College In Crisis: Why Student Athletes Are Not Workers

By Mitchell Bonner

***Resolved: NCAA student athletes ought to be recognized as employees under the Fair Labor Standards Act.***

Two things stand as sports icons of American culture, in close competition even with their professional counterparts: Division 1 NCAA basketball and football. However, not only has this iconic status netted team and network owners cash and fame, but it has also netted them controversy. As the dollar bills stack up into the millions, people began to note the similarities between the student player’s relationship with his team, and the employer’s relationship with his employee. Soon it began to seem as if the “employee” of the player wasn’t getting payed fairly for services rendered. Therefore, it was no surprise when college teams like the Northwestern University football team and UPenn track team began to sue for such employee privileges in court.

However, what these lawsuits failed to recognize, and why the court cases eventually failed and were not brought up again, is that there is a fundamental difference between pro sports and amateur sports. The nature of amateur status dictates that players play entirely voluntarily. The players are not even totally without payment: college scholarships for sports has increased to such an extent as to compensate college players well. This is why we deny *Resolved: NCAA student athletes ought to be recognized as employees under the Fair Labor Standards Act*.

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COLLEGE IN CRISIS: WHY STUDENT ATHLETES ARE NOT WORKERS (CON)

As college athletes achieve higher and higher fame, so more and more college sports programs seek to gain off of that fame. Many have noted that in this situation college athletes are seemingly working for the college without pay. Therefore, many posit, the students should be treated as employees and be payed; after all, they provide far too much value to the college not to be. However, the framework is already in place for the denial of this status to student athletes without it being weighed as unfair, and that is why we deny the resolution *Resolved: NCAA student athletes ought to be recognized as employees under the Fair Labor Standards Act.*

Contention 1: Amateur Status Dictates

NCAA student athletes may have millions made off their names. However, they did not join collegiate sports fundamentally for this reason. Fundamentally, NCAA student athletes joined their respective teams for reasons entirely unrelated to earning a wage. Ronald Miller, J.D. explains it thus:

Ronald Miller, J.D. (Writer for Employment Law Daily), “Employment Law Daily Wrap Up, EMPLOYEE STATUS—7th Cir.: Student athletes not employees entitled to minimum wage under FLSA”, December 6, 2016. <https://www.jacksonlewis.com/sites/default/files/docs/WK_EMPLOYEE%20STATUS7th%20Cir%20Student%20athletes%20not%20employees%20entitled%20to%20minimum%20wage%20under%20FLSA%20Dec%206%202016.pdf>

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.).

Not only do college athletes participate for reasons unrelated to wage earnings, but their fundamental status as college student athletes dictates that they be not compensated by wages. Miller explains this relationship as such:

Ronald Miller, J.D. (Writer for Employment Law Daily), “Employment Law Daily Wrap Up, EMPLOYEE STATUS—7th Cir.: Student athletes not employees entitled to minimum wage under FLSA”, December 6, 2016. <https://www.jacksonlewis.com/sites/default/files/docs/WK_EMPLOYEE%20STATUS7th%20Cir%20Student%20athletes%20not%20employees%20entitled%20to%20minimum%20wage%20under%20FLSA%20Dec%206%202016.pdf>

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.

In other words, if student athletes were to be paid, they would cease fundamentally to be student athletes, for they would no longer be participating in the sport as first and foremost a student, but as an athlete to earn a wage. Part of the definition of a student athlete set out when students joined their college teams is amateurism, which is by definition unpaid. The affirmative team does not have the fiat power to force the NCAA to change its definition of amateurism as part of the definition of a student athlete. To force them to change this would require an entirely different debate about the NCAA’s definitions outside of the scope of this resolution. Thus, the reality of amateur status of NCAA student athletes dictates that the resolution be denied.

Contention 2: Cost

The thing that must be kept in mind is that by voting for the affirmative, you apply a broad sweeping rule to all NCAA teams, divisions 1-3. That means that such compensation rules are afforded to colleges well off and less well-off alike. Another reality to keep in mind is that in most top sports program cases, the revenue gained through the big money earners are used primarily to fund non-revenue earning sports programs still contained in the NCAA system, fund scholarships, and general maintenance. Therefore by applying employment status en masse to all student athletes, more athletic programs and therefore athletes would suffer than benefit. Michael A. Corgan of the Villanova School of Law puts it thus:

Michael A. Corgan (Villanova School of Law), “Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme”,2012. <http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1009&context=mslj>

