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The Department of Labor's Internship Test Under the FLSA Struck Down by 6th Circuit

by Robert B. Fitzpatrick

In *Solis v. Laurelbrook Sanitarium and School, Inc.*, 2011 U.S. App. LEXIS 8585 (6th Cir. Tenn. 2011) a panel of the 6th Circuit, struck down the U.S. Department of Labor's internship test. The Department of Labor had created a six-factored analysis to determine the legality of unpaid interns, volunteers, or trainees. In determining whether the students who worked at a school-owned nursing home were employees or interns, the 6th Circuit refused to follow the six-factored test created by the Department of Labor, and affirmed the district court's decision in *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 2009 U.S. Dist. LEXIS 60413 (E.D. Tenn. July 15, 2009). Eastern District of Tennessee Judge Collier's opinion straightforwardly lists fifty five findings of fact and fourteen conclusions of law to support his conclusion that students at Laurelbrook are not performing work within the meaning of the Fair Labor Standards Act.

The Obama administration has made unpaid internships a high priority. It's well documented that the Department of Labor is going after companies for use of interns. For a few blogs on this see blog postings on Bloomberg Opinion, Outside the Beltway, and Real Clear Politics. The last of those blog posts perhaps received the most buzz due to John Stossel's strong opposition to Obama's focus on interns. He should be happy with the 6th Circuit's ruling in *Laurelbrook*.

The court begins with a lengthy discussion of the facts. Laurelbrook is a boarding school for students in grades nine through twelve. The curriculum is focused on providing both an academic education and practical training. Connected to the school is the Sanitarium where students receive practical training. The court focuses on the ways the Sanitarium is used as part of the school. Its existence is for the sole purpose of training students. Most of the practical training courses are approved for transfer credit, and the other courses can be transferred at the school's discretion. The majority of the benefits of the program are derived by the students, not the school.

The two issues before the court are whether the district court's use of the "primary benefits test" was the correct legal standard and whether the district court properly applied that standard. The case centers on FLSA's prohibition against child labor since the question is whether high school students should have received compensation as employees. An employment relationship must exist for the child labor laws to apply. The court goes through a lengthy discussion to establish the principle that determining whether an employment relationship exists is a case-by-case determination under the "totality of the circumstances" rather than by following a strict test.

In determining the correct legal standard, the court first examines Laurelbrook's proposed test. Their test is described as categorical as opposed to fact-based. Their argument is that under *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), FLSA does not apply to all vocational schools. The court disagrees. The court holds language from *Portland Terminal* to be dicta. The

court holds this paragraph was written to point out the absurdity of regarding a student's regular school work performed for its educational value as employment. The issue in that case was an employer-based training program, not a vocational school. The court holds that such a test based on labels given by the parties is antithetical to a "totality of the circumstances" approach and bypasses any real consideration of the economic realities.

Next, the court turns to the six factor test offered by the Secretary of Labor. This test is in the Wage and Hour Division's Field Operations Handbook. *Employment Relationship Under the Fair Labor Standards Act*, WH Pub. 1297 (Rev. May 1980), *available at* http://www.osha.gov/pls/epub/wageindex.download?p_file=F11973/WH129.pdf. The handbook lays out a six factor test. All of the following factors must apply for the handbook to consider trainees or students to not be employees:

> 1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
>
> 2) the training is for the benefit of the trainees or students;
>
> 3) the trainees or students do not displace regular employees, but work under their close observation;
>
> 4) the employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his operations may actually be impeded;
>
> 5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
>
> 6) the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

The Secretary argues that this test is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 139 (1944). The court notes that the Secretary does not argue for deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 834 (1984). *Skidmore* and *Chevron* deference are popular when courts agree with an agency, but when courts disagree they find a workaround the deference. From the start off the discussion the court begins undermining the "weight of deference" due to the agency under *Skidmore*. The "weight of deference" to an agency is determined by the thoroughness in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all factors giving it the power to persuade.

