio State University quarterback Terrelle Pryor in 2011 for conduct that occurred while he was in college—conduct that occurred before he was ever employed by the NFL.⁸ Similarly, the League recently suspended Cedric Benson after he was convicted of an assault charge stemming from an incident that occurred during the NFL lockout, while Benson was technically unemployed.⁹ This incident poses more serious questions because the National Football League Players Association (“NFLPA”) agreed to allow the League to discipline second-time offenders like Benson for their conduct during the lockout.¹⁰ However, while Benson filed a charge against the NFLPA for violating its duty of fair representation, he later withdrew his case, confirming how powerful the League may be.¹¹

Despite whatever reasons Cedric Benson had for withdrawing the case, this note will argue that the NFLPA committed an unfair labor practice under the National Labor Relations Act (“NLRA”) when it signed a side-

⁵ Nat’l Football Players Ass’n, Collective Bargaining Agreement Between the NFL Management Counsel and the NFL Players Association, art. XLVI, § ¶ a, at 204 (2011), available at <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

⁶ See Constitution and By-Laws of the National Football League, Art. 8.6, at 29 (1970) (Revised 2006) (“The Commissioner is authorized, at the expense of the League, to hire legal counsel and take or adopt appropriate legal action or such other steps or procedures as he deems necessary and proper in the best interests of either the league or professional football, whenever any party or organization not a member of, employed by, or connected with the league or any member thereof is guilty of any conduct either detrimental to the league, its member clubs or employees, or to professional football.”).

⁷ See Chris Mortenson, *Terrelle Pryor to Appeal Ban*, ESPN (Sept. 9, 2011, 9:02 AM), http://espn.go.com/nfl/story/_/id/6949048/oakland-raiders-terrelle-pryor-appeal-five-game-suspension-sources-say.

⁸ See discussion in *infra* Section IB.

⁹ See discussion in *infra* Section IC.

¹⁰ See *id.*

¹¹ National Football League Players Association (Cincinnati Bengals) (09-CB-065431, 2011). Docket activity available at <http://www.nlr.gov/case/09-CB-065431#docket-footnote>.

agreement subjecting Benson to punishment for actions that occurred (1) while the League was not operating and (2) while Benson was a free agent.¹² Had Benson maintained his case before the Board, the Board should have found the NFLPA to be in violation of the NLRA. Part I provides brief background information regarding the NFL's authority to discipline, the recent decisions to suspend Terrelle Pryor and Cedric Benson, and the NFLPA's duty to provide fair representation.¹³ Part II argues that the NFLPA committed an unfair labor practice and breached its duty to provide fair representation to Cedric Benson because (1) negotiating away Benson's rights runs counter to the objectives of the NLRA and an employee union's duty to provide fair representation; (2) when the Union conceded jurisdiction over Benson's lockout behavior, it allowed the NFL to have unprecedented power over behavior that no sports league has ever disciplined; and (3) it defies logic that the Union would allow the League to discipline Benson for conduct that occurred when he could not earn a paycheck from the League.¹⁴ Part III examines the likely policy implications of the League's recent decisions to discipline players like Terrelle Pryor and Cedric Benson.¹⁵ Ultimately, this note concludes that the NFL's decisions to suspend Benson and Pryor set a dangerous precedent, and the Union's consent to subject Benson to the League's discipline—as opposed to contesting it—is violative of the labor organization's duty to provide fair representation to all of its members.¹⁶

I. BACKGROUND

A. The NFL's Authority to Discipline Players [and Non-Players]

The above mentioned provisions of the NFL Constitution and By-Laws¹⁷ and the collective bargaining agreement between the NFL and NFLPA¹⁸ provide the League with weapons for disciplining any conduct that is detrimental to the integrity of the League or professional football. Courts have affirmed the League's broad disciplinary powers.¹⁹ In *Holmes v.*

¹² This note will focus on the legality of the Union's decision to submit Benson to league jurisdiction for his lockout behavior. Any possible legal claims against the NFL will not be discussed because, as noted in *infra* Section IC, an arbitrator has already ruled in favor of the NFL in a grievance filed by Benson. The running back's NLRB claim against the Union has not been decided and presents a more unique legal issue.

¹³ See discussion in *infra* Section I.

¹⁴ See discussion in *infra* Section II.

¹⁵ See discussion in *infra* Section III.

¹⁶ See discussion in *infra* Section IV.

