Employment Law Daily Wrap Up, EMPLOYEE STATUS—7th Cir.: Student athletes not employees entitled to minimum wage under FLSA, (Dec. 6, 2016)

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By Ronald Miller, J.D.

Former members of the University of Pennsylvania's women's track team were not employees of the university under the FLSA, and so were not entitled to be paid minimum wage for their work performed as student athletes, ruled the Seventh Circuit in affirming dismissal of their claims. Applying the economic realities test, and taking into account the tradition of amateurism in college sports, and eligibility rules that define what it means to be a student-athlete, the appeals court concluded that student athletes participate in their sports for reasons wholly unrelated to immediate compensation. Student-athletic "play" is not "work," as that term is used in the FLSA (*Berger v. National Collegiate Athletic Association*, December 5, 2016, Kanne, M.).

The former student athletes sued the NCAA, Penn, and more than 120 other universities and colleges alleging that student athletes are employees who are entitled to a minimum wage under the FLSA. Collegiate athletic teams are regulated by the NCAA. According to the students, the NCAA and its member schools violated the FLSA by not paying their athletes a minimum wage. The defendants filed a motion to dismiss. The district court held that the students lacked standing to sue any of the defendants other than Penn, and that they failed to state a claim against Penn because student athletes are not employees under the FLSA. This appeal followed.

Standing. As an initial matter, the Seventh Circuit agreed with the district court that the students lacked standing to sue any of the defendants other than Penn. Under the FLSA, alleged employees' "injuries are only traceable to, and redressable by, those who employed them." Here, the students' connection to the other schools and the NCAA was far too tenuous to be considered an employment relationship. Thus, they did not plausibly allege any injury traceable to, or redressable by, any defendant other than Penn.

Economic reality test. Next, the appeals court considered the merits of the students' claim with regard to Penn. To qualify as an employee for purposes of the FLSA, one must perform "work" for an "employer." Under the FLSA, the plaintiff bears the burden of establishing that he or she performed work for an employer and is therefore entitled to compensation. Thus, to survive the motion to dismiss, the students had to allege facts, which taken as true, established that they were employees and performed work for Penn.

Because status as an "employee" for purposes of the FLSA depends on the totality of circumstances, courts must examine the "economic reality" of the working relationship between the alleged employee and the alleged employer to decide whether to apply the FLSA to that particular relationship. In determining whether the students were employees in this instance, the Seventh Circuit rejected application of the Second Circuit's test set forth in *Glatt v. Fox Searchlight Pictures, Inc.* Rather, relying on its decision in *Vanskike v. Peters*,the Seventh Circuit has declined to apply multifactor tests in the employment setting when they "fail to capture the true nature of the relationship" between the alleged employee and the alleged employer.

Amateur tradition. Accordingly, the Seventh Circuit agreed with the district court's decision to follow the reasoning of *Vanskike*. The appeals court observed that there exists a tradition of amateurism in college sports, and that long-standing tradition defines the economic reality of the relationship between student athletes and their schools. The eligibility rules devised by the NCAA and its member institutions "define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of" collegiate athletics. The multifactor test does not take into account this tradition of amateurism or the reality of the student-athlete experience.

Student-athlete experience. A majority of courts have concluded that student athletes are not employees. Further, the Department of Labor, through its Field Operations Handbook (FOH), has also indicated that student athletes are not employees under the FLSA. The court rejected the students' attempt to compare NCAA-regulated athletes to the work-study participants of §10b24(b) in the FOH. The court pointed out that Section

10b24(a) categorically states that students who participate in "extracurricular" activities are generally not considered employees. Moreover, Sec. 10b03(e) includes "interscholastic athletics" in a list of activities that do not constitute "work." Thus, the court found the FOH's interpretation of the student-athlete experience to be persuasive.

"Play" is not "work." Noting that student participation in collegiate athletics is entirely voluntary, the Seventh Circuit concluded that the plaintiffs in this case had not alleged that the activities they pursued as student athletes qualified as "work" sufficient to trigger the minimum wage requirements of the FLSA.

Expert comments. "The Court's ruling is clearly correct," Paul DeCamp, a Principal in the Washington, DC office of Jackson Lewis, told Employment Law Daily. The firm represents 30 of the university defendants in the case. "College students who participate in amateur athletics are not employees. The Court properly rejected inapt analogies to work-study and internships."

The case is No. 16-1558.

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Companies: National Collegiate Athletic Association aka NCAA; Abilene Christian University; American University

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