New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 14
WEDNESDAY, JULY 22, 2015

SECOND CIRCUIT REVIEW

Expert Analysis

Primary Beneficiary Test May Impede Intern Class Actions

By **Martin Flumenbaum** | And **Brad S. Karp**

This month, we discuss *Glatt v. Fox Searchlight Pictures*,[1] in which the U.S. Court of Appeals for the Second Circuit considered the appropriate standard for determining when an intern qualifies as an employee under the Fair Labor Standards Act (FLSA), and therefore must be compensated for his work. In its decision, written by Judge John Walker, Jr. and joined by Judges Dennis Jacobs and Richard Wesley, the court concluded as an issue of first impression in this circuit that the proper inquiry turns on whether the intern or the employer is the primary beneficiary of the relationship.

The court also found that the question of whether each plaintiff satisfied the primary beneficiary standard called for a highly individualized analysis that required particularized proof. In so ruling, the court vacated and remanded the district court's opinion granting partial summary judgment for plaintiffs, as well as the district court's orders certifying a New York class and conditionally certifying a nationwide collective action.

Background

Under the FLSA, employers are required to pay all employees a specified minimum wage and overtime wages of time and one-half for hours worked in excess of 40 hours per week.[2] New York Labor Law (NYLL) requires the same, except that it specifies a higher minimum wage than the federal standard.[3]

MARTIN FLUMENBAUM *and* BRAD S. KARP *are members of Paul, Weiss, Rifkind, Wharton & Garrison.* SARAH ISTEL*, a litigation associate at the firm, assisted in the preparation of this column.*

While the strictures of both statutes apply only to employees, neither statute provides helpful guidance on what circumstances qualify workers as employees. The FLSA defines "employee" as an "individual employed by an employer"[4] and "employ" as "to suffer or permit to work."[5] The NYLL similarly defines "employee" as "any individual employed, suffered or permitted to work by an employer."[6]

In 2010, the U.S. Department of Labor published a formal intern fact sheet to provide guidance on this issue in the context of unpaid interns working in for-profit companies. The fact sheet enumerates six factors, each of which must be satisfied before an employer may establish that an intern is not an employee pursuant to the FLSA.[7] The factors, mirroring prior 1967 the Labor Department guidelines on trainees,[8] are based on the reasoning articulated by the Supreme Court in a 1947 decision holding that unpaid railroad brakemen trainees should not be treated as employees under the relevant statutes.[9]

> When is an unpaid intern entitled to compensation as an employee under the Fair Labor Standards Act? The issue is a matter of first impression in this circuit.

The Second Circuit had not addressed how and, if so, whether to apply the Labor Department's guidelines—or if an alternative legal standard should be adopted. Prior to the court's opinion in *Glatt*, district courts in this circuit generally applied a totality of the circumstances approach that incorporated, with varying degrees of deference, the Labor Department's six criteria in determining an intern's employment status.[10]

Prior Proceedings

Plaintiffs in *Glatt* worked as unpaid interns either on the Fox Searchlight film *Black Swan* or at the Fox corporate offices in New York City. All of the plaintiffs were either enrolled in or had recently completed a formal course of post-secondary education when interning for defendants. Plaintiffs' duties as interns included copying, scanning, tracking purchase orders, maintaining employee files, taking out the trash, taking lunch orders, breaking down, removing, and selling office furniture and supplies at the end of production, setting up travel arrangements, and booking rooms for press events. Plaintiffs alleged that their work for defendants constituted employee status under the FLSA and NYLL, thus entitling them to compensation.

Plaintiffs filed their first amended class complaint seeking wages and overtime for "themselves and all others similarly situated" on Oct. 19, 2012. Thereafter, plaintiffs Eric Glatt and Alexander Footman abandoned their class claims and proceeded as individuals, seeking summary judgment that they should be considered employees under the relevant statutes. Plaintiff Eden Antalik, representing a class of similarly situated plain-

tiffs, simultaneously moved to certify a class of New York State interns working at certain Fox divisions and to conditionally certify an FLSA collective of interns working at those same divisions nationwide.

Under the FLSA, employees may create a collective by opting in to a back-pay claim brought by similarly situated employees.[11] Antalik alleged that she and the members of her proposed class and collective action were similarly situated as victims of a common policy by defendants of using unpaid interns to perform work that required them to be paid.

On June 11, 2013, U.S. District Judge William Pauley concluded that Glatt and Footman had, as a matter of law, been improperly classified as unpaid interns rather than employees.[12] In so deciding, Pauley applied a form of the Labor Department's six-part test. Instead of applying the department's requirement that each factor must be satisfied, the court balanced the six criteria and concluded that, because the first four factors weighed in favor of finding that Glatt and Footman were employees, summary judgment was appropriate.