Ultimately, the pay-for-play model has a number of serious practical and legal consequences that prevent it from being a viable alternative to the NCAA's current system. First, although a number of universities generate millions of dollars through football and basketball programs, schools utilize this revenue to fund other unprofitable sports. Consequently, although numerous schools would be able to afford to pay all student-athletes a monthly stipend, a large number of schools would be forced to cut other men's sports to even consider paying stipends to both men and women student-athletes that could total millions of dollars. While scholarship cuts could help schools solve their potential financial woes, this proposed financial solution would eliminate opportunities for male athletes in sports such as wrestling and baseball, which have already been drastically reduced by schools to remain in compliance with Title IX.

Bridget Shanley of Chicago-Kent College of Law notes as well that this additional cost requirement imposes a no-win situation that puts them in violation of Title IX, which requires colleges to equally accommodate both men’s and women’s sports:

Bridget Shanley (Chicago-Kent College of Law), “Student-Athletes:Why Employee Status is Not the Answer”, Fall 2014. <http://www.kentlaw.edu/perritt/courses/seminar/BridgetShanley.pdf>

From the Regional Director’s findings, the Northwestern University football program generated $30.1 million in revenue for the 2012-2013 season, yet also generated $21.7 million in expenses.37 The remaining $8.4 million is then used to maintain the stadium facility, as well as subsidize Northwestern University’s non-revenue raising sports. It is noted in the decision that the revenue used to subsidize the other sports ensures that there is a proportionate number of men’s and women’s varsity sports in compliance with Title IX of the Education Amendments of 1972.

Utilizing these funds as compensation for the student-athletes would not only reduce the funds available for the other programs, but could also cause universities to violate Title IX inadvertently. Men’s sports, specifically football and basketball, are the main sources of revenue for the majority of universities. Women’s basketball, although popular, most likely will not provide enough revenue in order to level the playing field among the breadwinners of collegiate sports. Re-allocation of revenue funds in order to compensate the employee student-athletes is thus an unworkable, and possibly unconstitutional, solution to this problem.

Shanley further notes the cost to student academics, as the student-athlete’s relationship with the college morphs into that of an employee:

Bridget Shanley (Chicago-Kent College of Law), “Student-Athletes:Why Employee Status is Not the Answer”, Fall 2014. <http://www.kentlaw.edu/perritt/courses/seminar/BridgetShanley.pdf>

Classifying the student-athletes as employees puts further emphasis on their athletic commitment by stating up front that their employment is for athletic, not scholastic, performance. Further, this classification, as previously mentioned, only applies to student-athletes receiving scholarship. While there will still be those who will participate for “the love of the game,” further alienating these walk-on or non-scholarship student-athletes runs the risk of deterring non-employee student-athletes from participating at all.

This employee classification additionally deters prospective student-athletes, regardless of scholarship status, who want to find a balance between academics and athletics by placing an emphasis, through monetary compensation, on the athletic portion of their commitment. The current rules additionally subject the student-athletes to academic performance standards. Failure to meet these academic obligations results in ineligibility to participate in athletics, and is a legitimate reason for the cancelling of scholarships. There has been no discussion how the current NCAA rules would apply to student-athlete employees, though it can be assumed that their employee status would not be revoked for poor academic performance, thus furthering the disconnect between student-athletes and their academic pursuits.

Therefore, by activating employment status for NCAA athletes, you ultimately hurt the school’s ability to maintain sports to pay people to play, and in fact cause Title IX violations on top of that, all while harming the actual academic pursuits of the player. As a result, all but the largest Division 1 athletic programs would have to be dramatically reduced in size or eliminated, thus reducing and eliminating scholarship opportunities in other sports. This leads to it being harder for these other student athletes to attend college with the reduced or eliminated scholarship money. Therefore the status quo must be maintained in order to promote the most good for the most students, avoid law breakage, and promote student athlete academic pursuits.

Therefore, by reason of the dictates of amateur status and reasons of cost, we deny the following resolution that Resolved: NCAA student athletes ought to be recognized as employees under the Fair Labor Standards Act.

CON-AT: ANSWERS NCAA ATHLETES SHOULD BE CONSIDERED EMPLOYEES

AT: National Labor Relations Board has considered NCAA athletes to be employees in the case of Northwestern.

The NLRB’s decision was not meant to apply to other colleges, and would not bind the majority of Division 1 Schools.

