IS IT REALLY WORK IF YOU'RE HAVING FUN?

Shedding Light on the Employment Protections Afforded to College Students

By: David Disler

Over the years, courts and administrative agencies have struggled to properly classify the "work" performed by college students under our country's employment and labor laws. As the U.S. Supreme Court poignantly observed, the "structure of a university does not fit neatly within the statutory scheme."[1] This past year was no exception, as the entitlements afforded to student-athletes and teacher assistants grabbed headlines. With the college landscape continuing to evolve, each of these cases illustrate the increasing complexity in properly classifying work performed by students.

Student Athletes

The issue of whether college athletes are considered "employees" of their respective universities rose to national prominence in 2014 when a Regional Director at the National Labor Relations Board ("NLRB") determined that scholarship athletes on the Northwestern University football team met the statutory definition of "employees" and therefore were entitled to unionize. This matter was appealed to the full NLRB in August 2015, which used its discretionary authority to refuse to assert jurisdiction. The NLRB determined that due to the nature of college football, "in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction," "it would not promote stability in labor relations to assert jurisdiction in this case."[2]

By declining jurisdiction, the NLRB left unanswered the question of whether scholarship athletes were employees of the school and what, if any, protections they could be afforded. However, in September 2016 an Associate General Counsel of the NLRB issued an Advice Memorandum that held that Northwestern's Football Handbook violated the National Labor Relations Act ("NLRA").[3] The memorandum began by assuming "that Northwestern's scholarship football players are statutory employees." Based on this assumption, the Advice Memorandum concluded that team policies that prevented the athletes from discussing their health, required university approval to speak with the media, and prohibited negative comments about the school, were unlawful under the NLRA. However, a complaint was not issued because Northwestern voluntarily agreed to change these policies.[4]

Following the issuance of the Advice Memorandum, the General Counsel of the NLRB issued a Memorandum to all Regional Directors, which established the position of his office that "scholarship football players at Northwestern and other Division I FBS private colleges and universities are employees under the NLRA." Therefore, "scholarship football players should be protected by Section 7 when they act concertedly to speak out about aspects of their terms and conditions of employment."[5] While the opinion of the General Counsel's office is not binding on the NLRB, it would appear that student- athletes may be afforded additional protections under the NLRA, despite being unable to unionize.

Beyond the ability to unionize, one of the most prominent issues in college sports is whether student-athletes are entitled to be paid. Under the Fair Labor Standards Act ("FLSA"), employers must pay employees a minimum wage of $7.25.[6] Since college sports have become a billion-dollar industry, many have questioned the amateur status of college athletes. Recently, the Seventh Circuit faced this very question in a lawsuit filed by two former student-athletes on the University of Pennsylvania's women's track and field team. In determining whether these students were employees under the FLSA, the key issue was whether they performed "work." In citing the "revered tradition of amateurism in college sports" the Court found that student-athletes participated

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1 *N.L.R.B. v. Yeshiva Univ.*, 444 U.S. 672, 673 (1980).
2 *Northwestern Univ. & Coll. Athletes Players Ass'n*, 362 NLRB 167 (2015).
3 29 *U.S.C.* §§ 151-169.
4 *NLRB Advice Memorandum Re: Northwestern University*, Case 13-CA-157467 (Sept. 22, 2016).
5 *NLRB Memorandum GC 1701* (Jan. 31. 2017).
6 29 *U.S.C.* § 206.

In examining the issue of the admissibility of the EEOC's determination and findings, the Sixth Circuit actually held that the trial court is "free to adopt a general rule that refuses to admit these cause determinations in any sort of trial, whether to the court or to a jury." *EEOC v. Ford Motor Company*, 1996 U.S. App. LEXIS 26263, 1996 WL 557800 at *9. The court noted that the finder of fact owed no deference to the administrative agency and thus the determinations had little value. Id. The concern among most of circuit courts that follow this "discretion" rule is that the jury would allow the EEOC's judgment to replace its own and that this potential outweighs any probative value that the EEOC determination might have.

Conclusion

Upon review of the case law and the district court decisions, it appears rare other than in the Fifth and Ninth Circuits to have a judge admit an EEOC determination at trial. Most trial courts error on the side of a jury making the ultimate determination without the aid of the EEOC's view. So as a plaintiff's side attorney, it is certainly worth making the argument for admissibility of a "cause" finding, but I wouldn't bet your trial strategy on it actually making it into evidence. ⚖

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in sports for reasons wholly unrelated to immediate compensation. Therefore, the Court concluded that these students were not employees because they "play," rather than "work."

