

NFL FLAG PROTESTS: WHERE DO PLAYERS STAND LEGALLY WHEN THEY KNEEL?

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ABSTRACT

This article examines the relatively new phenomena of professional athletes' publicly protesting the American Flag and National Anthem during sporting events and the potential legal ramifications of such protests to both the athlete and the athlete's employer. Legal issues are examined that involve both the First Amendment right of freedom of speech and federal law under the National Labor Relations Act (NLRA) that governs the relationship between an employer and its unionized employees. Distinctions are made between public versus private employers and also between union workers versus at-will workers. An analysis of one NFL player and his protests is made.

Keywords: National Football League (NFL), Flag, National Anthem, Protest, First Amendment, National Labor Relations Act (NLRA), National Labor Relations Board (NLRB), Waiver, Past Practices, Failure to Discipline, Free Speech.

INTRODUCTION

Over the past few years, a great deal of attention has been given to the National Football League (NFL) regarding different policies. These policies range from the health of the players (concussions) to on-field rules (the catch rule) to contract policies. A major controversy the NFL is facing now is players' kneeling during the National Anthem. Colin Kaepernick, formerly of the San Francisco 49ers, decided to take a knee during the National Anthem of a preseason game on August 26, 2016. Following the season, Kaepernick had trouble finding a new job in the NFL (Schilken, 2017). Since that day, players across the NFL have had mixed emotions regarding this method of protesting. Some players have not only voiced their support for Kaepernick's actions but also have joined him in his protests. Others, however, have spoken out about Kaepernick and the protesting of the National Anthem. In this paper, the viewpoints of both parties will be discussed as well as the legality of the protests and their consequences. Also, the current case of Kaepernick's grievance filed against the NFL will be reviewed.

Colin Kaepernick, quarterback of the 49ers, felt strongly about two issues facing the country and decided he could use his celebrity platform to try to make a difference. The two primary issues that were being brought to the nation's attention were police brutality and inequality against African-Americans. Kaepernick's protests started to gain national attention, and he was given a chance to speak with the media. He used this opportunity to speak for those who do not have a voice, saying, "*I'm going to continue to stand with the people that are being oppressed. To me, this is something that has to change*" (Sandritter, 2016). Many athletes throughout sport have voiced their support for Kaepernick and his stance over the past few years, with some even joining in the protests. Perhaps most notable is U.S. women's soccer star

Meagan Rapinoe. Before a game with the Seattle Reign, her professional soccer club, Rapinoe took a knee to show her support of Kaepernick's stance (Yeboah, 2016).

With any controversial issue comes strong resistance. Citizens across the country took to twitter to voice their opinion of Kaepernick. One of the main issues brought about was the disrespect of the American flag and of military veterans. Yet, some veterans argued that they fought for Kaepernick's right to protest. One veteran was asked how he felt about Kaepernick's protests and responded, "*We should stand during the anthem, or the pledge, or salute and honor the flag when we can do so with genuine pride and respect. When we see our nation faltering, we must put aside mindless patriotism and work together to right what is unjust.*" Other veterans expressed major opposition to Kaepernick's protests (Szoldra & Woody, 2017).

Many athletes have also voiced their displeasure with the protests. Hall of Fame wide receiver Jerry Rice tweeted, "*All lives matter. So much going on in the world today. Can we all just get along! Colin, I respect your stance, but don't disrespect the Flag*" (Yeboah, 2016). Another professional athlete who spoke out against Kaepernick's protest was NASCAR driver Tony Stewart. In a statement made on Twitter, the 46-year-old driver said, "*I'm sorry but @Kaepernick7 (Colin Kaepernick's Twitter account) needs to learn the facts about police before running his dumbass mouth! He has no clue what they go thru! #idiot*" (Yeboah, 2016).

To examine Kaepernick's stance, one must dissect the rights of citizens under the First Amendment of the Bill of Rights. The First Amendment states, "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances*" (U.S. Const. amend I). Although the ultimate interpretation of the Constitution is to be done by the U.S. Supreme Court, the established precedent from its former cases allows an insight regarding the rules currently governing (unless and until overturned by a future court). In "*West Virginia State Board of Education vs. Barnette*"¹, a West Virginia public school expelled students from the Barnette family for not saluting the American flag (319 U.S. 624). The Supreme Court overturned the school's decision, stating that the First Amendment barred any rule compelling an individual to salute the flag or to participate in the Pledge of Allegiance. This court case exemplifies the First Amendment and the Supreme Court's protection of an individual's rights more than American symbols such as the Pledge of Allegiance. Although private employers can require employees to comply with dress codes and rules of conduct and may even prohibit or compel some speech beneficial to the employer, the NFL players are governed by their Collective Bargaining Agreement (CBA). Neither the First Amendment's protection from government action nor the typical, permissive rights of employers to restrict the speech and expressions of "*at will*" or other non-unionized employees govern NFL players' rights while at work. Kaepernick voluntarily subjected himself (and his rights of speech and expression) to his employer's policies upon accepting employment and the CBA that governs that employment. He did not, however, surrender any free-speech rights vis-à-vis any state or federal government action.