The court also held that class certification and conditional collective certification were appropriate because Antalik's generalized proof that the interns were victims of a common policy to replace unpaid workers with unpaid interns predominated over individual issues and defenses.

The court granted defendants' interlocutory appeal of these rulings on Nov. 26, 2013.

The Second Circuit Decision

The Second Circuit reviewed the district court's order granting partial summary judgment de novo, the district court's certification rulings for abuse of discretion, and the conclusions of law that informed the district court's certification rulings de novo.

Supreme Court Precedent. The court began its discussion by analyzing the Supreme Court's 1947 decision in *Walling v. Portland Terminal*.[13] Portland Terminal involved a railroad that held a week-long training course for prospective brakemen. The brakemen trainees alleged that they should be compensated as employees under the FLSA. Instead of articulating a specific standard, the Supreme Court relied on several adduced facts to conclude that the trainees were not covered employees. These facts included that the trainees "did not displace any of the regular employees," that the trainees' work "did not expedite the company business," that the trainees did not provide any "immediate advantage" to the employer, and that the training course itself was similar to that of a school program.[14]

Primary Beneficiary Standard. The specific issue in *Glatt*—when is an unpaid intern entitled to compensation as an employee under the FLSA?—is not directly addressed by *Portland Terminal's* holding and is a matter of first impression in this circuit. The court noted that while all parties agreed that there are circumstances in which an intern is actually an employee entitled to compensation, each party in the case proposed a different standard for identifying when such circumstances exist.

Plaintiffs argued that the holding in *Portland Terminal* rests on the finding that the brakemen trainees provided no immediate advantage to the employer. Plaintiffs thus proposed adopting a standard whereby interns would be considered employees whenever the employer received an immediate advantage from the interns' work.

The court noted that the primary beneficiary test has two salient features: (1) "what the intern receives in exchange for his work" and, (2) the flexibility "to examine the economic reality as it exists between the intern and the employer."

The Labor Department, appearing as amicus curiae in support of plaintiffs, argued that its guidelines "come directly" from *Portland Terminal's* articulated factors and should apply. It clarified that, in contrast to the district court's balancing approach, each of its six criteria—that (1) the internship is similar to training that 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; (4) the employer that provides the training derives no immediate advantage from the activities of the intern; (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[15]—must be satisfied before an employer can forgo its obligations under the FLSA. The department also suggested that, as the agency charged with administering the FLSA, its views on employee status should be entitled to deference.

The Second Circuit rejected both interpretations of *Portland Terminal's* holding as unpersuasive.

Instead, the court agreed with defendants that the "proper question is whether the intern or the employer is the primary beneficiary of the relationship." The court noted that the primary beneficiary test, adopted by the U.S. Court of Appeals for the Sixth Circuit in the context of unpaid interns and used in similar situations by sister circuits,[16] has two salient features: (1) "what the intern receives in exchange for his work" and, (2) unlike the Labor Department's rigid criteria, the flexibility "to examine the economic reality as it exists between the intern and the employer."

The court articulated specific considerations to help guide district courts in applying the revised standard. These considerations include: whether (1) the intern and the employer clearly understand that there is no expectation of compensation; (2) the internship provides training similar to that provided in an educational environment; (3) the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; (4) the internship corresponds to the academic calendar; (5) the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and (7) the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[17]

The court instructed that its considerations are not exhaustive, that no single factor is dispositive, and that "every factor need not point in the same direction for [a] court to conclude that [an] intern is not an employee entitled to the minimum wage."

Although the district court concluded that the primary beneficiary test has "little support" in *Portland Terminal*, the Second Circuit instead found that its adopted standard, in considering the totality of the circumstances, is

faithful to the Supreme Court's holding. The court explained that "[n]othing in the Supreme Court's decision suggest[ed] that any particular fact was essential to its conclusion or that the facts on which it relied would have the same relevance in every workplace."[18]

More broadly, the court characterized its approach as aptly recognizing a central purpose of the modern internship: "integrat[ing] classroom learning with practical skill development in a real world setting." The court reasoned that in focusing on educational aspects of the internship, its standard "better reflects the role of internships in today's economy than the Labor Department factors, which were derived from a 68-year-old Supreme Court decision that dealt with a single training course offered to prospective railroad brakemen."[19]

Certification of the New York Class. The court next addressed whether plaintiffs could be certified as a New York class under Rule 23. Specifically, the court focused on Rule 23(b)(3)'s predominance requirement,[20] which specifies that questions of law or fact common to the class must "predominate" over those affecting individual members.

