MIRROR, MIRROR ON THE WALL, ARE THEY TRAINEES AND NOT EMPLOYEES AT ALL? THE LEGALITY AND “ECONOMIC REALITY” OF UNPAID INTERNSHIPS

BEATRIZ CARRILLO

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INTRODUCTION

The modern version of the United States internship system has changed over the years. It is believed internships descended from professional apprenticeships, which originated with the trade guilds of Europe in the eleventh and twelfth century.\(^1\) In the trade guilds, a person would pay to work alongside a “master,” who would teach him a skill.\(^2\) Apprentices could spend several years working alongside their “master,” and typically started their training at the age of sixteen.\(^3\)

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\(^*\) J.D. candidate, May 2018, Chicago-Kent College of Law, Illinois Institute of Technology.


\(^3\) Id.
Internships are recognized as a necessary experience for career development.\(^4\) Over time, they became an integral part of a person’s education and are sometimes required to earn a college degree.\(^5\) In today’s economy, many employers consider internship experience as one of the most significant factors in hiring decisions.\(^6\) However, if an intern is not considered an employee by law, they are not afforded the same protections under Title VII or the Fair Labor Standards Act (“FLSA”).\(^7\) Under the FLSA, employees are guaranteed a minimum wage for their work, but the Act does not provide a clear definition of the term “employee.”\(^8\) In addition, lack of Title VII protection exposes interns to discrimination and hostile work environments, such as sexual harassment.\(^9\)

Recently, there was been an increase in litigation involving unpaid internships.\(^10\) Unpaid interns argue that employers cannot avoid FLSA requirements simply by labeling employees as interns, contending that interns should be considered employees only when they successfully show an employer-employee relationship.\(^11\)

\(^4\) Spradlin, supra note 1.


\(^6\) Human resources professionals recently ranked internship experience as one of the most important factors when hiring an applicant. See Joanna Venator & Richard V. Reeves, *Unpaid Internships: Support Beams for the Glass Floor*, Bookings Inst. (July 7, 2015), https://www.brookings.edu/blog/social-mobility-memos/2015/07/07/unpaid-internships-support-beams-for-the-glass-floor/

\(^7\) See Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947) (establishing the trainee exception under the FLSA).


\(^9\) See Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527, 529 (S.D.N.Y. 2013) (holding that an intern was not protected under Title VII although she was sexually harassed at her internship site).


Currently, there is no federally regulated definition of “intern.” The Supreme Court attempted to shed light on the subject in *Walling v. Portland Terminal Co.*, which provided guidance on how courts should determine the circumstances when an unpaid trainee may be considered an employee under the FLSA. Since that decision, the U.S Department of Labor (“DOL”) and various circuit courts have attempted to interpret the *Walling* factors as applied to modern day internship programs. As a result, four predominant tests have emerged: The Wage & Hour Division (“WHD”) factors, the “primary beneficiary” test, “the totality of the circumstances” test, and the *Glatt* test.

Most recently, the Seventh Circuit analyzed this issue in *Hollins v. Regency Corp.* In *Hollins*, the Seventh Circuit held that cosmetology students, whom worked in a salon for school credit, were not employees covered by the FLSA. As a result, those students were

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15 All the four tests will be discussed in Section II of this note.

16 U.S Dep’t of Labor, Fact Sheet #71, supra note 14.


19 See *Glatt v. Fox Searchlight Pictures, Inc.*, 803 F.3d 1199, 1212 (2d Cir. 2015).

20 867 F.3d 830 (7th Cir. 2017).

21 Id.
not entitled to compensation for the time they worked in the salon.  

The court also discussed the various established tests that have emerged from other circuits that have grappled with the distinction between an employee and an unpaid intern/trainee. It ultimately decided on a combination of the relevant tests, which it called the “economic reality test.”

This note unfolds in five parts. Part I gives a brief overview of the FLSA and the federal government’s involvement in trying to define the FLSA’s self-defining “employee” definition. Part II focuses on the different tests employed by the DOL and circuit courts across the nation when attempting to determine who constitutes an employee under the FLSA. Part III analyzes the recent Seventh Circuit decision of Hollins v. Regency Corp. and discusses the court’s hesitation to articulate a specific and definitive test to apply in cases in which it is necessary to first determine whether an employer is properly classifying employees as “interns” or “trainees,” or if those persons should be deemed “employees” by law. Part IV looks at the dangers unpaid interns face when they are not considered employees, specifically focusing on the issues that arise under Title VII in the context of sexual harassment in the workplace. Finally, Part V advocates for a clear, universal, two-question test to determine whether unpaid interns should be considered employees under the FLSA.