After looking at both sides of the protest, an investigation must be made to determine if Kaepernick had a right to protest during the National Anthem. To do this, one must look into contract law, at standard player contracts, and into the literature of the Collective Bargaining Agreement (CBA) signed by the NFL and the NFL Players Association (NFLPA). Contract law is a very interesting component in this case. There are three steps in the contract administration process-offer, acceptance, and interpretation. In the offer phase, a team's management drafts a

contract and sends it to an athlete whom they wish to have on their team. An athlete can either accept this contract or reject it and negotiate new terms. The next phase is the acceptance phase. This phase is all about timing. In the off-season, players have a certain amount of time to sign a contract. The contract becomes valid once both parties agree to the terms of the contract and sign it. The final phase of the contract process is interpretation. This phase is focused on how the language of the contract should be read based on the circumstances that surround the sport, such as a lockout or player injury (Champion, 2009). As will be discussed in greater detail below, the past practices of the employer and the union are a significant factor in contract interpretation.

In sport, contracts are used to not only define a player's salary and years with the team but also to define the rights and responsibilities of both parties. Most Standard Player Contracts (SPK) provide very little job security unless a player is able to create more leverage. Players who have this leverage (or "juice") have the ability to create additional security with their teams such as no-trade clauses and/or higher guarantee money to create financial security. The most important part of the SPK as it pertains to Kaepernick is the Termination Clause. Kaepernick decided to opt out of his contract with the 49ers, but owner John Lynch said in a statement that the QB would have been cut (Brinson, 2017). For a player to be cut under the SPK, the team must have "just cause," and the player cannot be cut just because the team no longer needs that player. Another important section of the SPK concerns league punishment. The SPK gives the Commissioner of the NFL the ability to fine players for infractions of League rules (Champion, 2009).

Another area that needs to be considered in the investigation of Kaepernick's case is labor law. Professional sports and their unions fall under the National Labor Relations Act (NLRA). Because of the National Labor Relation Act (NLRA), employees (the athletes) have been able to unionize and negotiate for better SPKs. It is the Union's job to create the best possible situation for the athletes it represents. The NFL's player union, the NFLPA, has done a very good job in recent years with negotiating better player-injury protocols and contract deals in the Collective Bargaining Agreement (CBA). When looking through the CBA, one notices there is a very interesting section in NFL Player Contract and Section 2 (Employment and Services):

"Club employs Player as a skilled football player. Player accepts such employment. He agrees to give his best efforts and loyalty to the Club, and to conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game. Player will report promptly for and participate fully in Club's official mandatory minicamp(s), official preseason training camp, all Club meetings and practice sessions, and all preseason, regular season and postseason football games scheduled for or by Club. If invited, Player will practice for and play in any all-star football game sponsored by the League. Player will not participate in any football game not sponsored by the League unless the game is first approved by the League [emphasis added] (NFL & NFLPA, 2011)."

The importance of the above-highlighted section concerns personal conduct on the field. Kaepernick's protests sparked similar protests throughout the league, and the fans took note. Social media and fan surveys showed a drop in fan viewership over the past two seasons, which can possibly be traced to the outrage over the protests. ESPN reported that the regular 2017 NFL football season showed a 9.7% reduction in television ratings; however, such reduction may be more attributable to an overall decline in television viewership, as CNN reports that all major networks in 2017 (during the same time period) were down by 8%². Whether there is a causal relation between flag protests and lower television ratings is open for debate. The NFL and its

team owners can still assert that the athlete's taking a knee is not conducting "*him on the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game*" (NFL & NFLPA, 2011). Such an assertion is based upon player conduct and the NFL's standards; it is not dependent upon Nielson ratings. While lower ratings serve to provide a legitimate business interest and concern for management, the NFL and many team owners support the protests and are accepting the potential negative consequences to their financial bottom lines. Further research is warranted to see if there is a causal relationship between players kneeling and a decline in NFL viewership, ticket sales, and/or merchandise sales.

