

Source: Daily Labor Report: News Archive > 2014 > April > 04/15/2014 > News > Education: NLRB Action Shines Light on Problems Of College Athletes, Labor Lawyers Say

72 DLR A-4

Education

NLRB Action Shines Light on Problems Of College Athletes, Labor Lawyers Say



By John Herzfeld

April 15 — A March decision by a National Labor Relations Board regional director finding that college football players on scholarship are employees with bargaining rights has put needed attention on the plight of college athletes, a pair of labor law practitioners said April 7.

Speaking at an annual conference on collective bargaining in higher education, former NLRB Chairman Wilma Liebman said the value of the regional director's decision in the *Northwestern University* case (58 DLR A-14, 3/26/14) was that it "shone light on a problem in need of resolution."

Without addressing the merits of the case, Liebman said it raises social and economic justice issues for college athletes in an exploitative system marked by abuses. College athletes face risks of injury and have problematic graduation rates, she said, although she added that the rates vary from institution to institution and are comparatively high at Northwestern.

Liebman, who has taught at universities since she left the board in 2011 and is a visiting professor at the Cornell University Industrial and Labor Relations School, said the system for collegiate athletes also raises racial justice issues, pointing to a "very strong racial gap in graduation rates."

The Northwestern case, while distinguishing the role of athletes from the status of graduate assistants, raises similarly interesting issues of how to apply decades-old labor law to the varying, evolving forms of work in the contemporary economy, Liebman said.

The conference was sponsored by the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Hunter College, which is part of the City University of New York.

Estreicher Says Union Not Answer

Joining Liebman in the conference's keynote session, Samuel Estreicher, director of the Center for Labor and Employment Law at New York University Law School, said he shared her concern over fairness issues, although he took issue with her points on racial disparities in graduation rates.

The college athletics system does raise issues concerning workload, compensation and injuries, but unionization is not a viable solution to them, Estreicher said.

Several problematic issues were not addressed in the regional director's decision, he said. If scholarships are compensation for services, then the amounts would be taxable, which would in effect result in a pay cut unless the university were to make up the shortfall, he said.

Also, the role of walk-on athletes, who perform in revenue-generating sports but receive no scholarships, would remain ambiguous in a collective bargaining unit made up of a team, he said.

Noting that there is no team-based bargaining in any professional sport, Estreicher said the "elephant in the room" is the National Collegiate Athletic Association. NCAA standards for amateur athletics do not allow compensation, and "no university can act alone" on that issue, he said.

New Look at Yeshiva?

On another pending case, *Pacific Lutheran University*, both speakers said the NLRB's February action seeking briefs on its jurisdiction over religiously affiliated educational institutions and the legal status

of university faculty members raises the visibility of the issues and fosters greater transparency (28 DLR A-1, 2/11/14).

The *Pacific Lutheran* briefing, Liebman said, is one sign of an openness by the board to revisiting the doctrine in the U.S. Supreme Court's 1980 decision on the managerial status of faculty members under *NLRB v. Yeshiva University*, 444 U.S. 672, 103 LRRM 2526 (1980).

That would be a welcome step to "adjust the law to current reality," she said. The *Yeshiva* doctrine, she added, is "more likely to be distinguishable over time."

But Estreicher argued that, among all the varying models for university governance, "none have fundamentally changed in a way that would change *Yeshiva*."

To change the *Yeshiva* doctrine, he said, Congress would have to change the underlying law, an unlikely step.

Both speakers suggested that the religious affiliation issues in *Pacific Lutheran* would turn on a fact-specific analysis, with Liebman emphasizing whether a particular job is part of the institution's religious mission and Estreicher focusing on how the university presents the role of religion in its mission, curriculum and governance.

To contact the reporter on this story: John Herzfeld in New York at jherzfeld@bna.com

To contact the editor responsible for this story: Susan J. Mcgolrick at smcgolrick@bna.com

Contact us at <http://www.bna.com/contact/index.html> or call 1-800-372-1033

ISSN 2156-2849

Copyright © 2014, The Bureau of National Affairs, Inc. Reproduction or redistribution, in whole or in part, and in any form, without express written permission, is prohibited except as permitted by the BNA Copyright Policy.