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Unpaid Internships: Recent Second Circuit Caselaw

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I. Introduction and Background

Since 2011, unpaid internships have come under increasing criticism by plaintiffs who claim that these programs violate the Fair Labor Standards Act ("FLSA"). This paper provides an overview of the legal landscape relating to unpaid internship programs, with a special emphasis on recent decisions in the Southern District of New York currently on interlocutory appeal before the Second Circuit. The appellate court's decision in those cases is eagerly anticipated due to the number of high profile lawsuits brought in the circuit. Moreover, should the Second Circuit adopt a standard that differs from the one adopted by other circuit courts addressing these programs, such ruling may provide an opportunity for the Supreme Court to revisit the legal standing of interns under the FLSA for the first time since 1947.

The FLSA defines an "employee" as a person "employed by an employer" and defines "to employ" as "to suffer or permit to work." The Supreme Court addressed unpaid training programs in *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947), and that decision has served as the principal governing law in this area. In *Portland Terminal*, the Supreme Court found that trainees who worked for seven or eight days for the defendant railroad without pay during "a course of practical training" were not "employees" under the FLSA based on "the unchallenged findings [] that the railroads receive no 'immediate advantage' from any work done by the trainees." 330 U.S. at 153. The Court reasoned that "[t]he definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." *Id.* at 152.

In April 2010, the U.S. Department of Labor ("DOL") published a Fact Sheet that set out six factors—principally derived from the discussion in the *Portland Terminal* decision[1]—by which it evaluates unpaid internship programs. The DOL has

[1] The Supreme Court described the railroad's training program as follows: "This training is a necessary requisite to entrusting them with the important work brakemen must do. An applicant for such jobs is never accepted until he has had this preliminary training, the average length of which is seven or eight days. . . . His activities do not displace any of the regular employees, who do most of the work themselves, and must stand immediately by to supervise whatever the trainees do. The applicant's work does not expedite the company business, but may, and sometimes does, actually impede and retard it. If these trainees complete their course of instruction satisfactorily and are certified as competent,

taken the position that unless an unpaid internship program meets the six criteria, the employer's interns likely will be considered employees who must be paid minimum and overtime wages. The six factors set forth in the DOL Fact Sheet are:

> 1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
>
> 2. The internship experience is for the benefit of the intern;
>
> 3. The intern does not displace regular employees, but works under close supervision of existing staff;
>
> 4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
>
> 5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
>
> 6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

See U.S. DOL, Wage and Hour Division, Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act, *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

Plaintiffs challenging unpaid internship programs have relied on the six-factor test to argue that employers' programs do not meet the criteria for unpaid trainee programs. Defendant employers have countered that courts should reject the DOL test and should instead apply a "primary benefit test," which assesses whether the internship's benefits to the intern outweigh the benefits to the employer entity. Employers argue that such a test looks at the totality of circumstances of the intern-employer relationship, as well as its "economic realities" – an approach that is consistent with courts' analyses of FLSA classifications in other contexts. Various circuit courts have adopted a balancing test analogous to the primary benefit test in their FLSA jurisprudence, including in the context of student workers. *See, e.g.*, *Solis* v. *Laurelbrook Sanitarium & Sch., Inc.*, 642

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their names are included in a list from which the company can draw when their services are needed. Unless they complete the training and are certified as competent, they are not placed on the list. . . . The findings do not indicate that the railroad ever undertook to pay, or the trainees ever expected to receive, any remuneration for the training period other than the contingent allowance." 330 U.S. at 149-50.

F.3d 518, 526 (6th Cir. 2011) (holding that students with a vocational requirement at a Seventh-Day Adventist school were not employees and that the "primary beneficiary" test "provides the appropriate framework for determining employee status in the educational context"); *Blair* v. *Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (holding that student's activities at a Baptist boarding school "were not 'work' . . . as contemplated under the FLSA [because] chores were an integral part of the educational curriculum . . . and those chores were primarily for the students' . . . benefit"); *McLaughlin* v. *Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) ("In sum, this court has concluded that the general test used to determine if an employee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainees' labor."); *Donovan* v. *Am. Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982) (adopting a "balancing analysis" and holding that American Airlines flight attendant and reservation sales agent trainees were not employees under the FLSA while in training at the airline's learning center).

II. Recent Decisions and Developments

A. Recent Decisions in the Southern District

Wage-and-hour lawsuits over internship programs are pending in federal court against many employers. Many of these cases are brought in the Southern District of New York due to the concentration of high profile companies, many of which offer unpaid internship programs. The allegations in the complaints vary, but generally rely on the DOL six-part test to argue that the internship positions offered by the defendant employers are ordinary jobs, not educational opportunities, and, thus, the interns are employees covered by the FLSA's minimum wage and overtime compensation guarantees. The cases generally address one or both of two questions: whether the plaintiff interns were actually employees and should be so classified; and whether the interns were subject to a common employment policy such that a collective action under the FLSA could be certified.

On May 13, 2014, Judge Paul G. Gardephe conditionally certified a class of almost 3,000 Warner Music Group interns in a class action lawsuit for unpaid minimum wages under the FLSA. *Grant* v. *Warner Music Grp. Corp.*, No. 13 Civ. 4449 PGG, 2014 WL 1918602 (S.D.N.Y. May 13, 2014). Plaintiff Kyle Grant submitted a declaration along with three other former unpaid interns of Warner Music Group stating that the interns performed the same type of work as paid employees in the departments in which they worked and that they received neither compensation nor academic credit for at least part of their internships. Warner argued that its internship program is legitimate and provides trainees with the opportunity to shadow industry professionals. The Court found persuasive plaintiff's evidence suggesting that the interns' work conditions were the result of a nationwide internship policy at Warner. However, the Court deferred any factual determination of the interns' employee status because "such factual determinations are more appropriately addressed at the second stage of the certification process after the completion of discovery." *Id.* at *7 (internal quotations omitted).

On May 7, 2014, in *Fraticelli* v. *MSG Holdings, L.P.*, No. 13 Civ. 6518 JMF, 2014 WL 1807105 (S.D.N.Y. May 7, 2014), Judge Furman denied plaintiffs' motion for certification of a collective action alleging that the Madison Square Garden improperly classified regular employees as interns, holding that plaintiffs failed to meet their "low burden" of a "modest factual showing" that they were subject to a common policy or plan that violated the law. The court concluded that "significant differences exist among the interns in terms of the activities they performed, the supervision, training and benefits they received, the burdens they imposed on MSG and the manner in which they were selected for their positions." Further, Judge Furman noted that the interns worked in approximately 100 different departments and their experiences "appear to vary greatly" by department. The decision concluded that "although Plaintiffs assert that the Madison Square Garden Company runs a centralized internship program based in Penn Plaza," they presented little or no evidence to support that assertion; they merely pointed to a copy of the code of conduct that governs all MSG employees, including interns, a standardized time sheet with the word 'Intern' at the top, and a script distributed to interns instructing them on how to manage telephone calls." Judge Furman distinguished the facts of the case from other cases in which collective actions were certified:

> In *Glatt* [v. *Fox Searchlight Pictures Inc.* (discussed *infra*)], for example, Plaintiffs offered 'generalized proof that interns were victims of a common policy to replace paid workers with unpaid interns.' That proof included testimony that departments at the defendant company requested interns 'according to their needs,' and an internal company memorandum reporting that 'because paid internships were eliminated and overtime pay and temporary employees scaled back, the size of [the] unpaid intern program more than doubled.' And in *O'Jeda* v. *Viacom, Inc*., an intern collective action that this Court recently certified, the evidence of a centralized internship program was far stronger than that here; it included a thirty-five page long internship guide, a memorandum from the company's College Relations Department mandating that interns complete an orientation program and work at least two days per week, and centralized web pages that provided general descriptions of the program. Even with that evidence, the Court acknowledged that 'the question [was] a close one in some respects.'

In the *O'Jeda* case, Judge Furman granted plaintiffs' motion for conditional certification of a FLSA collective action of unpaid interns at Viacom to recover unpaid minimum wages. *O'Jeda* v. *Viacom, Inc.*, No. 13 Civ. 5658 (JMF), 2014 WL 1344604 (S.D.N.Y. Apr. 4, 2014). The plaintiff, a college student, worked without pay in Viacom's "mobile development department" and worked on routine maintenance and operations on the company's mobile website. O'Jeda claimed that paid employees in his department performed the same work, and that he did not receive training beyond one orientation. The court held that "Plaintiffs offer sufficient 'generalized proof' that members of the putative collective were 'victims of a common policy to replace paid workers with unpaid interns.'" The court noted that there "may well be, or have been, some variance in the practices and procedures with respect to

interns among Defendants' entities, departments, and locations, but the possibility that 'disparate factual and employment settings' exist does not mean that the interns were not subject to a 'common policy' to replace paid workers with unpaid interns." (On December 31, 2014, the parties in *O'Jeda* notified the court that they had agreed to settle the case in principle.)

Other pending lawsuits include ones against Sirius XM Radio, Gawker Media, and Sony Corporation of America. Some lawsuits have settled, including those against NBCUniversal Media, Condé Nast (which chose to end its internship program), Charlie Rose, Inc., Hamilton College, and Fenton Fallon Corp.[2]

B. New York City Human Rights Law Amended to Protect Interns

On April 15, 2014, Mayor Bill DeBlasio signed into law a bill that provides interns—including unpaid interns who qualify as "nonemployees"—with protection from workplace discrimination and harassment under the New York City Human Rights Law. The law took effect on June 14, 2014. Section 8-102 of the New York City Administrative Code was amended to add a new subdivision 28, as follows: "The term 'intern' shall mean an individual who performs work for an employer on a temporary basis whose work: (a) provides training or supplements training given in an educational environment such that the employability of the individual performing the work may be enhanced; (b) provides experience for the benefit of the individual performing the work; and (c) is performed under the close supervision of existing staff. The term shall include such individuals without regard to whether the employer pays them a salary or wage." And a new subdivision 23 of Section 8-107 of the New York City Human Rights Law provides that the "provisions of this chapter relating to employees shall apply to interns."

The law was prompted by a sexual harassment suit brought by an unpaid intern in the New York office of a Chinese news agency, who claimed she was groped and harassed by her supervisor; the claim was dismissed by Judge Castel of the Southern District for lack of standing, because the intern did not qualify as an employee under New York state and city human rights laws. *Wang* v. *Phoenix Satellite Television US, Inc.*, 976 F. Supp. 2d 527 (S.D.N.Y. 2013).

III. *Hearst* and *Fox* Appeals Before the Second Circuit.

On November 26, 2013, the Second Circuit granted petitions for leave to pursue interlocutory appeals of two cases in the Southern District that had come to

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[2] Some of these settlements have been for significant amounts. NBCUniversal Media paid $6.4 million to settle its wage-hour action. Condé Nast paid $5.85 million to settle a lawsuit brought by interns who had worked at The New Yorker and W magazine. *See* Lisa Milam-Perez, *Strategic Perspectives – Second Circuit to Consider the Status of Unpaid Interns*, 2015 WL 393022 (C.C.H.) (Jan. 30, 2015).

different conclusions regarding the employee status of interns. *Glatt* v. *Fox Searchlight Pictures, Inc.*, 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013) (certifying decision for immediate appeal), Second Circuit docket no. 13-2467; *Wang* v. *The Hearst Corp.*, 2013 WL 3326650 (S.D.N.Y. June 27, 2013) (certifying decision for immediate appeal), Second Circuit docket no. 13-4480. The two decisions are discussed below.

In March 2014, the Second Circuit announced that the interlocutory appeals for the two cases should be heard together for oral argument, and oral argument was held on January 31, 2015 before Judges Wesley, Jacobs and Walker.

The cases have generated great interest and many amici filings. The DOL filed amicus briefs in both cases: in April 2014, in the *Hearst* case, arguing that Judge Baer used an improper standard in his certification decision and should have used the DOL's six-factor test; and in July 2014, in the *Fox* case, arguing that the Second Circuit should defer to the Department's long-standing six-part trainee test.