Michelle Piasecki (Specialist in U.S collegiate sport law and current law associate at Harris Beach and writer for Americanbar.org), “Law Review: Are College Athletes Employees?”, Winter 2015 <https://www.americanbar.org/publications/insights_on_law_andsociety/16/spring-2016/law-review--are-college-athletes-employees-.html>

On review, the NLRB declined to assert jurisdiction over the case on the basis that its decision “would not promote stability in labor relations.” The NLRB noted that the unique nature of college football, wherein there exists a “symbiotic relationship” between the teams, conferences, and the NCAA, makes it difficult, if not impossible, to assert jurisdiction over only one team. Issues impacting the players at Northwestern would also affect the Big Ten Conference, its conference members, the NCAA, and other Division I institutions. For this reason, every previous sports case decided by the NLRB only covered league-wide bargaining arrangements. The NLRB also observed that the majority of teams competing in Division I FBS football were public institutions and therefore exempt from NLRB jurisdiction. Of the more than 125 colleges and universities participating in FBS football, only 17 would be impacted by a decision from the NLRB, and in the Big Ten Conference, a decision would only affect Northwestern. With so little anticipated impact on college athletics as a whole, the NLRB declined to issue a decision in the case.

Therefore, a blanket declaration by the NLRB, the board that would declare student-athletes to be employees in the case of a Pro ballot, would have little to no impact on the wider NCAA. This also defeats the argument that employee status levels the playing field, because only 17 schools in Division 1 football would be affected by such a declaration.

The NLRB’s previous rulings on student employment status precludes student athlete employment status.

John Leppler (University of Baltimore School of Law), “I’m the One Making the Money, Now Where’s My Cut? Revisiting the Student-Athlete as an “Employee” Under the National Labor Relations Act”, March 2014. <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1026&context=pipself>

The NLRB’s decision in Brown is currently the legal standard for determining whether a university student is a statutory employee. In that decision the NLRB majority acknowledged that the right to control standard must be satisfied as a general requirement. The NLRB further held that another specific requirement for students was that unless the relationship between the school and the student was “primarily economic,” rather than “primarily educational,” then the students were not employees. Therefore, when students’ efforts are predominantly educational and not economic, then those individuals are not employees within the meaning of the NLRA. From that test it logically follows that when a student who works for a university performs services that are not primarily educational or academic and the relationship to the university with respect to those services is an economic one, the student may be an employee under the NLRA, provided that he also meets the common law test for that term. [89-90]

Student athletes have a primarily academic relation with the schools in which they perform. Athletes who fail to uphold academic good-standing are suspended from playing and risk losing their position on the team and their scholarships.

Students for the most part do not care for pay beyond scholarships, as demonstrated in no follow-ups by students for pay after the Northwestern and Berger cases.

Michelle Piasecki (Specialist in U.S collegiate sport law and current law associate at Harris Beach and writer for Americanbar.org), “Law Review: Are College Athletes Employees?”, Winter 2015 <https://www.americanbar.org/publications/insights_on_law_andsociety/16/spring-2016/law-review--are-college-athletes-employees-.html>

These factors prompted the court to rule that Berger and her teammates were not employees of Penn and therefore not entitled to compensation under the FLSA.

The court’s decision never addressed the merits of Berger’s case against the NCAA and other Division I schools. Since Berger and her teammates were all enrolled at Penn, the court held they did not have a plausible basis to sue anyone other than Penn. Presumably, athletes from other colleges and universities could join the lawsuit to assert claims against other schools, but none have come forward to do so.

The math to pay students a salary or wage doesn’t work. More expensive for both parties to pay student-athletes as employees.

John Thelin (professor of higher education and public policy at the University of Kentucky), “Here’s Why We Shouldn’t Pay College Athletes), March 2016. <http://time.com/money/4241077/why-we-shouldnt-pay-college-athletes/>

