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Game, Set, . . . and On to the Match: U.S. Court of Appeals for the Third Circuit Breaks Precedent, Recognizing That Collegiate Athletes May Assert Claims Under the Fair Labor Standards Act

By Alison Silveira and Lilah Wylde

In this article, the authors analyze a decision by a federal circuit court of appeals holding that collegiate athletes may assert claims under the federal Fair Labor Standards Act.

The U.S. Court of Appeals for the Third Circuit has ruled that collegiate athletes may assert claims under the Fair Labor Standards Act (FLSA).

The decision, in *Johnson v. National Collegiate Athletic Ass'n*,[1] is the first of its kind at the federal appellate level, as it breaks from the precedent of its sister circuits which have historically dismissed such claims over the past 30 years by "grant[ing[] the concept of amateurism the force of law."[2] That these athletes may continue to pursue their claims under the FLSA and state wage laws, however, is akin to winning a tennis set – but far from finishing the match. The ball is now back in the athlete-plaintiff's court, to see whether the economic reality of their athletic endeavors is sufficient to establish that they are employees of either the National Collegiate Athletic Association (NCAA) or the universities for which they competed.

The authors, attorneys with Seyfarth Shaw LLP, may be contacted at asilveira@seyfarth.com and lwylde@seyfarth.com, respectively.

THE GAME . . .

In 2019, six then-current and former collegiate athletes filed a putative collective and class action against the NCAA and 25 NCAA Division 1 universities. The plaintiffs, who competed in football, swimming/diving, baseball, tennis, and soccer, allege that they and all other similarly situated collegiate athletes were jointly employed by the defendants and 100 additional NCAA Division 1 universities. According to the district court, the premise of their claim is that "student athletes who engage in interscholastic activities for their colleges and universities are employees who should be paid for the time they spend related to those athletic activities."[3] Defendants moved to dismiss the Complaint on the ground that they do not employ the plaintiffs (whether directly or under a joint employer theory of liability), but the court denied that motion.

In reaching its decision, the district court first addressed the concept of amateurism, which has historically served as the foundation upon which collegiate athletics are distinguishable from anything akin to a business or employment model. The idea that amateurism – i.e., the practice of participating in athletics on an unpaid as opposed to professional basis – exempts collegiate athletes from the federal wage laws grew out of the Supreme Court's opinion in *NCAA v. Board of Regents*,[4] which recognized that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports." However, in 2021, just two months before the district court denied the motion to dismiss, the Supreme Court revisited this language, explaining:

> *Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject all challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in Board of Regents.[5]

Relying on this new guidance, the district court rejected the concept of amateurism as an exemption to the FLSA, and handed plaintiffs a win in the first game of their (legal) set.

. . . The Set . . .

Defendants appealed to the Third Circuit, and while the matter was argued in early 2023 it took nearly 15 months for the court to declare that the plaintiffs are entitled to assert a claim for employment status under the FLSA.

The Third Circuit's opinion begins with an interesting and instructional summary of the history of college athletics, reasoning that it is necessary to understand how collegiate sports generate revenues to

answer the question of whether the amateur status of a collegiate athlete renders them ineligible for payment of the minimum wage.[6] The 1843 Boat Race between Harvard and Yale was the first college athletic contest designed for profit that set the stage for what has become a multi-billion dollar industry.[7] College athletics steadily evolved to increase institutional prestige through revenues[8] and increased applications for admission following highly publicized football or basketball games.[9]

Ultimately, the Third Circuit's decision in *Johnson* upholds the district court's decision and announced a new "test" to determine what constitutes an employee in the world of collegiate athletics, finding:

> [C]ollegiate athletes may be employees under the FLSA when they (a) perform services for another party (b) necessarily and primarily for the other party's benefit, (c) under that party's control or right of control, and (d) in return for express or implied compensation or in-kind benefits.[10]

This test stems from what the Third Circuit saw as a "need for an economic realities framework that distinguishes college athletes who 'play' their sports for predominantly recreational or noncommercial reasons from those who play crosses the legal line into work protected by the FLSA."[11]