¹⁷ See *supra* note 6.

¹⁸ See *supra* note 5.

¹⁹ See *Nat'l Football Players Assoc. v. N.L.R.B.*, 503 F.2d 12, 15-16 (8th Cir. 1974)

National Football League,²⁰ a federal district court denied an NFL player's constitutional challenge alleging he was not afforded his full due process rights when the commissioner, who was appointed by the CBA as the arbitrator for drug appeals, upheld his suspension.²¹ The court noted that the Commissioner's power stemmed from the rules of a drug program that the Union and the NFL had agreed to as part of the CBA.²² Therefore, because the commissioner's decision was consistent with the CBA, the plaintiff was entitled to minimal due process protection.²³ In response to *Holmes*, an expert in the field of sports law suggested that "[i]t is evident . . . that judges are not much inclined to overturn decisions made by Commissioners about . . . player behavior that the Commissioner believes is a threat to the integrity of the game."²⁴ The extensive provisions in the CBA and the NFL Constitution, and the judicial deference to the commissioner's decisions related to the integrity of the game, make Roger Goodell a very powerful man.²⁵

B. Terrelle Pryor

The NFL Commissioner's controversial authority reached unprecedented levels in 2011 when he suspended Terrelle Pryor, the Oakland Raiders'

(recognizing that the league has the power to fine players and that disciplinary actions are reviewable pursuant to the NFL Constitution and By-laws); see also Suzanne Janusz, Comment, *The NFL's Strict Enforcement of its Personal Conduct Policy for Crimes Against Women: A Useful Tool for Combating Violence or an Attempt to Punish Morality*, 2 Seton Hall J. Sports & Ent. L. 93, 125 (2012) (interpreting the Eighth Circuit's decision in *Nat'l Football Players Assoc. v. N.L.R.B.* and recognizing that while "owners cannot unilaterally take actions concerning wages, hours, or working conditions without negotiating with the NFLPA . . . the commissioner can impose disciplinary rules unilaterally by virtue of his authority to create policy with respect to the provisions of the NFL's Constitution and Bylaws and their enforcement"). *C.f. Oakland Raiders v. Nat'l Football League*, 32 Cal. Rptr. 3d 266, 285 n. 21 (Cal. Ct. App. 2005) (characterizing *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978) by noting that "the Seventh Circuit noted that the baseball commissioner had *extremely broad authority* over the affairs of the professional baseball league") (emphasis added).

²⁰ 939 F. Supp. 517 (N.D. Tex. 1996).

²¹ *See id.*

²² *Id.* at 525.

²³ *See id.* (concluding that "Holmes has not alleged that the Commissioner's ruling was procured by the parties' fraud, or by dishonesty, bad faith," and that the suspension "drew its essence from the Drug Program and did not constitute the Commissioner's own brand of industrial justice").

²⁴ PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: TEXT, CASES, PROBLEMS* 61 (3d ed. 2004).

²⁵ *See* Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 Tex. Rev. Ent. & Sports L. 23, 54 (2008) (noting that, while there have been "several cases in the NBA and MLB challenging commissioner 'best interest' rulings, such challenges are absent from football").

third-round draft pick in the 2011 NFL Supplemental Draft.²⁶ The NCAA suspended the former Ohio State University (“OSU”) quarterback for five games when he was found to have violated the association’s rules when he sold memorabilia while still at OSU.²⁷ Since Pryor would not be able to comply with his five-game suspension at OSU once he was selected in the NFL Supplementary Draft, the commissioner insisted that Pryor’s behavior—which occurred before the quarterback was ever employed by an NFL team—undermined the integrity of the NFL draft, and decided to suspend Pryor for five games.²⁸ Many have criticized the Commissioner’s decision, claiming that it sets a precedent that retroactively allows the League to fine or suspend current NFL players for their past NCAA violations.²⁹

C. Cedric Benson

Cincinnati Bengals running back Cedric Benson’s suspension is perhaps even more eye-opening, as the NFLPA actually agreed to subject him to discipline for an event that occurred (1) off the field, (2) while the League was not operating, and (3) while Benson was a free agent.³⁰ On July 17, 2011, Benson was arrested after he allegedly punched his former roommate in the face.³¹ The incident occurred four months into the NFL lockout and

²⁶ See Chris Mortenson, *Terrelle Pryor to Appeal Ban*, ESPN (Sept. 9, 2011, 9:02 AM), http://espn.go.com/nfl/story/_id/6949048/oakland-raiders-terrelle-pryor-appeal-five-game-suspension-sources-say.

