Attack of the Cheerleaders! Allegations of Violations of the FLSA on an Uncertain Landscape

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INTRODUCTION

Recently, several lawsuits were brought by National Football League (NFL) cheerleaders who claimed that their respective football clubs violated the Fair Labor Standards Act (FLSA) (or similar state laws), the 1938 federal act that mandates the minimum wage, overtime provisions, and so on. Interestingly, and at the same time, national discourse manifested itself over possibly increasing the federal, state and local minimum wage in 2013-2014. Several prominent cities and states, in fact, voted to increase the minimum wage as well. The purpose of this article is to explore the recent claims by certain NFL cheerleaders and to analyze relevant case law regarding this alleged employer-employee relationship. This article will analyze

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1. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (2014); see also ESPN Video, Blood, Sweat & No Cheers?, ESPN.com (July 19, 2014), http://espn.go.com/video/clip?id=11231194 (reporting by Shelley Smith and discussing the case of Caitlin Yates (a.k.a. Caitlin Y), an Oakland Raiders cheerleader and the eleventh NFL cheerleader to file a lawsuit related to the minimum wage against her team at that time, but the first to include the NFL itself as a defendant).


3. Id.; see also Ben Wolcott, 2014 Job Creation Faster in States that Raised the Minimum Wage, Center for Econ. and Policy Research (June 30, 2014), http://www.cepr.net/index.php/blogs/cepr-blog/2014-job-creation-in-states-that-raised-the-minimum-wage; see also Paul Davidson, More States, Cities Raising Minimum Wage, USA Today (May 15, 2014), http://www.usatoday.com/story/money/business/2014/05/15/minimum-wage-increases/9129183/ (noting that seven states passed laws to increase the minimum wage this year including Connecticut, Maryland, Hawaii and Vermont which increased it to $10.10, while San Francisco, Santa Fe, and San Jose are among cities that increased their minimum wage above the $10.10 level).

4. See Robin Abcarian, NFL Cheerleader Lawsuit Update: Buffalo Jills Win One Against Bills, Los Angeles Times (July 2, 2014), http://www.latimes.com/local/abcarian/la-me-ra-jills-cheerleaders-wage-theft-20140702-column.html (discussing New York Supreme Court Judge Timothy Drury’s decision that there was evidence to show that the cheerleaders were, in fact, Bills employees). It should be noted that there still remains the on-going issue as to whether NFL cheerleaders as a whole or individually are considered employees or independent contractors.

whether NFL teams, or even the NFL itself, may have violated federal or state minimum-wage laws and overtime-hour laws in relation to NFL cheerleaders.5

The characterization of who is and who is not an employee in the context of the sports business, both amateur and professional, has been a timely and hot topic in its own right, let alone for NFL cheerleaders.6 For example, the National Labor Relations Board (NLRB) in 2014 ruled that Northwestern University college football players are indeed classified as employees for National Labor Relations Act (NLRA) purposes and can vote to unionize.7 Also in 2014, the lawsuit and trial spearheaded by Ed O’Bannon, a former National Collegiate Athletic Association (NCAA) student-athlete, proceeded before Judge Claudia Wilken in the U.S. District Court for the Northern District of California (within the Ninth Circuit).8 O’Bannon and his lawyers attempted to demonstrate that the NCAA did not have the right to use their names, images, and likenesses for commercial purposes, such as in popular video games, without financial compensation.9 Thus, employment and labor law issues are popular subjects in the sports industry at the present time and at both the professional and amateur levels.10