In reaching its decision, the Court gave significant credence to the Department of Labor's Operations Handbook, which holds that college students participating in "extracurricular activities" are generally not considered employees under the FLSA. Notably, the definition of "extracurricular activities" was not limited to interscholastic athletics, but also included dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, and intramurals. Therefore, a natural extension of this holding is that students who participate in these activities (such as participating in a school play, orchestra, or newspaper, where revenue is generated by the school through charging admission or the sale of advertisements), are also not protected by the FLSA.[7]

Judge David Hamilton joined the Court's opinion, but wrote a separate concurrence to "add a note of caution." While Judge Hamilton agreed with the Court's reasoning as it applied to non-scholarship athletes who participated in non-revenue sports, he was less confident that its rationale, which was largely based on the tradition of amateur college athletics, would extend to students who participated in "revenue sports" such as men's basketball and football. Rather, the fact that these sports generate billions of dollars in revenue may lead to a different outcome. Fortunately, this lingering question raised by Judge Hamilton may soon be answered. A former University of Southern California football player recently sued the NCAA and the Pac-12 Conference, seeking unpaid wages under the FLSA and state law.[8] The defendants moved to dismiss and a ruling is expected soon.

Teaching Assistants & Research Assistants

The history of defining teaching assistants and research assistants as "employees" under the NLRA is rather convoluted. In 2000, the NLRB found that student assistants at New York University ("NYU") met the definition of employees and therefore could unionize. However, the NLRB reversed this decision in 2004 and found that graduate teaching and research assistants at Brown University were not employees because they were "primarily students and [had] a primarily educational, not economic, relationship with their university." This decision stood for twelve years, until the NLRB again reversed itself in 2016, finding that its original rationale in *NYU* was the correct interpretation of the NLRA.

In the NLRB's most recent decision, graduate research assistants, graduate teaching assistants, and undergraduate teaching assistants at Columbia

7 *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 294 (7th Cir. 2016).

8 *Dawson v. National Collegiate Athletic Association et al.*, 16-CV-05487-RS (N.D. Cal.).

University sought to unionize. The Democratic-controlled NLRB found that a "common law employment relationship" existed between these students and the University because these students "perform services for, and under the control of, their universities," which in turn paid them for those services.[9] This decision was 3-1, with all three Democratic Board members concurring with the majority decision and the one Republican Board member dissenting. However, under President Trump the five member NLRB will have a Republican majority for the first time in seven years. In addition, President Trump named the dissenting Board member (Philip A. Miscimarra) as Acting Chairman of the NLRB.[10] Therefore, the NLRB's decision in *Columbia University* may be short-lived.

Resident Advisors

A broad reading of the NLRB's holding in *Columbia University* would also protect students in all non-academic positions at their universities, such as lifeguards, campus tour guides, or administrative assistants in the campus financial aid or alumni affairs offices.[11] In light of the NLRB's decision in *Columbia University*, undergraduate resident advisors at George Washington University filed a petition with the NLRB's Regional Office in Baltimore, Maryland on November 29, 2016 seeking to unionize. The NLRB has yet to issue a decision in this matter; however, if granted, these students would be the first residential advisors to unionize at a private college.[12] Naturally, such a decision will provide further guidance on how expansive the NLRB intends to define "employees" as it relates to the work performed by college students.

Conclusion

There have been significant changes throughout the federal government under the Trump Administration. While a President typically must wait until a Board member's five year term expires to change the composition of the NLRB, President Trump enters office with two seats already vacant. Therefore, President Trump can immediately alter the configuration and philosophy of the NLRB. It is anticipated that the President will utilize this opportunity to appoint two management-sided labor attorneys. Naturally, the views of a majority Republican NLRB are likely to be far different than the Democratic controlled Board. However, until the President fills the two vacant seats, the impact of this change in philosophy remains unclear. ⚖

9 *Columbia University*, 364 NLRB 90 (August 23, 2016).

10 *Who We Are*, National Labor Relations Board available at https://www.nlrb.gov/who-we-are/board/philip-miscimarra

11 *NLRB Memorandum GC 1701* (Jan. 31. 2017).

12 *George Washington University*, Case Number 05-RC-188871 (Filed Nov. 29, 2016).