Other amici that have filed briefs in the two cases include the American Council on Education, American Association of Community Colleges, American Association of State Colleges and Universities, Association of Public and Land-Grant Universities, College and University Professional Association for Human Resources and NASPA: Student Affairs Administrators in Higher Education; as well as the Economic Policy Institute, National Employment Law Project, National Employment Lawyers Association, National Writers Guild, and Writers Guild of America East.

A. *Glatt* v. *Fox Searchlight*

In the *Fox* case, plaintiffs served as unpaid interns on the production of defendants' films (including the films Black Swan and 500 Days of Summer). Judge William Pauley granted plaintiffs summary judgment on their status as employees, holding that they were employees covered by the FLSA and under the New York Labor Law; Judge Pauley also granted plaintiffs summary judgment on their claim that Fox Searchlight was their employer. *Glatt* v. *Fox Searchlight*, 293 F.R.D. 516 (S.D.N.Y. 2013), motion to certify appeal granted, No. 11 Civ. 6784 WHP, 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

In holding that the interns were employees subject to minimum wage and overtime laws, the court relied on the DOL's six-part test (discussed above), and noted that the Second Circuit had not addressed the "trainee" exception to the FLSA. Fox argued that the DOL factors should not be the applicable standard and the court should apply a "primary benefit test" by determining whether "the internship's benefits to the intern outweigh the benefits to the engaging entity." The court declined to apply the "primary beneficiary test," holding that it had little support in the Supreme Court's *Portland Terminal* decision and was a "subjective and unpredictable" test and therefore "unmanageable." The court concluded that the DOL factors, on the other hand, have support in *Portland Terminal* and are entitled to *Chevron* deference. In addition, Judge Pauley concluded that New York Labor Law embodies the same standard for

employment as the FLSA and the analysis for the trainee exception to the Labor Law is the same as that for the FLSA. *Id.* at 531-32.

The court analyzed the DOL six-factor test as follows:

1. Training Similar to an Educational Environment. The court held that "while classroom training is not a prerequisite, internships must provide something beyond on-the-job training that employees receive." The court found that at least one plaintiff successfully alleged that "he did not receive any formal training or education during his internship"; and he "did not acquire any new skills aside from those specific to Black Swan's back office, such as how it watermarked scripts or how the photocopier or coffee maker operated. . . . It is not enough that Footman 'learned what the function of a production office was through experience.' He accomplished that simply by being there, just as his paid co-workers did, and not because his internship was engineered to be more educational than a paid position." *Id.* at 532-33.

2. Whether the Internship Experience Is for the Benefit of the Intern. Benefits such as "resume listings, job references, and an understanding of how a production office works" are not sufficient because "those benefits were incidental to working in the office like any other employee and were not the result of internships intentionally structured to benefit them. Resume listings and job references result from any work relationship, paid or unpaid, and are not the academic or vocational training benefits envisioned by this factor." By contrast, Fox Searchlight "received the benefits of their unpaid work, which otherwise would have required paid employees. Even under Defendants' preferred test, the Defendants were the 'primary beneficiaries' of the relationship," not plaintiffs. *Id.* at 533.

3. Whether the Interns Displaced Regular Employees. The court found that the interns performed routine tasks that would otherwise have been performed by regular employees, such as obtaining documents for personnel files, picking up paychecks for co-workers, tracking and reconciling purchase orders and invoices, etc.

4. Whether the Employer Obtained an Immediate Advantage From the Interns' Work. "Searchlight does not dispute that it obtained an immediate advantage from [the plaintiffs'] work. They performed tasks that would have required paid employees." *Id.*

5. Whether the Interns Were Entitled to a Job at the End of Their Internships. Although the court did not discuss this factor in detail, Judge Pauley noted that there was "no evidence [plaintiffs] were entitled to jobs at the end of their internships or thought they would be." *Id.* at 534.

6. Whether Both Parties Understood They Were Not Entitled to Wages. The court remarked that this factor "adds little because the FLSA does not allow employees to waive their entitlement to wages."

The Court concluded:

> Considering the totality of the circumstances, Glatt and Footman were classified improperly as unpaid interns and are 'employees' covered by the FLSA and NYLL. They worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training. The benefits they may have received—such as knowledge of how a production or accounting office functions or references for future jobs—are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer. They received nothing approximating the education they would receive in an academic setting or vocational school. This is a far cry from *Walling*, where trainees impeded the regular business of the employer, worked only in their own interest, and provided no advantage to the employer. Glatt and Footman do not fall within the narrow 'trainee' exception to the FLSA's broad coverage."

Id.

B. *Wang* v. *The Hearst Corp.*

Judge Baer's decision in *Wang* v. *The Hearst Corporation* denied class certification to a proposed opt-out class of "persons who have worked as unpaid interns at Hearst Magazines in New York" who brought claims under New York State labor law that they were employees. No. 12 Civ. 793 (HB), 2012 WL 3642410, at *5 (S.D.N.Y. May 8, 2013).

In denying the plaintiffs' partial motion for summary judgment contending that they were "employees" under the FLSA and New York Labor Law, Judge Baer addressed the standards laid out in the DOL Fact Sheet for determining whether an unpaid internship program satisfies the FLSA. The Court held that an evaluation of whether an internship created an employment relationship should take into account the DOL's six-factor test framework, but the relationship should ultimately be assessed under a totality of the circumstances test. *Id.* at *4. Judge Baer noted that while he considered the totality of the circumstances test to be "the prevailing view," "the six factors in the [DOL Fact Sheet] ought not be disregarded; rather, it suggests a framework for an analysis of the employee-employer relationship." *Id.* at *5.

The Court found that the proposed class of interns did not meet the commonality and predominance requirements of Fed. R. Civ. P. 23. *Id.* First, the proposed class did not satisfy the commonality requirement because the approximately 3,300 interns worked at 20 separate Hearst publications. Although all were subject to a common policy that they would not be paid, the Court held that their experiences at the separate magazines were insufficiently common to meet the commonality test. *Id.* at *7. The class also failed to satisfy the predominance requirement because "the record shows

that there is no uniform policy among the magazines with respect to the contents of the internship, including interns' duties, their training, and supervision, such that the analysis of four out of six DOL factors would have to be individualized." *Id.* at *8.

C. Second Circuit Briefing on *Fox* and *Hearst* Cases

The parties' briefing in the *Fox* and *Hearst* cases was completed in July 2014, and amici briefs were submitted in December 2014. All parties and amici agreed that the primary legal issue before the Second Circuit on the interlocutory appeals—one of first impression for the Circuit—was the "correct legal standard to be applied in determining whether an unpaid student intern is an employee for purposes of the FLSA." (Hearst Br., Case No. 13-4480, Doc. No. 112, at 9.) In its amici brief in the *Fox* case, the Secretary of Labor stated that the DOL, "as early as 1967, enunciated a six-part test based on the [*Portland Terminal* decision]" and "the issue presented by [the] case is whether this longstanding *Portland Terminal* test for determining whether a trainee or intern is an employee for purposes of the FLSA is the proper test to apply in these 'intern' cases, rather than a 'totality of the circumstances' or 'primary benefit' test." (DOL Br., Case No. 13-4478, Doc. No. 137, at 2-3.)

Both employers argued that a "totality of the circumstances"/"primary beneficiary" analysis was the appropriate legal standard. Both argued that the primary beneficiary standard was endorsed by the Supreme Court in *Portland Terminal*, and that the standard is consistent with the precedent of other circuit courts, as well as the Second Circuit's decision in *Velez* v. *Sanchez*. In *Velez*, a case brought by an alien against her stepsister and stepsister's relatives alleging that she was trafficked from Ecuador and forced to work in her stepsister's home, the Second Circuit noted that in determining whether an employee-employer relationship exists, a "court should also consider who is the primary recipient of benefits from the relationship," an "approach taken by courts determining if trainees and students providing services as part of their education are also employees." 693 F.3d 308, 330 (2d Cir. 2012). Hearst and Fox both argued that the six-factor test was "one dimensional" and improperly shifted the burden of proof under the FLSA from the employee to the employer.

Fox also argued that Judge Pauley's certifications of a Rule 23 class and an FLSA collective were incorrect "because the question of who primarily benefited from those relationships—the intern or the company—was necessarily individualized" because "(a) the internships were designed and supervised by different managers, (b) the interns (even those in the same division and department) participated in a wide variety of activities in exchange for academic credit, and (c) the interns performed an array of duties tailored to each intern's unique interests and in furtherance of his or her express academic pursuits." (Fox Br., Case No. 13-4478, Doc. No. 94, at 4.)

The plaintiffsargued that the Second Circuit should adopt the DOL's six-factor test because the test incorporates the criteria that were essential to the Supreme Court's decision in *Portland Terminal* and because the DOL's administrative experience in the area of employee classification warrants deference. The plaintiffs urged the

Second Circuit to reject adoption of the primary beneficiary test because that test is subjective, unmanageable, and would impermissibly narrow the FLSA's broad definition of "employee" and thwart the act's remedial goals. The plaintiffs also argued that, no matter the standard employed, the factual record made clear that the interns were employees, not trainees, and that the employers benefited more than the plaintiffs from the relationship. In the *Fox* case, plaintiffs argued that Fox failed to showed that Judge Pauley abused his discretion in certifying a class and collective action. (Pl. Br., Case No. 13-4478, Doc. No. 122; Pl. Br., Case No. 13-4480, Doc. No. 59.)

In its amici briefs, the Secretary of Labor argued that the DOL's "six-part test . . . provides a consistent, comprehensive, and objective standard for measuring employment" in all cases involving interns and trainees. (DOL Br., Case No. 13-4478, Doc. No. 137, at 1-2.) The Secretary of Labor also argued that the Second Circuit should defer to the Department's long-standing test, which it described as "critical" to its enforcement of the FLSA, and which was derived from the *Portland Terminal* decision and "accurately measures employment status in a trainee or internship setting." (*Id.* at 7; *see also* DOL Br., Case No. 13-4480, Doc. No. 85.)

D. Second Circuit Oral Argument on *Fox* and *Hearst* Cases

Media coverage of the oral argument on January 30, 2015 suggests that the Second Circuit panel was skeptical about the usefulness, as well as the present-day relevance, of the DOL's six-factor test. *See* Mark Hamblett, *Judges Grapple with Test Under FLSA for Interns*, NEW YORK LAW JOURNAL (Feb. 2, 2015). Judge Walker was reported to have "faulted the factors for being inconsistent" and out of step with the world the Supreme Court faced in the years since *Portland Terminal*. *Id.* Judge Jacobs was reported to have said that the "willingness to work for nothing is a powerful signal that one thinks the arrangement is beneficial to oneself." However, Judge Jacobs was also reported to have expressed skepticism that the Fox and Hearst interns received educational value from the internships.

Attached as Appendices A and B to this paper are transcriptions of the oral arguments in the *Fox* and *Hearst* cases, respectively.

Appendix A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE MATTER OF:

ERIC GLATT, ET AL.,

Petitioners,

Index Nos.:
13-4478-cv,
13-4481-cv

Vs.

FOX SEARCHLIGHT PICTURES INC., ET AL.,

Respondents.

----------X

January 30, 2015

HELD AT: THURGOOD MARSHALL U.S. COURTHOUSE
40 Foley Square
New York, NY 10007

BEFORE: HONORABLE WESLEY,
HONORABLE JACOBS
HONORABLE WALKER
Judges

APPEARANCES: MS. BIEN
Attorney for Eric Glatt, et al.

NEIL CATCHIALL, ESQ.
Attorney for Fox Searchlight Pictures Inc. et al.

MARIA VAN BUREN
Attorney for Department of Labor

TRANSCRIBER: JESSICA M. MCDONALD

INDEX

W I T N E S S E S

PETITIONER: WITNESS	DIRECT	CROSS	RE DIRECT	RE CROSS	V. D.	J

RESPONDENT: WITNESS	DIRECT	CROSS	RE DIRECT	RE CROSS	V. D.	J

E X H I B I T S

PETITIONER: IDENTIFICATION	DESCRIPTION	I.D.	IN EV.

RESPONDENT: IDENTIFICATION	DESCRIPTION	I.D.	IN EV.

JUDGE JACOBS: Let's begin. We'll hear Glatt vs. Fox Searchlight Pictures.