FLSA Fundamentals and Exemption

The FLSA establishes minimum wage, overtime pay, record-keeping and

5. This article focuses primarily on the federal-law landscape, but recognizes that individual states have their own employment-law concerns, such as minimum wage, as well. See Robin Abcarian, The Raiders Strike Back at Cheerleaders: You Can’t Sue Us, Ladies, LOS ANGELES TIMES (Mar. 18, 2014), http://articles.latimes.com/2014/mar/18/local/la-me-raiders-cheerleaders-lawsuit-20140318 [hereinafter Raiders Strike Back] (reporting that within the Raiderettes contract there was a mandatory arbitration clause that prevented them from suing in court over disputes, but that—at that time—there was the issue of whether or not such a mandatory arbitration clause was valid in California in the first place); see also Robin Abcarian, Cheerleaders Add New Defendant to Wage Theft Lawsuits: The NFL, LOS ANGELES TIMES (June 6, 2014), http://www.latimes.com/local/abcarian/la-me-ra-second-raiderette-lawsuit-20140606-column.html [hereinafter Cheerleaders Add New Defendant] (explaining that an agreement for this subsequent lawsuit paved the way for the cheerleaders to sue in a class-action lawsuit against the NFL alleging violations of federal antitrust law).

6. 29 U.S.C. § 203(e)(1) (2014) (“Except as provided in paragraphs (2), (3), and (4), the term “employee” means any individual employed by an employer.”).


8. See George Schroeder, O’Bannon Trial: Mark Emmert Sticks to NCAA’s Script, USA TODAY (June 19, 2014), http://www.usatoday.com/story/sports/college/2014/06/19/obannon-antitrust-case-against-ncaa-mark-emmert/10860101/.


10. See, e.g., Charlotte Alexander, WORKPLACE PROF BLOG (June 5, 2014), http://lawprofessors.typepad.com/labprof_blog/2014/06/sports-both-amateur-and-professional-have-recently-offered-up-a-variety-of-interesting-work-law-questions-including-the-nl.html (referring to the FLSA, the NLRB ruling and the cheerleaders cases, in addition to claims made by minor league baseball players, fan-convention workers, batboys, basketball ticket sales, fan relations workers, stadium maintenance workers, and even groundskeepers).
youth employment standards affecting employees “engaged in commerce” in the private sector and in federal, state, and local governments. Currently, the FLSA mandates that covered, non-exempt employees must be paid a minimum wage of $7.25 per hour. Under the FLSA, an employee is defined quite generally as “any individual employed by an employer.” Additionally, according to the U.S. Department of Labor, “[e]mployees of businesses that are engaged in interstate commerce or instrumentalities of interstate commerce are also generally covered [by the FLSA].” If NFL cheerleaders can demonstrate that they are covered employees (and therefore not exempt), NFL teams and possibly the NFL itself would likely have to compensate the cheerleaders with back pay and other damages, including attorneys’ fees.

However, even if the cheerleaders are successful in demonstrating that they are employees, there is an exemption to the federal minimum wage under § 213(a)(3) of the FLSA, which relieves any seasonal “amusement or recreational establishment” of the obligation to pay the minimum wage or overtime. In other words, this seasonal employee characterization allows employers to pay employees less than the minimum wage under federal law.

The seasonal employer-employee defense applies to amusement or recreational businesses that either “operate for [no] more than seven months in any calendar year,” or have low and high financial revenue seasons, as measured by differences in their receipts. Though the NFL more than likely provides “amusement or recreational” services, the issue of whether the teams would have a valid defense under the seven-month, seasonal operation exemption is unclear, since team and league activities and revenues flow year-round as a result of season-ticket deposits, television broadcast agreements, and sponsorship deals.

The Raiderettes and Other NFL Cheerleader Claims

Within the last year, members of five NFL cheerleading squads, starting with the squad from Oakland, filed claims alleging that their teams violated minimum wage

12. § 206 (a)(1)(C).
13. Id. § 203 (e)(1).
15. Id.
16. § 213(a)(3)(A) (2014) (exempting employees if “it does not operate for more than seven months in any calendar year”).
19. Id. § 213(a)(3)(B) (“... during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year”).
20. See Nathaniel Grow, Pro Sports Teams and the Fair Labor Standards Act, SPORTS LAW BLOG (May 29, 2014); see also discussion infra Part V.
laws. The defendant teams (and their respective cheerleading squad names) include the Oakland Raiders (Raidersettes), Cincinnati Bengals (Ben-gals), Buffalo Bills (Jills), New York Jets (Flight Crew), and the Tampa Bay Buccaneers (Cheerleaders).

