

## “CHANGED DRAMATICALLY”: *WALDREP* REVISITED IN RESPONSE TO NORTHWESTERN’S UNIONIZATION EFFORT

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### INTRODUCTION

In January 2014, Northwestern University football players announced that they would attempt to unionize.<sup>1</sup> The players, led by former quarterback Kain Colter, with the support of the National College Players Association and United Steelworkers filed a petition with the National Labor Relations Board (“NLRB”) seeking certification as a union.<sup>2</sup> The NLRB recently heard two cases involving graduate students hoping to unionize, supporting certification in 2000 for students at New York University but reversing course in 2004 for students at Brown University.<sup>3</sup> With the Northwestern hearings completed just days ago, a decision is expected within a month. Despite its unprecedented nature, former NLRB president William Gould stated:

I think these guys are employees because their compensation is unrelated to education, unlike the teaching assistants in Brown University, and they are supervised not by faculty, but by coaches. Their program for which they receive compensation does not have a fundamentally educational component. So given the direction and control that supervisory authorities have over them, I think they are easily employees within the meaning of the act.<sup>4</sup>

### STUDENT-ATHLETE OR EMPLOYEE: CAN *WALDREP* STILL HOLD?

The Northwestern players have not been solely focused on a desire for compensation.

Central to their argument has also been a claim for continued medical benefits due to the

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<sup>1</sup> See Kevin Trahan, Examining Northwester Football’s Unionizing Effort, USA Today Sports (Feb. 12, 2014), <http://www.usatoday.com/story/sports/ncaaf/2014/02/11/northwestern-wildcats-football-labor-union-hearing-nlr/5390601/>.

<sup>2</sup> *Id.*

<sup>3</sup> See 332 NLRB 1205 (2000). ; 342 NLRB 483 (2004).

<sup>4</sup> See Michael Tarm, College Athletes Take Step Toward Forming Union, Yahoo! Sports (Jan. 29, 2014), <http://sports.yahoo.com/news/college-athletes-step-toward-forming-170258471--spt.html>

residual effects of injuries suffered while playing.<sup>5</sup> The main hurdle facing Colter and his former teammates in unionization is obvious; can college athletes be considered employees? To analyze the claim for medical benefits in the athlete-employee framework, a detailed study of the *Waldrep* case is necessary. In revisiting *Waldrep*, this paper will attempt to explain how the *Waldrep* analysis, if applied to the current environment of big-time college sports, actually steers one to the conclusion that college football players are employees.

Kent Waldrep was recruited to play football at Texas Christian University (“TCU”) during high school.<sup>6</sup> He signed his “Letter of Intent” and “Financial Aid Agreement” and began his career.<sup>7</sup> In 1974, Waldrep suffered a severe spinal cord injury while playing against the University of Alabama and became paralyzed.<sup>8</sup>

Waldrep filed a worker’s compensation claim in 1991.<sup>9</sup> His claim was granted initially but reversed by jury in a *trial de novo*.<sup>10</sup> The Texas Employer’s Insurance Association convinced the jury that Waldrep was not an employee at TCU and therefore ineligible for worker’s compensation benefits.<sup>11</sup> When Waldrep’s appeal was heard in 2000, the procedural history weighed heavily.<sup>12</sup> As the jury had ruled on the facts that Waldrep was not an employee, the Court of Appeals was bound “[to] uphold the jury’s finding if more than a mere scintilla of evidence supports it.”<sup>13</sup>

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<sup>5</sup> See Lester Munson, Unionization May Fail but Not a Failure, ESPN (Jan. 28, 2014), [http://espn.go.com/espn/otl/story/\\_/id/10366061/northwestern-players-attempt-unionize-likely-fail-impact-far-reaching](http://espn.go.com/espn/otl/story/_/id/10366061/northwestern-players-attempt-unionize-likely-fail-impact-far-reaching)

<sup>6</sup> *Waldrep v. Tex. Emp’rs Ins. Ass’n*, 21 S.W.3d 692, 695 (Tex. App. 2000).

<sup>7</sup> *Id.* at 696.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 697.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* The author is highly skeptical that this result would repeat itself and that a jury would rule against a paralyzed football player in favor of a BCS-level institution today.

Despite ultimately ruling against Waldrep, the court concluded their opinion with tepid words:

In conclusion, we note that we are aware college athletics has changed dramatically over the years since Waldrep's injury. Our decision today is based on facts and circumstances as they existed twenty-six years ago. We express no opinion as to whether our decision would be the same in an analogous situation arising today; therefore, our opinion should not be read too broadly.<sup>14</sup>

Waldrep was injured at TCU while competing in the Southwest Conference. TCU competed in the Southwest Conference from 1923 until 1995. Since the *Waldrep* decision in 2000, TCU has competed in *four* athletic conferences.<sup>15</sup> The *Waldrep* court acknowledged that college athletics had "changed dramatically" but, in 2000, they had not seen anything yet.