MR. NEIL CATCHIALL: Thank you, Judge Jacobs, may it please the Court, my name is Neil Catchiall on behalf of appellants Fox. The District Court made three large errors. First, instead of doing what Circuit Courts have done in similar cases which is to apply the primary beneficiary test, it created a new rule whereby an entity offering an internship could not derive an immediate advantage. No Circuit Court has ever done that to the contrary as this court in *Velez* [phonetic] acknowledged the Court's use of primary beneficiary test and for good reason. It squares with the text of the statute and repeated were pronouncements of this Circuit and the Supreme Court that FLSA determinations should not be based on artificial multi-factor test but rather the totality of the circumstances. The District Court's- -

JUDGE JACOBS: [Interposing] - - stop. You mentioned the immediate advantage test. Is that a test based on the advantage that a company gets immediately that is to say during the term of the internship, or does that mean that at point on no particular day should you get a net advantage?

MR. CATCHIALL: I take it that the Department of Labor's emphasis on that factor is the immediacy. It's the former. It's not at some point in the future, and our problem with the Department of Labor test--

JUDGE JACOBS: [Interposing] So it's during the internship the company gets no net immediate advantage?

MR. CATCHIALL: That's correct, and if you interpret that way, then, you are I think really going against thousands of internships offer right now which - - briefs say, and the kind of rigid checklist. It's not a six factor test the Department of Labor. It's you got to meet each one of these.

JUDGE WALKER: Isn't the fact sheet drawn from *Portland Terminal*, and wasn't *Portland Terminal* the set of facts particular to that particular case rather than an application of a test?

MR. CATCHIALL: That's exactly--

JUDGE WALKER: [Interposing] So they have extracted the facts of that case, and somehow morphed into a test? That seems kind of restricted.

MR. CATCHIALL: That's precisely right. That's what Judge Bear said as well in the companion case which you'll be hearing about a little later

today. It's why the 6th Circuit in *Laurel Brook* rejected the Department of Labor test, indeed why every Circuit Court the Department of Labor's tried for two decades to try and sell this test to a court. No court has adopted except essentially the District Court below.

JUDGE WALKER: Would you describe *Portland Terminal* as a fact? I mean and in *Portland Terminal* it seemed to me which is years 1947 was just the Supreme Court looking at the facts of that case and saying, okay, under those circumstances they're not employees but without really trying to craft any rules.

MR. CATCHIALL: Right, well, I think you could derive the primary beneficiary test from *Portland Terminal* itself Judge Walker because--

JUDGE WALKER: [Interposing] They didn't use that.

MR. CATCHIALL: They didn't know, but what they did is they first said the undisputed facts are advantage only to the trainee and not to the company. Then, they went through that and said, look, the trainee gets to earn benefits. It's vocational training. Then, they looked at the other side and said employer you get nothing that's the undisputed

facts. That's exactly the logical structure you would expect in a balancing test over who's the primary beneficiary, and I'd say one more thing about this which is our argument's not just derived from *Portland Terminal*, it's derived from the test of the statute itself because 203(g) define and says you need to have work in order for the FLSA apply at all. And work hasn't been defined, and our brief starts us out at page three from *Tennessee Cole* in 1945 it's saying it's got to be, "necessarily and primarily for the benefit for the employer." That is the primary beneficiary test, and that's why courts time and again look to who's primarily benefiting in this relationship. Judge Jacobs you applied this very test in *Chilver v. Gotham*. Judge Wesley you were on the Panel in *Sing v. New York*. You applied this same *Tennessee Cole* test asking who is the beneficiary.

JUDGE WALKER: That was a trainee case primarily, I mean an internship, but it wasn't current at that time, and is there a difference in the test or in the way the test should be applied between a trainee and an intern?

MR. CATCHIALL: We think there can be, and that's a difference I could cut in favor of Fox. That is what the Court in *Portland Terminal* is

worried about was essentially an employer doing an end run around the FLSA by not paying someone for essentially their first period of work. Here are the undisputed facts both with a class, the collective as well as Glatt Equipment these folks had no expectation of compensation and no expectation of a job at the end of their internships.

JUDGE WESLEY: That can't be the loads down though. I mean the fact that they don't have an expectation the Court in the Supreme Court's was just saying, look, these people were really trained, and frankly, interestingly enough, if they got hired shortly thereafter, they did get paid for the time that they had been working. So they did have an expectation of sorts. It was a bit extended, but they had an expectation that the brakeman ultimately got a job at the terminal. They got the $4 dollars a day, right?

MR. CATCHIALL: We agree with you Judge Wesley it can't be the be all and end all expectation of compensation. We do think that it's a factor that should be looked to, and indeed, *Portland Terminal* itself five times in its opinion said there is no expectation of compensation, so that $4 dollar thing you're referring to I think the Court itself poo-

pooed that and said these particular trainees on the facts of that case had no expectation of compensation.

JUDGE WESLEY: So you crossed - - the District Court for a summary judgment didn't you?

MR. CATCHIALL: But not on this. We're not asking for Glatt Equipment--we're asking for this Court to remand on Glatt and Footman and to throw out the class and the collective. The class and the collective were really problematic.

JUDGE WESLEY: Whereas we could either sustain the summary judgment determination or the make the summary judgment determination under our case law; and notwithstanding our cross motion it found that the record was adequate to do so could we?

MR. CATCHIALL: You certainly have that I think available - -.

JUDGE WESLEY: Say that the test was wrong what is the fact remain that we should send it back for reconsideration?

MR. CATCHIALL: So the first thing is we don't think you should back the class and the collective. Judge Pauley made grave errors with respect to commonality predominance--

JUDGE WESLEY: [Interposing] Say that's on

your side and we agree with you with regard to that, and we buy your argument also with regard to a primary beneficiary test, what stands in the way of our doing the weighing ourselves and ultimately determining whether these folks are employees or indeed trainees?

MR. CATCHIALL: We certainly think you could, Your Honor, but I mean if you did I think you'd look to the fact that there is no expectation of compensation and no employment.

JUDGE WESLEY: Now do the analysis for me, and tell me why you think they're not.

MR. CATCHIALL: Well, with respect to Glatt and Footman, these are folks who the undisputed evidence indeed even Judge Pauley admits there's no expectation of compensation, and they didn't expect a job at the end of the internship. If someone takes a position under those two conditions, that's a pretty good barometer that they are the primary beneficiary of the relationship. Why would you take the position periphery where you're not going to get a job except to get something out of it, and indeed, the evidence in this case if you look in Mr. Glatt's deposition at pages 52 to 60, he acknowledges that he did benefit from this. That he took the job for resume reasons

and obtained it, and we have greatest respect for Mr. Glatt. We're not here to quibble with that, but we do think that even his own deposition acknowledges that he's the primary beneficiary.

JUDGE WALKER: One area that I think maybe we're not clear on at least with these individuals is whether they had a continuing connection to an educational institution or to an education program. I don't think that was really fleshed out.

MR. CATCHIALL: Right.

JUDGE WALKER: So cite the basis for remanding for some for their work.

MR. CATCHIALL: I'm not sure that you agreed then on that 'cause I think that both of them had graduated from school. Fox said--

JUDGE WALKER: [Interposing] Didn't one of them have a sort was taking further classes? I don't know whether that's true. Maybe I've got somebody else in mind.

MR. CATCHIALL: I can't remember if that's true. I can certainly tell you Fox had an undisputed policy--this is page A461 of the appendix--that they required academic credit before they'd provide an internship which is yet another reason why the class and the collective have to be thrown out.

JUDGE WALKER: This program might be a factor?

MR. CATCHIALL: It certainly could be. We think just as the ACE brief says that is an important factor.

JUDGE WALKER: Somehow reporting back after the internship in a class setting some discussion of the interns and whether the school itself lost their internships.

MR. CATCHIALL: Exactly, Judge Walker, we don't think it's a necessary requirement, but we think it is a sufficient one and does explain why the Fox internship program and the class and the collective was so problematic.

JUDGE JACOBS: You asked the rhetorical question of why would somebody work for nothing expect to get something, and the answer could be that interns like employees could be disappointed in the yield what they get out an experience. And then you cited a resume item which of course is what every intern gets out of every internship, but that's really discounting almost to zero the benefit that an intern would get out of this, and I mean I look at the record with Mr. Footman [phonetic], and he's being used as a gopher and a messenger and polishing

the doorknobs during the swine flu epidemic. If that's all he was doing, and all he got out of it was a resume item, what would be the result? It seems to me he didn't get anything.

MR. CATCHIALL: Absolutely, Judge Jacobs. Our position is not that the primary beneficiary is somehow an employer wins in every circumstance. We think that it does include--Judge Pauley was wrong to discount the intangible benefits such as resume and making contacts and the like which the 4th and 6th Circuits and the 8th Circuits have all adopted.

JUDGE JACOBS: And working for nothing is little weight which seems odd.

MR. CATCHIALL: No, that's what he's said exactly, and we think that's wrong. That is a barometer of whether or not there is a benefit to the internship, but for example the 4th Circuit has had the primary beneficiary since the *Works* case for 50 years, and in *Works* itself, it threw out and rejected the argument of the employer in saying this is not primarily benefitting the interns, the student trainees there. They were high school students, and they were opening mail and doing the kind of menial tasks you're saying. They said, yeah, you know what actually the interns aren't the primary beneficiary.

They said that's the right test, but the employer in that circumstance lost that case, and so this is a test that has teeth. That's why it's been used in circuit after circuit to consider the issue, and it's working quite well.

JUDGE JACOBS: You have to concede that the Department of Labor's test is at least clear and decisive. I mean you may not like it, but what is there that gives the same kind of assurance to an employer that they were are within the law given the kind of test that you're advocating.

MR. CATCHIALL: Right, well, Your Honor, I think that the employers represented by the Chambers of Commerce and others are before you saying they don't think that that's the right test and for good reason. You're right the Department of Labor's rigid six factor checklist provides more predictability, but that's never been the rule in FLSA determinations that--

[Crosstalk]

MR. CATCHIALL: Yeah, can't have internships throughout the three states of this circuit if that rule is adopted. That's a massive see change in jurisprudence for the FLSA, and it's something that doesn't square with the text of the statute and its

focus on the word work.

JUDGE JACOBS: How does your test yield any level of predictability?

MR. CATCHIALL: Well, I think it's been working very well in the many circuits that have adopted it because--

JUDGE WALKER: [Interposing] I would agree that it's less predictable - ---

MR. CATCHIALL: [Interposing] Absolutely.

JUDGE WALKER: It appears we're going to have that in return for being allowed to have internships.

MR. CATCHIALL: Exactly and so are the students because it provides such a benefit, and Judge Walker your own opinion in *New York v. Schala* [phonetic] said the Department of Labor shouldn't be entitled to any special - - deference when we're just dealing with the interpretation of a Supreme Court opinion.

JUDGE WALKER: - - difference were the factors ever circulated or exposed to the Department of Education? Did they have a chance to weigh in here?

MR. CATCHIALL: I suspect you'd have to ask Female Voice 1 that, but certainly, the factors

themselves say they're not an official position, and as for the reasons Parker Fire said, this bears all hallmarks.

JUDGE WALKER: - - a strong amicus on the education side here, and it seems to me any educational value is not featured by the Department of Labor's position, and I just wondered whether there were other government agencies that might have consideration.

MR. CATCHIALL: And as I recall, the Department of Labor has independent litigating authority at the Circuit Court level, so I believe--and you can check this with Female Voice 1--they don't have the requirement of adopting one United States government unified position - -.

[Background noise]

MS. BIEN: Morning, Your Honors, may it please the Court internships like Foxes that require interns to perform productive work on a regular basis without pay are inconsistent with *Portland Terminal*, the remedial purposes of the FLSA, and the FLSA's broad definition of employee. The plaintiffs--

JUDGE WALKER: [Interposing] - - inconsistent with *Portland Terminal*. *Portland Terminal* was dealing with trainees in a specific

situation, and the Court there had a list of factors that they went through to decide that case. Without naming any facts that they found without naming any and setting up a testament expressly, and one could imply as your adversary has that there was a balancing of interests back and forth And both sides have tried to make something of *Portland Terminal* for themselves, but I read the case less is being decided on is particular set of facts. So in that case, quite clearly the benefit was for the trainee, and so they had no difficulty deciding that. That doesn't inform what the test should be as far as I'm concerned.