The Raiderettes’ complaint alleged that the cheerleaders are required to spend substantial funds out of their own pockets for uniforms, travel, participation in being photographed for swimsuit calendars, attending a minimum of three practices each week, and various types of beauty maintenance and grooming, including mandatory trips to costly nail and hair salons. Other allegations included that the team withheld their pay of $1,250 until the end of the season, failed to provide lunch breaks, and imposed fines for infractions, all of which constitute violations of the California Labor Code. Apparently the cheerleaders were also given an employee handbook that set the rules and expectations, even related to weight-management, and transferring their image rights to the team itself.

First and fundamental to the analysis, of course, is whether the cheerleaders are employees or independent contractors under both federal and state law, and this is not necessarily an easy, clear-cut answer. The cheerleaders must be deemed employees under the law if the FLSA is to apply. In the traditional analysis, the more control the NFL teams (i.e., an employer) have over the cheerleading squads (arguably the employees), the greater the likelihood that the legal relationship between the parties is employer-employee rather than contractor-independent contractor. At first glance, it appears that the control over the Raiderettes is substantial.

However, in March 2014, the Department of Labor completed its own investigation of the cheerleaders’ claims, concluding that the Oakland Raiders team members fall within the § 213(a)(3) exemption of seasonal employees and are

21. Nathaniel Grow, supra note 20; see also Abcarian, supra note 4; Raiders Strike Back, supra note 5; ESPN Video, supra note 1.
22. Nathaniel Grow, supra note 20. At the end of the 2013 season, there were six teams that did not have full-time cheerleading squads: Pittsburgh Steelers, Cleveland Browns, Chicago Bears, New York Giants, and Green Bay Packers. See Kyle Meinke, Detroit Lions Proud to be Among Just 6 NFL Teams Without Cheerleaders, MLIVE.COM (Mar. 26, 2014), http://www.mlive.com/lions/index.ssf/2014/03/detroit_lions_proud_to_be_1_of.html.
23. See Raiders Strike Back, supra note 5; see also Cheerleaders Add New Defendant, supra note 5.
25. Id.
26. Id.
27. See, e.g., Richard R. Carlson, Why the Law Still Can’t Tell an Employee When it Sees One and How it Ought to Stop Trying, 22 BERKELEY J. EMP. & LAB. L. 295, 368 (2001) (“Employee status matters mainly because our employment laws make it matter. . .but the borders of any test of employee status are destined to remain forever vague.”).
28. See, e.g., Abcarian, supra note 4 (discussing New York Supreme Court Judge Timothy Drury’s decision that there was evidence to show that the Buffalo Jills are employees of the Bills).
29. See Carlson, supra note 27, at 305-08 (discussing the evolution of the “control test”).
30. See Raiders Strike Back, supra note 5; Cheerleaders Add New Defendant, supra note 5; see also Hess, supra note 24.
therefore exempt from the FLSA. However, the Oakland Raiders decided to voluntarily comply with the California Labor Code and will now pay the women California’s minimum wage of $9 per hour.

Meanwhile, subsequent to the Raiderettes lawsuit, a Cincinnati Ben-gals cheerleader filed a similar class-action suit on behalf of the members of her squad, who she says are paid the equivalent of $2.85 an hour. Then, the Buffalo Bills football organization suspended their cheerleading operation after five former cheerleaders filed a wage-theft lawsuit, which also alleged that the Jills had to submit to a jiggle test, were not paid for games or practices, had to make 20-35 mandatory appearances each season, and had to pay $650 for their own uniforms. The Jills alleged that they were mischaracterized as independent contractors rather than employees. Lawsuits from the Flight Crew and the Tampa Bay Buccaneers Cheerleaders related to minimum wage violations were filed as well.

