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Third Circuit Holds That NCAA Athletes May Qualify as Employees Under the FLSA

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Recently, in *Johnson v. NCAA*, the U.S. Court of Appeals for the Third Circuit held that, depending upon the surrounding circumstances, student-athletes may qualify as employees under the Fair Labor Standards Act (FLSA). This is the latest in a series of court and agency decisions involving student-athletes seeking employee status at their colleges and universities. As we reported in February, the National Labor Relations Board (NLRB) recently ruled that the student-athletes on the Dartmouth College men's basketball team are "employees" under the National Labor Relations Act (NLRA) and, therefore, were eligible to vote on whether to unionize (see *Trustees of Dartmouth College*, Case No. 01-RC-325633). This decision, which was issued by Regional Director for Region 1 Laura Sacks, is currently on appeal to the full NLRB. These decisions are likely to encourage additional litigation by student-athletes across the U.S.

Background

The *Johnson* case originated in 2019 when athletes at several National Collegiate Athletics Association (NCAA) Division I member schools filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania asserting violations of the FLSA and various state wage laws. The athletes argued that they were entitled to unpaid minimum wage and overtime for time spent representing their institutions in collegiate sports.

The NCAA moved to dismiss the complaint on the basis that the athletes failed to allege facts that would establish that they were employees of the schools, which is required for a claim under the FLSA. In its motion, the NCAA cited past court decisions holding that student-athletes were "amateurs" and, therefore, not employees.

The district court denied the motion to dismiss, applying a seven-factor balancing test previously used in cases involving interns, and concluded that the athletes had sufficiently pled facts that might allow them to be classified as employees under the FLSA. The district court subsequently granted a motion allowing the NCAA and member schools to pursue an interlocutory appeal of its decision to the U.S. Court of Appeals for the Third Circuit. On February 15, 2023, a three-judge panel of the court of appeals heard oral arguments. After more than 15 months of deliberation, on July 11, the court issued its opinion, affirming the district court's denial of the motion to dismiss, but based on a different legal analysis.

Court of Appeals Decision

The court of appeals began its decision by explaining that, "The issue raised by this interlocutory appeal is not

whether the athletes before us are actually owed the protections of the [FLSA], but rather, whether college athletes, by nature of their so-called amateur status, are precluded from ever bringing an FLSA claim. Our answer to this question is no."

The court of appeals' opinion includes a detailed history of college athletics and how it has evolved. The court of appeals rejected the NCAA's defense that the "history and tradition of amateurism in college athletics" should control the court's assessment of the claim. The court decided that the appropriate test for determining whether college athletes are employees under the FLSA is a four-factor economic realities test, rather than the seven-factor test the district court had applied. The court of appeals held that college athletes may be employees under the FLSA when they:

1. Perform services for another party;

2. Do so necessarily and primarily for the other party's benefit;

3. Are under that party's control or right of control; and

4. Receive express or implied compensation or in-kind benefits.

While holding that certain student-athletes may be employees under the FLSA, the court of appeals also suggested that this will not always be the case. Rather, it stated that its four-factor, economic realities framework should be applied in a way that would "distinguish college athletes who 'play' their sports for predominantly recreational or noncommercial reasons from those whose play crosses the legal line into work protected by the FLSA."

The court of appeals has sent the case back to the district court to apply the economic realities test, which will be fact-dependent and may vary among the named plaintiffs depending on various circumstances, including the sport which they played.

What Happens Next?

Once the district court renders a final judgment, that decision will almost certainly be appealed by the losing parties. In any case, because two other courts of appeals have rejected arguments that student-athletes were employees, the issue may ultimately be resolved by the U.S. Supreme Court (see *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019); *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016)).

Bills have been proposed in Congress that would confirm that student-athletes are not employees of their institutions or the NCAA. Last month, the U.S. House Committee on Education and the Workforce voted, strictly along party lines, to move one such bill forward. However, the lack of bipartisan support for such legislation suggests that it is unlikely that such a bill will pass in the near future.

Unanswered Questions?

The *Johnson* decision leaves many unanswered questions:

- What differentiates a college athlete who plays their sport for predominantly recreational or noncommercial reasons (and who would not be an employee under the FLSA) from one whose play crosses the line into work (and who would be an employee under the FLSA);
- Can some student-athletes on a team be employees while others on the same team are not;
- Which hours connected with the student-athlete's sport would count as work;
- Will student-athletes be entitled to workers' compensation and other employee benefits;
- Will Title IX mandate equal pay for the same sport teams of different genders?

Unfortunately, we expect much more litigation by student-athletes before we have definitive answers on any of these questions.

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