The next step to ascertain whether or not Kaepernick's actions were acceptable was to examine the language in the NFL Rules and Regulations. After searching nearly 100 pages of rules and regulations, no trace of the National Anthem could be found. The focus then shifted into Game Operations, a 200-page manual that outlines the NFL's stance regarding player conduct during the National Anthem. The language is as follows:

"The National Anthem must be played prior to every NFL game, and all players must be on the sideline for the National Anthem. During the National Anthem, players on the field and bench area should stand at attention, face the flag, hold helmets in their left hand, and refrain from talking. The home team should ensure that the American flag is in good condition. It should be pointed out to players and coaches that we continue to be judged by the public in this area of respect for the flag and our country. Failure to be on the field by the start of the National Anthem may result in discipline, such as fines, suspensions, and/or the forfeiture of draft choice(s) for violations of the above, including first offenses (Fitzpatrick, 2017)."

Based on the language above, it is NFL policy for a player to not only be on the sideline but also to stand at attention. A player may not be cut if he chooses not to stand, but the rules allow for the player to be disciplined by the Commissioner in ways such as fines and suspensions. In this written language, the NFL was within its rights to punish Kaepernick and any other player who did not stand on the sideline for the National Anthem. This rule would also heavily affect a team like the Pittsburgh Steelers who decided to stay in the locker room during the playing of the National Anthem of a game during the 2017-2018 seasons. This action could have resulted in the loss of a draft pick for the team.

A critical element or concept within the interpretation phase of a collective bargaining agreement is the role of the "*past practice*" between management and labor. Past practices made by management, the union, and employees who are members of the union can play a significant role in contract interpretation and create legally binding results just as much as the specific, bargained-for language in the contract does. For over five decades, such past practices have been given great weight by federal courts, including the United States Supreme Court³. When the NFL (as a League/employer) has a contractual right to discipline a player for kneeling during the National Anthem but declines repeatedly to do so, the NFL may lose its right to enforce such provisions that otherwise clearly allow players to be so disciplined. Simply stated, the past practices of the employer can be construed to act as a waiver of the contractual rights the employer previously bargained for and obtained in the contract.

Past practices of management and its employees can play a role in what rights each side has when a new collective bargaining agreement is being first established. It can also play a role in how an existing agreement is interpreted. Generally, for a past practice to rise to the level of having a binding legal effect upon the parties, such past practices must:

1. Be clear.
2. Be consistently performed in the past.
3. Be mutually accepted by both the employer and the union.
4. Not be contrary to clear and unambiguous language in the CBA.
5. Be a major term or condition of employment.

In the past, some courts and the National Labor Relation Board (NLRB) have held that a CBA could incorporate past practices not specifically stated in the agreement; however, such past practices could never be read into the contract as separate terms, but could guide in interpreting other terms of the contract⁴. The trend, however, is for past practices to be more material and enforceable, even as affecting §8 bargaining rights under the NLRA.

Collective bargaining agreements may include implied as well as express terms. An employer's established past practice can become an implied term of a collective bargaining agreement. Past practices rise to the level of an implied agreement when they have ripened into an established and recognized custom between the parties. Moreover, such implied terms cannot be modified under §8(d) of the National Labor Relations Act, codified at 29 U.S.C.S. §158(d), without the parties' mutual consent [emphasis added]⁵.

Likewise, regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if not addressed in a collective bargaining agreement. As such, these past practices cannot be changed without offering the unit (union) employees' collective bargaining representative (Players Union) notice and an opportunity to bargain, absent a clear waiver by the union of this right⁶ citing *Sunco, Inc.*, 349 NLRB 240, 244 (2007). Such past practice to be effective at modifying the terms of a CBA must occur with such regularity and frequency that employees could reasonably expect the "*practice*" to continue or recur on a regular and consistent basis (Phila, 2003). *Coca-Cola Bottling Co.*, 340 NLRB 349, 353-354 (Phila, 2003). Looking at the past practices and conduct of the players during the 2017 NFL season wherein many players and even team owners were kneeling during the National Anthem, such conduct could be asserted as being a new "*past practice*" that must be negotiated before the League management or team owners could successfully discipline players for such conduct. As this article is being written, pre-season NFL games are being played, and many players are continuing to kneel in protest during the National Anthem. As the kneeling behavior is continuing beyond just one season, the players are gaining the ability to successfully argue that such conduct, even though in violation of clear language of the CBA, has become "*regular and frequent*" and is occurring on a consistent basis so as to satisfy the legal elements necessary to establish a "past practice" sufficient to modify the terms of their CBA.