So, to start the “play for pay” games, let’s assume that salaries replace scholarships in big-time men’s college sports. What happens, for example, to the college player if he were paid $100,000 per year? A full athletic scholarship (a “grant-in-aid”) at an NCAA Division I university is about $65,000 if you enroll at a college with high tuition. This includes such private colleges as Stanford, Duke, Northwestern, University of Southern California, Syracuse, and Vanderbilt. The scholarship is $45,000 for tuition and $20,000 for room, board and books. At state universities, the scholarship would be lower if you were an “in state” student—because tuition would be about $13,000. But if Michigan coach Jim Harbaugh recruits nationwide and wants a high school player from California or Texas, the University of Michigan out-of-state tuition bumps up to about the same as that charged by the private colleges. That’s the old model. In the new era, a coach could offer a recruit a salary instead of a scholarship. Does a $100,000 salary give the student-athlete a better deal than the $65,000 scholarship? The $100,000 salary is impressive. A future Heisman Trophy winner might command more, but $100,000 is not bad for an 18-year-old high school recruit. But since it’s a salary, not a scholarship, it is subject to federal and state income taxes. Tuition and college expenses would not be deductible because the income level surpasses the IRS eligibility limit. So, a student-athlete paid a salary would owe $23,800 in federal income tax and $6,700 in state taxes, a total of $30,500. In cities that levy an employee payroll tax, the salaried student’s taxes go up about $2,400 per year. Income taxes then are $32,900. And, as an employee, the player would have to pay at least $2,000 in other taxes, such as Social Security, for a total of $34,900. This leaves the college player with $65,100. Since college bills come to $65,000, the player has $100 left. By comparison, how bad was the scholarship model? According to the federal tax code, the $45,000 tuition award is deductible, but room and board are not. The student-athlete will be able to deduct book expenses and qualify for a tax credit under the American Opportunity Tax Credit (AOTC), reducing his tax. The bottom line is that the student-athlete gets a $200 refund in federal taxes and pays $820 in state taxes, for a total tax bill of $620. There’s no local payroll tax because he was not an employee. This means $64,380 of the $65,000 scholarship can go toward paying academic expenses of $65,000. How does the salary compare to the scholarship for student purchasing power? The $100,000 salary gives the college sports “employee” an advantage of $720 per year, the difference between his net salary of $65,100 versus the scholarship player’s net of $64,380. That’s not great news for the salaried player. It’s bad news for the athletics department which paid $100,000 in salary rather than $65,000 in scholarship, driving up expenses $35,000. What’s clear is that paying salaries for college players is a taxing situation. Each case will vary by state. The case above used a moderate tax state, Kentucky. Massachusetts (a.k.a. “Taxachusetts”) will be more painful. In following all the “pay for play” contests, the skilled players will be dueling accountants and agents.

AT: Scholarships are contracts requiring employee status

Primary interest of the relationship between the school and student via scholarships is education.

Michael A. Corgan (Villanova School of Law), “Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme”,2012. <http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1009&context=mslj>

In the 1983 case, Rensing v. Indiana State University Board of Trustees, the Indiana Supreme Court also concluded that an athletic scholarship is not the equivalent of an employment contract. The Court reasoned that the football player's scholarship was not contingent on his athletic play because the student maintained his scholarship despite injuries that inhibited him from performing. Moreover, the scholarship given to the student-athlete to play football did not constitute a method of payment, as the Internal Revenue Service ("IRS") did not require the student to report such benefits as gross income. The Court also noted that there is no distinction between athletic and academic scholarships. The university did not provide the student-athlete with a scholarship because of his "services" on the football field. Instead, universities give athletic and academic scholarships because of "past demonstrated ability in various areas" with the hope that such financial assistance will allow students to "pursue opportunities for higher education as well as to further progress in their own fields of endeavor. In other words, the contract between a student-athlete and a university is not an employment contract or a contract to render certain services, but rather a contract involving education. Thus, universities are not required to compensate student-athletes under workers' compensation.

AT: NCAA defines "student-athlete" intentionally to avoid employee status.

Supreme Court backs this definition to demark pro and amateur athletics.

Paul Anderson and Adam Epstein (Marquette Sports Legal Review) “The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective”, 2016. <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1673&context=sportslaw>

The collegiate model of NCAA level sports is grounded on the NCAA’s Fundamental Policy that “intercollegiate athletics [is]. . .an integral part of the educational program and the athlete [is]. . an integral part of the student body and, by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports.” Within this collegiate model, student-athletes are considered to be amateurs, and as such can only receive grants-in-aid (i.e., athletic scholarships) to help pay for their college education while competing in college sports. If student-athletes are paid to play, they are no longer amateurs under NCAA rules and are ineligible to compete in varsity athletic competition. This notion of amateurism has come to be known as the amateurism defense supported by courts in challenges to the NCAA and its bylaws, in many ways starting back in 1984 when the United States Supreme Court said that in order to maintain collegiate athletics, “athletes must not be paid.”