MS. BIEN: Well, Your Honor, respectfully we disagree. This Court has often looked to Supreme Court cases in order to come up with the appropriate tests.

JUDGE WALKER: But bear in mind, look, the test could say the line is sort of here in the middle, and yet *Portland Terminal* could be way over on one side of that, but what the Department of Labor has done is taken the facts of that case, and in fact what the Court said in that case and said that should be the test was that's a test that favors very much Department of Labor's position. And it's not one

that's been followed in other circuits

MS. BIEN: Well, I think it was appropriate to limit the exception for trainees to those narrower circumstances in light of how broad the definition of employee is, and how unusual it would be for someone to be performing work on the premises of an employee and not fall under the expanse of coverage of the FLSA. And so in coming from--

JUDGE JACOBS: [Interposing] The wording in *Portland Terminal* which says that the act, the FLSA, the act's purpose as to wages was to ensure that every person whose employment contemplated compensation should not be compelled to sell the services for less than the prescribed minimum wage. I mean if you took *Portland Terminal* literally--and I'm not sure one can--that would basically say that if you're not getting compensation, you're not coverage by the FLSA.

MS. BIEN: I think that's why the Court can't take that line literally.

MR. JACOBS: It truly indicates the willingness to work for nothing is a powerful signal that one thinks that arrangement is something beneficial to oneself.

MS. BIEN: Well, Your Honor, I would

disagree. If you look at the *Atonian Susan Alamo* case in which the volunteers vehemently protested that they were entitled to any wages and said that they were working solely for their own benefit, the Supreme Court disregarded that and said that if the economic reality shows that there was an employment relationship here regardless of what the intent of the workers were, then, they are employees covered by the act. And so I think the extent there was any ambiguity in *Portland Terminal* about that--

JUDGE JACOBS: [Interposing] Question what is the economic reality? Of course, the economic reality shows that an employment relationship. That's the ultimate conclusion, but we're looking at how you got there, and you've some problems it seems to me with the fact sheet. First of all, the fact sheet talks about totality of the circumstances out of one side of its mouth, but at the other, it says that all of the factors have to be met before you can have an internship relationship. So that seems to me a problem. It says the six criteria must be applied, but then, I don't think it precludes perhaps other circumstances 'cause it does talk about totality of the circumstances, and then there's an internal inconsistency between step one and step four, which

says the internship even though it includes actual operation of the facilities of the employer, it's similar to training which will be given an educational requirement. But if you have actual operation of the facilities of the employer, presumably you're going to have some advantage to the employer, and yet that's ruled out by four, so there you have a problem with that it seems to me.

MS. BIEN: Let me try and tackle, Your Honors, that very good questions.

JUDGE JACOBS: With criticisms.

MS. BIEN: Well, first, I think that the Department of Labor test does provide the factors that inform the economic reality of whether this is an employment situation or a trainee situation. They have captured those factors--

JUDGE JACOBS: [Interposing] The other side doesn't disagree with fact that these factors may be relevant in a determination.

MS. BIEN: That's true they haven't, and so I think that if you look at each of the factors, they sort of build on each other. You really can't have a bona fide training program within the contemplation of *Portland Terminal* even if you stray from those facts if you don't meet the first factor which is

that there is a training program, and that it's similar to training that would be provided in an educational environment. That is essential in order to distinguish between a regular employee an a trainee there must be a training program, and similarly, if you look at the fourth requirement that the intern provide no immediate advantage to the employer, surely the FLSA does not allow a circumstance you do find in the present case where interns are just performing the routine work of the company on a day to day business indistinguishably from regular employees.

JUDGE WALKER: - - primary benefit test. I mean you argued against the test - -, but exploitation of the situation by employers whether there's limited benefit to the employee and to the trainee and great benefit to the employer would be covered by the test.

MS. BIEN: Well, I think that there are some problems with the primary beneficiary test, and one is that it makes employment contingent on who benefits more, and that's never been the test of the employment. And in fact, Courts have consistently held that even work that is not beneficial because it's unproductive or because it's not performed well

is still nonetheless work, and it needs to compensated, so I think that that's one fundamental problem with the primary beneficiary test.

JUDGE JACOBS: That's why you would advocate the Department of Labor requirement that there be no immediate advantage and that allocation the operations of the company actually be impeded.

MS. BIEN: Yes.

JUDGE JACOBS: If that is so, then, what kind of a reference letter would be safe to say Terry was appropriately useless and frequently an impediment to our operations, this is a person you really ought to hire.

MS. BIEN: Well, the value to the intern is in the training that is provided and the skills that are provided, so if you look at what the interns did here, they did errands. They did administrative work. They made sure employee files were completed. Those are not the kinds of specialized or academic skills that an employer typically is going to look to.

JUDGE JACOBS: Recognizable these facts that you've pointed out would be - - with the primary benefit test, and the Court could look at and may reach a conclusion on that score. And the fact that

you've said that somehow this is a subjective test to be raised and it's presuming somehow unmanageable and yet there's a history of courts managing this test, and courts are used to balancing facts - - to - - results. That's part of what we do, and - - convenience and - - balancing and you name it, so it doesn't seem to me that it's entirely of the question to have a primary balancing test - - and to uphold the values that you're espousing here.

MS. BIEN: But Your Honor, first of all, I would say that the Department of Labor's test does include in the second element a requirement that the internship be for the benefit of the intern, and so I think there it does capture this notion of who is benefiting from these relationship. So I think that it's already--

JUDGE WALKER: [Interposing] It's not - - though. It's not an all or situation. The benefit can be both ways, and then, the question is because if you're going to say it includes the application and the operation of - - the employer, the employer's going to get some benefit too. The question is really who is benefiting more isn't it?

MS. BIEN: Well, I think that, that prong of the Department of Labor's test could be used, could

be interpreted as sort of a balancing test, but the ultimate question of employment should not come down to who benefitted. It needs to come down to whether or not this was a bona fide training experience, and that's what the Supreme Court identified in *Portland Terminal*. And just determining who benefitted more from the relationship is not going to tell you whether this person was an entry level employee for example who gains a great deal of benefit from their work and may benefit more than their employer does when they're out. You need these other factors that the Department of Labor has incorporated. You need evidence of a bona fide training program not interns just simply performing the routine work of the operations. You need evidence that they're not displacing regular employees. You need evidence that they're not providing immediate advantage. All of these very important significant indicia of whether there's a true trainee relationship--

JUDGE JACOBS: [Interposing] - - would the first test of the Department of Labor fact sheet which it'd be similar to that which - - it's something that would be given in an educational environment, would that be satisfied if the intern is getting academic credit from an accredited

institution?

MS. BIEN: No, Your Honor. We don't think that credit should be a proxy for a truly educational or academic trainee experience, and first--

JUDGE JACOBS: [Interposing] Wouldn't a college or a university know whether something is educational? That's their business.

MS. BIEN: That's true, but the criteria that schools use in order to award credit are not necessarily the criteria that show compliance with the FLSA, and for example, as the *Laurel Brook* case discusses the Baptist Hospital case in which notwithstanding that the interns did receive credit for their externships, nonetheless if you focus in on the actual training that the employer provides which should be the focus, the training was deficient because there was a lack of supervision because the externs were just doing the routine of the company. So the focus needs to be on what the employer's requirements and what's training is and not on whether credit is reported.

JUDGE JACOBS: Would educational credit support some kind of a presumption or heavy weight with respect to that criteria?

MS. BIEN: I don't think it should because

the schools practices in this area vary so greatly. There are some schools that won't aware any academic credit for unpaid internships. Those that do may do so based on criteria that are perfectly sound in their judgment but not necessarily compliant with the FLSA requires--

MR. WESLEY: [Interposing] A lot of the times the educational side of it is back at the school either in seminars or papers that are required I think. I don't know if it's in this case or the next case where that shows up that some of the schools have requirement. Your time's up, but I haven't asked a question, and I've been waiting, so I'm going to. It's called being - - which is all right. Presuming that you're wrong and that we reject the Department of Labor's test and accept a primary beneficiary test or something formulated in that way, should we remand the case, or do we have enough of a record here to determine whether these folks are employees or trainees?

MS. BIEN: If the Court adopts a primary beneficiary test, it has enough evidence to determine that these two individuals were employees and not interns.

JUDGE WESLEY: But tell me why.

MS. BIEN: One there's no evidence that the received any training beyond just learning how to perform their day to day work, and they performed that day to day work as part of the routine operations of the production office. They were supervised no more than a regular employee. They did provide an immediate advantage on a day to day basis, and Fox does not dispute that, and they did displace regular employees. The evidence in the record is that from the supervisor of Mr. Glatt, for example, is that if he didn't do that work, they would have hired another paid employee or the employees would have done it themselves.

JUDGE JACOBS: [Interposing] Mr. Footman he went back for another internship or two with the same company. In fact, one of them is on the same film.

MS. BIEN: That's true, Your Honor. Unfortunately, I think it's often the case that employees continue to work under circumstances that are not necessarily compliant with the law, and so--

JUDGE JACOBS: [Interposing] - - getting something out of it, something positive that he can use that will benefit him in the future.

MS. BIEN: Yes. Even Mr. Footman even if we would concede that Mr. Footman did get something out

of it, under a primary beneficiary test, the primary beneficiary of the relationship was certainly Fox.

JUDGE WALKER: Is there any educational component to either - -?

MS. BIEN: No.

JUDGE WALKER: I know they finished their undergraduate work, and I just wasn't clear on the record as to whether there's more.

MS. BIEN: No. There's no connection at all between any educational institution, and neither of them were in school or pursuing any academic area that connected with what they were doing internship.

JUDGE WALKER: One further question and that is what's the baseline here? I mean you start off with the fact if there's an expectation of being hired in some way, and if you succeed at this, we're going to hire you on the one side, or on the other side, it's understood that the internship would not be paid, and that's sort of a given with all of this. Is the baseline the fact that we're dealing with internships here that are for various reasons worthwhile, and that the Department should or that the intern needs to establish that this is really for the benefit of the employer, or is the burden the other way?

MS. BIEN: So the question is who should bear the burden?

JUDGE WALKER: Yes.

MS. BIEN: Well, what we've urged the Court to do would be to have the employer bear the burden, and that is because generally when an employer is saying an exception from the very broad definition of employee applies, then, it is typically the employer's burden to show that.

JUDGE WALKER: The interns agreed not to be paid. Couldn't that be a starting point with the burden going the other way?

MS. BIEN: Well, I don't think so because the definition of employee is to suffer to permit to work, and so if that is the baseline that we're looking at, then, certainly here the plaintiffs have made a prima facie showing that their work was suffered or permitted, and that the question is really the employer coming back--

JUDGE JACOBS: [Interposing] Would that also have been true in *Portland Terminal*?

MS. BIEN: I think that it wasn't necessarily shown in *Portland Terminal* because certainly the trainees would not have acknowledged that their work was suffered or permitted at all. In

fact, the undisputed fact was they did it purely for their own purpose, so I think that it is a different set of circumstances here, if an employee is able to come forward with evidence that they provided services for an employer, and that's more than just I was present on the employer's premises. But I provided services which undoubtedly these two plaintiffs did.

JUDGE WALKER: Your position would be that somehow the intern or the employee comes forward initially with initial showing that the burden of persuasion is on the other side.

MS. BIEN: Yes. And if you look at some of these factors whether or not there was training provided, it makes sense to really put that in the hands of the employer to show that it provided this educational training, it provided these benefits to these interns rather than have to make the plaintiffs disprove that there was no training or disprove that they didn't get a benefit, so that's why we think that it makes sense to put the burden on the employer. Thank you, Your Honors.

JUDGE WESLEY: Thank you.

JUDGE WALKER: Thank you.

MS. MARIA VAN BUREN: May it please the

Court Maria Van Buren for the Department of Labor, if I could address a few points made so far. First, I would just like to note as an initial matter that the Department's official positon on trainees was not derived from the fact sheets that a lot of people are talking about here today. It is housed in the Department's field operations handbook and has been used by the Department since at least the mid-60s, as reflected by the 10th Circuit in the - - decision.