²⁷ *Id.*

²⁸ See Mike Florio, *In Suspending Pryor, League Relied on General Provisions Regarding ‘Detrimental Conduct’*, NBC SPORTS (Aug. 18, 2011, 11:02 AM), <http://profootballtalk.nbcsports.com/2011/08/18/in-suspending-pryor-league-relied-on-general-provisions-regarding-detrimental-conduct/> (reporting that, in suspending Pryor, Goodell relied on Article 8.6 of the NFL Constitution and By-laws, which authorizes the commissioner to take appropriate steps when non-members of the league are guilty of conduct detrimental to the league or to professional football).

²⁹ See, e.g., *Roger Goodell Gone Too Far*, HUFFINGTON POST (Aug. 22, 2011, 2:39 PM), http://www.huffingtonpost.com/2011/08/22/tiebreak-goodell-nfl-pryor-suspension_n_933105.html (suggesting that Pryor’s suspension is “all about the commish”); Tim Keown, *Roger Goodell Merges NFL, NCAA*, ESPN (Aug. 18, 2011, 5:00 PM), http://espn.go.com/espn/commentary/story/_id/6874169/terrelle-pryor-suspension-nfl-ncaa-merger (indicating that Goodell’s decision merges all NCAA rules with NFL rules).

³⁰ *Lawyers in Cedric Benson Case Spar*, ESPN (July 21, 2011, 10:51 AM), http://espn.go.com/nfl/story/_id/6789751/lawyers-cedric-benson-cincinnati-bengals-claiming-extortion-threat.

³¹ See Gregg Rosenthal, *More Details Come out About Benson’s Arrest*, NBC SPORTS (July 18, 2011, 1:57 PM), <http://profootballtalk.nbcsports.com/2011/07/18/more-details-come-out-about-cedric-benson/>; Mike Florio, *Cedric Benson Arrested for Assault, Again*, NBC SPORTS (July 17, 2011, 11:56 AM), <http://profootballtalk.nbcsports.com/2011/07/17/cedric-benson-arrested-again> (explaining accusations made

after the Union had decertified.³² About two weeks after Benson's arrest, the Union recertified and was again able to operate as the players' exclusive bargaining agent with the League.³³ Shortly thereafter, the League and the Union agreed to a new collective bargaining agreement.³⁴

The Union and the League also signed an additional side-agreement, exempting first time offenders from League discipline for off-the-field behavior that occurred during the lockout.³⁵ In exchange, however, the agreement subjected eight players who were repeat offenders—including Benson—to League discipline for their behavior during the lockout.³⁶ About a month later, Benson was found guilty of assault, and sentenced to twenty days in prison.³⁷ The running back was subsequently released for good behavior after serving a five-day sentence.³⁸

While Benson did not have to miss any playing time due to his sentence because he completed his term of incarceration prior to the start of the NFL's regular season, the mutually agreed-upon side agreement did keep Benson off the field for a small part of the season. Three weeks into the season, the League suspended Benson for three games for his conduct during the lockout.³⁹ Benson appealed the decision and the League reduced

against Pryor).

³² See John Clayton, *NFL to Vote Thursday*, ESPN (July 21, 2011, 5:48 PM), http://espn.go.com/nfl/story/_id/6789837/nfl-lockout-owners-vote-thursday (noting that the NFL lockout began on March 11, 2011); *Report: NFL locks out players, who file suit*, ESPN (Mar. 12, 2011, 4:26PM), <http://sports.espn.go.com/nfl/news/story?id=6205936> (explaining that the NFLPA decertified, thereby declaring itself out of the business of representing NFL players).

³³ See *Report: NFLPA Recertified as Union*, ESPN (July 30, 2011, 10:55 PM), http://espn.go.com/nfl/story/_id/6818756/report-nfl-players-union-recertified-final-negotiations-nfl (noting that the NFLPA was recertified as the NFL players' exclusive bargaining representative).

³⁴ See, e.g. Goodell, *Smith Sign 10-Year Collective Bargaining Agreement*, CBS SPORTS (Aug. 5, 2011), <http://cbssports.com/nfl/story/15401364/goodell-smith-sign-10-year-collective-bargaining-agreement>. (noting that the NFL and NFLPA had reached a new collective bargaining agreement).