I. THE FLSA AND ITS SELF-DEFINING EMPLOYEE DEFINITION

A. Brief Overview of the FLSA

The Fair Labor Standards Act (“FLSA”) was enacted on June 25, 1938. 24 The FLSA requires that all nonexempt employees receive

[22 Id.
23 Id.
minimum wage and overtime pay. It sets a minimum wage of $.25 per hour (rising to $0.40/hr by 1945), fixed the maximum work hours to 44 (falling to 40 hr/week by 1940), and banned child labor. This act was part of a strong push, led by President Franklin D. Roosevelt, for government control over the hours and wages of all workers, specifically those of children.

When Congress enacted the FLSA, it declared that the “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” created burdens and perils to the labor markets and interstate commerce. Thus, Congress believed enacting the FLSA and creating a federal minimum wage requirement improved a worker’s quality of life.

Section 6(a) of the FLSA established the federal minimum rate employers must pay their employees. The minimum wage requirement applies to every employment relationship that falls under

25 Employees are considered Non-Exempt when they are primarily performing work that is subject to the overtime provisions of the Fair Labor Standards Act and overtime pay is required. Dep't. of Human Res., FLSA Non-Exempt and Expect Defined, UNIV. OF MINN., https://humanresources.umn.edu/compensation-and-classification/flsa-exempt-nonexempt-defined (last visited Dec. 1, 2017).


29 Nordlund, Supra. Note 24.


31 Id.

32 See 29 U.S.C §206.

33 FLSA 6(a), 29 U.S.C § 206.
the FLSA’s definition of “employee.” However, the FLSA broadly defines “employee” as “any individual employed by an employer” and defines “employed” as “to suffer or permit to work.” An employer, in turn, “includes any person acting . . . in the interest of an employer in relation to an employee.”

These definitions allow for broad interpretations and lead to uncertainty as to when interns are employees under the FLSA. Nevertheless, the courts have found it proper to reduce the breath of the definitions by carving out certain exceptions. One of those exceptions was established in Walling v. Portland Terminal Co., as the “trainee” exception, which has formed the basis of unpaid intern law. Further, if an unpaid intern is found to be an employee then the FLSA standards apply, and the employer is forced by the DOL to pay that intern the federal minimum wage and any overtime compensation.

**C. Walling v. Portland Terminal Co., The Supreme Court’s Attempt to Differentiate Employees from Unpaid Trainees**

The Supreme Court has yet to decide if unpaid interns are considered employees under the FLSA, but it has provided some guidance for courts grappling with cases brought by unpaid trainees. In Walling v. Portland Terminal Co., the Supreme Court carved out a

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34 29 U.S.C § 203(e)(1)–(5).
39 See Walling, 330 U.S. at 152.
40 Id.
The specific “trainee” exception under the FLSA.41 Portland Terminal was a railroad company that offered a course of practical training to prospective yard brakemen.42 The training was a necessary requisite; brakemen applicants were never accepted until they had taken the training course.43 However, the company did not pay the individuals for their training time.44 Thus, the plaintiff, a brakeman, argued he was an employee under the FLSA and was entitled to compensation for the time he spent in the training program.45

The Portland Terminal training course consisted of working under the supervision of a yard crew.46 The trainee would first observe and then was gradually permitted to do actual work under close scrutiny and supervision.47 The Court noted there was “no question” that the trainees were doing the type of activities covered by the FLSA.48 However, the Court also stated that it would not interpret the FLSA to create an employment relationship when a person’s work was intended to serve only his or her own advantage, stating,

broad as [the definitions of employer and employee are], they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction. Had these trainees taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act.49

41 Id.
42 Id. at 149.
43 Id.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id. at 152–153. The Court also claimed that the FLSA “[did not] intended to stamp all persons as employees, who, without any express or implied compensation
The Court ultimately held that the plaintiff was a trainee of the company and, therefore, did not fall within the FLSA’s definition of “employee.”50 In support of its holding, the Court looked to the intent of the legislature when enacting the statute.51 The Court noted that the FLSA’s purpose “was to ensure that every person whose employment contemplated compensation should not be compelled to sell his services for less than prescribed minimum wage.”52