JUDGE JACOBS: What is it derived from?

MS. VAN BUREN: Well, it's the Department's view that our test is based in *Portland Terminal*, and I understand the Court's concern that *Portland Terminal* was really only reflecting a set - ---

JUDGE JACOBS: [Interposing] I mean *Portland Terminal* is the law, but what level of deference would we owe to the Department of Labor when the Department of Labor is construing the Supreme Court opinion which we can read as well - - respect as you?

MS. VAN BUREN: Certainly, Your Honor. What the Department's position is that it's using the Supreme Court's position as guidance, but that's exactly in this field operations handbook is setting out the Department's view of what an employee is a trainee setting. And so we're asking for Skidmore

deference to our interpretation of a statutory term.

JUDGE JACOBS: The statutory term is entirely cryptic. There's no useful definition, and you're deriving all of these factors from a Supreme Court case which we can read.

MS. VAN BUREN: Certainly, Your Honor. We have used these factors for a long time. Many Courts have used even if they haven't deferred to the test in total that the circuits deferred to secretary's test.

JUDGE JACOBS: You're saying that the test stands on its own feat as a persuasive document whether we give it this level of deference or not.

MS. VAN BUREN: We have used it, Your Honor, because we think it is the best way of objectively measuring an employment relationship whether someone is an employee in a trainee setting.

JUDGE WALKER: How is the field operation handbook different from the fact sheet?

MS. VAN BUREN: Well, it's just it's a mechanism that the Department use to advise its--

JUDGE WALKER: [Interposing] I don't mean in its operation. I mean in its form, in what it says--

MS. VAN BUREN: [Interposing] We--

JUDGE WALKER: --in terms of the factors on

how that it can be used.

MS. VAN BUREN: It's more a long-standing official document that we've used in the past.

JUDGE WALKER: Does it differ in substance?

MS. VAN BUREN: No.

JUDGE WALKER: Okay.

MS. VAN BUREN: It's substantive based same, I'm sorry, Your Honor.

JUDGE WALKER: As to the burden.

MS. VAN BUREN: No. One thing I would like--

JUDGE WALKER: [Interposing] You heard my misgivings about the fact sheet before when I spoke to your colleague.

MS. VAN BUREN: Certainly.

JUDGE WALKER: And I wonder if you could-- doesn't that sort of disqualify in some respects the fact sheet and the handbook because it's internally inconsistent?

MS. VAN BUREN: And you are referring, Your Honor, to the totality of the - ---

JUDGE WALKER: [Interposing] Totality of the circumstances and the difference between one and four.

MS. VAN BUREN: Well, the totality of the

circumstances we view our the FOH as measuring the totality of the circumstances of any or the economic realities of any given trainee setting, so in other words, a totality of the circumstances test as the--

JUDGE WALKER: [Interposing] It's all or nothing too.

MS. VAN BUREN: Well, and as we say in our brief, we think that this is the best test. We think it gives consistent results and should be used in the vast majority of circumstances. However, as we note in our briefs to this Court, we note that there may be very unusual circumstances where perhaps an individual will be found to be a trainee when fewer than six factors are met, or when there's an additional fact that is just not taken into account.

JUDGE WALKER: So you're providing a whole notion that they're really all acquired.

MS. VAN BUREN: Well, we're not dropping it, Your Honor, but we're recognizing that there may be unusual circumstances, and I could give you an--

JUDGE WALKER: [Interposing] - - factors a minute ago not elements or requirements, and that seems to be consistent with the idea that there would be factors, and they would be part of the picture. Maybe in some cases all of the picture there would be

factors.

MS. VAN BUREN: And if I could go to your concern about factors one and four, Your Honor, so the training--was it one and four, yes? It was immediate advantage in benefit, or was it the--

JUDGE WALKER: [Interposing] Immediate advantage on the one hand but also acknowledging that they're going to be doing some work for the employer--

MS. VAN BUREN: [Interposing] Right.

JUDGE WALKER: --why doesn't that create an immediate advantage?

MS. VAN BUREN: Well, when you go back and you look at *Portland Terminal*, you have a situation where you have individuals who are in very short training programs, and it lasted only for seven or eight days, and they're to learn a skill. They're to learn how to perform a certain thing in the railroad, and it happened under the supervision of regular employees, and the Court noted in *Portland Terminal* that there was really no question that these individuals were engaged in work, as it's intended to be under the act. But that the supervision offset any productive work, and the Department recognizes that when you have interns who are at a place of

employment, they will be doing something, and we can't have this test that is so strict that doesn't acknowledge that they may at some points perform minimal work. But we recognize that there may be an offset by the amount of supervision and training given to the person just as in *Portland Terminal*, so the net effected is washed out, so that's how we reconcile those two.

JUDGE WESLEY: No one's suggesting that these inaccurately portrayed the considerations that were expressed by Justice Black to the majority in *Portland Terminal*, so even though they may to some degree have an internal inconsistency to them, they come from - ---no one's suggested that they don't track Justice Black's opinion.

MS. VAN BUREN: Certainly.

JUDGE WESLEY: So I would hard pressed to see that we could tell the Supreme Court that we can choose to disregard its method of analysis. The question is whether you encapsulated is a hard and fast fits all rule or it's indicative of a thought process and an analytical paradigm that was trying to come to grips with a poorly defined--everybody knows it when they think they know it when they see it, but they can't really tell you what it is work and

working for someone. And so I mean I don't know where we're going with all of this about whether it's your test or whether it's primary beneficiary, but it seems to me that rigidity of your test is problematic especially for Judges who are typically called to look at varying fact patterns and difficult situations. Cardoza once again that human experience is the ability to take logical premise with its illogical extreme, and so the human experience we know that the next case is going to be one that doesn't fit the law of these, and that's what makes us nervous. But so is it your view than that this is it? I mean this is the Department's view? This is how the Department stands on this, and that's what works best for the Department?

MS. VAN BUREN: Well, yes, Your Honor, this is the Department's test. We do recognize there may be unusual circumstances where deviating from our test is appropriate. We don't think that those circumstances exist in either of the cases before the Court today.

JUDGE JACOBS: Following up on that, would you say that it would be improper for a Court to consider of equal weight with some of these factors the grand of academic credit for the internship by an

accredited institution or the brevity of the terms of engagement such as of two weeks or four months versus two years, or that the term of the internships is coterminous with an academic term or the summer would be - -. I mean if a Court consider those things, none of those things are taken in by your six factors, and yet all of them seem to be useful for figuring out who is the primary beneficiary.

MS. VAN BUREN: Well, actually, Your Honor, the Department does take into account and recognizes the important role that colleges and universities play in student internships, and we do consider whether the institution has exercised oversight and whether it is giving credit to the interns for that.

JUDGE JACOBS: It's not one of your six factors.

MS. VAN BUREN: Well, that's the first factor is similarity to a vocational program or similarity to an educational environment that's encompassed, and I do believe--

JUDGE JACOBS: [Interposing] Educational environment has very little to do with an educational experience. There are large numbers of people who are in educational environments who don't learn a thing.

MS. VAN BUREN: Well, Your Honor, and that's why I mean as in *Portland Terminal* where you have the practical application, when we apply that first factor, the Department is looking for the practical application of things that are learned in a classroom, things that are fungible within the industry. This is what Parker Fire spoke to as opposed to what the 4th Circuit in the *McLachlan* case skills that don't go beyond that employer. In that case, we had--

JUDGE WALKER: [Interposing] Isn't one of the purposes of the internship to give a practical application to the lessons learned in school and to sort of have a hands-on experience in which you can see in the real world how these concepts that you have been studying in school play out in the marketplace? Isn't that part of it?

MS. VAN BUREN: Yes, Your Honor. And let me just say there are internships out there that meet our six factor test.

JUDGE WALKER: Right.

MS. VAN BUREN: I'm just going back to Judge Jacobs point for just a moment. The duration of the internship is critically important, and it is referenced in the fact sheet. It's describing how we

apply our--I will flip right to it--under job entitlement on page two--

JUDGE JACOBS: [Interposing] That's says you're not necessarily entitled to a job at the conclusion of the internship. It doesn't say anything about the brevity. I mean if you have a four month internship after which you're assured that you'll have a job, then, I think everyone would agree that that's a training period or on the job training for which somebody is not being paid and is a violation of the Fair Labor Standards.

MS. VAN BUREN: Well, Your Honor, we do take into account the duration, and it is a very important factor because of course someone may be learning in the first six weeks, but at some point, the learning aspects may subside, and the doing the job part--

JUDGE JACOBS: [Interposing] So what I'm hearing is that as applied this test has more factors and more considerations than are reflected in the very words of these six factors and starts to approach a full set of circumstances.

MS. VAN BUREN: Well, again, Your Honor, what I'm describing is how the Department--

JUDGE JACOBS: [Interposing] I'm trying to find out what's the difference between these tests.

'Cause if all these things that I'm listing are included here even though they're not listed in so many words in the six factors, then, it looks the six factors as the Department of Labor applies them starts to look very much a totality circumstances.

MS. VAN BUREN: Well, Your Honor, we do believe that our six part test does capture the totality of the circumstances of any given trainee or internship setting in almost all circumstances, so there is something to that, but what I've been describing is things that are been said in opinion letters and in other parts of the field operations handbook as the Department has administered this test over the years.

JUDGE WALKER: Just get to the point then what is your criticism of the weighing of benefits and analysis?

MS. VAN BUREN: Well, it's the subjectivity, Your Honor.

JUDGE WALKER: Whose subjectivity? I mean Courts make this decision and this kind of decision is balancing of the factors all the time.

MS. VAN BUREN: Well, it's unclear--

JUDGE WALKER: [Interposing] It's not based on the subject intern's view which because they're

all plaintiffs would probably be that I'm being exploited, but either way that wouldn't be the consideration, so it's balance factors. I'm not sure that that's necessarily subjective unless you think that everything Judges do is subjective god forbid.

MS. VAN BUREN: Your Honor, it's not as objective as breaking it down from factor to factor because it's all under the umbrella of who is your intern. It all starts with who is your intern.

JUDGE WALKER: - - it would be an umbrella within which the factors would be considered. It's kind of holistic notion a look and feel kind of thing it comes into play, and this is really something that the employer is doing just to improve the bottom line, or is there a real advantage to the intern in terms of enhancing his prospects in the future and educating.

MS. VAN BUREN: Well, Your Honor, I think that it could lead to inconsistent results. If you had two Fox interns, for example, one who really needed contacts in the industry and one who was already well-established in the industry, how would the primary benefits apply to that situation? Would we say that one person was a trainee and one person was an employee because of who they were to start

with, and I would just say the - - is that it's just not consistent with *Portland Terminal* where there was no dispute that there was no immediate benefit to the employer. I'm staying over my time, but I think the Court--

JUDGE WALKER: [Interposing] The Court is grateful to the Department of Labor for assisting - - .

MR. CATCHIALL: Thank you, Your Honor, I'd like to just make three points: one about the sweep of the plaintiffs' argument, the second about the meaning of who and who bears the burden of proof, and the third Skidmore deference. First, I think the plaintiffs have admitted before you just how sweeping their rule is, saying even the provision of academic credit is not enough which would doom thousands of beneficial internships as the ease brief says Fox has a requirement for such internships. And that underscores why that Judge Pauley's determination of the class and the collective--

JUDGE WESLEY: [Interposing] Let me stop you for a sec. Just what was it that Mr. Glatt was learning? What was he learning? He may have been college approved, but what was he learning how to coffee for people and how to fill all people's travel

vouchers? I don't see that as learning.

MR. CATCHIALL: Judge Wesley, gladly I will in a moment but just to be clear arguments here about academic credit is about why the class and the collective were so problematic lumping all of that together, but with respect to Glatt, for example, is that position that 52 to 60 says that he did learn about the working environment, that he made contacts, and that it benefitted him through his resume. And Judge Pauley discounted all of those intangible benefits, but we think and indeed this Court's own citation on *Velez* to *Laurel Brook* and *Blair* there out--

JUDGE WESLEY: [Interposing] You have a very prestigious law firm, and you got a level of reputation. Could you just say to someone, look, come on in and write briefs for me. I don't want to make it personal with you. Oh, let's take another lawyer even better known than you Mr. Catchiall Clarence Darrell in his day, and Clarence Darrell says sonny come on in to work for me and write briefs for me, and you'll get my name on your resume, and you'll learn - - Clarence Darrell. Clarence Darrell is giving benefit to him. Is he learning? Is that an internship, or is he a worker?