In the event the NFL desires to begin enforcement of its contractual right to discipline players for "*taking a knee*," the employer would be well advised to serve the union a specific notice of such intent and to provide the union an opportunity to bargain with respect to the issue prior to taking any adverse action against a kneeling player. Such notice involves a multitude of rights and obligations under the NLRA as enforced by the National Labor Relations Board (NLRB) and federal courts. Likewise, unions can waive their right to bargain over proposed changes in contractual terms. The NLRB does not require unions to demand negotiations with management every time an employer mentions a potential, future change in order to avoid the risk of waiving its right to bargain. However, more than general statements by the employer about planned upcoming future changes are required⁷.

If an employer (like the NFL) should suddenly decide to “*get tough*” on enforcing workplace rules when unionized employees are asserting their rights under the NLRA, courts can view the previous lack of enforcement coupled with the new “*get tough*” change in attitude as a violation of the law. “*The failure to discipline and discharge other employees for similar errors was designed to demonstrate the [employer’s] power over employees’ working conditions in order to discourage them from further support of the Union*”⁸. The NFL should also be careful not to single out only one or only a few players for “*taking a knee*” when several players are engaged in similar conduct. Treating employees differently for similar conduct of other employees who are similarly situated can be considered by the NLRB to be unlawful discrimination and/or a waiver of the employer’s right to discipline for that specific infraction⁷ (generally Hoffman Fuel Co., 309 NLRB 327, 329 (1992)).

After defining what the rule is, how it applies to the players, and how it can be enforced, a closer observation can be made into Kaepernick’s grievance case made against the NFL. Following Kaepernick’s on-field protests and the opt-out provision of his contract, he has not been able to find a job in the NFL. Having no luck, the former QB decided to file a grievance against the NFL for collusion. In sport, collusion occurs. “*When two or more teams, or the league and at least one team, join to deprive a player of a contractually earned right. Such a right is normally found in the collective bargaining agreement signed by a league and its players’ association*” (McCann, 2017). After thorough examination of the NFL’s CBA, the rules on collusion can be seen very clearly. Starting on page 119, Article 17 (Anti-Collusion) establishes the foundation for what collusion is and how it is to be prevented. Section 1 is written as follows:

Section 1: Prohibited Conduct: No Club, its employees or agents shall enter into any agreement, express or implied, with the NFL or any other Club, its employees or agents to restrict or limit individual Club decision-making as follows:

1. Whether to negotiate or not to negotiate with any player.
2. Whether to submit or not to submit an Offer Sheet to any Restricted Free Agent.
3. Whether to offer or not to offer a Player Contract to any player.
4. Whether to exercise or not to exercise a Right of First Refusal.
5. Concerning the terms or conditions of employment offered to any player for inclusion, or included, in a Player Contract (NFL & NFLPA, 2011).

Kaepernick went unsigned in the Free Agent signing period, but the difficult thing for Kaepernick going forward will be that the Burden of Proof falls on him. In the Burden of Proof section of Article 17, failure to receive any offers is not viable evidence for collusion. What Kaepernick will need to do is provide evidence that teams violated any of the parts of Section 1. If evidence is brought forth, the NFL teams have a right to refute said evidence, and the case will go in front of the System Arbitrator (NFL & NFLPA, 2011). Evidence must be shown to exist between teams as listed before and has nothing to do with the skill of a player. It would not matter if a team thinks Player A is better than Player B. The team is free to sign whomever they want (McCann et al., 2017). At any time during this process, the arbitrator can determine whether the plaintiff’s evidence is sufficient and if the case will continue. When one considers Kaepernick’s grievance that NFL teams and the League are punishing him for kneeling during the National Anthem, the evidence for his case is not very strong. Players across the League and even on Kaepernick’s own team have been supported by teams and the League for protesting in

the same manner as Kaepernick. This is not a case of a player being punished or “*blackballed*” as an example to prevent other players from following his actions.

