Fight On? Student-Athletes Press for Employee Status Despite Seventh Circuit Rejection

Tuesday, December 27, 2016

Dong ... Dong ... Dong ... that is the death knell you thought you heard following the decision from the Seventh Circuit Court of Appeals (covering Indiana, Illinois, and Wisconsin) in Berger v. NCAA earlier this month. After that case, many legal prognosticators proclaimed the demise of student-athletes’ claims that they are actually employees of their colleges and universities, and thus, entitled to wages for their athletic services under the Fair Labor Standards Act (FLSA).

Football, Grass

Not so fast. Only days later, in another case, Dawson v. NCAA, a California federal district court issued an early case management ruling suggesting that that student-athlete FLSA wage claims may still have a few kicks left.

At its core, Berger involved two former university track team members’ claim for
wages under the FLSA. The federal district court dismissed the case at an early stage, based on the pleadings, and in its recent opinion, the Seventh Circuit sustained that dismissal after the former students appealed. The Seventh Circuit concluded that the determination of employee status was not solely dependent on application of a fact-intensive, multi-factor test (see, e.g., the Second Circuit’s test applicable to unpaid interns), but also could rest on a more flexible standard based the “economic reality” of the relationship.

In assessing the economic relationship between student-athlete and school, the Seventh Circuit held that “student athletic ‘play’ is not ‘work’” under the FLSA because: (i) U.S. Supreme Court precedent recognizes the “revered tradition” of amateurism in college sports; (ii) in the workers’ compensation context, most courts have held that student-athletes are not employees; and (iii) the U.S. Department of Labor – the federal agency charged with enforcing the FLSA – has stated in its Field Operations Handbook that student athletes are not employees.

Berger was a decisive win for the school, and a big, intriguing win for employers generally. Historically, in FLSA litigation, employee status determinations require case-specific, fact-intensive analysis. Consequently, employers have little hope of an early exit and instead invariably find themselves in the money-sucking rabbit hole of extensive discovery and praying for a district court judge with the temperament and insight to grant them summary judgment. Perhaps the Seventh Circuit has created an opening for employers to succeed with an early motion in FLSA cases, though such opportunities may be limited to unique relationships of the sort found in this particular case. Meanwhile, the Berger plaintiffs have asked the Seventh Circuit for a rehearing, complaining that the early dismissal on the pleadings is not consistent with the precedent that pushes FLSA cases to discovery and trial.

Out in California, however, it appears that the defendants in Dawson may not be as fortunate as the Berger defendants in finding an early exit from their case – an FLSA and California wage law action brought by a former University of Southern California football player (on his own behalf and on behalf of similarly situated college football players) against the NCAA and the Pac-12 Conference. There, the defendants had moved to forestall discovery and stay the case in anticipation of filing a motion to dismiss based on the Berger decision. Largely on procedural grounds, the court rejected the defendants’ request and declined to stay discovery, notably stating that “the Seventh Circuit’s decision in Berger is not controlling here.”

And so with Dawson, the FLSA litigation gambit by student-athletes lives another day. While that survival may hinge on jurisdictional differences (here, between courts in the Seventh and Ninth Circuits), there also may be another, more substantive angle at play. A concurring opinion in Berger suggested that the economic reality of the relationship between student-athlete and school might be viewed differently under the FLSA if the plaintiffs had been participants in revenue-generating sports like football or basketball as opposed to track and field. Naturally, this is a distinction that the plaintiff is pushing hard in Dawson, but is it a distinction worth a difference? Concluding that that employee status in the FLSA context should depend on the revenue-generating aspects of the student’s extracurricular activities leads to a variety of questions. For example, if football and basketball players are employees, what about a university’s student dancers,
musicians, and actors whose performances also may be sold to the public? And what about high school football and basketball players whose games are now broadcast (and presumably sold) via cable television; do their revenue-generating extracurricular activities render them wage-eligible employees? Interesting questions for sure, and notwithstanding *Berger*, the *Dawson* court appears willing to plunge the parties into extensive discovery in order to address them. For now, looks like ‘game on.’

© 2020 Foley & Lardner LLP