MR. CATCHIALL: It wouldn't be in that circumstance. It would fail the primary beneficiary test for the reasons I was saying my first colloquy with you. If you go all the way back to 1964 and the 4th Circuit decision in *Works*, there really is a true weighing of the factors, and in that circumstances if someone is writing briefs for me, well, hopefully they're benefiting me--present company accepted--so but in general our point Your Honor is that there's divergence in this class. The Bruce Sherry deposition is very clear on this point showing all the kinds of academic learning and the environment and the contacts, weekly lunches, media map, introducing them to executives and the like that's why the class was so problematic. Then, we get into the definition the second--

JUDGE WESLEY: [Interposing] So you say pressing your test you say on our side is the fact that weekly they have these meetings, and they're exposed to executives from Fox. They get the inside scoop on how the industry works. Obviously, they're not prepared to do some of the kinds of things that is required of someone who's been in the business for a number of years, and that juxtapose to the fact that they're doing some other things that one might

classify as menial still shows that the primary benefit is going to them in an educational kind.

MR. CATCHIALL: That's precisely correct.

JUDGE WALKER: The issue would be then if we were to re-formulate the test from what Judge Pauley did that it should go back and be reconsidered in the light of that test--

MR. CATCHIALL: [Interposing] Exactly.

JUDGE WALKER: --because of the different weight that he would be required to give to various - .

MR. CATCHIALL: Exactly, and our test derives from the word work, and that's a threshold, and so that's why when my friend keeps talking about a trainee exception or something like that Judge Walker, I think you're exactly right to say, no, there's a first order question. Who bears the burden of proof as is showing there's an employer relationship, and that burden has always been on the plaintiff. *Alamo* itself says that. They look to the expectation of compensation in the first part to say is there an employment relationship in the first place, so they bear the burden of proof. Judge Pauley I think got this absolutely wrong by calling it a trainee except or something like that.

JUDGE WESLEY: The world clearly was a different place in 1947 when Justice Black wrote this opinion. I mean internships didn't exist in the dark ages when the three of us went to college. They're a relatively new kind thing kind of relevant education kinds of things, so I mean to some degree there is a bit of a disconnect here because the world has move on, and that's what makes the test seem so rigid. And obviously, there's a great of pushback.

MR. CATCHIALL: Exactly, Judge Wesley. And I guess my concern is that sure circumstances have evolved, but I think it will be a very dangerous thing for this Court to read into the statutory meaning of the word work what the plaintiffs are asking here and to cover it with this rigid factor test internships. And that brings me to the last point I'd like to make which is about deference to the Department of Labor. I at this point have no idea what this Court is supposed to defer to when it comes to the Department of Labor. Ms. Van Buren said you defer to, "The Department of Operations Manual as reflected in the 10th Circuit decision in *Parker Fire*." Well, *Parker Fire* says don't defer precisely because the Department of Labor's been inconsistent since 1967 in trying to apply this test, and indeed,

the Department has been inconsistent from the time they filed this brief to the oral argument in this case because what you just heard Ms. Van Buren say is that it's now not a rigid six factor test, that there can be exceptions. You can look at something beyond those factors. She says it now takes into account the provision of academic credit. It takes into account the duration of the internships. This is nowhere either in the manual. It's not in the six factor checklist, and it's frankly not even in their brief, and I think that underscores the problem when you move away from the text of the statute which is always asked a very simple question who's the primary beneficiary in order to decide whether there's work, and you'd move from that to something the Department of Labor's amorphous test which now certainly does not sound predicable by any stretch.

JUDGE JACOBS: When Judge Wesley challenged you to say what benefit or what the interns at your client's premise learned, you said that they learned about the employment working environment, and that seems to me to be very amorphous, I mean it should. It's a great thing to see how people work and to see how people in the profession talk to each other and interact, but I'm not sure that that's sufficient

learning because that's what any employee learns the first couple of weeks on the job. And besides the employment working environment is different if you're working in a fashion magazine or if you're an intern in a salt mine.

MR. CATCHIALL: Judge Jacobs, we absolutely agree with that. That's why we don't think that simply pointing to that factor means the employment wins, and that's why the employer wins, and that's why the primary beneficiary--

JUDGE JACOBS: [Interposing] That's the way you were starting out.

MR. CATCHIALL: No. I just mentioned it as a benefit to Glatt and Footman. The primary benefits as we're talking about are the ones you can find in the deposition such a Bruce Sherry's which is about the class and the collective, all the academic learning the context and the like. The *Works* case itself dealt with exactly this because it said just exposure to a working environment alone isn't enough, if the employer is getting something more of it the opening of mail and things like that, so we absolutely we agree with Judge Jacobs that, that type intangible benefits learning the working relationships with an office environment alone is not

enough by itself to make the intern the primary beneficiary. It's a balancing test just as it's always been in the Fair Labor Standards Act.

JUDGE JACOBS: Thank you.

JUDGE WESLEY: Thank you very much.

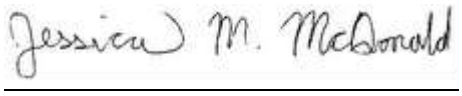
JUDGE JACOBS: We will reserve decision.

JUDGE WESLEY: Actually brief well argued.

[END OF HEARING]

C E R T I F I C A T E

I, Jessica McDonald, certify that the foregoing transcript of proceedings in the United States Court of Appeals for the Second Circuit of Eric Glatt, et al. v. Fox Searchlight Pictures, Inc., et al., Index Nos. 13-4478-cv and 13-4481-cv, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: 

Date: February 17, 2015

Appendix B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE MATTER OF:

XUEDAN WANG, ET AL.,

Petitioners,

Index No.:
13-4480-cv

Vs.

THE HEARST CORPORATION, ET AL.,

Respondents.

----------X

January 30, 2014

HELD AT: THURGOOD MARSHALL U.S. COURTHOUSE
40 Foley Square
New York, NY 10007

BEFORE: HONORABLE WESLEY,
HONORABLE JACOBS
HONORABLE WALKER
Judges

APPEARANCES: MS. BIEN
Attorney for Xuedan Wang, et al.

JONATHAN, ESQ.
Attorney for The Heart Corporation, et al.

TRANSCRIBER: JESSICA M. MCDONALD

INDEX

W I T N E S S E S

PETITIONER: WITNESS	DIRECT	CROSS	RE DIRECT	RE CROSS	V. D.	J

RESPONDENT: WITNESS	DIRECT	CROSS	RE DIRECT	RE CROSS	V. D.	J

E X H I B I T S

PETITIONER: IDENTIFICATION	DESCRIPTION	I.D.	IN EV.

RESPONDENT: IDENTIFICATION	DESCRIPTION	I.D.	IN EV.

JUDGE JACOBS: At this time, we'll hear Wang v. The Hearst Corporation.

[Background noise]

JUDGE JACOBS: Ms. Bien, welcome back.

MS. BIEN: Thank you. It's good to hear. May I please the Court under *Portland Terminal* or either of the intern tests that we've been discussing here today Hearst failed to raise a question of fact that the eight plaintiffs who move for summary judgment are not employees entitled to the minimum wage. The eight plaintiffs performed entry level work on a regular basis for several months that benefited Hearst operations. Their duties included working in fashion closets where they unpacked and re-packed clothing, accessories and beauty products, cataloguing them, keeping them organized, running errands, doing their bosses expenses, doing research for sales meetings and making sales spreadsheets, organizing files and assisting of casting calls.

JUDGE JACOBS: Is this going to be a complete list? In order words, you're going to say that there were no informative meetings with executives? There were no seminars in fashion or in magazine publication or in editing on in anything else? I mean in every internship there's going to

be--look everybody does scut [phonetic] work no matter what they have. They do some of them, so you're listing all these things, and the question becomes is that all just scut work and nothing else?

MS. BIEN: Your Honor, this is not to say that aren't internships out there that may involve a small amount of productive work, but here, this is what the interns did. On a routine basis, they did the productive work of the offices in which they worked.

JUDGE JACOBS: So you're not saying that there were no educational elements to it. You're just saying that a good part of what they did conferred a benefit on Hearst and their individual magazines, and that they were displacing other people.

MS. BIEN: Yes, Your Honor. And to the extent there were educational elements, they were very, very minimal and certainly under a primary beneficiary test would not weigh in favor of treating them as trainees. Only three of the eight plaintiffs--

JUDGE JACOBS: [Interposing] You're saying that you win under either test.

MS. BIEN: Yes. That's what we're saying.

I would like to discuss some of the issues that we were already discussing earlier. In terms of the primary beneficiary test, if the Court does adopt that as the overarching issue that it's going to answer, it needs to set out some specific criteria that employers can look to make their personnel decisions, and I think one of the main problems with the way that the primary beneficiary has been articulated in the papers here is it is so open-ended and so broad that first it doesn't keep with the very broad definition of employee.

JUDGE JACOBS: That is so when truly the second item on the Department of Labor's fact sheet is also so open-ended that it can't be applied. It says that the internship experience is for the benefit of the intern. That's just as vague. That's just as difficult to apply. That's just as multifarious as what you're telling me.

MS. BIEN: If that was the only factor, then, it would be a problem, Your Honor, but here there are other factors that are very concrete that are objective, that employers can use to guide their decisions and make sure that a trainee situation is only in the very narrow circumstances in which the interns are really getting bona fide training from

the internship. They are not displacing regular employees, and they're not regularly performing productive work for the employer that allows it to unfairly compete in the marketplace against employers who are paying FLSA wages to their workers.

JUDGE WALKER: Well, the fact is it seems to me is the connection to the educational environment or the educational experience, formal education if you will, and in this situation, it seems to me that there is more of a contact there was in the previous case. Were they accredited or given some benefit course granted or something of that sort for their work?

MS. BIEN: Hearst did not run an accredited program. It didn't submit its program to any educational body to accredit it.

JUDGE WALKER: Did they require some sort of approval by an educational institution?

MS. BIEN: They did have a policy that was inconsistently applied under which interns had to show they would receive academic credit, but even if the Court concludes that academic credit is relevant to the test that it fashions, in this case it really warrants very little weight because Hearst did not enforce its academic requirement consistently. Three

of the eight plaintiffs did not receive academic credit for their internships, and Hearts will accept less than even one credit if the school will not authorize it. For example they'll accept just a notation on a transcript. They'll accept enrollment in a no credit course. Hearst does not actually evaluate the criteria that schools use to award credit to make sure that it conforms with the FLSA's requirements, and Hearst didn't actually adopt its credit policy out of deference to school but in order to protect it from liability. So in this case, I think that it's really warrants very little weight because of the circumstances here. I wanted to address one of the arguments that was made earlier which is that somehow what these plaintiffs were doing even though it looked in every way, shape and form as work that it is not work under the *Tennessee Cole* definition. And I think the *Tennessee Cole* really don't apply to the circumstances here. There really can be no dispute what the interns were doing here was work, and that it was part of the routine operations of the employers. *Tennessee Cole* was decided before the *Portland Terminal* case, so if *Portland Terminal* believed it was relevant to defining what the trainees were doing in that case,

surely it would've cited it, and *Tennessee Cole* is typically used in cases where the work is performed after the regular scheduled shift. And there's really a question whether or not the employee is relieved from their normal duties, for example, during a break time or a lunch time, and I don't think it would be appropriate to apply it as an extra layer that a plaintiff would have to show in order to not be a trainee, so somehow the work that interns do is just quasi work not real work, unless they meet the *Tennessee Cole* standard of what work is.

JUDGE JACOBS: If I could just go back--I don't want to derail your argument--but if we could go back to the burden of proof. Ordinarily, the burden of proof lies with the person who has best access to the information, the data. Why couldn't it be said that the plaintiff intern or the plaintiff supposed intern is the person who knows what they did and what they didn't do and has complete command of the facts and also has generally speaking the proof of persuasion in a civil case? Why doesn't the burden of proof I mean at least start there?