The *Waldrep* court examined two tests to determine whether Waldrep was an employee of TCU.<sup>16</sup> The court first looked at whether a "contract of hire" existed and second to whether the employer had the "right to direct the means or details of the work and not merely the results to be accomplished."<sup>17</sup>

#### CONTRACT FOR HIRE TEST

Little has changed in documentation since *Waldrep*. Players are still required to sign a letter of intent and are then given a scholarship. These facts do not end an examination of the *Waldrep* court's analysis. The court was specifically concerned with the "intent" of both parties as to whether Waldrep was an employee or not.<sup>18</sup> The "intent" of a big-time collegiate athlete in 1972 and 2014 are incomparable. In discussing his unionization effort, Colter rhetorically stated,

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<sup>14</sup> *Id.* at 707.

<sup>15</sup> TCU's conference history: 1923-1995: Southwest; 1996-2000 Western Athletic; 2001-2004 Conference-USA; 2005-2011 Mountain West; 2012-Present Big 12 (TCU almost joined the Big East as well). See *TCU Will Not Have To Pay Exit Fee To Leave MWC For Big East In '12*, SPORTS BUSINESS DAILY (Nov. 30, 2010), <http://www.sportsbusinessdaily.com/Daily/Issues/2010/11/Nov-30/Colleges/TCU>.

<sup>16</sup> *Waldrep*, 82 S.W.3d at 698.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 699.

“[h]ow can they call this amateur athletics when our jerseys are sold in stores and the money we generate turns coaches and commissioners into multimillionaires? . . . [t]he current model represents a dictatorship.”<sup>19</sup> In 2014, if Waldrep was a highly regarded recruit, his recruitment would have been followed by millions on television networks such as ESPNU, BIG TEN NETWORK and the Longhorn Network.<sup>20</sup> The “circumstances as they existed twenty-six years ago” in *Waldrep* have truly “changed dramatically” since its ruling.<sup>21</sup>

The court further examined the “contract for hire” in regards to whether Waldrep could be fired by the university.<sup>22</sup> If, as he was not an employee, he could not be fired, it logically follows he would have no restrictions on quitting either. In 1972, like today, this conclusion did not follow. Waldrep’s letter of intent “penalized him if he decided to enter a different school within the Southwest Conference.”<sup>23</sup> While conceding that it is arguable Waldrep could not have been “fired” by TCU, it is difficult to reconcile the presence of what reads like a non-compete clause in a “non-contractual” document.

#### RIGHT TO DIRECT MEANS OF WORK TEST

The second prong of the *Waldrep* analysis was “whether there is some evidence concerning TCU’s right to direct the means or details of Waldrep’s ‘work.’”<sup>24</sup> TCU’s current football budget is around \$28.1 million a year. Facially, it seems plausible to assume considerable “means” of work has been “directed.”<sup>25</sup> The life of big-time college athletes is

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<sup>19</sup> See Tarm, *supra*.

<sup>20</sup> The Longhorn Network will bring the University of Texas about \$300 million dollars over 20 years. See Texas, *ESPN Announce New Network*, ESPN (Jan. 19, 2011) <http://sports.espn.go.com/espn/news/story?id=6037857>.

<sup>21</sup> See *Waldrep*, 82 S.W.3d at 707.

<sup>22</sup> “Thus, TCU could not ‘fire’ Waldrep as it could an employee.” See *Id.* at 701.

<sup>23</sup> *Id.* at 696.

<sup>24</sup> *Id.* at 701.

<sup>25</sup> See Alex Apple, [TCU Spends More on College Football than Any Other Team in Texas](http://collegesportsblog.dallasnews.com/2013/12/tcu-spends-more-on-college-football-than-any-other-team-in-texas.html), Dallas Morning News (Dec. 20, 2013). <http://collegesportsblog.dallasnews.com/2013/12/tcu-spends-more-on-college-football-than-any-other-team-in-texas.html>

almost comparable to that of a professional athlete in travel and time commitments.<sup>26</sup> Despite this, it would be imprudent to believe an increase in the amount of time spent on football alone is enough to tilt *Waldrep*.

Once again, one has to look at the expansion and growth of collegiate athletics to tilt the scale; specifically, the summer requirements and extended schedule “directed” to modern athletes. Colter explained he spent 50-60 hours per week on football during the summer.<sup>27</sup> That time, rather than being spent on football could have been “directed” by Colter towards an internship or summer job.

In 1974, eleven bowl games existed and not one conference championship game. In 2013, college football held seven conference championship games and 35 bowl games, all of which had sponsorships. In 1974, 22 teams had the honor of extending their season for a bowl game. In 2013, 70 teams and all of their players were “directed” to practice and prepare for an extra month. Like the summer, this month over winter break is removed from the player’s discretionary disposal to volunteer in his community or spend time with family.

### CONCLUSION

The *Waldrep* court admitted things had “changed dramatically,” but it is easy to surmise the next decade exceeded even their expectations. For the reasons stated, a strong argument can be made that if *Waldrep* was heard today, by the same court, a different result would occur. Considering the NLRB’s recent disagreement on students ability to unionize and the apologetic ruling in *Waldrep*, whether achieved through the Northwestern unionization effort or NCAA

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<sup>26</sup> See Chris Johnson, Northwestern's Kain Colter states his case college football union, Sports Illustrated (Feb. 18, 2014), <http://sportsillustrated.cnn.com/college-football/news/20140218/kain-colter-northwestern-union/#ixzz2ugIVywqL>

<sup>27</sup> *Id.*

implemented expansion of medical coverage, hope can be had that the days are numbered where a decision like *Waldrep* is possible.