Before making its own determination, the court notes the 5th Circuit's giving the Secretary's test "substantial deference," the 4th Circuit's rejection of the Secretary's test, and the 10th Circuit's middle ground finding the Secretary's test relevant but not dispositive. *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1128 (5th Cir. 1983); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209-10 & n.2 (4th Cir. 1989); *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993). The 6th

Circuit concludes the Secretary's test is a poor method for determining employment in a training or educational setting. The court describes the six factor test as overly rigid and inconsistent with a "totality of the circumstances" approach. The court also criticizes the Secretary's test for being inconsistent with prior WHD interpretations that a flexible approach is needed as opposed to the all-or-nothing approach of the six factor test.

After tossing aside DOL's 6 factor test, the court opts for an approach it finds consistent with *Portland Terminal*. This approach examines which party derives the primary benefit from the relationship. The Supreme Court used various factors including whether the trainees displaced paid workers, whether the trainees impeded the railroad's business, whether they were supervised, and whether they received relevant training. All these factors were used to guide the ultimate inquiry as to who received the most benefit. In *Portland Terminal*, the court concluded the trainees were not employees because they most greatly benefited while the railroad received no immediate advantage.

The court goes through a lengthy discussion of its previous decision in *Marshall v. Baptist Hosp., Inc.*, 668 F.2d 234 (6th Cir. 1981). The discussion focuses on their determination that students receiving Radiologic Technician training were employees. Even though the 6th Circuit did not rule on the Secretary's test, its reasoning relied on a finding that the benefits ran to the hospital who used the trainees to replace paid employees. The students were deemed to have received little educational value since they were largely unsupervised performing their work either alone or only with other students. The court finds its prior decision in *Baptist Hospital* used a primary benefits determination as the standard for determining whether students or trainees are employees.

After concluding that the district court applied the proper test, the circuit court goes on to determine if the test was properly applied. Laurelbrook's value from the student work includes contributions to facilities maintenance, work in the Sanitarium contributing to satisfaction of licensing requirements, sale of flowers and produce grown with student help, assistance repairing cars for customers who pay the school for the repairs, and the sale of wood pallets students help build. These benefits were found to be offset by the fact that students did not replace any paid employees and that the instructors were forced to spend extra time supervising students at the expense of productive work.

On the "other side of the equation" the court found the students received many tangible and intangible benefits. These include hands on training comparable to vocational courses, learning to operate tools used in trades they are learning, and engaging in accredited courses of study. The court finds the educational aspect of Laurelbrook to be sound, in direct contrast to the findings in *Baptist Hospital*. In addition, the students received intangible benefits consistent with the religious mission of the school. Students received practical training that teaches responsibility and the dignity of manual labor. As a result, in this case, the court concludes that the students received the primary benefit and were properly categorized as not employees.

What does this mean for employers? To start, if the employer is outside the 6th Circuit, it means very little since the holding does not apply. For employers within the jurisdiction of the 6th Circuit, it affects those with unpaid training and internship programs. In order to survive a

primary benefits test, the employer should be certain the educational benefit to the trainees and interns exceeds any financial benefit of free labor. Avoid sending interns off to work on their own in the same capacity as a paid employee like Baptist Hospital. Instead, follow Laurelbrook's example and have your paid employees spend time supervising the work of unpaid interns providing feedback and educational value to their experience. You don't want a court to criticize you for shortchanging your interns. You want the primary benefit to run to your interns, which is really just good business. If you want good unpaid interns, give them a good experience worth sacrificing pay to learn from you.

For more information on employment law for internships, see Ross Perlin, *Inern Nation: How to Earn Nothing and learn little in the Brave New Economy* (Verso 2011); David C. Yamada, *The Employment law Rights of Student Interns*, 35 Conn. L. Rev. 215 (2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1303705; Ryan Bonina, *Sixth Circuit Applies "Primary Benefit" Test To Uphold Unpaid Internship Program*, Employer Law Report (May 2, 2011), http://www.employerlawreport.com/2011/05/articles/wage-hour/sixth-circuit-applies-primary-benefit-test-to-uphold-unpaid-internship-program; Jon Hyman, *6th Circuit tosses out DOL's internship test*, Ohio Employer's Law Blog (May 3, 2011), http://www.ohioemployerlawblog.com/2011/05/6th-circuit-tosses-out-dols-internship.html.

Read the opinion here.