MS. BIEN: I think the burden of proof would as I had proposed start with the plaintiff to show that they performed services for the employer.

Certainly, the plaintiff--

JUDGE JACOBS: [Interposing] Also to show that there the primary benefit was not to me as the intern, it was to the company which would seem to say that it would be the burden of the retire intern to say I had no courses, I didn't meet with any executives; they didn't take me lunch a summer associate, and I didn't get any of these benefits.

MS. BIEN: And intern could put forth that kind of evidence, but I do think that if the focus is on the employer's requirements and its training program, then they're in a better position to identify what their training program actually consists of.

JUDGE WESLEY: The intern comes forward and says none of it is happening. The employer could say well we have this general requirement, and we relationships with certain institutions, et cetera, so I mean the initial burden of going forward makes sense for it to be with the employer, I think further trainee or the intern whatever we're going to call this individual. And then obviously the burden would shift probably to the employer where it moves over into information concerning general policies and things like that.

MS. BIEN: And I also think that the question of whether or not the work provided immediate advantage is something that the employer would be in a better position to have the burden of proof on as well as whether or not the work displaced regular employees. Certainly, the interns themselves often do have some of that information, but I think most of that information would be better coming from the employer.

JUDGE WALKER: You're saying the employer statistics for instance and whether they left off people and this was a substitute for paid employees and that kind of thing those would be facts that they would have under their umbrella.

MS. BIEN: That's right, Your Honor.

JUDGE JACOBS: What do you say to the case of *O'Connor v. Davison* in this circuit which says when no financial benefit is obtained by the reported employees and the employer no plausible employment relationship of any sort can be said to exist?

MS. BIEN: I'm not familiar with that case if it was an FLSA case, or if it was--

JUDGE JACOBS: [Interposing] Well, and I don't think it was, but I mean it's sort of a general incitement.

MS. BIEN: I think that, that has been typically the standard under Title 7 and other employment laws, but Courts have recognized that the definition of employee and employ under the FLSA is far broader than those statutes. In fact it's the broadest definition that's ever existed in any statute, and for that reason, there has never been a requirement that the employee also show a compensation arrangement. And, again, I think that, that was the point that the Supreme Court was making in the *Alamo* case where it said that you can't volunteer your labor for a private employer notwithstanding that you claimed that you don't want any wages and you're not entitled to them.

JUDGE WESLEY: - - think the expectation would be more like kind of an industry perception as opposed to on an individual negotiating basis. Someone who wants to get some experience and says, oh, I'll do this for $10 dollars an hour, and the employer says but you'd make a much better intern, the person may very well decide to pass on the wage to get the experience. But there are a number of cases where employees don't necessarily FLSA rights because of the inequity with regard to the bargain party of the case.

MS. BIEN: Right, I think that if I'm understanding Your Honor's comment, that is really the risk of putting too much emphasis on the fact that the interns have agreed to work without wages, and I think that the Court made the point in *Nuvellas v. Sanchez* case that the expectation of compensation is significant to whether or not there's an employment relationship, but the flipside isn't.

JUDGE JACOBS: What reason would a person have to work without wages for a profit making institution other than at least the expectation that will get a benefit from it?

MS. BIEN: Because people are really desperate to get their foot in the door, and they believe that this is the only way they're going to get a job. They have zero bargaining power in these circumstances, and I think especially in times of recessions where there aren't entry level jobs out there for these students who are saddled with a tremendous amount of debt in this day and age, they're willing to do whatever they can to ultimately, hopefully lead to an employment situation where they're paid, even take unpaid work. And if it provides them with very little benefit because they are doing the kind of routine and menial work, that's

really not tied to an academic institution.

JUDGE WALKER: How many studies that you're aware of the effect of denying internships or limiting internships under the Department of Labor's rules what the effect would be of that on the availability of internships to people? In other words, might the whole internship industry dry under those circumstances?

MS. BIEN: Your Honor, I don't think so, and I think--

JUDGE WALKER: [Interposing] I'm not asking for your view. You don't think - ---

MS. BIEN: [Interposing] Well, I don't know of studies, but I can tell you that as the Chamber of Commerce's brief actually does point out internships exist that meet the Department of Labor's factors, and they actually discuss the kinds of experiences that those interns get. They do shadowing. They participate in training. They participate in intern programming, and they do projects that are tied to the kinds of things that they learn in school but are not producing an immediate advantage to the employer, so I think that there are continue to be internships out there. As the Chamber of Commerce as identified, there are those.

JUDGE WALKER: I mean companies normally don't just operate purely for altruistic reasons. They want to see some payoff at some point either from the intern that might help them or the possibility that they will be training that will make a great employee later on, so there's an advantage in which seem to be inherently sort of advantage to the employer. Otherwise, it wouldn't bother them, right?

MS. BIEN: Right, I mean I think that employers will continue to have internship programs for two reasons mainly. One is because it does provide them with a trained pool from which they can ultimately make hires, and that was sort of the rationale in the *Portland Terminal* case. The railroads weren't doing it altruistically, but they were developing a trained workforce to be used down the road, but even employers--

JUDGE WALKER: [Interposing] That was a little more connected wasn't it? That was a pool. Once you got through that system, you were available to be called for specific work--

MS. BIEN: [Interposing] Right.

JUDGE WALKER: --by the company. It was almost a union hiring. It's a little different, yeah.

MS. BIEN: It is a little different, but if you look at many of the interns for example who had internships at Hearst ultimately did get jobs at the company, and I think that the company benefitted enormously from the fact that these interns already had done work as part of its operations. The ramp-up time for them, the learning time for them as regular employees was significantly diminished, and that would continue.

JUDGE JACOBS: That seems to contradict the argument you made earlier which is that all they were doing is running clothing closet.

[Crosstalk]

MS. BIEN: All they were going to be doing as the entry level employee--

JUDGE WESLEY: [Interposing] Things that they were not paid to do previously.

MS. BIEN: Exactly. So they basically had a grave period of time where they doing the same work that they were going to be hired into as entry level employees, but already having several months under their belt, okay, well, maybe they could take on some additional responsibilities as well. But for the most part, the interns tasks and many of the entry level employees tasks overlapped, and what interns

allowed the company to do or those entry level employees to do was focus on other work while the interns did some of their regular tasks.

JUDGE JACOBS: Thank you.

MS. BIEN: Thank you.

JONATHAN: Good morning, Your Honor, it's Jonathan - - from Hearst. I start off with a point you made Judge Jacobs with respect to the record here, and this is very selective and one-sided view of the record, and I know we have four competing legal standards that have been argued before the Court.

JUDGE JACOBS: And rather large appendix.

JONATHAN: And a rather large appendix. It's over 5,600 pages in the appendix to our case of 58 depositions--

JUDGE JACOBS: [Interposing] I have to be careful not to trip over it.

JUDGE WESLEY: I use digital copies.

[Laughter]

JONATHAN: The one point I would like to make at the outset about the record though is that there is no evidence in there that any intern ever displaced any Hearst employee, and I do believe that that's an irresponsible--

JUDGE WESLEY: [Interposing] - - then after you hired them they did the same things?

JONATHAN: There's certainly interns who were hired later, but--

[Crosstalk]

JUDGE WESLEY: I asked a simple question.

JONATHAN: Yes, Your Honor.

JUDGE WESLEY: Is there evidence that they did the same things that they did as an intern?

JONATHAN: Some tasks were the same, Your Honor, but there is testimony in the record from interns who became employees who testified about how their jobs were completely different from the intern experiences. Their responsibilities were completely different.

JUDGE WESLEY: I didn't say all. I just said some.

JONATHAN: Yes.

JUDGE WESLEY: So the answer's yes?

JONATHAN: Absolutely, and that's part of experiential learning, Your Honor, and that's one--

JUDGE WESLEY: [Interposing] Sure, but this the point. I mean what was it that these people were learning? I can understanding walling. Walling is a job. It's a brakeman. I brakeman's got a very

important brake personally, so a brake person's job is very important. It stops the train. Those people tend to be rather important where other trains are. I can understand that, and so they don't want somebody who doesn't know what they're doing. The person comes works for about a week or two. They can't applying the brakes themselves. They have to be around somebody else. After they're done with that, they're certified, and maybe they'll get a job at the end of term, okay, so that's a very identified training experience. No benefit comes to the employer. All the benefit goes to the employee because now the employee can ultimately have the job. What was it that the people were working as interns spending their time with you as interns, what was it that they learning to do hang clothes on hangers?

JONATHAN: The benefits varied widely depending upon the particular intern, the particular internship, and one of the things that you have to look at also is where they were going to school, and what the course of study they were engaged in. Just to give you an example from the named plaintiffs in this case, plaintiffs Scora [phonetic] she went to FIT, and she was in a cosmetic and fragrance marketing program. That was her major. She was in

the beauty area, and through that she had the opportunity to work with products, meet with salespeople pitching the products, trying to get them in the magazines. She had a variety of different experiences. You also had Ms. Lesik [phonetic] who went to LIM College which specializes in fashion. It's here in Midtown Manhattan. Her major was digital merchandising, and this goes to the point about academic supervision as particular programs in her case there was actually a site visit to her magazine to asses it. She interned four days a week. She went to a seminar on Fridays. She had to keep a journal, and there are examples of this throughout.

JUDGE JACOBS: Who sponsored the Friday seminars?

JONATHAN: That was at her college. That was at LIM College, and this goes to a point that you--

JUDGE WESLEY: [Interposing] And the other part of this is commonality whether there should be a class or not. There certainly are differing fact patterns and that relate to this, and some of the examples you just cited fit closer to the side of the trainees. In other words it's really an educational environment in workplace, right, so - - a better

word, but some of these are menial?

JONATHAN: Well, Your Honor, some people would say that's about education as well.

JUDGE WESLEY: I - - but I got paid for it.

JONATHAN: I understand, Your Honor. There are menial parts of every educational I would say as well as every work experience, and some of these may very well be, but there is educational value that has been recognized by these colleges and universities. And that's a critical distinction here, and one Judge Jacobs which you had really asked which is whether or not there should be academic credit should create a presumption or some sort of heavy weight. We know that in this particular case the academic amici have argued in favor of presumption. That in fact is consistent with the way the DOL itself had applied its own criteria over years. There's a number of DOL opinion letters which are cited in - - brief, but one that it doesn't cite--and it's not the only one which is in the record--actually says that where you have an internship which is for college credit--

JUDGE WALKER: [Interposing] Give us the cite.

JONATHAN: Yes, it's A4610, and it says in situations where students receive college credit it's

applicable towards graduation when they volunteer to perform internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting, we do not believe that an employment relationship exists between the students and the facility providing the instruction. That is not the only DOL letter like that. There are others in the public record. Another one from July 11th, 1995 is available on Westlaw. We also have in the record an unrebutted and undisputed declaration from Patricia Slate, that's A3911. She was a DOL official for over 30 years who administered these rules, and she states in her declaration that the earning of post-secondary school academic credit for an internship was the key factor in determining that the intern was not an employee of the host business providing an internship opportunity regardless of whether the business receives some benefit from the efforts of the intern. And she cites an example of a journalism major going to a broadcast station who may have the opportunity to do some work on the premises.

JUDGE WALKER: This is a situation where the Judge Bear denied summary judgment to the plaintiffs

isn't that correct?

JONATHAN: That's right, Your Honor.

JUDGE WALKER: That's the posture. It came on certain occasion.

JONATHAN: That's correct, Your Honor.

JUDGE WALKER: So the matter has not been resolved as a matter of fact in any respect.

JONATHAN: That's right, Your Honor. The point that I'm trying to make here is that with respect to academic credit that this should be at a minimum a very heavy weight in terms of the factor, and there's a couple of reasons for that. Number one is the way the Supreme Court has addressed academic judgments, and in the *Ewing* case which we cite in our brief, the Supreme Court had said that there are considerations of profound importance counseling - - Judicial Review and academic judgments. The decision to award academic credit is a quintessential academic judgment.

JUDGE JACOBS: I'm sure the college doesn't forbid paying somebody at the minimum wage.

JONATHAN: Some of them do, Your Honor. Certainly, we have in the record instances--

JUDGE JACOBS: [Interposing] What's the educational value of assuring that people work for

nothing except people learn to dislike it I guess.