³⁵ Mike Florio, *NFL Attempts to Explain August 4 Letter Agreement*, NBC Sports (Oct. 29, 2011, 10:07 PM), <http://profootballtalk.nbcsports.com/2011/10/29/nflpa-attempts-to-explain-august-4-letter-agreement>.

³⁶ Mike Florio, *Fight Looming between NFL, NFLPA over Lockout Arrests*, NBC SPORTS (Sept. 24, 2011, 10:07 PM), <http://profootballtalk.nbcsports.com/2011/09/24/fight-looming-between-nfl-nflpa-over-lockout-arrests/>; see also *Source: Cedric Benson Files vs. NFLPA*, ESPN (Sept. 25, 2011, 11:21 PM), http://espn.go.com/nfl/story/_id/7018584/cedric-benson-cincinnati-bengals-files-nlr-b-charge-vs-nflpa-source-says (listing Adam "Pacman" Jones, Johnny Jolly, Aqib Talib, Clark Haggan, Albert Haynesworth, Kenny Britt, and Brandon Underwood as the other seven players).

³⁷ Joe Reedy, *Bengals' Cedric Benson Released from Texas Jail*, USA TODAY (Sept. 4, 2011, 1:47 AM), <http://www.usatoday.com/sports/football/nfl/bengals/story/2011-09-03/Bengals-Cedric-Benson-released-from-Texas-jail/50252194/1>.

³⁸ See *id.*

³⁹ Mike Florio, *Cedric Benson Gets Three Game Suspension*, NBC SPORTS (Sept. 22, 2011, 4:26 PM), <http://profootballtalk.nbcsports.com/2011/09/22/cedric-benson-gets-three-game-suspension/>.

the punishment to a one-game suspension.⁴⁰ Benson also unsuccessfully filed a grievance against the League, arguing that the NFL did not have jurisdiction over Benson's actions during the lockout.⁴¹ Finally, Benson filed an unfair labor practice grievance with the National Labor Relations Board ("NLRB") alleging that the Union unfairly agreed to subject him to punishment, though the General Counsel of the NLRB accepted Benson's withdrawal on November 22, 2011.⁴²

D. The NFLPA's Duty of Fair Representation

The NLRA provides employees of an organization, including a professional sports league, with the right to organize themselves into a union, to engage in collective bargaining with their employer, and, at times, to strike.⁴³ Section 8 of the NLRA prohibits employers from interfering with these rights, deeming such interference an unfair labor practice.⁴⁴ While not explicitly mentioned in the NLRA, one of the protections that the NLRB and the Supreme Court have recognized as inherent to these worker protections is the union's duty of fair representation.⁴⁵ The union owes this duty to all employees—even non-union members—during the negotiation and execution of the collective bargaining agreement.⁴⁶

A union breaches its duty of fair representation if its conduct toward an employee is "arbitrary, discriminatory, or in bad faith."⁴⁷ A union's actions are arbitrary only if, "in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational."⁴⁸ Moreover, union discriminatory conduct violates the duty of fair representation if it is invidious.⁴⁹ Finally, a violation on the basis of bad faith "requires a showing of fraud, deceitful

⁴⁰ See *NFL Attempts to Explain August 4 Letter Agreement* *supra* note 35.

⁴¹ See *id.*

⁴² See *id.* National Football League Players Association (Cincinnati Bengals) (09-CB-065431, 2011). Docket activity available at <http://www.nlr.gov/case/09-CB-065431#docket-footnote>.

⁴³ See WEILER & ROBERTS, *supra* note 24, at 277 (citing National Labor Relations Act, 18 U.S.C. § 151 et. seq. (2006)).

⁴⁴ *Id.*

⁴⁵ See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (outlining union activity that constitutes a breach of the duty of fair representation); *Hughes Tool*, 104 N.L.R.B. 318, 329 (1953) (holding that a union could not charge non-union employees a flat-rate fee for handling their grievances).

⁴⁶ See *Hughes Tool*, 104 N.L.R.B. at 327 (stating that "all employees in an appropriate unit are entitled, upon their request, to the impartial assistance of the certified representative in the filing and adjustment of grievances.").

⁴⁷ *Vaca*, 386 U.S. at 190.

⁴⁸ *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 67 (1991).