The Court also noted several factors and observations which helped it determine the trainee was not an employee.53 First, the Court noted the trainees’ work did not “displace” any of the company’s regular employees.54 Second, the Court looked at the fact that the trainees’ work was closely supervised, such that the “work [the trainees did] did not expedite the company’s business, but may [have] . . . actually impede[d] . . . it.”55 The Court further noted the importance of the training program in the trainee’s subsequent employment with the company.56 In addition, the Court also relied on the trainee’s lack of a guaranteed job following the completion of the program, and the trainee’s lack of expectation of compensation.57 Finally, the Supreme Court considered the educational benefit of Portland’s training course, as well as the instructional benefit for the trainee.58 Based on all of its observations, the Court determined Portland received “no immediate agreement, might work for their own advantage on the premises on another.” Id. at 152

50 Id. at 153.
51 Id. at 152.
52 Id.
53 Id. at 153.
54 Id. at 149–50.
55 Id. at 150.
56 Id. at 149–50. However, subsequent employment with the railroad company was not guaranteed upon completion of the training program. After the individuals completed the program they were then placed into a pool of people that the railroad could hire from when necessary. Id.
57 Id. at 150.
58 Id. at 152–53.
advantage” from the trainees work, thus concluding the plaintiff was not an employee within the meaning of the FLSA.

D. The Department of Labor’s, Wage & Hour Division Six-Factor Test

In the aftermath of Walling v. Portland Terminal Co., employers were faced with the question of whether the workers fell under the “trainee exception” or whether an employment relationship existed with their trainees. To provide a more direct approach and interpretation of Walling, the Department of Labor, under their Wage & Hour Division (“WHD”), devised a six-factor test. In April 2010, the DOL under WHD released these factors on Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act.

The WHD determined that for an employment relationship not to exist and federal protections to apply, all of the following factors must be met: (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

59 Id. at 153.
60 Id.
61 Id.
64 Id.
65 Id.
66 Id.
67 Id.
operations may actually be impeded;\(^{68}\) (5) the intern is not necessarily entitled to a job at the conclusion of the internship;\(^{69}\) and (6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.\(^{70}\) The WHD concluded that “[i]f all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the [FLSA’s] minimum wage and overtime provisions do not apply to the intern.”\(^{71}\)

Although the DOL and WHD published this test as a Fact Sheet, they are opinion letters, and many courts have taken it upon themselves to interpret the Walling case and to develop their own factors.\(^{72}\) Fact sheets from the DOL do not hold the necessary force of law to bind the courts.\(^{73}\) Thus, all the DOL can do is strongly encourage that its test be followed, and that the courts give deference to its opinion.\(^{74}\) The WHD explained that the more an internship program resembles an educational experience and offers an

\(^{68}\) Id.

\(^{69}\) Id.

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) See discussion in Section II.

\(^{73}\) See Wage & Hour Div., supra note 63 (“This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations”); see also Matthew Tripp, Note, In the Defense of Unpaid Internships: Proposing a workable test for Eliminating Illegal Internships, 63 Drake L. Rev. 341, 354-66 (2015) (noting that some courts have denied the DOL fact sheet any deference, as it is subject to much criticism for its inconsistency with prior DOL interpretations).

\(^{74}\) See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that “the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”). Furthermore, courts have also disagreed about the level of deference to give the DOL Fact Sheet. Compare Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011) (stating that the DOL Fact Sheet #71 should not be given deference under Skidmore), with some courts giving agency opinions great deference according to Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (creating a two-step test that affords deference to Congress if it has spoken directly to the issue in question).
educational benefit, the more likely the unpaid internship will fit into the “trainee exception.”

1. The Issue with the DOL Factors

Even though Fact Sheet #71 is not federally enforced, many jurisdictions have used the DOL’s six-factor test. Employers have also tried to navigate the landscape of internships by relying on the WHD’s educational benefit rationale. However, a key issue arises when employers follow the DOL factors and exploit the education benefit concept.

The issue is the test heavily focuses on student opportunities and class credit. Nevertheless, a growing number of interns in this country are no longer college students. Recently there has been a growing number of post-graduate and “career-changers” that have

75 See Wage & Hour Div., supra note 63.
78 Such as in Hollins v. Regency Corp., where the court states one of the reasons that cosmetology interns are not employees is because they are getting educational credit to fulfill their certificate, which can be a type of compensation. 144 F.Supp.3d 990, 993 (2015). However, what happens to those students who are not aiming to get a certificate, they would not be working for certificate hours, so what would be their type of compensation?
80 See Amy Levin-Epstein, Why Internships Aren’t Just for College Students, CBS NEWS (Apr. 4, 2011), https://www.cbsnews.com/news/why-internships-arent-just-for-college-students/ (noting that there has been an increase in numbers of individuals searching for internships that are recent graduates or older: “We have noticed that 20 percent of the people searching … for internships are either recent graduates or older. So, it's clear that internship seekers are no longer undergrads alone”).
sought internships in today’s markets. Thus, when more and more employers require interns to be eligible to receive college credit as a pre-requisite for their internship program, the employer excludes those post-graduates and “career-changers”. A system is needed that addresses the growing number of individuals seeking unpaid internships, shifting the focus from educational benefit and focusing on the benefit the intern brings to the employer.

