Former Linebacker Leads Compensation Charge Against NCAA

Robert Teachout

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Student athletes continue to push to be included in an expansive definition of "employee"—and thus be entitled to compensation. So far, though, they haven't been successful.

A former linebacker for the University of Southern California (USC) filed a class-action lawsuit against the National Collegiate Athletic Association (NCAA) for alleged minimum-wage and overtime violations. Besides Fair Labor Standards Act (FLSA) violations, Lamar Dawson also claimed violations of California's Labor Code. The lawsuit named as a co-defendant the Pac-12 Conference, to which USC belongs.

According to the lawsuit, the NCAA and the Pac-12 failed to pay student athletes minimum wage and overtime as required by the FLSA and California law. The organizations, which the lawsuit claims are joint employers, also exercised a high degree of control in the players' on- and off-campus activities and restricted the players' ability to earn compensation.

"The reality of the relationship between the students and the universities they work for is that the athletes deserve to be compensated for the enormous value they bring to the universities," said Mark Rifkin, a partner at Wolf Haldenstein Adler Freeman & Herz LLP in New York City, who is one of the attorneys representing Dawson.

Dawson filed the class-action complaint in California's federal district court in San Francisco (*Dawson v. Nat'l Collegiate Athletic Ass'n*, N.D. Cal., No. 3:16-cv-05487) on behalf of himself and student athletes similarly situated during the four years prior to the Sept. 26 filing date.

In its response to the suit, the NCAA stated that it "strongly disagree[s] with the notion that college students participating in athletics are employees."

"Our experience is that these college students, like their nonathlete colleagues, are very focused on their academic endeavors," said Donald Remy, the NCAA's chief legal officer. "Moreover, they have a passion for their sport and a commitment to their teammates that can't be equated to punching a time clock."

In its statement, a Pac-12 representative said that "we have conducted an initial review of the complaint and will vigorously defend ourselves. As has been made clear through the legal process, student athletes are not employees."

Recent Efforts to Grant Student Athletes Employee Status

There have been several recent attempts to extend employee status to college student athletes. But despite these efforts, the federal courts have been unwilling to redefine student athletes as wage workers, according to Walter Olson, a senior fellow at the libertarian think tank Cato Institute, who researches FLSA issues.

Olson noted that the National Labor Relations Board (NLRB) has been unwilling to force the issue in a case brought by football players against Northwestern University.

In addition, in February 2016, the U.S. District Court for the Southern District of Indiana dismissed a complaint against the NCAA and 123 member schools filed by three University of Pennsylvania track athletes who alleged that they were employees of the school for purposes of the FLSA. Like Dawson, the student athletes argued that the schools reaped large financial benefits from their efforts. The court concluded that school activities such as interscholastic athletics "do not result in an employee-employer relationship between the student and the school or institution," even if a student receives a minimal payment for participation (*Berger v. NCAA*, No. 1:14-cv-1710 (S.D. Ind. 2016)). The case was argued on appeal to the 7th Circuit on Sept. 28.

In a separate lawsuit, the U.S. Supreme Court declined on Oct. 3 to review an appeals court decision that said that the NCAA did not have to pay college basketball and football players, The Wall Street Journal reported.

Case Faces Uphill Battle, Say Experts

Nathaniel Glasser, a partner in the Washington, D.C., office of Epstein Becker Green, sees the USC case as another in a growing trend to classify student athletes—and student workers more broadly—as employees of the colleges and universities that they attend. So far, he says, the effort has been unsuccessful, and "I don't think that will change with this new case filed against the NCAA and the Pac-12."

Olson thinks the case is not so much an attempt to break through the federal legal wall as it is an attempt to create a bypass around it based on unique California law. "Even in a world in which the NLRB redefines grad students as workers, it is far less likely that either courts or agencies will be willing to redefine student athletes as workers without some legislative push from Congress," Olson said. "So the question is whether California law provides a special set of legal tools that plaintiffs can use to get a different result than they could get at the federal level."

Despite the fact that California labor law is more liberal in some important respects, Dawson's case still faces a significant hurdle, Olson said. "Labor law also involves a very substantial element of federal pre-emption," he noted.

Olson explained that while federal statutes permit some variation (often by explicit exemptions and leeway), "states are not free to make up their own view of what is an employment relationship or who gets to unionize; they need to steer within the channels of the acknowledged discretion for states left by federal supremacy in this area."

He expressed doubt that the case would be successful "even if California law were read to carve out its own rules making this set of students into wage workers," something that Olson feels in itself would be a stretch. "The plaintiffs would still face a pre-emption problem that seems to me like an uphill battle for them."