

Lane Johnson's bold move to sue his own union is rare, but not unprecedented

- Is the Eagles O-lineman's lawsuit against both his league and his union a pointed shot at an isolated grievance, or just the start of a new trend in player-league legal disputes?

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When an NFL player goes to court and claims that he is the victim of a “fundamentally unfair” arbitration process, a logical assumption would be that he is suing the NFL with help from the players’ union—that applies to the recent lawsuits brought by Tom Brady and Adrian Peterson to challenge the league’s authority. It made sense for Brady and Peterson to involve their union. Every player’s employment is governed by a collective bargaining agreement that the NFLPA negotiates on behalf of all players, so it’s understandable to think that the news of a new NFL player suing over fundamental unfairness would be another joint effort to take on the NFL.

This time, however, that’s only partially correct.

In a lawsuit filed last Friday in the U.S. District Court for the Northern District of Ohio, Eagles offensive lineman Lane Johnson, like Brady and Peterson before him, has sued the NFL over a suspension. But in a sharp departure from the cases of Brady and Peterson, Johnson is also suing the NFLPA, insisting that NFL and NFLPA officials unlawfully conspired against him.

Johnson’s objection stems from his recent unsuccessful appeal of a 10-game suspension for a performance-enhancing substance. Johnson identifies numerous ways in which the league and union allegedly denied him a fair process. He believes the league and union conspired to insulate their collectively bargained drug policy from lawful scrutiny. Johnson now demands that he be awarded compensation for the damages he suffered or will suffer. That

compensation would presumably include the salary Johnson lost while on suspension (reportedly around \$4.8 million) as well as any lost endorsement opportunities. Johnson also demands that he be paid unspecified punitive damages to account for the NFL and NFLPA's supposedly egregious misconduct. Further, Johnson requests that he be removed from the heightened drug testing procedures that govern NFL players who fail drug tests.

Johnson's lawsuit marks a rare instance of an active NFL player suing his own union. As explained below, the case could serve as a template for other players to bring lawsuits against the NFLPA, especially if Johnson wins.

Johnson's positive tests and accompanying appeals

The Eagles selected Johnson with the fourth pick in the 2013 NFL draft, and the 26-year-old has started every game in which he has suited up for the Eagles. He has been a critical part of Philadelphia's pass protection and running game, first under under Chip Kelly and now under Doug Pederson. Johnson has, however, attracted substantial controversy.

In May 2014, the NFL announced that Johnson had failed a drug test due to the presence of a performance-enhancing substance in his body, violating the NFL and NFLPA's collectively bargained policy. Johnson's appeal did not contest the presence of the prohibited substance. Instead, he insisted that he had simply made an innocent mistake in ingesting a drug prescribed by a family physician. Presumably, this physician was unaware of the NFL's list of prohibited substances and failed to inform Johnson about those ingredients. Johnson reasoned that his error was in failing to consult the Eagles' training staff before taking the medicine, but he stressed he never intended to cheat.

The appeal failed because the underlying rule is a strict liability offense: It's not about *why* the substance was in Johnson's system, only that it *was* in his system. He served his suspension over the first four regular season games of the 2014 season, but Johnson also became subject to "reasonable cause testing," whereby he could be drug tested up to 24 times per year and would be punished more severely if he failed a second time. Johnson says that he passed every reasonable cause test administered to him until July 12, 2016. Under the

drug policy, each player's urine sample is divided into an "A" sample and a "B" sample. A couple of weeks later, the NFL notified Johnson that his "A" sample from that July 12 test contained peptides, a prohibited substance. As a result, he had failed a second drug test.

Johnson publicly expressed his shock at the positive test result and believed that other persons, groups and even the government were at fault. He attributed the positive result to taking an amino acid supplement, the manufacturers of which Johnson has threatened to sue for incorrectly listing ingredients. Johnson also blamed the NFLPA for providing players with an app designed to inform players about approved and disapproved substances, which Johnson says failed to list the supplement he took as disapproved (the NFLPA fired back at Johnson, calling him "factually inaccurate" and saying the app clearly does not guarantee a product's compliance with NFL drug testing rules). Further, Johnson criticized the U.S. Food and Drug Administration's lack of regulation over supplements.

Johnson then invoked his right under the drug policy for an independent observing toxicologist to monitor the testing of his "B" sample, which would be performed at the UCLA Olympic Analytical Laboratory. If the "B" sample also tested positive, Johnson would be subject to a 10-game suspension. Johnson retained toxicologist Michael Levine, M.D., to serve as the independent observing toxicologist.

At that point, according to Johnson, procedural problems began to surface. Johnson asserts that Levine sought basic information about the laboratory's procedures and policies on testing and storage. As retold by Johnson, John Lombardo, M.D.—the independent administrator of the collectively bargained drug policy—denied Levine's requests for information. Johnson asserts that the NFL had instructed Lombardo to reject Levine's request on grounds that no rule required that materials be made available. In other words, Johnson believes the NFL instructed Lombardo to be uncooperative, thereby making it more difficult for Johnson to receive a fair and honest assessment of his "B" sample.