⁴⁹ See *Vaca*, 386 U.S. at 182 (noting that "[it] would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination.").

action, or dishonest action.”⁵⁰ Accordingly, this note focuses on arbitrary behavior because there is no evidence that the Union engaged in invidious discriminatory conduct or fraud, deceit, or dishonesty.

A union’s behavior is arbitrary if it reflects a reckless disregard for the rights of the individual employee, “but not if it represents only simple negligence.”⁵¹ The union’s representation does not need to be error-free, as courts have feared that holding labor organizations to a high standard of care would hurt their ability to vigorously represent employees.⁵² In *Peterson v. Kennedy*, for example, the Ninth Circuit Court of Appeals held that the NFLPA did not breach its duty of fair representation when it provided a player with incorrect advice on whether to file an injury or non-injury grievance, resulting in the Statute of Limitations running out before the player could file his grievance.⁵³ In dismissing the plaintiff’s claim, the Court noted that the NFLPA’s error was in mishandling a complex issue and that the court would not hold the Union to a standard of perfection.⁵⁴ In light of this precedent, Cedric Benson’s claim against the NFLPA was required to meet a high standard: the Union’s conduct must have been egregious enough to overcome this significant hurdle.⁵⁵

II. THE UNION COMMITTED AN UNFAIR LABOR PRACTICE WHEN IT AGREED TO SUBJECT BENSON TO A SUSPENSION FOR HIS CONDUCT DURING THE LOCKOUT

The NFLPA breached its duty to fairly represent Cedric Benson when it engaged in an agreement with the NFL allowing the League to discipline Benson for his conduct during the lockout. The Union breached its duty in three ways. First, when the Union conceded jurisdiction to the NFL over Benson’s behavior during the lockout, it gave the League unprecedented power over player discipline. The NFL’s jurisdiction over Benson’s lockout behavior is contrary to other leagues’ approaches to lockout discipline. Second, the way the NFLPA negotiated away Benson’s rights runs counter to the objectives of the NLRA and its duty to provide fair representation. Third, it defies logic that Benson could have reasonably anticipated the League to have the ability to discipline him for conduct that occurred when he could not earn a paycheck from that same employer.

⁵⁰ *Mock v. TG & Y Stores Co.*, 971 F.2d 522, 531 (10th Cir. 1992) (citing *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971)).

⁵¹ *See Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985) (citing *Robesky v. Qantas Empire Airwaus Ltd.*, 573 F.2d 1082, 1089-90 (9th Cir. 1978)).

⁵² *See id.* at 1259 (noting that the Court was reluctant subject union representatives to a higher standard due to policy considerations).

⁵³ *Id.* at 1244.

⁵⁴ *Id.*

⁵⁵ *See* discussion in *infra* Section IC.

These arguments will be discussed in turn.

First, a look at how sports leagues have handled player conduct during lockouts provides a valuable perspective on whether a reasonable employee would ever expect to be disciplined for off-the-field conduct that occurred while the League locked him out. For example, two summers ago, Michael Beasley, an NBA starter who was employed by the Minnesota Timberwolves at the time, was arrested for possession of marijuana during the NBA lockout.⁵⁶ Like Benson, Beasley was a repeat offender.⁵⁷ However, two weeks before Benson was arrested for assault, Tim Frank, the NBA's Senior Vice-President of Basketball Communications, openly said that the League's anti-drug agreement was not in effect during the lockout.⁵⁸ Sports writers have commented that the decision to discipline Benson is the first instance of a league punishing a player for behavior that occurred during the lockout.⁵⁹

The notion that the NFLPA signed an agreement that gave the NFL extensive jurisdiction over Benson's lockout behavior is therefore unprecedented. Even if the League's decision to suspend Benson could have survived a legal challenge because of the League's broad bylaws and judicial deference to the commissioner's interpretation of the League's "best-interest" provisions,⁶⁰ the Union's side-agreement subjecting Benson to discipline amounts to inefficient representation. Facilitating the League's expansion of its totalitarian desires constitutes the exact behavior that the NLRA was designed to prevent unions from engaging in with rival employers.⁶¹ The Union's actions amount to more than the mere negligence referred to in *Peterson v. Kennedy*.⁶² Labor unions have a duty to act in good faith to represent the interests of their members to the best of their abilities.⁶³ Permitting the League to exercise jurisdiction over lockout behavior—jurisdiction that no league has ever exercised or even claimed that it had—and thus expanding the commissioner's power to

