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News Concerning Recent Labor and Employment Issues

COZEN O'CONNOR

No Pay for Student Athletes' Play, Seventh Circuit Affirms

Adding to the growing body of case law dealing with the employment status of college students *vis-à-vis* institutions of higher learning where they are enrolled, the U.S. Court of Appeals for the Seventh Circuit recently ruled — as a matter of law — that student athletes are not employees of the college or university they attend, and therefore are not entitled to a minimum wage or overtime pay under the Fair Labor Standards Act.

In *Berger v. National Collegiate Athletic Association*, a group of former women's track and field athletes at the University of Pennsylvania (Penn) sued Penn, the National Collegiate Athletic Association (NCAA), and more than 120 other NCAA Division I universities and colleges. The theory: They were employees of the defendants in their capacities as student athletes, and therefore should have been paid at least the minimum wage for the time they devoted to their sport. The Court of Appeals affirmed a decision of the U.S. District Court for the Southern District of Indiana granting Penn's motion to dismiss on the merits, and dismissing the claims against the NCAA and other defendants for lack of standing.

Addressing the matter of standing first, the Court of Appeals noted that in a claim brought under the FLSA, alleged employees' "injuries are only traceable to, and redressable by, those who employed them," and that the plaintiffs' connection to the non-Penn defendants, including the NCAA, was "far too tenuous to be considered an employment relationship."

Turning to the merits, the Seventh Circuit rejected (as did the district court) the plaintiffs' argument that the multifactor test established by the U.S. Court of Appeals for the Second Circuit in its seminal case addressing the employment status of unpaid interns, *Glatt v. Fox Searchlight Pictures, Inc.*, should apply to the matter at hand. The problem with applying the *Glatt* standard to cases involving student athletes, the court reasoned, is that doing so would "fail to capture the true nature of the relationship" between the students and the alleged employer. To capture the nature of that relationship, the court continued, requires "a more flexible standard" focused on the economic realities of the situation.

The economic reality of the case presented, the Court of Appeals said, is that there is a "revered tradition of amateurism in college sports," and "an elaborate system of eligibility rules" to attain and maintain student-athlete (i.e., amateur) status. Further, a majority of courts have concluded in various contexts that student athletes are not employees, and the Department of Labor's Field Operations Handbook also persuasively "indicate[s] that student athletes are not employees under the FLSA." Ultimately, the Court of Appeals concluded, the plaintiffs "quite frankly" could not allege a set of facts under which the time they chose to devote to their sport would qualify as "work" under the FLSA.

In a short concurring opinion, Judge Hamilton notes that the student athletes in question did not hold scholarships, and the sport at issue is not a "revenue" sport. In light of those facts, Judge Hamilton "cautioned" that he was "less confident" that the court's reasoning should extend "to students who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and FBS football." While we do not anticipate such a theory being advanced again in the Seventh Circuit anytime soon, scholarship student athletes in revenue-generating sports might use that concurring opinion in other judicial circuits to pursue claims under the FLSA.

In the meantime, however, colleges and universities have strong authority in support of the argument that when student athletes take to the playing field, they are "playing," according to the U.S. Court of Appeals for the Seventh Circuit and not working.

Joseph E. Tilson
Member
jtilson@cozen.com
Phone: (312) 474-7880
Fax: (312) 878-2019

Anna Wermuth
Vice Chair, Labor & Employment Department
awermuth@cozen.com
Phone: (312) 474-7876
Fax: (312) 878-2023

Jeremy J. Glenn
Member
jglenn@cozen.com
Phone: (312) 474-7981
Fax: (312) 706-9791

Cozen O'Connor's Labor & Employment attorneys are available to provide counsel and guidance on the issues discussed in this Alert.