In June 2014, a subsequent class action lawsuit was filed on behalf of all current and former Raiderettes. This subsequent lawsuit alleged that the NFL violated antitrust laws by acting in concert with teams to depress the wages of all NFL cheerleaders. This could expose the NFL itself to wage violations. For example, Section 9.3 (a)(2) of the NFL Constitution and Bylaws (“Constitution”), requires that NFL teams file all written employment contracts with non-player employees in the NFL League Office. This section states:

Every contract with any employee of the League or of a club therein shall contain a clause wherein the employee agrees to abide and be legally bound by the Constitution and Bylaws and the Rules

31. See Fielkow, supra note 14 (noting that the Department of Labor’s opinion is only an opinion and only applicable to federal law anyway).
33. See Royster, supra note 32.
35. Id.
36. See Royster, supra note 32.
37. See Cheerleaders Add New Defendant, supra note 5.
38. Id.
39. Id.
40. NFL, Const. & Bylaws of the Nat’l Football League 42 (1970, 2006 rev.), available at http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf [hereinafter NFL Const. & Bylaws] (displaying 2006 revision and incorporating the above provision); see also ESPN Video, supra note 1 (citing the NFL Constitution and Bylaws in an attempt to demonstrate knowledge and control by the NFL itself, not just individual teams, over NFL cheerleaders).
In sum, the Raiderettes claim that this part of the NFL’s business thereby exposes the league as a party to the lawsuit and the violations, and, therefore, that the cheerleaders were agents of the NFL. However, it may prove difficult to demonstrate that this applies to cheerleaders, particularly since there is disagreement as to whether they are employees in the first place, and the only mention of the word cheerleader in the NFL’s Constitution deals with the specific regulation of their cheers found under a small section N, Crowd Noise. Having a contract on file does not necessarily demonstrate the requisite element of control for determination of the agency aspect of the employer-employee relationship by the NFL itself.

**Other Sports Industry FLSA Claims**

The NFL cheerleaders are not currently alone in their FLSA claims in the sports industry. In fact, there have been several minimum wage and overtime lawsuits filed recently including *Senne v. Office of the Comm’r of Baseball*, a class action suit alleging that minor league baseball players are paid below the minimum wage and that MLB has set up a system that is “artificially and illegally depressing minor league wages.” Another lawsuit was dismissed in 2014 against Major League Baseball (MLB) on behalf of unpaid volunteers at the annual FanFest convention held in conjunction with the July 2013 MLB All-Star Game (held at Citi Field in New York City) at the Javits Center in the same locale.

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41. ESPN Video, supra note 1.
42. *Id.*
43. See *NFL Const. & Bylaws, supra* note 40 (“While the League does not wish to place restrictions on spontaneous crowd noise or to diminish fan enjoyment in our sport, it is each club’s responsibility to exert proper control over cheerleaders and mascots.”).
45. See Dave Matter, *Minor Leaguer-turned-lawyer Targets MLB in Lawsuit*, ST. LOUIS POST-DISPATCH (June 25, 2014), http://www.stltoday.com/sports/baseball/minor-leaguer-turned-lawyer-targets-mlb-in-lawsuit/article_713f4d65-e981-5565-a4a2-2c36ed1e627c.html (reporting that the suit was filed in the U.S. District Court for the Northern District of California, naming five parties as defendants: Major League Baseball, MLB commissioner Bud Selig, the Kansas City Royals, Miami Marlins and San Francisco Giants, and that the defendants have filed a motion to move the case to Florida); see also Michael McCann, *In Lawsuit Minor Leaguers Charge They are Members of ‘Working Poor’*, SL.COM (Feb. 12, 2014), http://www.si.com/mlb/2014/02/12/minor-league-baseball-players-lawsuit (noting that minor league players could sue under the Sherman Act, although the Sherman Act would not apply to MLB players because MLB is exempt from antitrust law).
Similarly, Melissa Margulies, a former member of the Los Angeles Temptation, a team in the all-female Legends Football League (formerly known as the Lingerie Football League), filed a lawsuit alleging that players in the league are improperly classified as independent contractors and should be paid overtime. She claims that there was significant control over the job by the league and that “[t]he nature of team sports demands that players [follow] league and team rules or face discipline or termination.” Additionally, she claimed that players’ pay was based not on a wage but on ticket sales and team performance, resulting in seasons where some players received no pay at all.