⁵⁶ *Despite Bust, Michael Beasley Avoids NBA Substance-Abuse Policy*, AOL SPORTING NEWS (Jul. 7, 2011, 12:20 PM), <http://aol.sportingnews.com/nba/story/2011-07-07/despite-bust-michael-beasley-avoids-nba-substance-abuse-policy>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Ryan Wilson, *Cedric Benson Gets 3 Game Suspension*, CBS Sports (Sept. 22, 2011, 6:24 PM), <http://eye-on-football.blogs.cbssports.com/mcc/blogs/entry/22475988/32182757/?tag=contentMain;contentBody>. (noting that Benson's suspension is the first instance of the NFL punishing a player for activity that occurred during a lockout).

⁶⁰ Benson filed a grievance against the league and an arbitrator upheld the league's decision to suspend him. See Andrew Brandt, *Benson Grievance Against NFL Rejected*, National Football Post (Oct. 29, 2011, 5:50 PM), <http://www.nationalfootballpost.com/Benson-grievance-against-NFL-rejected.html>.

⁶¹ See WEILER & ROBERTS, *supra* note 24, at 277.

⁶² See 771 F.2d 1244, 1254 (9th Cir. 1985) (noting that simple negligence will not be enough for a plaintiff to succeed on a claim against a union representative).

⁶³ See 29 U.S.C. § 151-169.

unprecedented levels is far outside any range of reasonableness for union behavior.⁶⁴

Second, Benson's case involved exactly what the duty of fair representation was designed to protect: the concern that individual players would not be deprived of all avenues of protecting their interests.⁶⁵ Here, the Union not only failed to fairly represent Benson's interests, but actually bartered away his right to be free from the League's decision to discipline him for his conduct during the lockout, effectively abandoning him.⁶⁶ The Union owes the duty of fair representation to the Cedric Bensons, Kenny Britts, and Michael Vicks of the League as much as it owes it to a Tom Brady or a Peyton Manning.⁶⁷ Under federal labor law, a union cannot disregard the interests of a player simply because the union does not like the employee, or, alternatively, because the employee does not like or is not a member of the union.⁶⁸ Allowing the Union to decide that it will negotiate away Benson's right to play so that other players are not disciplined for their conduct during the lockout is troublesome for the same reason: it allows the Union to arbitrarily support some players more than others.⁶⁹ By choosing not to punish first-time offenders while simultaneously subjecting repeat offenders, like Benson, to the League's punishment, the Union discriminated against a select population within the bargaining unit.⁷⁰ The duty of fair representation does not permit selective lawyering,⁷¹ and

⁶⁴ See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

⁶⁵ See *Delcostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 n.14 (1983) (holding that "[i]n such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization 'to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'") (citing *Vaca v. Sipes*, 386 U.S. at 177).

⁶⁶ *Cedric Benson Files vs. NFLPA*, ESPN (Sept. 25, 2011, 11:21 PM), http://espn.go.com/nfl/story/_/id/7018584/cedric-benson-cincinnati-bengals-reportedly-files-nlrb-charge-vs-nflpa.

⁶⁷ See, e.g., Michael Silver, *Goodell Overreaches with Personal Conduct Policy*, YAHOO! SPORTS (Aug. 25, 10:27 AM), http://sports.yahoo.com/nfl/news?slug=ms-silver_player_conduct_britt_cba_union_082511 ("[DeMaurice] Smith . . . has to understand that advocating for the interests of guys like Britt, Talib, Brandon Marshall, Cedric Benson and, yes, Michael Vick and Ben Roethlisberger is part of the gig.").

⁶⁸ See *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974) (finding that an airline workers' union breached its duty of fair representation when it discriminated against passenger-relations agents because they were not members of the union); see also Silver, *supra* note 67 (acknowledging that when former NBA player Latrell Sprewell choked his coach and was suspended for a full season, the NBA Players' Association persuaded an arbitrator to reduce the suspension to 68 games because "Sprewell was a dues-paying member of the union, and it was the *players' association's job* to fight for his interests") (emphasis added).

⁶⁹ See *Vaca*, 386 U.S. at 190 (1967) (highlighting that a union cannot arbitrarily select which employees it will represent).

⁷⁰ See Florio, *supra* note 36 (describing the seemingly disparate treatment the first time offenders received with the penalty imposed upon Benson).

