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Labor Lawyers Predict NLRB Fumble on Football Decision

BY JENNA GREENE

Labor lawyers are skeptical that a decision by a National Labor Relations Board official in Chicago giving football players at Northwestern University a green light to unionize would survive judicial scrutiny.

"It will be an uphill battle for the petitioner," said Steven Bernstein, a partner at Fisher & Phillips who specializes in labor issues. The holding "flies in the face of decades of precedent. … The concept of the employment relationship seems to have gotten lost in translation."

On Wednesday, NLRB regional director Peter Ohr held that 85 football players on scholarship at the private university in Evanston, Ill., are employees and can vote to unionize.

"It is clear that the scholarships the players receive are compensation for the athletic services they perform for the employer," he wrote, noting that Northwestern's football program generated $235 million in revenue from 2003 to 2012. "It cannot be said that the employer's scholarship players are 'primarily students.' "

The College Athletes Players Association, represented by lawyers from Bredhoff & Kaiser in Washington, Cornfield and Feldman in Chicago and Legghio & Israel in Royal Oak, Mich., wants to unionize the players. The association says a union could guarantee coverage for sports-related injuries, minimize the risk of brain injuries, provide due process rights when players are accused of rule violations and allow players to receive compensation for commercial sponsorships.

Northwestern, represented by a team from Meckler Bulger Tilson Marick & Pearson led by name partner Joseph Tilson, said in a written statement that it "believes strongly that our student-athletes are not employees, but students. Unionization and collective bar-

gaining are not the appropriate methods to address the concerns raised by student-athletes."

The National Collegiate Athletic Association, which was not a party to the proceedings, also issued a statement, saying, "We strongly disagree with the notion that student-athletes are employees." Northwestern said it plans to appeal the decision to the five politically appointed NLRB members—three Democrats and two Republicans.

Morgan, Lewis & Bockius labor and employment partner Jonathan Fritts predicted that the board initially would decline to grant review and allow the union election to go forward.

If the players vote to unionize, Northwestern can then refuse to bargain with them. At that point, the case would come before the board and from there could be appealed to the U.S. Court of Appeals for the Seventh Circuit or the D.C. Circuit.

"At the end of the day, the question is whether the [players'] relationship with the university is primarily educational or not," Fritts said. "It's new ground."

Similar issues arose where graduate assistants at colleges sought to unionize.

Ultimately, the board in 2004 found that grad students were not employees. Ohr held that precedent did not apply here, because "the players' football-related duties are unrelated to their academic studies unlike the graduate assistants."

To former NLRB board member Brian Hayes, now a partner at Ogletree, Deakins, Nash, Smoak & Stewart, the distinction is "far from compelling." Ohr's legal analysis, he said in an email, "appears rather facile. On the central question of employee status, one is struck by the dearth of legal citation in the decision—and by the failure to adequately address the many board and court cases that reflect a much more restrictive view of employee status than the decision would indicate."

Hayes said it would not be surprising if the board upheld the decision, but that it "may face a more difficult challenge in the federal courts" or "generate significant backlash" that could spark political action.

For now, the ruling is limited to Northwestern, said Tyrone Thomas, of counsel to Mintz, Levin, Cohn, Ferris, Glovsky and Popeo. However, he said, the precedent could apply to other private colleges with big football programs such as the University of Southern California or big basketball programs such as Duke University. Public universities are subject to state laws, not NLRB jurisdiction.

"I think this is destined in one form or another to make it to the appellate level," Thomas said. "It redefines what is permissible amateurism."

Jay Krupin, who co-leads the labor-relations practice at Baker & Hostetler, said in a written statement that if student-athletes are employees, "then a host of other labor-related issues need to be addressed—such as why don't the athletes receive W-2's and why aren't the scholarships taxed?"

He continued, "Players practicing for more than 40 hours a week would also be eligible for overtime and injured players could get workers compensation. The university sports programs would also open themselves up to discrimination lawsuits based on equal employment opportunity laws."

Contact Jenna Greene at jgreene@alm.com.