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Second Circuit Adopts The “Highly Individualized” Primary Beneficiary Test In Unpaid Intern Lawsuits

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On July 2nd, the United States Court of Appeals for the Second Circuit issued its decisions in *Glatt et al. v. Fox Searchlight Pictures, Inc. et al.* and *Wang et al. v. The Hearst Corp.*, the two unpaid intern lawsuits heard in tandem by the court on January 30, 2015. The court’s opinion in *Glatt*, and summary order in *Wang*, adopted the employer-proposed “primary beneficiary” test to determine whether an unpaid intern should be considered an “employee” under the Fair Labor Standards Act (“FLSA”) and New York Labor Law (“NYLL”) and thus entitled to compensation.

The court rejected the six-factor test promoted by the U.S. Department of Labor, and applied by the district court in *Glatt*, finding that it was “too rigid” and ill-suited to apply to the “particular facts [of] all workplaces.” The “primary beneficiary” test examines “whether the intern or the employer is the primary beneficiary of the relationship.” This test was preferred because “it focuses on what the intern receives in exchange for his work” and “accords courts the flexibility to examine the economic reality as it exists between the intern and the employer.” This approach, the court remarked, “reflects a central feature of the modern internship—the relationship between the internship and the intern’s formal education,” as it recognizes the integration between the internship and classroom studies, as well as the receipt of academic credit.

In applying the “primary beneficiary” test, the court provided seven (7) factors, none of which is dispositive, to aid lower courts in examining the lawfulness of an unpaid internship. These factors are not exhaustive, and a court may consider any other relevant factor; this requires “weighing and balancing all of the circumstances.” The seven factors are set forth below:

1. The extent to which the intern and employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee – and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

While the factors include several of the six factors previously urged by the DOL as relevant to the analysis, one previous requirement is excluded: that 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.” The exclusion of this



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factor was notable because it was the most difficult for any employer to satisfy in the context of an unpaid internship. The court then vacated the district court's ruling that Eric Glatt and Alexander Footman, former production interns on the Black Swan film, were "employees" and entitled to minimum wage, and remanded the decision to the district court.

In light of this new test, the court also vacated and remanded the Glatt district court's Rule 23 class and FLSA collective certifications brought by Plaintiff Eden Antalik, a former corporate intern in Fox Searchlight's New York Publicity Office. Specifically, the court found that the Glatt district court "misconstrued" the Circuit's standards to evaluate whether common questions predominate over individual ones under Rule 23(b)(3), and vacated the district court's Rule 23 certification. In this regard, the Second Circuit remarked that the "question of an intern's employment status is a highly individualized inquiry," and even if the district court properly found that "Fox had a policy of replacing paid employees with unpaid interns, it would not necessarily mean that 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 court concluded in the same manner with respect to the FLSA conditional certification decision, acknowledging that the "proposed collective presents an even wider range of experience than her proposed class because it is nationwide in scope, rather than just limited to New York interns." The court found that under the standard it adopted, "courts must consider individual aspects of each intern's experience" and "none of the common proof identified by Antalik and relied on by the district court, will address these questions." Indeed, the court concluded that "the plaintiffs in Antalik's proposed collective are not similarly situated even under the minimal pre-discovery standard."

In Wang, the Second Circuit, in a summary order, applied the same "primary beneficiary" test and affirmed the district court's denial of Rule 23 certification, which was in accord with its decision in Glatt that the test for employment is a "highly individualized inquiry." The court also affirmed the district court's denial of plaintiffs' summary judgment motion, where the district court concluded that genuine issues of material facts prevailed when evaluating the question of whether several unpaid interns at Hearst were FLSA and NYLL "employees."

These decisions established new law in the realm of unpaid internships, and provided explicit guidance to district courts in the Second Circuit as to how this test should be applied. In addition, the decisions are important because the spate of unpaid internship lawsuits have all been brought as Rule 23 class and/or FLSA collective actions, and these decisions certainly suggest that classes and collectives will now be harder to certify. The Second Circuit's remark that the test is "highly individualized" casts doubt on whether district courts will certify Rule 23 classes under the "rigorous" standards set forth by the Supreme Court in Dukes and Comcast. The court's remark that Plaintiff Eden Antalik in Glatt failed to even satisfy the lower threshold for FLSA conditional certification is also noteworthy, and suggests that in evaluating unpaid internships, plaintiffs may have great difficulty meeting the "similarly situated" standard for FLSA certification.

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