⁷¹ See *id.* (recognizing that a union breaches its duty of fair representation if its

precedent holds that this deliberate abandonment of Benson's rights constituted an unfair labor practice.⁷²

Third, a player who was a free agent during an employer-instituted lockout could not have reasonably expected to later be disciplined for his behavior during that period. At the very least, the Union could have held the position that the League lost its ability to punish the players when it decided to lock them out.⁷³ Alternatively, when the Union was discussing the side-agreement with the NFL, it had a duty to inform Benson that he could be subject to the long-arm jurisdiction of the League for his behavior during the lockout.⁷⁴ The Union did not inform Benson of this problem, instead signing a side-agreement that would ultimately subject him to a one-game suspension.⁷⁵ The fact that the League could discipline Benson during a time when the player did not have a right to a paycheck or medical benefits defies logic. Tim Frank's announcement that the NBA had no jurisdiction over Michael Beasley's lockout behavior is a reasonable indication that neither Cedric Benson nor any athlete would have thought that Goodell had the authority to punish the running back for his behavior during the lockout.⁷⁶ The NFLPA's concession in this matter sets a dangerous precedent.

III. THE LEAGUE'S DECISIONS TO SUSPEND PRYOR AND BENSON SET A DANGEROUS PRECEDENT REGARDING THE COMMISSIONER'S POWER

Gabe Feldman, an associate professor and director of the sports law program at Tulane University Law School,⁷⁷ commented on the potential implications of a league telling its players "you cannot be paid while we lock you out but you can be punished."⁷⁸ Unfortunately for the players,

conduct toward a member is arbitrary, discriminatory, or in bad faith).

⁷² See *Aguinaga v. United Food and Commercial Workers Int'l Union*, 993 F.2d 1463, 1471 (10th Cir. 1993) (noting that bartering away plaintiffs' interests constituted a breach of the duty of fair representation when the union signed a side-agreement releasing employees from their right to sue the employer after it reopened a plant with non-union employees).

⁷³ See *Silver*, *supra* note 67.

⁷⁴ Cf. *Machinist Dist. No. 4 (McDonnell Douglas)*, 283 N.L.R.B. 881 (1987) ("the necessity to give members notice of the existence of any rules or impediments to resignation prior to penalizing them for failing to adhere or comply with such is required by a labor organization's fiduciary duty of fair representation . . .").

⁷⁵ See Florio, *supra* note 36.

⁷⁶ See *supra* notes 56-58 and accompanying text.

⁷⁷ Gabriel Feldman Profile, TULANE UNIVERSITY LAW SCHOOL, <http://www.law.tulane.edu/tlsfaculty/profiles.aspx?id=412>.

⁷⁸ See Jon Saraceno, *Benson Battles Suspension, Union*, USA TODAY, Sept. 28, 2011, at 1C (recognizing that the issue of whether the NFL could discipline Benson for conduct that occurred during the lockout was "intriguing because there is not much precedent to guide either side").

Roger Goodell's power is so broad that he now apparently has the jurisdiction to discipline players for conduct that occurs while a player is wholly unaffiliated with professional football—whether that person was a college football player like Pryor or an out-of-work trouble-maker like Benson.⁷⁹ Either way, the League's broad jurisdiction is troubling.

Punishing players for conduct that does not occur during times of official employment creates major concerns regarding the NFL's reach and its ability to arbitrarily enforce policies. These concerns were illustrated when Terrelle Pryor was suspended for five games, while Seattle Seahawks head coach Pete Carroll was able to seek refuge in coaching a professional football team when, after he left USC, it was discovered that Carroll also violated NCAA rules.⁸⁰

Another example of the policy's unequal application was when Detroit Lions head coach Jim Schwartz and former Oakland Raiders head coach Tom Cable avoided *any* League discipline for physically confronting other coaches.⁸¹ These on and off-the-field acts run afoul of the requirements of the NFL Constitution and By-laws.⁸² However, according to Goodell, neither of these coaches' behavior is as troubling as Chicago Bears wide-receiver Earl Bennett's decision to wear orange cleats during a game.⁸³ Bennett received a \$5,000 fine;⁸⁴ Schwartz and Cable received warning letters.⁸⁵

Additionally, accepting the Pryor suspension as precedent, it seems Goodell could now suspend Kellen Winslow Jr. and fellow University of Miami players for their alleged ties with an infamous convicted booster while they played college football.⁸⁶ After all, in suspending Terrelle

⁷⁹ *Id.*

⁸⁰ David Hough, *Goodell Out of Bounds on this Ruling: Penalizing Pryor for his Sins at OSU is a Slippery Slope*, CHI. TRIB., Aug. 19, 2011, at C1.