**Case Law: Where Do We Stand?**

As previously mentioned, there are exemptions to the FLSA minimum wage requirements found in § 213(a)(3), a provision covering seasonal amusement and recreational establishments. Specifically, the business is exempt from the FLSA if either subsection (A) or (B) apply. The business is FLSA-exempt under subsection (A) if the business does not operate for more than seven months in any calendar year, or under subsection (B) if the business’s receipts from its six lowest-revenue months in the previous year were less than 33 1/3% of its receipts in its six highest-revenue months (e.g., the business’s receipts from April-September were at least three times

Law § 190; § 650, claiming violations of his right to receive a minimum wage). The court noted the defendant’s arguments that the plaintiff was a volunteer and not an employee, and that even if he was an employee that the defendant would be exempt because of the “amusement or recreational establishment” exemption [not operating for more than seven months in any calendar year] found in 29 U.S.C. § 213(a)(3). Id. at *29-*30. The court held that FanFest, rather than MLB, was an establishment that operated for only a “handful of days” thereby supporting the grant of summary judgment and never really reaching the question of whether or not he was an “employee” per se. Id. at *29-*30.


49. Id.

50. See, e.g., Adams v. Detroit Tigers, Inc., 961 F. Supp. 176, 177, 179 (E.D. Mich. 1997) (dismissing the claims of four batboys who sued under the FLSA and the Michigan Minimum Wage Law, M.S.A. § 17.255(1), alleging that their work at the home-team clubhouse of Tiger Stadium from April through October of 1992-1995 violated these federal and state minimum wage and overtime hours laws because the Tigers demonstrated—at that time—that they were exempt based upon calculations related to off-season as compared to in-season receipts, and also that the Tigers were an amusement or recreational establishment operating not more than seven months in a year. Id. at 177, 181). Notably, the court observed that the Commissioner of Baseball told the Tigers via a memorandum on April 2, 1991, that “the federal minimum wage laws did not apply to certain ball club employees, among them batboys, as the Tigers offer seasonal employment qualifying for an exemption to the minimum wage laws.” Additionally, the court opined that “[t]he Tigers have shown that the work of batboys exclusively concerns the staging of baseball events” and serve as event personnel as opposed to the work of administrative personnel who might be characterized as non-seasonal employees. Id. at 179-80. Judge Avern Cohn in his decision differentiated the *Bridewell I* decision, discussed further, infra, in that *Bridewell I* involved year-round maintenance workers who worked for both the Cincinnati Reds and the Cincinnati Bengals, whereas the batboys only worked for the Tigers. Id. at 181.
greater than its receipts from October-March). However, courts are divided regarding the status of professional sports teams under the seven-month operation provision in Section 213(a)(3)(A).

For example, in Bridewell v. Cincinnati Reds, a Sixth Circuit appellate decision emanating from Ohio, a group of Riverfront Stadium maintenance staff brought suit against MLB’s Cincinnati Reds, claiming that the Reds had violated the FLSA by failing to pay overtime wages as required by the statute. The Reds argued that the team was exempt from the law because its baseball season did not run for more than seven months, even accounting for spring training. The court held that the franchise operated a year-round establishment and concluded that there was a distinction between operating for more than seven months and merely providing recreation or amusement for its customers for more than seven months. The Reds employed 120 year-round workers, and it was clear their operations extended beyond just the playing season; accordingly, the team was subject to the overtime pay requirements of the FLSA and was not exempt. On remand, the district court held that the Reds were not exempt under subsection (B) either, which the Sixth Circuit also affirmed.

51. Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(3)(A) and (B) (2014). Indeed, because MLB teams tend to receive a significant percentage of their revenues during the off-season (from season ticket deposits, e.g.), they typically will not satisfy the six-month “receipts” requirement set forth in § 213(a)(3)(B). See Bridewell v. Cincinnati Reds, 155 F.3d 828 (6th Cir. 1998) (“Bridewell II”). It should be noted that Bridewell II represented a “continuation of the dispute between employees and the Cincinnati Reds (“Bridewell I”), regarding the team’s refusal to pay overtime for hours worked in excess of 40 hours per week.” Id. at 829-30 (explaining, in Bridewell II, that the narrow question focused on whether “receipts” referred to money when received as opposed to when it was recorded in the books as income, and that FLSA referred to the former (i.e., when it is actually received) based upon the definition of “receipt” in Black’s Law Dictionary, thereby rejecting the Reds’ accounting method characterization as accrual in terms of “income” rather than actual receipt of the money itself). Id. at 830.


54. Bridewell I, 68 F.3d at 137; Bridewell II, 155 F.3d at 829, (citing 29 U.S.C. § 207(a)(1) (“Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”)).


56. Bridewell I, 68 F.3d at 138-39; Bridewell II, 155 F.3d at . at 829 (citing the prior decision of the panel in Bridewell I).


58. Bridewell II, 155 F.3d at 831-32 (expressing sympathy for the Reds’ accrual-accounting method, agreeing that this method might best reflect the reality of running the Reds organization, and asking, “What sort of amusement establishment could be more seasonal than one whose only business is to showcase the talents of the Boys of Summer?”). Id. at 832. The next sentence stated, “But the law is the law.” Id. In his concurrence, Judge R. Guy Cole, Jr. stated, “I believe that we are presented with a difficult question because Congress has provided us with so little guidance in § 213(a)(3)(B)’s legislative history.” Id.
On the other hand, a 1995 Eleventh Circuit decision\(^59\) determined that the proper focus under the FLSA’s seven-month operation exemption\(^60\) was the length of a minor-league baseball team’s seasonal operation (playing April-August),\(^61\) not the length of time the employees performed their work.\(^62\) In that case, Jeffery v. Sarasota White Sox,\(^63\) a groundskeeper for the Sarasota (Florida) White Sox sued the minor league baseball team, a wholly owned subsidiary of MLB’s Chicago White Sox,\(^64\) for unpaid overtime since 1989, alleging that the team’s refusal to pay overtime violated the FLSA’s\(^65\) overtime pay requirements under § 213 (a)(3).\(^66\) Focusing on the team’s seasonal operation, the court reasoned that since the minor-league-baseball season was only five months long and the team’s receipts\(^67\) occurred seasonally,\(^68\) the Sarasota White Sox team was exempt from the FLSA’s mandatory overtime wage requirement.\(^69\)

Similarly, the U.S. District Court for the Eastern District of Louisiana (in the Fifth Circuit), in 2008, held that the National Basketball Association’s (NBA) New Orleans Hornets were subject to the FLSA in a lawsuit brought by former employees.\(^70\) In Liger v. New Orleans Hornets NBA Ltd. P’ship,\(^71\) the court concluded that the Hornets were not exempt under Section 213(a)(3)(A) because they were “clearly a year round operation.”\(^72\) The court noted that the Hornets’ season could potentially last as long as nine months if pre-season and post-season games were considered,\(^73\) while also noting that the team participated in the NBA draft each

