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ARE COMPELLED ARBITRATION CLAUSES IN COACHES' CONTRACTS WITH THE
NFL EFFECTIVE AND FAIR TO ALL PARTIES?

Andreas Kouzouoglou

Employment agreements between football coaches and the NFL grants the NFL commissioner “the full, and complete, and final jurisdiction and authority to arbitrate” various forms of disputes between the two parties.¹ There is one case that is currently being litigated challenging the legality of this arbitration provision.² In *Flores v. NFL*, the plaintiffs attack the clause for being overbroad and unconscionable.³ Arbitration agreements can be an effective way to settle disputes as an alternative to litigation, but sometimes when there is unequal bargaining power resulting in one entity in complete control of the process, the negative consequences outweigh potential benefits.⁴

The *Flores* court ruled that Flores’ claims against the Miami Dolphins under applicable Florida law alleging discrimination is arbitrable because “the claims were dependent upon the plaintiffs’ employment status and could not be brought in the absence of the employment relationship governed by the agreements.”⁵ However, with respect to his claims against the Giants and the Texans, the defendants failed to prove that the “arbitration agreement was in effect when or after Mr. Flores was being considered for hire by those teams.”⁶ While the arbitration agreement may seem to encompass everything, there are valid limitations with respect

¹ Mark C. Travis, *Arbitration Between Coaches and the NFL*, A.B.A (Aug. 24, 2022), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/summer-2022/arbitration-between-coaches-and-nfl/ [https://perma.cc/C5UE-QZV9].

² *Id.*

³ *Id.*

⁴ Law Journal Editorial Board, *Mandatory Arbitration Clauses are Contracts of Adhesion*, LAW.COM (Nov. 2, 2018, 5:12 PM) <https://www.law.com/njlwjournal/2018/11/02/mandatory-arbitration-clauses-are-contracts-of-adhesion/> [https://perma.cc/5D6T-EMWY].

⁵ *Flores v. NFL*, 2023 U.S. Dist. LEXIS 34496, at 16 (S.D.N.Y. 2023).

⁶ *Id.* at 18.

to the subject matter of the controversy and the retroactive effect it has with respect to the other teams.

The court denied the plaintiffs claim alleging that the arbitration clause was unconscionable.⁷ The main thrust of the plaintiffs' argument was that it would be fundamentally unfair to have Commissioner Goodell serve as arbitrator since he will inevitably be biased.⁸ However, the relevant state law in this case did not recognize this lack of neutrality as an issue and instead focused on if the provision was fundamentally unfair because it grants one party unilateral control over the pool of arbitrators.⁹ The court found no evidence of this since this was a matter of contract; plaintiffs cannot ask the court to provide them with an arbitrator who is more neutral than the one whom they agreed.¹⁰ Since the coaches have agreed to have the commissioner serve as arbitrator and it is assumed that the parties have equal bargaining power, they are bound by the agreement if the controversy is within its scope.¹¹

The main issue with this case that isn't adequately addressed in the opinion is the presumption that the coaches had the ability to negotiate and pick a different arbitrator if they so choose.¹² The employment contracts are governed by the NFL Constitution which then provides the commissioner as arbitrator.¹³ How much control is there to amend the NFL Constitution? Could the coaches have in fact denied having their employment contracts governed by the Constitution? Or was it in effect an adhesion contract that gave the coaches no choice but to accept the terms if they wanted to work for the NFL?¹⁴ These are all very important questions dealing with the fairness and effectiveness of arbitration contracts in this context that are not

⁷ *Id.* at 21–22.

⁸ *Id.* at 21.

⁹ *Id.*

¹⁰ NFL Mgmt. Council v. NFL Players Ass'n, 820 F.3d 527, 548 (2016).

¹¹ Flores v. NFL, 2023 U.S. Dist. LEXIS 34496, at 31 (S.D.N.Y. 2023).

¹² *Id.* at 21.

¹³ Travis, *supra* note 1.

¹⁴ Law Journal Editorial Board, *supra* note 4.

addressed here. However, the court is not worried about the potential for abuse since plaintiffs would have a recourse if the arbitrator was improperly biased; the court retains the authority to review the Commissioner's decision and vacate the award if there is evident partiality or corruption.¹⁵

The court seems very tolerant of arbitration clauses most likely due to the Supreme Court and various state courts adopting a liberal federal policy favoring arbitration agreements.¹⁶ The scope of review varies depending on the relevant state law that is at issue, so it's hard to determine if this is an adequate safeguard. If there is some leeway in the employment contract, a more neutral party should be chosen to serve as arbitrator to ensure complete fairness in the adjudication of potential claims against the NFL.

¹⁵ *Flores*, 2023 U.S. Dist. LEXIS 34496, at 29.

¹⁶ *Id.*