⁸¹ See *NFL Won't Discipline Harbaugh, Schwartz for Post-game Tussle*, NFL.com (Oct. 17, 2011, 6:49 PM), <http://www.nfl.com/news/story/09000d5d82337b2e/article/nfl-wont-discipline-harbaugh-schwartz-for-postgame-tussle> (Schwartz charged at another coach following the conclusion of a game); Adam Schefter, *NFL Unlikely to Discipline Cable*, ESPN (Nov. 16, 2009, 5:01 PM), <http://sports.espn.go.com/nfl/news/story?id=4657147> (Cable allegedly punched one of his assistant coaches).

⁸² See Nat'l Football Players Ass'n, *Collective Bargaining Agreement Between the NFL Management Counsel and the NFL Players Association* *supra* note 5; *Constitution and By-Laws of the National Football League* *supra* note 6.

⁸³ See *Bears WR Bennett Fined \$5K for Bright Orange Shoes*, HUFFINGTON POST (Nov. 9, 2011, 7:23 PM), <http://www.huffingtonpost.com/huff-wires/20111109/fbn-bears-bennet-fined> (Bennett received a \$5,000 fine for wearing bright orange shoes during a game).

⁸⁴ *Id.*

⁸⁵ See *NFL Won't Discipline Harbaugh, Schwartz for Post-game Tussle*, *supra* note 81.

⁸⁶ See Hough, *supra* note 80 (providing an interesting overview regarding many of the troubling implications of Goodell's decision to suspend Pryor, including tainting Reggie Bush's Super Bowl ring like the NCAA did to his Heisman Trophy).

Pryor—a player who was disciplined for conduct that occurred while he had never worked for the League—some say Goodell essentially merged the NCAA and NFL codes of conduct.⁸⁷ The minimal due process rights owed by League commissioners to players, and the judicial deference owed to Goodell's decisions make these precedents quite frightening.⁸⁸

The new collective bargaining agreement has not reined in Goodell's authority.⁸⁹ The Terrelle Pryor and Cedric Benson precedents suggest that, if the trend continues, players will need the assistance of their union leaders to challenge the Commissioner's authority. However, when the Union itself concedes unprecedented authority to an already powerful commissioner, the players are left with little recourse to protect their rights. If Cedric Benson had maintained his case, the NLRB would have had an opportunity to urge the NFLPA to be more reactive to the Commissioner's trending increase in authority. Perhaps this issue must await an athlete who is more willing to sustain their claim against the NFLPA, despite all the pressures that doing so may place.

IV. CONCLUSION

If he did not withdraw his case, Cedric Benson should have prevailed in his NLRB challenge to the NFLPA's side-agreement with the League. When the Union decided to agree to subject Benson to the League's discipline—as opposed to contesting the League's controversial, authoritarian proposal—the labor organization violated its duty of fair representation. Moreover, the NFL's recent decisions to suspend Cedric Benson and Terrelle Pryor raise concerns regarding the League's ability to discipline players for conduct that occurred while they were not employed by the NFL. Labor unions were designed to level the playing field between employees and employers. Unfortunately, when unions like the NFLPA concede outrageous demands to employers and, in doing so, trade away important individual player rights, employer dominance reaches unprecedented levels. In order to uphold its obligation to fairly represent its players, the NFLPA must be more reactive when the NFL decides to punish players like Pryor and Benson for conduct that occurred while they could not collect a paycheck from the League.

⁸⁷ See e.g., Lynn Zinser, *N.F.L.-N.C.A.A. Merger, Hypocrisy Division*, NY TIMES (Aug. 19, 2011), <http://www.nytimes.com/2011/08/20/sports/the-nfls-suspension-of-terrelle-pryor-leading-off.html> (commenting that by punishing Pryor for actions committed while he was still a college student, Goodell is attempting to combine the two leagues).

⁸⁸ See *supra* Section IA (discussing judicial deference to Goodell's decisions and the minimal due process rights players are entitled to when they challenge a commissioner's determinations).

⁸⁹ See Silver, *supra* note 67.