PUBLICATION

Seventh Circuit Sidelines Claims That Student-Athletes Are "Employees" Under The FLSA

December 13, 2016

The NCAA and its member institutions scored another win last week in a Chicago courtroom when the Seventh Circuit closed the book on former student-athletes' proposed class action claiming that their participation in college athletics made them employees entitled to be paid minimum wage compensation.

The Court affirmed Judge William Lawrence's February 2016 decision to dismiss claims filed by former student-athletes Gillian Berger and Taylor Hennig under the Fair Labor Standards Act (FLSA). As we previously wrote, the students sued the University of Pennsylvania, the NCAA and more than 120 other Division I member schools, claiming that participation in collegiate athletics makes all student-athletes "employees" within the meaning of the FLSA. In a concise opinion, the panel of three Seventh Circuit judges affirmed the trial court's decision and likely sidelined this case for good.

Judge Kanne, writing for the Court, summarily affirmed dismissal of the claims against the NCAA and the other 120 member institutions: "[Berger and Hennig] attended Penn. Their connection to the other schools and the NCAA is far too tenuous to be considered an employment relationship." Because they could not possibly have been employed by any school other than Penn, the Court reasoned, Berger and Hennig could not be entitled to recover from those schools.

The Court then turned to Berger and Hennig's allegations that they were employees of Penn. In their appeal, the former track athletes had asked the Court to liken their athletic participation to that of an internship. The Court rejected that theory and focused on the "economic reality" of the former athletes' relationship to Penn. Noting the "revered tradition of amateurism in college sports" and citing approvingly to *NCAA v. Bd. of Regents of Univ. of Oklahoma* (1984), the Court stated that this "long-standing tradition defines the economic reality between student athletes and their schools." The NCAA eligibility rules, prior court decisions and the Department of Labor handbook all led the Court to determine that student-athletes are not university "employees" within the meaning of the FLSA.

Judge Kanne finished strong, stating "[Berger and Hennig] have not, and quite frankly cannot, allege that the activities they pursued as student-athletes qualify as 'work' sufficient to trigger the minimum wage requirements of the FLSA." Student-athletes, in line with the tradition of amateurism in college sports, "participate in their sports for reasons wholly unrelated to immediate compensation." The Court acknowledged the "tremendous amount of time" student-athletes spend competing for their schools, but noted that they do so "without any real expectation of earning an income." Thus, student-athletes are not employees and are not entitled to minimum wage compensation under the FLSA.

While this decision likely marks the end of the race for Berger and Hennig, another student-athlete may pick up the baton and run with Judge Hamilton's concurring opinion. Judge Hamilton emphasized the distinguishing factors that Penn, like other Ivy League schools, does not offer athletic scholarships, and its track program does not generate revenue for Penn. Thus, the economic reality of Berger and Hennig's athletic participation was far from an employment relationship. However, breaking from the tone of Judge Kanne's opinion, Judge Hamilton noted that revenue sports like Division I men's basketball and FBS football "involve billions of dollars

of revenue for colleges and universities." Under that economic reality, Judge Hamilton wondered aloud that "there may be room for further debate" regarding revenue-sport athletes having more viable legal claims. Accordingly, this case may be merely a false-start for student-athletes' employment-based claims, rather than a crushing defeat.

Baker Donelson will continue to provide additional alerts on this topic as appropriate. Stay tuned.

With more than 30 Higher Education attorneys and more than 90 Labor & Employment attorneys, Baker Donelson has significant experience in FLSA related matters. For more information, please contact any member of our Higher Education Group.