Levine, Johnson asserts, was clearly annoyed by Lombardo's denial. Levine allegedly wrote an email to Lombardo in which he complained that the denial had "significantly compromised" Levine's ability "to effectively observe and evaluate the B sample test."

Levine ultimately observed the testing of the “B” sample, albeit without information he deemed essential. Unfortunately for Johnson, the “B” sample also tested positive, resulting in a 10-game suspension.

Johnson's unsuccessful appeal of his second suspension

Johnson exercised his right to appeal the 10-game suspension on Sept. 8, 2016. His legal argument centered on an alleged process violation: The toxicologist (Levine) should have had greater access to the procedures and policies related to the testing of his “B” sample. Without such access, neither Levine nor Johnson could be certain the test was done fairly and accurately.

In an attempt to advance his appeal, Johnson requested evidence and relevant information from the NFL—details on all of his reasonable cause tests, how those tests were conducted, how the arbitrator is selected and so on. Johnson claims the NFL “refused to provide virtually all of the information” he requested.

Johnson’s appeal also objected to the selection of Wilmer Hale attorney James Carter as the arbitrator. Carter, Johnson charged, failed to disclose important conflicts of interest between his law firm and both the NFL and NFLPA. Johnson also averred that Carter unfairly denied much of the drug testing information he needed to wage an effective appeal.

Johnson’s appeal was denied on Oct. 10. Johnson’s first expression of a legal disagreement with the NFLPA occurred on Nov. 22. He filed unfair labor practice charges against the NFLPA and NFL with the National Labor Relations Board and a separate complaint against the NFLPA with the Department of Labor (it will likely be many weeks until those matters are resolved). He returned from his 10-game suspension for the Eagles-Giants game on Dec. 22, but he continued to believe that he had been wronged by both the league and his union. He retained experienced labor and employment attorneys from the Zashin & Rich law firm in Cleveland to build a case against them.

Johnson's lawsuit blames both the NFL and NFLPA

As other players have tried before, Johnson hopes a federal court will find that the NFL unlawfully suspended him. To prove such a claim, Johnson must show that the NFL's appeals process, which is a form of arbitration, was so fraudulently conducted that it broke the law.

Johnson's lawsuit faces very steep odds since federal law commands that courts review arbitration matters with great deference towards the arbitrator. This point was made unmistakably clear in the cases of Brady and Peterson. Here, Johnson must show that arbitrator James Carter so egregiously failed in his duties that a court should vacate the suspension. If it was a tall task for Brady and Peterson, it will be an even taller one for Johnson—Carter's background suggests he would adopt a much more neutral viewpoint towards an NFL labor matter than either Roger Goodell or Harold Henderson did as the respective arbitrators in those other high-profile lawsuits.

Nonetheless, Johnson's lawsuit raises several theories that a court will consider. Johnson constructs a case against a drug testing process that, he says, denied him basic information and led to an "illegitimate" result. Among other points, Johnson's complaint highlights how Levine (the independent observing toxicologist) was denied information, and how Lombardo (the independent administrator) allegedly committed a process error by failing to notify Johnson that he would remain in the reasonable testing program beyond two years. Johnson also contends that Carter (the arbitrator) was biased and failed to disclose potential conflicts of interest based on work conducted by his law firm, Wilmer Hale, on behalf of the NFL in the Ray Rice matter and other matters.

Up to this point in this analysis, much of Johnson's lawsuit is unremarkable. Like other players before him, he portrays both the NFL and the arbitrator who ruled against him as unfair. The lawsuit takes an unconventional turn when Johnson expands his lawsuit to include claims against the NFLPA, whom Johnson depicts as corrupt and incompetent.

According to Johnson, the NFLPA and NFL “deliberately withheld relevant and pertinent information from Johnson in order to impede his ability to mount his appeal effectively.” To advance that point, Johnson argues that the NFL and NFLPA knowingly failed to find a replacement for Bryan Finkle, M.D., the chief forensic toxicologist (or CFT) for the drug policy. Among other things, the CFT had been entrusted with auditing the operation of the testing laboratories, reviewing laboratory procedures and certifying laboratory results. According to Johnson, no one has replaced Finkle since he retired about a year prior to Johnson’s failed drug test in July 2016—in fact, the position itself may have been eliminated. Johnson asserts the absence of a CFT led to important verification procedures going unmet, thus endangering the fairness of the process that resulted in Johnson’s suspension. Johnson maintains the NFLPA exacerbated the absence of a CFT by refusing to provide him with crucial pieces of information, including why the NFL and NFLPA jointly declined to use a CFT.

Johnson also charges that the NFLPA “retaliated against Johnson because of its public dispute with Johnson over the poor quality of the NFLPA’s representation” and did so “out of personal animosity, by abdicating its representative duties and abandoning Johnson to the caprice of the [NFL].” Johnson insists that an NFL official emailed a counterpart at NFLPA and proposed that they meet to discuss how Johnson was undermining their collectively bargained drug policy. Johnson also maintains the NFLPA thought an appeal would be a waste of everyone’s time. From Johnson’s view, the NFLPA cared more about the policy than about Johnson and was willing to work with the NFL to undermine his appeal.

