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Are Division I Intercollegiate Athletes Employees? Perhaps

Challenges to the rules of the National Collegiate Athletics Association (NCAA) have increased in recent years. The U.S. Supreme Court struck the NCAA's rule against paying intercollegiate athletes for use of their name, image and likeness (NIL) in 2021.[1] The General Counsel of the National Labor Relations Board, a federal agency that regulates labor relations in the private sector, stated that intercollegiate athletes can be classified as employees and allowed them to attempt to unionize[2] — as the recent case involving Dartmouth College demonstrated.[3] The NCAA and several Division I athletic conferences recently settled a $2.8 billion lawsuit brought by former intercollegiate athletes who demanded payment for NIL usage that accrued prior to the Supreme Court's 2021 ruling[4]. And on July 11, 2024, the U.S. Court of Appeals for the Third Circuit ruled that six intercollegiate athletes could maintain a lawsuit against the NCAA and the institutions they attended that claims that they are employees under the federal Fair Labor Standards Act (FLSA) and thus deserve pay for the time spent in athletics activities.[5]

The students, who had participated in one or more Division I sports (including football, baseball, swimming and diving, tennis, and soccer), claimed that the amount of control of their activities levied by their coaches, and the restrictions on how they spent their time while enrolled, meant that they met the requirements of the wage and hour law for employment protection. Thus, they claimed, they deserved at least minimum wage for the hours that they spent in these mandatory activities. The defendants disagreed, arguing that the students were amateur athletes, not professionals, and did not qualify for the protections of the FLSA. The defendants moved to have the case dismissed by the U.S. District Court for the Eastern District of Pennsylvania, but that court denied the motion, ruling that Division I intercollegiate athletes were analogous to unpaid interns.[6] That court analyzed the students' claims under a test used by the U.S. Department of Labor for determining whether interns were entitled to pay under the FLSA.[7] The court also reviewed a 2016 case, *Glatt v. Fox Searchlight Pictures, Inc.,*[8] that analyzed whether college students serving as interns should be paid. The trial court in *Johnson* found that the allegations of the students with respect to the time they spent, their lack of control over how they spent their time, and several other of the factors involving interns, could meet the test for employee

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[1] *Alston v. NCAA*, 141 S. Ct. 2141 (2021).

[2] NLRB, *Statutory Rights of Players at Academic Institutions (Student-Athletes) under the National Labor Relations Act,* General Counsel Memorandum 21-08, September 29, 2021.

[3] On February 5, 2024, a NLRB Regional Director ruled that the players on Dartmouth College's varsity basketball team were employees under the NLRA's definition, and ordered the College to bargain with the union representing these players. Trustees of Dartmouth College, Case No. 01-RC-325633 (February 5, 2024). The players voted to be represented by a union later that spring.

[4] Kristi Dosh, "10 Things to Know about the NCAA's House Settlement," Forbes, May 24, 2024, available at https://www.forbes.com/sites/kristidosh/2024/05/24/10-things-to-know-about-the-ncaas-house-settlement/

[5] *Johnson v. NCAA*, 2024 U.S. App. LEXIS 16953 (3d Cir. July 11, 2024).

[6] *Johnson v. NCAA*, 556 F. Supp. 3d 491 (E.D. Pa. 2021).

[7] U.S. Department of Labor. Fact Sheet #*71: Internship Programs Under the Fair Labor Standards Act,* January 2018. https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships.

[8] 811 F.3d 528 (2d Cir. 2016).

status, and that dismissal was inappropriate. The NCAA and college defendants asked the trial court to certify its ruling for an interlocutory appeal, rather than waiting until the trial court had ruled on the merits, and that court did so.[9] The appellate court agreed to hear the appeal.

On July 11, 2024, the U.S. Court of Appeals ruled 3-0 that the students could proceed with their case.[10] The appellate court rejected the "amateurism" defense, and agreed with the trial court's denial of the motion to dismiss, although for other reasons, finding that the students might be able to provide sufficient evidence to meet the FLSA requirements for employee status. The appellate court found that the trial court's use of the test for interns was erroneous, but affirmed the trial court's ruling on different grounds. The appellate court said that the *Glatt* test did not control this set of facts because interns are learning skills that relate to their academic training, while intercollegiate athletics did not relate to the students' academic curriculum. The court noted that time spent in required athletics activities actually was detrimental to the students' academic performance because the time and scheduling requirements interfered with their choice of courses and, in some cases, their choice of majors.

Referring to earlier cases involving the determination of whether a particular individual or set of individuals were "employees" entitled to FLSA protections, the appellate court created a four-part test:

1. Whether the individual(s) perform services for another party;
2. Whether the services are necessarily and primarily for the other party's benefit;
3. Whether the individual(s) are under that party's control or right of control; and
4. Whether the services are performed in return for express or implied compensation or in-kind benefits.[11]

The court added: "The touchstone remains whether the cumulative circumstances of the relationship between the athlete and the college or NCAA reveal an economic reality that is that of an employee-employer."[12]

It is likely that this litigation will be protracted because the stakes are so high and the arguments are so novel. A ruling that Division I intercollegiate athletes are employees could potentially entitle them to additional protections under other employment laws, such as worker's compensation, employment employment discrimination laws, collective bargaining laws, or Social Security requirements, to name a few. For colleges and universities, determining which laws may apply, and whether a particular issue involves the athlete's status as a student or as an employee, could be complicated. The application of laws affecting intercollegiate athletics has changed dramatically in just a few years, and it is quite likely that more change will come.

For any questions on how this information may affect your institution, please contact Barbara A. Lee, any attorney in Bond's higher education practice or the Bond attorney with whom you regularly work., any attorney in Bond's higher education practice or the Bond attorney with whom you regularly work.

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[9] 2021 U.S. Dist. LEXIS 246324 (December 28, 2021). An interlocutory appeal is an appeal of a ruling that is not final; its purpose is to resolve an unresolved matter of law prior to a ruling on the merits of a case.

[10] Although all three judges supported the outcome of the case, one judge, in a concurring opinion, stated that he disagreed with the reasoning of the case, but not its outcome.

[11] *Johnson v. NCAA,* 2024 U.S. App. LEXIS 26953 at *30.

[12] Id.

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