NFL player LeSean McCoy said the reason Kaepernick doesn’t have a job is because of his on-field performance. McCoy believes that Kaepernick does not have a job because the 49ers were 1-10 with him as the starting QB. If Kaepernick were to win the case, he would be economically compensated by the NFL based on the pay of similar QBs signed in the off-season, as well as potential for more. If Kaepernick does not win the case, he would be allowed to appeal the decision in federal court, which could be a steep mountain to climb (Schilken, 2017). To be fair to Mr. Kaepernick, there are many factors involved with a team’s decision to offer him a contract whether as a starting quarterback or a backup quarterback. Reportedly, the Denver Broncos offered to trade for him as late as August 21, 2016, so clearly Kaepernick has sufficient skills to be of interest to an NFL team. This offer also serves to counter Kaepernick’s claim that teams have blackballed him due to his kneeling protests, as the offer was made long after his protests were made. Also, one should not “*assume facts not in evidence*” that Kaepernick’s unemployment is due solely to his inability to receive offers. It takes two parties to agree to a contract, and Kaepernick may be rejecting offers for backup quarterback positions due to the significantly lower compensation such positions garner. Mr. Kaepernick is neither indigent nor is he desperate for any gainful employment not to his liking. His critics may not be considering these aspects of contract negotiations.

CONCLUSION

After reviewing the applicable legal data and studying the NFL CBA, a much better understanding of the rules and regulations for player conduct is evident. Once an NFL player signs his SPK, he is required to follow all NFL Rules and Policies. The rules and policies set forth for the players, coaches, and teams are negotiated by the NFL and the NFLPA to ensure that both parties’ interests are discussed. The Gameday Operations policies state that a player must be on the field and stand at attention during the National Anthem; and if this rule is broken, the Commissioner of the league may discipline the player(s) involved.

In Kaepernick’s case, these protests (according to him) are about giving a voice to those who do not have one. To him, he is using the platform provided to raise awareness to the racial inequalities and police brutality that plague our society. While he has the right as an American citizen to voice his displeasures and protest, he is legally bound by his contract to stand during the National Anthem or face consequences as seen fit by NFL Commissioner Rodger Goodell. In the case of his filed grievance for collusion, Kaepernick will have a difficult time with the Burden of Proof as laid out in Article 17 of the CBA; but should he win, he will be justly compensated. Overall, Kaepernick would be well advised to drop or settle his case against the NFL and attempt to play in the NFL based on the merit of his skill. He will also need to talk to owners in the league while trying to get a job and ensure them he will either stand during the National Anthem if playing for a team owner who demands such (or if the NFL begins enforcing its policy), or sign to play for a team whose owner supports his protests if the NFL allows such protests to continue.

In the future, if Kaepernick or a player similarly situated is punished by the NFL for protesting the flag or the National Anthem and the NFL asserts its rights to do so under its Game Operations provisions prohibiting such behavior, the NFL will be faced with the possibility of an

arbitrator or federal court ruling that the NFL waived its rights to enforce that language due to its lax enforcement of its rules with respect to Kaepernick, other individual players, and even entire teams who all protested without any adverse action being taken by the NFL. Should the NFL change its position to one where it desires to disallow such protests, the NFL will need to take remedial measures to give adequate notice of its change of policy (to one of enforcement of the Game Operations provisions disallowing such protests) prior to issuing any punishment to any player or team for engaging in any protest-type behaviors.

As far as private employers go, there is a distinction between the rights employees have depending on whether the employee is at-will or a member of a union. As a union employee, Kaepernick's and other NFL players conduct is governed by the collective bargaining agreement between the league and its players and by federal law. Although the NFL had the contractual right to disallow any game-day protests of the American flag or the National Anthem because of specific language in its Gameday Operations policies (incorporated into the collective bargaining agreement), the NFL instead chose to allow such protests. Such permissive allowances by the NFL of employee protests may operate as a waiver of the right of the NFL to discipline players for such protests. Other employers with union workers should refer to their own collective bargaining agreements to determine the employer's right to punish any similar protest-type behavior. Non-union employees who are "at-will employees" are generally subject to their employer's policies concerning workplace conduct. While such non-union employees may not be able to protest or otherwise freely express their feelings while at work (without facing termination of employment), such employees (like all Americans) enjoy the right to be free from governmental punishment for their speech.

As far as public employers go, generally speaking, public employers must be very careful to obtain legal advice before punishing employee speech; as such employers are by definition "state actors." The First Amendment is expressly aimed at limiting the government's ability to prohibit, censure, compel, or otherwise punish the speech of individuals. This does not mean public employers cannot control their workplace, as employees do not have an unlimited right to be disruptive; however, as a public employer (and public schools and universities in particular), case law like *Barnette* should be carefully considered, particularly when dealing with our nation's flag or our National Anthem.

ENDNOTE

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