In light of these contentions, Johnson asserts that the NFLPA breached its duty of fair representation. Both the Labor Management Relations Act and the National Labor Relations Act require that the NFLPA represent Johnson fairly and without bias or bad faith. Johnson contends that the NFLPA breached such a duty by “willfully and fraudulently mislead[ing]” him about his appeal options and strategies for an appeal, and by “depriving” him of the chance to receive and inspect documents germane to his appeal.

Expect the NFL and NFLPA to offer several defenses

As mentioned above, Johnson's lawsuit faces a steep climb. Expect the NFL and NFLPA to offer a number of defenses.

1. Both sides will likely object to Johnson's portrayal of the facts and his recounting of events. We have only heard Johnson's perspective. Given the number of specifics Johnson alleges, it seems likely that the NFL and NFLPA will disagree with many if not most of his assertions.
2. The NFL will stress that Johnson's appeal followed collectively bargained rules that apply to every NFL player. Even if those policies were not ideal for Johnson's current situation, those are the policies that Johnson's union lawfully accepted.
3. The NFL will defend Carter and insist that he capably performed his duties as arbitrator. The fact that Carter's firm, Wilmer Hale, conducted an internal investigation into the NFL's handling of Ray Rice does not prevent Carter from being fair in regards to Johnson. Wilmer Hale's internal investigation was also a **public matter**, and Carter likely presumed Johnson and his attorneys were well aware of that fact. In addition, the league will maintain—as it did during the Deflategate litigation—that federal law provides arbitrators with significant discretion.
4. The league might contend that even if process errors did occur, they would have been harmless. For instance, if Lombardo failed to provide sufficient notice about the duration of time Johnson would be subject to reasonable suspicion testing, as Johnson insists, the error would have proven harmless if Johnson hadn't taken a prohibited substance.
5. The NFLPA will highlight that while it owes a duty of fair representation to Johnson, it also owes a duty to all NFL players to ensure that collectively bargained policies are honored. The union might contend that Johnson simply sought an appeals strategy inconsistent with the policies the NFLPA accepted during collective bargaining.

6. The NFLPA might stress that conversations between the union and league about collectively bargained terms are commonplace. League and union officials frequently discuss player incidents and how rules apply in certain situations. The fact that they discussed Johnson is not indicative of collusion or a plot to deprive one player of his rights.

Will Johnson's case spark a new trend?

It will take months for Johnson's lawsuit to play out in court. In the meantime, expect players to keep a close watch on the proceedings. The NFLPA has taken criticism as the NFL has enjoyed the upper hand in labor negotiations, and Brady and Peterson have embarked on time-consuming, unsuccessful battles against the NFL in court. Johnson's strategy of suing both the NFL and NFLPA offers a potential new approach for players who are dissatisfied with how they are treated and demand change.

Suing the NFLPA is not an unprecedented strategy. This is particularly true of former NFL players, a number of whom have sued the NFLPA in recent years. In 2007, Bernie Parrish and Herb Adderley sued the NFLPA's licensing arm, claiming that retired players were owed millions of dollars from licensing deals. Other players, including Carl Eller, have sued over the NFLPA's legal right to bargain on behalf of former players. Perhaps most notably, in 1995, Sterling Sharpe sued the NFLPA, along with the Packers and NFL, claiming that the union and the league had unlawfully conspired to convince Sharpe to drop a grievance over a salary dispute.

Johnson's lawsuit is exceptional in that so few *active* players have sued the union.

There is, of course, an inherent awkwardness there. Johnson, like every other NFL player, is a member of the NFLPA. NFL players unionized in 1956 so that a separate entity—the NFLPA—would bargain on their behalf. The basic idea is that NFL players would enjoy more favorable terms of employment if they bargained as one unit. Aiding the NFLPA is the fact that federal labor law generally makes it challenging for union members to successfully sue their union over quality of representation (a point Alex Rodriguez knows well from his **unsuccessful lawsuit** against MLBPA).

One noteworthy example of active NFL players suing the union occurred in the aftermath of a dispute between a group of Redskins players and the NFLPA over union dues. In 1993, 37 players refused to pay NFLPA dues on grounds that the union didn't serve their best interests. Under the CBA at the time, specifically its union security provision, the Redskins were obligated to suspend these players for failing to pay union dues. An arbitrator ordered the Redskins to do just that, but the team refused, claiming that such suspensions would violate Virginia labor law. That sparked a lawsuit between Redskins tight end Terry Orr and the NFLPA over the applicability of state law, and Orr ultimately prevailed.

Will Johnson's lawsuit lead to a new era of NFL player litigation against the NFLPA? Given the long odds the lawsuit faces and the rarity of such lawsuits, chances are it won't. But it will be worth watching, especially if other players believe their union has compromised important rights and ignored its vital obligations.

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