In analyzing the predominance requirement, the district court had found that common questions pertaining to liability could be answered by Antalik's generalized proof "that interns were recruited to help with busy periods, that the interns displaced paid employees, and that certain groups who oversaw the internships did not believe that Fox's programs complied with the applicable law."[21]

In response, the court explained that the primary beneficiary standard requires a "highly individualized inquiry" into the activities and circumstances of each plaintiff. Even if a plaintiff could establish that his employer had a common policy of replacing paid employees with unpaid interns, the court found that such evidence would be "relevant but not sufficient" to determine the necessary considerations under the court's new standard. Specifically, the court noted that such evidence would not help answer "whether a given internship was tied to an education program, whether and what type of training the intern received, whether the intern continued to work beyond the primary period of learning, or the many other questions that are relevant to each class member's case."[22]

Because Antalik's generalized proof failed to provide the proper evidence to determine whether "every Fox intern was likely to prevail on her claim that she was an FLSA employee under the primary beneficiary test, the most important issue in each case," the district court's certification order was in error.[23]

The court explained in a footnote that its ruling did not foreclose the possibility that a renewed motion for class certification might succeed on remand under the revised standard.[24]

Conditional Certification of the Nationwide FLSA Collective. Lastly, the court addressed defendants' appeal of the district court order conditionally certifying the proposed FLSA collective.

The two-step process for certifying an FLSA collective requires an initial, modest factual showing of commonality by plaintiffs before notice may be sent to potential opt-ins, followed by a finding by the district court, with the benefit of additional discovery, that the opt-in plaintiffs are similarly situated.

The Second Circuit had originally granted certification on the question of whether the district court should have applied a higher standard in conditionally certifying the FLSA collective after discovery had been taken, but declined to answer that question. Instead, the court concluded that it need not address the higher standard because, for substantially the same reasons as with respect to the Rule 23 motion, plaintiffs in the proposed collective were not similarly situated even under the minimal pre-discovery standard. If anything, the court explained, the prospective FLSA collective, being nationwide in scope, "present[ed] an even wider range of [individual] experience" than the New York class.[25]

Conclusion

In the two years following the district court's holding in *Glatt*, which seemed to favor interns, dozens of class-action lawsuits were filed in this circuit and many corporations such as Condé Nast, NBC Universal, PBS and Lionsgate Entertainment, were forced either to settle these large lawsuits or to preemptively switch to paid programs.

In revising the appropriate standard, the court provides employers a reprieve on two distinct fronts.

First, the flexible framework embodied in the court's new test seems to let employers accrue benefits from interns and still avoid FLSA obligations, as long as some educational component accompanies the program.

Second, the court's holding creates strong precedent for employers defending against class actions. While the court clarified that its revised standard does not preclude the possibility of intern class-actions, its instruction for a more fact-specific analysis into the employment status of each unpaid intern seems to make the pleading requirements for predominance nearly impossible. Indeed, on the same day that *Glatt* was issued, the Second Circuit issued a summary order in a comparable unpaid intern suit, *Wang v. Hearst*, affirming the district court's denial of class certification in light of the court's newly articulated standard.[26] These holdings in *Glatt* and *Wang* will likely dictate similar defeats for intern plaintiffs in the many pending district court litigations.

1 No. 13-4478-cv, 2015 WL 4033018 (2d Cir. July 2, 2015).
2 See 29 U.S.C. §§206-07.
3 See N.Y. Lab. Law §652.
4 29 U.S.C. §203(e)(1).
5 Id. §203(g).
6 12 N.Y.C.R.R. §142-2.14(a).
7 See the Labor Department, Wage & Hour Div., Fact Sheet #71, Internship Programs Under the Fair Labor Standards Act (April 2010), available at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.
8 See the Labor Department, Wage & Hour Div., Field Operations Handbook, Ch. 10, ¶10b11 (Oct. 20, 1993), available at http://www.dol.gov/whd/FOH/FOH_Ch10.pdf.
9 See *Walling v. Portland Terminal*, 330 U.S. 148 (1947).
10 See, e.g., *Wang v. Hearst*, 293 F.R.D. 489 (S.D.N.Y. 2013).
11 29 U.S.C. §216(b).
12 See *Glatt v. Fox Searchlight*, 293 F.R.D. 516 (S.D.N.Y. Sept. 17, 2013).
13 See *Portland Terminal,* 330 U.S. at 148.
14 Id. at 149-53.
15 See the Labor Department, Wage & Hour Div., Fact Sheet #71, Internship Programs Under the Fair Labor Standards Act (April 2010), available at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.
16 See *Solis v. Laurelbrook Sanitarium & Sch.*, (6th Cir. 2011); see also *Blair v. Wills*, 420 F.3d 823 (8th Cir. 2005); *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989).
17 Id. at *6.
18 2015 WL 4033018, at *7.
19 Id. at *7.
20 See Fed. R. Civ. P. 23(b)(3).
21 See *Glatt*, 293 F.R.D. at 537.
22 2015 WL 4033018, at *8.
23 Id.
24 2015 WL 4033018, at *9 n.5.
25 Id. at *10.
26 See *Wang v. Hearst*, No. 13-4480-cv, 2015 WL 4033091 (2d Cir. July 2, 2015).