From Metaphor to Reality? NCAA Athletes Might Become Your Favorite College's New Employees

By Anthony Lucchesi on March 28, 2023
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"Being a college athlete is a full-time job." This saying is a metaphor for the realities of playing college sports, especially at the Division 1 level. However, a recent trend in court cases involving the NCAA might push this metaphor into reality.

Case Background

In February, the Third Circuit Court of Appeals heard oral arguments in *Johnson v. NCAA* as to why student athletes should be considered "employees" of the NCAA and their respective institutions as joint-employers under Section 203(e)(1) of the Fair Labor and Standards Act (FLSA) and thus granted minimum wage. Johnson v. Nat'l Collegiate Athletic Ass'n, 2021 WL 612095 (E.D. Pa. Dec. 28, 2021). [Section 203(e)(1) of the FLSA states that "the term 'employee' means any individual employed by an employer.'" 29 U.S.C.A. § 203 (West 2022).]

Johnson's argument, made on his own behalf and those of all similarly situated persons, is that the restrictions placed on student athletes at the Division 1 (D1) level severely hinder the athletes' economic opportunities; thus student athletes should be paid at the level of minimum wage under the FLSA. Johnson v. Nat'l Collegiate Athletic Ass'n, 556 F. Supp. 3d 491, 496-497 (E.D. Pa. Aug. 25, 2021). The allegations by Johnson illustrate the overall burden placed on student athletes by participating in collegiate sports. A few examples of these burdens listed in the complaint include that athletes:

1. must schedule classes around their required NCAA athletic activities and cannot reschedule their NCAA athletic activities around their academic programs
2. cannot enroll in a non-core class during the required athletic activities time, including classes that are prerequisites for academic degree programs
3. are required to participate in Countable Athletically Related Activities ("CARA"), which are recorded on time sheets required by NCAA bylaws
4. are required to perform activities like fundraising and community service. Furthermore, failure to attend meetings, practice, or scheduled competitions can lead to discipline, which include suspension or dismissal from the team.

The argument boils down to comparisons between student athletes and work-study students. In the complaint, Johnson asserts the fact that work-study students are classified as employees under the FLSA, even those with scholarships. If one group is required to be paid the minimum wage without the other requirements and burdens specifically attributed to student athletes, the question as to why there is a distinction is important.

Appellate Court Oral Arguments

The Third Circuit heard oral arguments for this case and was asked to decide whether student athletes are employees within the meaning of FLSA. The arguments before the Court and questions from the bench focused on several points.

What Test will be Used?

One of the main issues the Court has to decide in this case is what test will be used to analyze the question presented. Johnson proposed several tests, but he focused on two: (1) the *Glatt* student employee test and/or (2) the Independent Contractor v. Employee test. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016); *Razak v. Uber Techs., Inc., 951 F.3d 137 (3d Cir.), amended, 979 F.3d 192 (3d Cir. 2020).* While both tests deserve their own blog posts, the key focal points of the Court for each was ultimately the degree of control factor, the economic reality of the situation, and how this ultimately ties into the employment relationship.

Degree of Control

The first focal point of the arguments put forth by Johnson revolve around the degree of control that the NCAA has over student athletes. Johnson alleges that:

- NCAA D1 member schools are required to have an adult supervisor maintain timesheets for participants.
- The student athletes are required to adhere to handbooks that contain standards for controlling performance and conduct.
- Student athletes face greater possible consequences compared to the average student attendee of the same universities (e.g., suspension or dismissal from the team).
- NCAA D1 member schools also publish supplemental handbooks with standards for controlling conduct both on and off the field (e.g., social media use, derogatory or disparaging comments toward other teams, and restricting legal consumption of alcohol and nicotine products).

The panel of judges repeatedly questioned the NCAA's attorney about the degree of control over these athletes that is not seen for non-athletes. One reference was how athletes cannot pursue specific majors or study areas due to athletic commitments, mirroring Johnson's allegations. Another reference included how students in the arts fields can hire agents for professional arts pursuits, but athletes are prohibited from doing this. Finally, as noted by Johnson's attorney, sports gambling is an obvious difference: regular students can bet on sports, but athletes cannot. Johnson's attorney mentioned these examples during oral argument to illustrate just how much control the NCAA has over student athletes without them being considered employees.

Economic Reality and Employment Relationship

Finally, the Court focused on the employment relationship as a whole and the economic reality of the situation. On the topic of employment and economic reality, one Judge summed up the standard by stating: “Employment is not tied directly to economic reality, or even profitability.”

So, what test will the Court use? One Judge suggested it may be a combination of the two or even something more, when stating: “Compensation is only part[;] control would be another part. So, an athlete could equal an employee not because of compensation but because all of the other parts of the test [are] equal [to an employment relationship].” Another suggestion was that the end point of this legal issue may be that some athletes are considered employees while most other athletes are not. (For example, a scholarship athlete would equal an employee while a non-scholarship athlete would not.)

One thing is certain: the appellate court did not seem swayed by the NCAA’s “students are amateurs” argument. One judge went so far as to say, “You’re basically saying [these student athletes] are amateurs because you’re calling them amateurs.” The NCAA attorney pushed back with a notable quote, “They are amateurs because they are playing with no expectation of being compensated for it.” As for now, the motion to dismiss the case had been denied while both parties await the Third Circuit’s ruling.

Trending in the Right Direction?

While this case is not the first legal challenge brought against the NCAA, it’s certainly a notable one because of the recent shift in the legal sphere for the NCAA. The most notable decision came from the United States Supreme Court in *NCAA v. Alston*, an antitrust case. *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021). This case involved questions surrounding the antitrust nature of the NCAA and how the NCAA rules limiting education-related compensation violated the Sherman Act. *Id*. This famously led to student athletes being able to receive compensation for their name, image, and likeness (NIL). *Id*. This case represented a monumental shift in collegiate sports and has changed the recruiting landscape for the foreseeable future. (Notable college coaches have gone on record to indicate displeasure with the NIL landscape, including Alabama football coach Nick Saban, former Syracuse men’s basketball coach Jim Boeheim, and Clemson football coach Dabo Swinney.)

Aside from the NIL impact, another important aspect of the *NCAA v. Alston* case was Justice Kavanaugh’s concurring opinion. In that opinion, he issued a harsh review of the NCAA’s current situation and what their future might look like by stating that “all remaining NCAA compensation rules should receive ordinary ‘rule of reason’ scrutiny,” tossing aside decades-old comments regarding amateurism in college sports. 141 S. Ct. at 2167 (2021)(Kavanaugh, J. concurring). When the NCAA argued that maintaining compensation restriction is “necessary to distinguish college from professional athletics,” Justice Kavanaugh stated: “Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product.” *Id*. at 2168. The most damaging remark, however, was when Justice Kavanaugh hinted at the future of the NCAA by stating, “[N]owhere else in America can businesses get way with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair

market rate . . . the NCAA is not above the law." *Id*. at 2169.

The Takeaway

Based on the current trend, the next few months will decide whether another seismic shift in college sports is upon us and if the NCAA is truly outside of the law when it comes to student athletes. Next time a student athlete says that their college life is a full-time job, it may very well be true.

Tags: College Athletes, College Athletes as Employees, NCAA, Sports Law, U.S. Appellate Court