PUBLICATION

"'Play' is Not 'Work'" – USC Football Player Loses FLSA Suit Seeking "Employee" Wages

May 02, 2017

Former University of Southern California football player Lamar Dawson's attempt to be declared an "employee" under the Fair Labor Standards Act (FLSA), so that he and a proposed class of Division I Football Bowl Subdivision (FBS) football players would be entitled to minimum wage and overtime payments in return for their "work" generating "massive revenues" for their universities, was soundly defeated in federal court on Tuesday, April 25.

As we previously wrote in December 2016, the Seventh Circuit held in *Berger v. National Collegiate Athletic Association* that FLSA claims made by former track athletes at the University of Pennsylvania were properly dismissed because those non-scholarship student athletes were not "employees" within the meaning of the federal statute. In a concurring opinion, however, Judge David Hamilton wondered whether "there may be room for further debate" regarding revenue-sport athletes such as those who participate in "Division I men's basketball and FBS football." Given his concurrence, we opined that another student athlete could "pick up the baton" from the track athletes and run with a more appealing FLSA case in another jurisdiction.

Lamar Dawson did just that. Dawson filed his lawsuit in September 2016 against the Pac-12 Conference and the National Collegiate Athletic Association (NCAA), asserting claims for unpaid wages under the FLSA and California law. The defendants filed a motion to dismiss, asserting student athletes are not "employees" under the FLSA or California law. Lawson countered with Judge Hamilton's concurring opinion, asserting "there is a world of difference between Ivy League track and field and Division I FBS football."

Judge Richard Seeborg of the Northern District of California, however, did not agree and found Lawson's complaint was "based on an untenable legal theory." In a sharply worded opinion, Judge Seeborg relied heavily upon *Berger* as "persuasive" authority. He rejected Dawson's argument that *Berger*'s holding is distinguishable "because it involved track and field athletes at the University of Pennsylvania, while [his] case involves Division I football players who earn 'massive revenues' for their schools." Most significantly, Judge Seeborg held that "the premise that revenue generation is determinative of employment status is not supported by the case law." He cited several cases where, "in examining the 'economic reality' of the relationship between student[s] and their schools, courts have rejected the relevance of profitability."

In focusing on the "true nature of the relationship," Judge Seeborg opined that student athletes "participate in their sports for reasons wholly unrelated to *immediate* compensation" (emphasis added). Quoting *Berger*, Judge Seeborg agreed that although "student athletes spend a tremendous amount of time playing for their respective schools, they do so … without any real expectation of earning an income."

Judge Seeborg dismissed Judge Hamilton's concurring opinion in *Berger* as mere speculation, stating that it "did not consider, much less find, that football players are 'employees' under the FLSA." He also rejected Dawson's reliance on *O'Bannon v. National Collegiate Athletic Association*. In *O'Bannon*, the Ninth Circuit held that NCAA compensation rules are subject to antitrust laws, but Judge Seeborg bluntly observed that "the decision says nothing about the existence of an employment relationship between student athletes and the NCAA."

In addition to relying on *Berger* directly, Judge Seeborg followed its lead by relying on Chapter Ten of the Department of Labor Field Operations Handbook, which "contains interpretations regarding the employment relationship required for the [FLSA] to apply." He cited § 10b24(a), which provides that "students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the [FLSA]." He also cited § 10b03(e), which "explains that … extracurricular activities like 'interscholastic athletics,' which are 'conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by [the FLSA] and do not result in an employer-employee relationship between the student and the school.'" And Judge Seeborg rejected Dawson's attempt to liken students participating in revenue-generating sports to students participating in work-study programs (who are generally considered employees under the FLSA) because the reference to "interscholastic athletics" in § 10b03(e) "does not distinguish between sports that generate revenue and those that do not." He said, "There is a difference between work-study programs, which exist for the benefit of the school, and football programs, which exist for the benefit of the students and, in some limited circumstances, also benefit the school."

Leaving no stone unturned, Judge Seeborg also distinguished a case where a National Labor Relations Board regional director opined that Northwestern University football players receiving grant-in-aid scholarships are "employees" under the National Labor Relations Act. He noted that decision involved "a different statute and different types of parties" and, most importantly, "it was not adopted by the [National Labor Relations] Board. … Accordingly, the regional director's decision is not entitled to deference."

In sum, while the Seventh Circuit's opinion about non-scholarship track athletes in *Berger* may not have been a crushing defeat to student-athletes' FLSA claims, Judge Seeborg's opinion may be. Dawson can still file an appeal with the Ninth Circuit Court of Appeals, but that Court would be hard-pressed to overcome both the Seventh Circuit's and Judge Seeborg's determination that "the long tradition of amateurism in college sports, by definition, shows that student athletes – like all amateur athletes – participate in their sports for reasons wholly unrelated to immediate compensation." Moreover, the Ninth Circuit recently observed approvingly in *O'Bannon* that "not paying student-athletes is *precisely what makes them amateurs*," and concluded that "the difference between offering student athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap."

Baker Donelson will continue to follow litigation involving collegiate athletic departments and provide additional alerts as appropriate.