JONATHAN: Yeah, maybe. There's a syllabus from an internship from one of the plaintiffs, Ms. Spencer, at A3303, and the course objectives to have a supervising working experience in your area of specialization, to develop a better understanding of the operation of business. Accredited colleges and universities have made a considered judgment that this is an educational experience not unlike clinics in the law school or externship experiences. They differ, and they universities and the colleges are really in the best position to match and determine whether or not a particular student's major and their proposed course of study matches up with the experience that they're going engage in. That's why the site visits and the different curriculum here can be very important, but that's a judgment that's best left to these academic institutions which are most familiar with these courses of study and with what the students' objectives actually are. And it's consistent with a whole body of Supreme Court case law which requires deference to those judgments, as well as the DOL's approach for over 30 years as well. It also provides one of the thing that the Court here has cited as a potential concern which is

predictability. It allows employers, businesses, schools and students all if you have an unpaid internship involving a student to feel comfortable that they are operating within the law, and they're complying within the law. And it also speaks to every one of the factors, so even if it's not a presumption, it's going to be something that animates every single factor in what the DOL test is.

JUDGE WALKER: An educational institution that say we approve of the intern. They write a letter to the company to the effect we approve the internship as good for our students but doesn't mention anything about credit, you should be placing greater weight on credit rather than simple proof.

JONATHAN: We are, Your Honor. I think it's a clear line, but I think any school approved program is adequate just as in *Laurelbrook* or *Blair* those weren't necessarily for credit programs, but credit certainly adds something to the mix, and it can also point out that there are differences in philosophy between different schools, which is pointed out in one of the amicus briefs. In fact, some schools choose not to award academic credit. That simply confirms the fact that these are academic judgments that one can differ on, and the sort of judgments

that should be awarded - - respect--

JUDGE WESLEY: [Interposing] Would the absence of credit weigh against the employer and favor the trainee\employee? In other words the trainee's not really getting anything out of it in terms of academic credit, and their school has made a decision that it's not compensable in terms of credit, so wouldn't that be won on the side of the trainees as opposed to--I mean if we defer to that kind of academic judgment, would we then defer further to the fact that the school doesn't see it as educational in nature?

JONATHAN: I think that you still have to conduct the balance of the benefit as to the student.

JUDGE WESLEY: I wasn't disagreeing with you. I'm just saying that would be won on the side of the trainee.

JONATHAN: I don't think it should be weighed on the side of the trainee just as Judge Bear - - the absence--

JUDGE WESLEY: [Interposing] You don't want the trainee to get anything on its side, but I'm saying where else would you put it? You're going to give it to the employer and say well the kid's not getting anything out of this school, so he still

shouldn't be paid?

JONATHAN: Well, simply because it's not relevant to their study doesn't mean that's not educational.

JUDGE WESLEY: But I thought we were supposed to defer to the educational expertise of colleges. That's what you keep telling me, and when the college says this isn't the credit, shouldn't I take that into consideration?

JONATHAN: Schools that make blanket determinations--

JUDGE WESLEY: [Interposing] One thing to learn in the school of life, but a lot of people I said before were being paid in the school when they worked in the school. I mean I have a hard time understanding how someone's learning something when I'm learning how to get along with co-employees, or they're existing in an adult work environment. Maybe that's the way we treat our children these days, and we have put them in seminars on how to grow up, but seriously, I mean understand Ms. Wang she was doing a lot of various specific kind of related to the magazine's work. She was getting a great deal of hands-on fascinating work. I mean she's doing contact between editors and public relations. She's

doing online research. She's cataloging stuff. She's doing storyboards. She's doing a lot of stuff that probably was quite relevant to what she was going to do in her later job. I can the educational value here. Where I have a problem if an employer says well they're learning how to work. I mean I have a real problem with that.

JONATHAN: Well, Your Honor, that's precisely where the balancing testing is the right approach because it provides a safeguard, and this is within the balance. I'm just talking about the emphasis that should be applied.

JUDGE WESLEY: You're defending a denial of summary judgment, so I mean if you've listen to the argument at all, I think you found three skeptics as to hard and fast six factor rule. We've been peppering anybody that stands up to defendant for a while, so the worst that happens to you is we agree with you. I mean--

JONATHAN: [Interposing] And that's a very nice position to be in, Your Honor, and that's precisely how I want to--

JUDGE WESLEY: [Interposing] There's a battle back with regard to whether there are still material facts as to some of these jobs - -. Why

don't you address the other findings that we made with regard to the class actions.

JONATHAN: Yes, Your Honor.

JUDGE WESLEY: If you want to finish up - - have at it.

JONATHAN: I will absolutely address the class. I just like to quickly make two points though before I move off the stand which is the academic credit you had asked about college oversight, and I think I gave you some examples to that in terms of site visits and the like. And in addition you'll see if you wish to peruse the record that there's lots of evidence shadowing of mock exercises and of all sorts of training, and one of the points that has been made repeatedly is making a comparison to an educational environment. The one thing about an internship for credit where it's been passed on by the school is that it's not an educational environment. It is an educational environment at least with respect to those particular schools, and it is a lens through which you can view each and every one of the factors if you're looking at the DOL factors whether it's educational, benefit. Certainly, a short duration makes it clear that there's going to be no job at the end and no pay, and the no pay piece is very critical

also. And Judge Jacobs you had made reference to this earlier as well. This is also a consideration that we do believe is worthy of significant weight in this particular context, and in every context it's something in the *O'Connor* decision which it was a Title 7 case, but at the same time, this is about creating consistency throughout the law. Expectation of compensation and working for pay in every area of employment law is a significant factor, and it was a significant factor that Judge Black pointed to, and that he found to be a reliable indicia in the *Portland Terminal* case. And *Alamo* significantly which respectfully I believe is being misread by plaintiffs the holding there was that you must have an expectation of compensation. There it was wages in another form not salary, but nonetheless that was an important factor. With respect to the class, Your Honor, we could believe that in the wake of *Dukes* and *Comcast* that this is simply not a certifiable class, and Judge Bear made some very detailed findings and I think explained in a very detailed way why that's the case on this particular record. We're not making the argument that there could never be a class certified in any intern case, but this is much the *Myers* case from this Court in which you don't have any

uniformity of duties upon which you can make some sort of determination as to balancing of the benefits, unless of course you are going to place significant weight on the academic or create a presumption.

JUDGE JACOBS: Are you speaking in terms of this case or in terms of Fair Labor Market Standards? That case is generally in the intern context.

JONATHAN: I believe that in this case specifically because you have 19 different programs--

[Crosstalk]

JUDGE JACOBS: I sort of heard you arguing that, that is characteristic of intern cases.

JONATHAN: No, Your Honor.

[Crosstalk]

JONATHAN: No. I believe it's much like the Court said in *Myers*. It really depends. It depends on whether or not there is common evidence, and it's predominant as to what the duties are as to what they're actually doing in terms of the benefit on both sides, and if there is sufficient to answer the question of who the primary beneficiary is well then that's a certifiable class.

JUDGE JACOBS: Thank you.

JONATHAN: Thank you very much.

MS. BIEN: May it please the Court we've discussed at great length today the parties dispute over the proper legal test, but I'd like to discuss a few things that we haven't heard today. One is we haven't heard the defendants deny that the interns in these cases provided a benefit, or that it was just a small part of what they did during their internships and not the routine duties that they performed. And just with the point that Judge Wesley made about Ms. Wang, I mean Ms. Wang was not just performing work that she may have learned from, but she was performing real work. He supervisor admitted that if she didn't do the work that she would've hired a paid temporary worker to do the work instead, or he would've done the work himself, and it would've caused him to work many more hours than he did.

JUDGE JACOBS: I realize that law schools other non-profits are exempt, but all you hear about the law schools is that they have clinical programs, and all the students wish to do is real work. They want to review documents. They want to talk to witnesses. They want to organize the exhibits, and your argument seems to run counter to universal appreciation in law schools that this kind of thing is highly education.

MS. BIEN: But even if they want to do real work, that doesn't mean that the work shouldn't be compensated when it provides the employer with an advantage in the marketplace that FLSA was specifically designed to prevent from happening, so the employer can't benefit from their free labor because that is the one of the evils, the anti-competitive nature of that--

JUDGE WALKER: [Interposing] An example of the problem seems to be you have a person who's assisting on a brief who would be paid, but six students would like to also work on the brief. They'd also like to be part of the drafting team but the client doesn't want to pay them they can't do it. Isn't there a problem here?

MS. BIEN: I don't think so. I mean we're talking here about the minimum wage which is not a great deal of money frankly.

JUDGE WALKER: You're drawing the distinction between different areas of work, and you're talking about minimum wage work as opposed to work of a more professional nature.

MS. BIEN: Well, even if the interns did work of a more professional nature, the obligation on the employer is just to pay the minimum wage. They

don't have to pay a wage that meets really the kind of work that the intern is doing, so really all we're talking about here is whether or not they have to pay the minimum wage.

JUDGE WALKER: Yeah, but if they have to pay the minimum wage, they also have to benefits and is such then to OSHA and subject to Title 7, and they're subject to 100 other a network for regulations that actually may make it impossible to - - the intern.

MS. BIEN: Well, I can give the example of the Fox case which we've been hearing today. In Fox they changed their program from an unpaid to a paid program. They continue to have internships. They continue to have a program that benefits interns, but they pay them the minimum wage for doing that work, so I don't think that this is going to end internships by any means. Many employers pay their interns, and in many industries, it's always been the practice.

[Crosstalk]

JUDGE WESLEY: - - fool with the statutes that they haven't fooled with in this particular areas for many, many years. That's up to them to do, but this is a statute. We have case law on. It may well be that we could throw a monkey wrench into

certain aspects of the way the law is today, but the law is unchanged. Congress is the place where it makes adaptations with regard to internships and things like that.

MS. BIEN: I agree, Your Honor, and the exception that the defendants in these cases are arguing for is so well beyond what the Supreme Court approved in *Portland Terminal* that it really would require congressional action, and that's really the path they should be taking and not trying to expand it to meet the facts of their internships.

JUDGE WALKER: We've waited 67 years for to do something in this area since - -, and nothing's happened. I mean this isn't right at the top of the congressional priority list I guess.

MS. BIEN: Well, I think that employers--

JUDGE WALKER: [Interposing] While we're in Court here, I mean it did occur to me that we're in here struggling with coming up with some sort of task for this that may be Congress would've done a better job at, but that's the reality of the world we're in now.

MS. BIEN: Right, I mean I do think that *Portland Terminal* is the binding authority, and so that any test of the Court fashion should comport

with what the Supreme Court articulated in that.

JUDGE JACOBS: *Portland Terminal* is binding, but the question is whether each fact or each circumstance referenced in *Portland Terminal* was intended by the Supreme Court to be prescriptive as a category that has to be met in every case.

MS. BIEN: I don't think that each fact is, but some of the factors clearly I think were. Whether the work provides an immediate benefit, that's not specific to what railroad brakemen do, but it's a standard that can be applied to many different training situations. Whether or not the training is similar to that provided in a vocational--

JUDGE WALKER: [Interposing] He didn't necessarily say that, that was required in every situation. He said it's a fact here in deciding case.

MS. BIEN: Respectfully, I think he went beyond it because he said accepting the unchallenged finding here that there are the railroad brakeman provided no immediate advantage re hold. I think it was much more significant than just fact that added to the conclusion.

JUDGE JACOBS: Thank you.

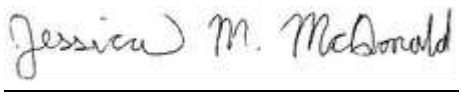
MS. BIEN: Thank you.

JUDGE JACOBS: All this has been a spectacular set of arguments. We will retire from the bench and return in a few minutes with Judge Carley for the remainder of the day calendar.

[END OF HEARING]

C E R T I F I C A T E

I, Jessica McDonald, certify that the foregoing transcript of proceedings in the United States Court of Appeals for the Second Circuit in the matter of Xuedan Wang, et al. v. The Hearst Corporation, et al., Index No. 13-4480-cv, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: 

Date: February 17, 2015