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\(^59\) Jeffery v. Sarasota White Sox, 64 F.3d 590 (11th Cir. 1995).
\(^60\) Id. at 594 (“The provisions of sections 206. . .and section 207 of this title shall not apply with respect to—(3) any employee employed by an establishment which is an amusement or recreational establishment . . .if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year.”).
\(^61\) Id. at 596.
\(^62\) Id. (distinguishing itself from Brennan v. Six Flags Over Georgia, Ltd., 474 F.2d 18 (5th Cir. 1973), in which construction work was considered to be different than amusement-park work, whereas in Jeffery, grounds-keeping work for baseball games was considered to be the same as recreational-establishment work).
\(^63\) Id.
\(^64\) Id. at 592-93 (noting that the Chicago White Sox hold spring training at the City of Sarasota-owned complex during March of each year).
\(^65\) Id.
\(^66\) Id. at 594.
\(^67\) Id. at 596 (“finding that since [the team’s] average receipts for the six off-season months of September through April in 1991, 1992 and 1993 are clearly less than one-third of its receipts for the other six month period beginning in March and ending in August of 1991, 1992, 1993, [the team was] exempt from the provisions of FLSA for payment of Plaintiff’s overtime wages claimed for the years of 1992, 1993 and 1994 pursuant to 29 U.S.C. § 213(a)(3). Therefore, Defendant is entitled to summary judgment as matter of law as to Plaintiff’s claims which pertain to overtime wages claimed for the years of 1992, 1993, and 1994.”).
\(^68\) Id. at 595 (“Virtually all of Defendant’s receipts are derived from spring training games played at the complex in March and minor league games played at the complex from April through August.”).
\(^69\) Id. at 596-97.
\(^71\) Id. at 683.
\(^72\) Id. at 683-84 (noting that the team operated “for at least eight months each year” and therefore did not qualify for the exemption under federal law).
Moreover, the court emphasized the fact that the Hornets employed 100 or more employees on a year-round basis. In sum, the court held that Hornets’ did not qualify for the exemption under the FLSA and had to pay overtime.

Thus, Bridewell and Liger stand for the proposition that these major professional sports teams are subject to the FLSA since their businesses were viewed on a year-round basis. The Jeffery decision conflicts with Bridewell and Liger by focusing instead on the seasonal operation of the business, at least in the minor-league scenario, and holding that the business there was exempt. Thus, there appears to be a difference of opinion among the courts.

CONCLUSION

The years 2013–2014 have been significant for the discussion of minimum wage, overtime and the term employee. After the Raiderettes, several other NFL cheerleaders from various teams have filed lawsuits against their clubs, alleging violations of the FLSA. The issue of whether cheerleaders are actual employees or independent contractors is certainly relevant, and an analysis related to the degree of control by teams or the NFL itself is warranted. On the other hand, it more likely will come down to whether the league or the teams fall within the FLSA exemption for seasonal employment under §213(a) (3) of the Act.

The Sixth and Eleventh federal circuits appear to disagree on how the Act is to be interpreted, at least with regard to baseball organizations. There are currently only a handful of published decisions on point related to the sports industry. However, the cheerleader lawsuits coupled with several other claims involving the FLSA, including minor league baseball players, unpaid volunteers at a convention, and a former female player in the all-female Legends Football League, are likely to continue to shape the interpretation of the FLSA in the near future.

Many questions remain unresolved at this point on a shaky legal landscape. Maybe cheerleaders should form their own union and collectively bargain? Maybe minor league baseball players should as well? After all, NFL referees have one. Even if cases are resolved under federal statutes, what about states that have their own requirements for minimum wage laws? Questions over whether cheerleaders are indeed considered employees in the first place need to be resolved before the FLSA applies anyway. Still, just like the student-athletes at Northwestern University who have been declared employees and given the right to form a union, and just like Ed

73. Id.
74. Id.
75. Id. at 689.
76. Id. at 684 (noting in fact that the Hornets relied heavily on Jeffery, but that the Liger court was “not convinced that the operative scale of a minor league baseball team is analogous to that of a NBA franchise”). The Liger court went further, noting that the plaintiff-employees’ reliance on Bridewell was “more appropriate.” Id. at 684.
77. See Josh Leventhal, MLB States Its Defense In Minor League Players Lawsuit, BASEBALL AM. (June 11, 2014), http://www.baseballamerica.com/minors/mlb-states-its-defense-in-minor-league-players-lawsuit. (interviewing Professor Nathaniel Grow, who “says the decision will come down to which side of the argument the court favors: that baseball is a year-round business or that it is a seasonal operation that does most of its business during a baseball season”).
O’Bannon, whose lawsuit against the NCAA could assist in changing the concept of the unpaid, amateur student-athlete to that of employee, someday lawyers and legal scholars may look back at the NFL, its cheerleaders, minor league baseball players, and others, and ask, “What took you so long?”