Seventh Circuit Affirms Dismissal of Student Athletes' Suit Seeking Federal Minimum Wage, But Concurrence Leaves Room For a Different Result in Future Cases

by Gerard J. Gaeng

On December 5, 2016, the federal Seventh Circuit Court of Appeals affirmed a trial court's dismissal of a suit brought by two former members of the University of Pennsylvania's ("Penn") women's track and field team.[1] The student athletes sued Penn, the NCAA, and more than 120 other NCAA Division I colleges and universities. The theory of the suit was that student athletes at the defendant colleges and universities are employees entitled to a $7.25 minimum wage under the federal Fair Labor Standards Act (FLSA). The trial court granted defendants' motions to dismiss. The athletes appealed to the Seventh Circuit, which affirmed the dismissal.

The Court first addressed the claims against the defendants other than Penn. It observed that plaintiffs always bear the burden of establishing standing to sue the defendants. One of the three elements of standing under federal common law is establishing that the plaintiff's injury "is fairly traceable to the challenged action of the defendant."[2] Since the two students attended Penn, their relationship to the NCAA and the other schools was too tenuous to establish standing to sue those defendants. The court affirmed the dismissal of the claims against the NCAA and the other schools.

Turning to the merits of the claim that the student athletes were employees of Penn, the Seventh Circuit rejected the plaintiffs' argument that the court should apply a fixed multi-factor test used to decide other FLSA employment cases, such as those involving private sector interns or prison inmates. The court said that a better approach to the student-athlete claim for the minimum wage was to look at the "totality of circumstances" and the "economic reality" of the alleged employment relationship.

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1 The case is *Berger, et al. v. National Collegiate Athletic Association, et al.,* No. 16-1558 (7th Cir., December 5, 2016).

2 *Friends of the Earth, Inc. v. Faidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

In concluding as a matter of law, without discovery, that the plaintiffs were not employees of Penn for purposes of the FLSA, the court relied strongly on "a revered tradition of amateurism in college sports,"[3] and the fact that courts generally have not treated students as employees under other laws, such as workers compensation laws or the National Labor Relations Act.

The Court also analyzed a Department of Labor *Field Operations Handbook* ("FOH") addressing the employment status of college and university students. The FOH states that students engaged in activities generally recognized as "extracurricular" are generally not considered to be employees under the FLSA. The FOH also refers elsewhere to "interscholastic athletics" as among a list of programs that do not create an employment relationship because they are "conducted primarily for the benefit of the participants as part of the educational opportunities provided to the students by the school … ." The Seventh Circuit found the FOH interpretation to be persuasive and concluded that the student athletes were not employees for purposes of the FLSA. Put another way, said the court, "student-athletic 'play' is not 'work,' at least as the term is used in the FLSA."

Circuit Judge Hamilton, who joined in the opinion, left a window open regarding future cases in a brief concurrence. He noted that plaintiffs were track and field athletes at an Ivy League school. As such, they did not receive athletic scholarships, or participate in a "revenue sport." Accordingly, plaintiffs advanced a very broad theory of employment (*i.e.* all student athletes in NCAA Division 1 schools are employees) to cover plaintiffs' situation. In plaintiffs' situation, both the "economic reality" and "amateurism" factors supported the court's decision that they were not employees.

Judge Hamilton opined that there "may be room for further debate" in the case of student athletes who receive athletic scholarships to participate in "revenue sports," such as Division I men's basketball and FBS football. He posited that in this hypothetical

[3] *Quoting National Collegiate Athletic Ass'n. v. Bd. Of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).

situation, the “economic realty” factor might tilt in favor of an employment relationship. Stay tuned.

Gerard Gaeng represents business clients in a variety of litigation matters, including suits brought on a class-action basis. He can be reached at ggaeng@rosenbergmartin.com.