II. THE DIFFERENT CIRCUIT COURT APPROACHES

Recently, the courts have had an influx of individuals challenging their unpaid intern status. Numerous circuit courts have had to address whether various working relationships rise to a level of an employee-employer relationship under the FLSA. While the DOL offered a six-factor test, circuit courts, when faced with the question of determining an intern’s employment relationship, have applied and adopted various tests based on their individual interpretations of the Walling decision and the DOL’s six-factor test.

81 See id.
82 See id.
83 While Interns may seek paid internships, the number is limited, which is why many Interns end up in unpaid and often illegal internships. See Avik Roy, The Unhappy Rise of The Millennial Intern, FORBES (Apr. 22, 2014), https://www.forbes.com/sites/realspin/2014/04/22/the-unhappy-rise-of-the-millennial-intern/#7d73bb211328 (last accessed Dec. 1, 2017).
84 For example, the Second Circuit reasoned that the key issue in assessing whether an individual was truly an “unpaid intern,” versus a mislabeled and uncompensated employee, is determining which party—the individual or the employer—derives the most benefit from the relationship: in other words, whether the relationship is genuinely focused on the education and development of the individual, or whether the “economic reality” of the situation makes the relationship a type of “employment-in-disguise.” See Glatt v. Fox Searchlight Pictures, Inc. 811 F.3d 528, 536-37 (2d Cir. 2015) (developing the Glatt test to help determine the relationship).
85 Andrew Mark Bennett, Unpaid Internships & The Department of Labor: The Impact of Underenforcement of the Fair Labor Standard Act on Equal Opportunity, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 302-06 (2011); See also Cody Elyse Brookhouser, Whaling on Walling: A Uniform Approach to
A. The Primary Beneficiary Test

1. The Fourth Circuit

In McLaughlin v. Ensley, the Fourth Circuit applied what is known as the primary beneficiary test. The Fourth Circuit developed this test upon a cursory analysis of Walling, stating a worker could not be an employee where “the principal purpose of the [work] was to benefit the person in the employee status.”

In McLaughlin, the employer Kirby Ensley was the owner of a snack food distribution service. The employer employed route men who drove his company trucks, restocked the vending machines, and sold snack foods to retailers on a commission basis. Before Ensley hired a new route man, the applicant was required to participate in a five-day orientation program. During the five-day orientation program, the prospective employee was exposed to the tasks they would be expected to perform. Over those five days, the trainees worked a total of fifty to sixty hours, loaded and unloaded delivery trucks, restocked Ensley’s vending machines, were given instructions on how to drive the trucks, introduced to retailers, taught basic

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86 The Fourth Circuit has repeatedly held “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.” See Wirtz v. Wardlaw, 339 F.2d, 785 (4th Cir. 1964); Isaacsen v. Penn Community Services, Inc., 450 F.2d 1306 (4th Cir. 1971); McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989).

87 See Ensley, 877 F.2d at 1209.

88 See id. (quoting Isaacsen v. Penn Cmty. Servs., Inc. 450 F.2d 1306, 1308 (4th Cir. 1971)).

89 See id. at 1208.

90 See id.

91 See id.

92 See id.
vending machine maintenance, and occasionally helped with preparing orders. Nevertheless, the trainees were not paid for their work in that five-day period.

The Fourth Circuit looked at who was receiving the benefit of the program. The court determined Ensley was the one receiving the primary benefit from the orientation program. It noted that through the program, Ensley had an opportunity to review if potential employees would be successful for free. The court also stated that one of the most important factors evaluated was the nature of the training and experience. The Fourth Circuit determined Ensley’s training program was very limited. The individuals did not receive training comparable to that which they would receive at a vocational school, and the skills they were learning were so job specific that they would be unable to transfer to other occupations. Thus, Ensley primarily benefitted from the training program, not the trainees.

2. The Sixth Circuit

Like the Fourth Circuit, the Sixth Circuit utilized the primary beneficiary test. In Solis v. Larelbrook Sanitarium & School, Inc., the central question focused on which standard was appropriate to determine if students were employees as defined by the FLSA. Here, the DOL sued the school alleging it had violated the FLSA’s child labor provisions. Solis involved students at a boarding school in Tennessee. At the boarding school, the students received both

93 See id.
94 See id.
95 See id. at 1210.
96 See id.
97 See id.
98 See id.
99 See id.
100 See id.
101 See 642 F.3d 518, 519 (6th Cir. 2011).
102 See id.
tangible and intangible benefits. The students received hands-on training like that offered in trade and vocational school, while also attending academic courses.

