

## Unlevel Playing Field: the hypocrisy of the NCAA's gender equity argument in *Johnson*

It is often said that defense wins championships. However, the NCAA's defense invoking gender equity as a concern for conferring employee status to student athletes won't be winning championships any time soon. The NCAA is currently facing a multi-faceted challenge to their amateurism model. Specifically, the National Labor Relations Board (NLRB) has placed the NCAA under investigation<sup>1</sup> and several student-athletes have filed suit under the Fair Labor Standards Act, claiming that they should be paid a minimum wage by their colleges and universities for the work they do as student-athletes.<sup>2</sup> The trial court denied the NCAA's motion to dismiss,<sup>3</sup> leading to this interlocutory appeal from the NCAA.<sup>4</sup>

At a hearing before a 3-judge panel of the Third Circuit Court of Appeals, the NCAA lawyers argued that declaring student-athletes employees would set forth great inequities between men's and women's sports.<sup>5</sup> Judge McKee appropriately pressed the NCAA attorneys, asking "Don't we already have that?," referring to the vast disparities between the 2021 men's and women's basketball NCAA tournaments.<sup>6</sup> Judge Restrepo noted that the service academies pay their student-athletes a wage without interference from the NCAA or any of the issues hypothesized by the NCAA.<sup>7</sup> These pointed questions reveal the inadequacy of the NCAA's argument, while highlighting the NCAA's own past perpetuation of gender inequity in sports.

The 2021 NCAA Basketball Championships incident was not the result of harmless oversight on behalf of the tournament committees; it was reflective of a systemic discounting of the value of women's sports. Because of the circumstances of the 2021 tournament, both the men and women played their games in a bubble with testing and quarantine requirements.<sup>8</sup> The NCAA had near total control over the operations of both tournaments, including the relative investment of resources that may have been otherwise allocated in non-COVID years. Yet, in a situation where the NCAA was operating simultaneous events with a high level of control over both, they *chose* to put on one world class event and one afterthought. This gross display of inequity is simply another example, albeit a public one, of a culture of minimization of women's sports at the NCAA.

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<sup>1</sup> Chris Isidore, *NLRB opens door for union for college athletes*, CNN Business, Dec. 15, 2022, <https://www.cnn.com/2022/12/15/business/nlr-unfair-labor-practice-athletes-usc-pac-12-ncaa/index.html>

<sup>2</sup> *Johnson v. NCAA*, 556 F. Supp. 3d 491 (E.D. Pa. 2021).

<sup>3</sup> *Id.*

<sup>4</sup> *Johnson v. NCAA*, No. 19-5230, 2021 U.S. Dist. LEXIS 246324 (E.D. Pa. Dec. 28, 2021).

<sup>5</sup> Billy Witz, *Federal Judges Express Skepticism College Athletes Are Not Employees of Institutions*, N.Y. TIMES (Feb. 17, 2023), <https://www.nytimes.com/2023/02/17/sports/ncaa-federal-court-athletes.html>

<sup>6</sup> *Id.*; see also Juliet Macur & Alan Blinder, *Anger Erupts Over Disparities at N.C.A.A. Tournaments*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/03/19/sports/ncaabasketball/women-ncaa-tournament-weight-room.html>

<sup>7</sup> Witz, *supra* n. 5.

<sup>8</sup> Wilton Jackson, *March Madness 2021: NCAA Tournament COVID-19 Rules and Protocols, Explained*, SPORTS ILLUSTRATED (Mar. 12, 2021), <https://www.si.com/college/2021/03/12/covid-19-protocols-ncaa-basketball-tournament>

The NCAA has undervalued women's sports since their inception. The NCAA was founded to support men's sports, and for many years, they did exclusively that.<sup>9</sup> In fact, the NCAA argued vigorously in the courts that Title IX does not apply to intercollegiate athletics.<sup>10</sup> The Association for Intercollegiate Athletics for Women (AIAW) was the governing body of women's intercollegiate athletics until the ramifications of Title IX's application to intercollegiate athletics prompted the NCAA to see dollar signs.<sup>11</sup> Through a legal fight, the NCAA took control over women's sports, effectively dissolving the AIAW.<sup>12</sup> After the NCAA took control, the percentage of women coaches coaching women's sports dropped from 90% in 1972 to 51% in 1984.<sup>13</sup>

One of the oft-repeated justifications for the disparate treatment of men's and women's sports is the difference in revenue generated by each sport. While it may be true that there is a gap, the NCAA itself bears partial responsibility. They do not market men's and women's sports equitably, they do not advocate for lucrative media deals equitably, and they most certainly do not invest in each sport equitably.<sup>14</sup> Women's sports are not a failing product; they simply aren't equipped with the same resources to succeed.<sup>15</sup>

Beyond the NCAA's hypocrisy of invoking gender equity as a concern, the slippery slope that they warn of does not comport with reality. First, if all athletes are guaranteed a minimum wage as employees of their institution, that will be more than they are guaranteed under the current regime. Second, athlete-employees will have access to employment discrimination statutes such as Title VII that would help ameliorate discrimination within their institution. Third, the existing unregulated NIL regime perpetuates disparities in earnings between male and female athletes, though the NCAA notably decided to crack down on a pair of women's basketball players in their first NIL enforcement.<sup>16</sup>

It is a nice change of pace to see the NCAA express interest in ameliorating inequities between men's and women's sports. It is unfortunate, however, to see this change of pace occur in a case where student-athletes are aiming to secure basic employment rights. If this is the line of argument the NCAA is choosing to put forward, let's hope it is accompanied by equally vigorous action to support women's sports.

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<sup>9</sup> Laine Higgins, *Women's College Sports Was Growing. Then The NCAA Took Over*, WALL STREET JOURNAL (Apr. 3, 2021), <https://www.wsj.com/articles/women-college-sports-ncaa-aiaw-11617422325>

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

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

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

<sup>13</sup> *Id.*

<sup>14</sup> Alan Blinder, *N.C.A.A. Acknowledges \$13.5 Million Budget Gap Between Men's and Women's Tournaments*, N.Y. TIMES (Mar. 26, 2021), <https://www.nytimes.com/2021/03/26/sports/ncaabasketball/mens-womens-tournament-gap.html>

<sup>15</sup> *Id.*

<sup>16</sup> Pat Forde & Ross Dellenger, *NCAA Issues First NIL Ruling, With Cavinder Twins at the Center of It*, SPORTS ILLUSTRATED (Feb. 24, 2023), <https://www.si.com/college/2023/02/24/cavinder-twins-miami-womens-basketball-infractions-nil-ncaa>