Department of Labor backs this definition, classifying such activities as supplemental to the educational experience of the student.

Chris Morran (author for Consumerist), “Court: NCAA Athletes Are Not Employees, Not Entitled To Minimum Wage”, December 7,2016. <https://consumerist.com/2016/12/07/court-ncaa-athletes-are-not-employees-not-entitled-to-minimum-wage/>

Chapter 10 of the Department of Labor’s Field Operations Handbook explains that schools may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics… Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work” as contemplated under the FSLA [sic] and “do not result in an employer-employee relationship between the student and the school.”

AT: Student-athletes are poor-off.

Scholarships and benefits for college athletes are high.

Steve Berkowitz (projects/database reporter/editor who works on Sports enterprise and investigations for USA Today), “NCAA increases value of scholarships in historic vote”, Jan 2015. <https://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073/>

In landmark action for major-college sports, schools and athlete representatives from the NCAA's five wealthiest conferences on Saturday voted 79-1 to expand what Division I schools can provide under an athletic scholarship. The vote, taken during the NCAA's annual convention, redefines an athletic scholarship so that it can cover not only the traditional tuition, room, board, books and fees, but also the incidental costs of attending college. That means a scholarship will now be able to pay for items including transportation and miscellaneous personal expenses.

Elsewhere in the same publication, specific benefits are outlined:

the schools and athlete reps voted to:  
--- Allow athletes to borrow against future earnings to purchase so-called loss-of-value insurance – policies that can help athletes if an injury while playing college sports results in an athlete getting less money from a professional contract than they might have otherwise gotten.  
-- Approve a resolution under which they pledge to, within the next two years, approve rules changes that would regulate time demands on athletes "to ensure an appropriate balance between athletics participation and the academic obligations and opportunities presented to students generally." Other changes to be addressed include those related to athletes' access to career-related insurance and interaction with agents.  
The new rules take effect Aug. 1, 2015, but scholarship agreements for the 2015-16 school year can be executed prior to that date.  
In court filings in the Ed O'Bannon antitrust lawsuit, the NCAA has indicated that, nationally, there is an average difference of about $2,500 between the value of a current athletic scholarship and the value of an athletic scholarship based on cost of attendance.

Later in August of 2015

Steve Berkowitz and Andrew Kreighbaum, “College athletes cashing in with millions in new benefits”, August 2015. <https://www.usatoday.com/story/sports/college/2015/08/18/ncaa-cost--attendance-meals-2015/31904839/>

Two recent changes in NCAA rules are resulting in major-college athletes receiving nearly $160 million a year in additional benefits, a USA TODAY Sports analysis has found. That figure is certain to rise as more schools implement — or increase their distribution of — athletic scholarships that can cover not only the traditional tuition, room, board, books and fees but also incidental costs of attending college such as transportation and personal expenses. The enhanced scholarships took effect Aug. 1, following a vote at January's NCAA convention by school and athlete representatives from the nation's five wealthiest conferences that allowed, but did not require, all Division I schools to cover athletes' cost of attendance. In April 2014, the Division I Board of Directors voted to allow schools to provide scholarship and non-scholarship athletes with unlimited meals and snacks.

Despite it being optional, schools are more than ever opting in, and students-athletes like it.

Athletes have talked about an array of possible uses for the incidentals money. Last week, when South Carolina football players received their first monthly allocation of $400, freshman wide receiver Jalen Christian was asked what he planned to do with it. "I don't know yet," he said. "Save it up? I'm an Xbox guy and there are new games coming out in October and November. But, other than that, I'm going to save it." Schools in the Power Five conferences — Atlantic Coast, Big Ten, Big 12, Pacific-12 and Southeastern — and some other schools, are covering the cost of attendance for athletes in all of their sports. FBS schools not in the Power Five are working under a wide range of plans for their athletes. Most, though not all, have increased their spending on meals and snacks. With cost of attendance, some are fully covering a few teams and partially covering the remainder. Some are partially covering all teams. Others reported that they will not begin providing any cost-of-attendance assistance until the 2016-17 school year. Non-FBS schools implementing cost-of-attendance plans primarily are focusing on men's and women's basketball. However, Liberty, which has an FCS football team, and Wichita State are providing it in all sports. Virginia Commonwealth has started a two-year phase-in to do the same.

This evidence is also effective at explaining why student-athletes are no longer interested in pursuing lawsuits: benefits to them are increasing without any legal changes.

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