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Unpaid Movie Production Interns Strike Back With Suit

By Jeffrey Campolongo **All Articles**

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Jeffrey Campolongo

Black Swan and *500 Days of Summer* are both known as good movies, and the unpaid interns working for the production company probably have some good memories of their involvement. What they do not seem to be having a good time with is finding out that not being paid was illegal.

Four former interns, Eden Antalik, Alexander Footman, Eric Glatt and Kanene Gratts, brought action against Fox Searchlight Pictures Inc. (Searchlight) and Fox Entertainment Group Inc. (FEG) for violations of the Fair Labor Standards Act (FLSA) and New York and California laws governing payment of wages in *Glatt v. Fox Searchlight Pictures*, No. 11 Civ. 6784, * 2 (S.D.N.Y. June 11, 2013). FEG is the parent corporation of Searchlight, which handles production and distribution of films. The summary judgment decision ruled that the interns were, in fact, employees who had to be paid for their time.

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So, why can't Hollywood get away with having unpaid interns? Under the FLSA, 29 U.S.C. § 203(g), one is employed if one is suffered or permitted to work. The ability to not pay someone helping out at your workplace falls into a slim category excepting one from coverage by the FLSA, and requires that the individual meet the standard of a "trainee" as described in *Walling v. Portland Terminal*, 330 U.S. 148 (1947). In *Walling*, individuals in a weeklong course for prospective railroad brakemen were properly treated as unpaid trainees rather than employees. They were not taking the place of employees, and the required training and constant supervision by employees actually served to "impede" the company's day-to-day business. "Providing, free of charge, the same kind of instruction [as a vocational school] at a place and in a manner that would most greatly benefit the trainee" does not subject the entity to FLSA employee pay requirements. The U.S. Department of Labor, which administers the FLSA, has adopted *Walling* into its interpretation of true unpaid internship requirements through six specific criteria:

"1. The internship ... 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.

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4. The employer ... 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.

6. The employer and intern understand that the intern is not entitled to wages for the time spent in the internship."

In the movie productions, the interns were not learning skills of the movie production industry, as one might learn as a film major. The interns worked in the production office watermarking scripts, making photocopies and making coffee. While they did learn about the "function of a production office," it was by virtue of being there in the same way a paid employee would learn about his or her surroundings in an office, the opinion said. Any benefits they earned as interns were "incidental to working in the office like any other employee," to include "resume listings, job references, and an understanding of how a production office works," according to the opinion.

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By contrast, the benefit to the employer was clear. In the absence of the unpaid interns, a paid employee would have done the same tasks. New interns or employees were brought on or existing employees worked longer hours if an intern left or cut back on his or her schedule. FEG requested more interns when they were busier, "the opposite of what one would expect if interns provided little advantage to the company and sometimes impeded its work," according to the opinion. It appears that FEG was eliminating paid positions and overtime pay and increasing its intern program, while also being aware of potential Department of Labor violations. The interns were performing essential, albeit menial, work that in no way was an imposition of the employer.

Factors in the employer's favor were that there was no promise of paid employment at the end of the internship, and there was no expectation of pay. Regardless, the FLSA "does not allow employees to waive their entitlement to wages," the opinion said, otherwise employers would most certainly take advantage of the ability to procure free labor.

The interns were, under the totality of the circumstances, employees under the FLSA and New York State Labor Law and were improperly classified as interns. The issues of the wages owed to the plaintiffs, and what penalties will be assessed against the defendants for the state and federal law violations, remain to be decided.

Both sides also moved for summary judgment as to "whether Searchlight was the 'employer' of Glatt and Footman as that term is defined in the FLSA and NYLL," according to the opinion. The FLSA specifically addresses how to define an employer when there are multiple entities involved by providing criteria for "joint employers." Each individual employer can be held liable for violations of the FLSA. The "control" of the purported employer is key.

The U.S. District Court for the Southern District of New York analyzed FEG's "control" of personnel under two separate tests that have been used in the U.S. Court of Appeals for the Second Circuit, the "formal control" and "functional control" tests. A summary of each test's criteria and the court's analysis of each would be too lengthy to discuss here, but in sum, the court, citing *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), and *Zheng v. Liberty Apparel*, 355 F.3d 61 (2d Cir. 2003), considered the entity's control over hiring and firing, supervision, authority for the rate and method of payment, retention of personnel records, relationship between businesses, and exclusivity of the personnel's work.

To make a movie, the parent company, FEG, works through its film division, Searchlight, which enters into a production agreement with a corporation that is solely created for the purpose of producing a particular film.

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Lake of Tears Inc. and 500 DS Films Inc. were formed for producing *Black Swan* and *500 Days of Summer*, respectively. Interns may be obtained through either Searchlight or the production company, but the production agreements specify that Searchlight had the power to hire and fire the production companies' personnel. Searchlight had significant control over the production companies, and could have eliminated the company completely if it wanted.

The bulk of the factors from both tests were in favor of Searchlight being an employer, thus satisfying the court that it was a joint employer with the production companies. The lesson learned for future Hollywood productions is that creating separate entities is no shield from liability if there is no true separation of control.

Finally, the court cleared the way for many more interns to get their long overdue wages by granting class certification to those with unpaid internships with FEG's divisions in New York over a period of five years.

Unpaid interns can legally exist, but the majority of companies offering unpaid internships are likely running afoul of the law. Affiliation with an educational program may assist with steering clear of legal violations, however, "a university's decision to grant academic credit is not a determination that an unpaid internship complies with" state or federal law, the opinion said. "Universities may add additional requirements or coursework for students receiving internship credit, but the focus of the [law] is on the requirements and training provided by the alleged employer." In the end, sucking it up and paying those menial temporary workers minimum wage is a safer bet. •

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.*

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