. . . *And On to the Match*

Johnson is the first appellate court to find that collegiate athletes can assert a claim to employment status under the FLSA. As any tennis player knows, however, winning a set is a far cry from winning the match. In issuing its opinion, the Third Circuit (without having before it any facts, given that no factual record has been developed below) recognized that the application of its test will be fact dependent, and may vary among sports, universities, and even individual athletes, opining "merely playing sports, even at the college level, cannot always be commercial *work* integral to the employer's business in the same way that the activities performed by independent contractors or interns are assumed to be" in other contexts.[12] The court further acknowledged that under both Supreme Court precedent and the Department of Labor's regulations, "the FLSA does not cover a person who, 'without promise or expectation of compensation, but solely for his personal purpose or pleasure' performs 'activities carried on by other persons either for pleasure or profit.'"[13] It remanded the matter back to the district court to undertake this factual inquiry.

Depending on how the factual record develops, these distinctions are likely to create roadblocks against *Johnson* proceeding in the manner that it is currently pled. For example, whether an individual collegiate

athlete's "services" are for their own benefit, or for the benefit of either the NCAA or the university that they attend, is the type of individualized inquiry that could preclude class certification. Even if "benefit" were interpreted to mean strictly financial benefit (which is very much an open issue), revenue is by definition inconsistent year over year. And while some sports may historically drive more revenue than others (i.e., football and men's basketball), this is only true at certain universities – and certainly not all 125 Division 1 schools that are covered by the putative class that the plaintiffs seek to represent.

Further, even among teams that historically generate significant revenue, not all athletes on a particular team in a given year will be able to establish that they engaged in athletic endeavors with an expectation of compensation; some will have walked on to teams in the hopes of having the opportunity to compete, as opposed to being recruited to play. And for universities that have historically never provided compensation to athletes (i.e., Ivy League schools which do not offer scholarships), an argument that any athlete who competes for those teams does so with an expectation of compensation or in-kind benefits is likely to face a steep uphill climb.

CONCLUSION

What *Johnson* does provide is a new lens to evaluate the unique characteristics of the NCAA and the individual universities' student athletes and athletic programs. The entire landscape of compensation for collegiate athletes is currently in flux, including with respect to name, image and likeness rights, collective bargaining rights, and a pending settlement in *House v. NCAA* which, as currently reported, will open the door, for the first time, to direct compensation to collegiate athletes in the form of revenue sharing. There are years of litigation to come before we see whether there will be further appellate review, how the trial court applies *Johnson* to the individual plaintiffs in that case, whether any subset of those plaintiffs will prevail on an employment claim, and whether the decision may have implications beyond just those plaintiffs. Only then will we be able to declare who has won this match.

NOTES

1. Johnson v. National Collegiate Athletic Ass'n, — F.4th –, 2024 WL 3367646 (3d Cir. July 11, 2024).

2. Id. at *6.

3. Johnson v. Nat'l Collegiate Athletic Ass'n, 556 F. Supp. 3d 491, 495 (E.D. Pa. 2021).

4. NCAA v. Board of Regents, 486 U.S. 85, 120 (1984).

5. National Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 92 (2021); see also id. at 108 ("The Court makes clear that the decades-old 'stray comments' about college sports and amateurism made in [Board of Regents] were dicta and have no bearing on whether the NCAA's current compensation rules are lawful.") (Kavanaugh, J., concurring) (citation omitted).

6. 2024 WL 3367646, at *2-*4.

7. The race was actually not proposed or organized by the students of Yale or Harvard, but instead by a railroad superintendent who hoped to increase ridership by staging a regatta on his rail line. 2024 WL 3367646, at *3.

8. At least 38 NCAA member colleges currently gross more than $100 million annual in sports revenue. Id. at *3.

9. Boston College applications jumped 30% the year following an exciting football game won by Boston College with a 48-yard Hail Mary touchdown pass with six seconds on the clock. Id. at *2.

10. 2024 WL 3367646, at *11 (internal citations and quotations omitted).

11. Id. at *13.

12. 2024 WL 3367646, at *9.

13. Id. (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947)).

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