The Sixth Circuit ultimately rejected the DOL’s argument that their six-factor test was the appropriate standard. The court noted that the DOL’s six-factor test was rigid and inconsistent with the holding in *Walling*. The Sixth Circuit called the six-factor test a “poor method for determining employee status in a training or educational setting.” Thus, the court chose to use the primary benefits test in determining if students were employees “since the test’s generality makes it applicable to many different employee-trainee relationships.” However, the Sixth Circuit modified the primary benefit test by adding a factor that considered if the students displaced any regular employees and whether the program provided students with an educational experience.

Ultimately, the court concluded the boarding school students were the ones receiving the primary benefit of the school’s training. The court determined that while the school did receive some benefit from the students’ work, the students were also gaining significant leadership skills and hands-on experience. The court reasoned that those skills made them into competitive candidates for trade occupations after graduation, ultimately being the primary beneficiaries. The Sixth Circuit also supported their conclusion by noting the students did not displace regular employees and, at times,

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103 See id. at 520.
104 See id.
105 See id. at 525.
106 See id.
107 See id.
109 See Solis, 642 F.3d 518, 529(6th Cir. 2011).
110 See id. at 520.
111 See id.
112 See id. at 532.
disrupted instructors’ time.\textsuperscript{113} Thus, the court concluded the students at
the school were not employees under the FLSA.\textsuperscript{114}

\textbf{B. The Totality of the Circumstances Test}

The totality of the circumstances test, unlike the primary
beneficiary test, looks not just at who is receiving the benefit, but at all
the factors found in *Walling*.\textsuperscript{115} However, unlike the DOL’s test\textsuperscript{116}
where all factors must be present, courts that use the totality of the
circumstances test balance factors to determine the totality of the
circumstances surrounding the individuals working relationship.\textsuperscript{117}
The DOL’s approach of all-or-nothing has not been adopted by any
circuit courts because courts prefer a more flexible standard.\textsuperscript{118}
Nevertheless, courts have used the six factors in applying the totality
of the circumstances test.\textsuperscript{119}

1. Fifth Circuit

The Fifth Circuit utilized the totality of the circumstances test
when it determined whether trainees of American Airlines were
employees under the FLSA.\textsuperscript{120} In *Donovan v. American Airlines*,
American Airlines required potential employees to undergo training at
American's Learning Center in Dallas, Texas, in order to be eligible

\begin{footnotes}
\item[113] See id. at 530.
\item[114] See id. at 532.
\item[115] See Cody Elyse Brookhouser, *Whaling on Walling: A Uniform Approach to
Determining Whether Interns are “Employees” Under the Fair Labor Standards
\item[116] See Wage \\& Hour Div., *Fact Sheet #71: Internships Under the Fair Labor
Standards Act*, U.S. DEP’T OF LABOR(2010),
\item[117] See Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1029 (10th Cir. 1993).
\item[118] See Solis, 642 F.3d at 525 (rejecting the all-or-nothing approach as too
rigid); Reich, 992 F.2d at 1026.
\item[119] See Reich., 992 F.2d at 1026-29.
\item[120] See Donovan v. American Airlines, 686 F.2d 267, 272 (5th Cir. 1982).
\end{footnotes}
for certain positions at American. However, this training required that the trainees give up their other jobs and move to Dallas. Further, trainees were not paid for the time spent training, and they were not guaranteed employment after completion of the American Airlines training program. Thus, before beginning training, each trainee acknowledged, in writing, that he or she was not an employee during training and that being accepted for training was not an offer of employment.

For flight attendants, training was forty hours, five days a week. The training included learning the emergency and safety features of each aircraft, as well as learning American Airlines’ internal procedures and practices. However, the instruction was designed to teach employees to work for American and not for other airlines. In addition, the trainees did not assist in commercial flights nor displaced other employees. The court believed that the DOL and other tests were too stringent of a requirement, and it forced for-profit companies to not benefit at all from a training or internship program. Therefore, to determine whether the trainees of American Airlines were employees under the FLSA, the Fifth Circuit used the balancing test.

The court considered the benefits American Airlines received with those the trainee received. The court stated: “Although training benefits American by providing it with suitable personnel, the trainees attend school for their own benefit, to qualify for employment they

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121 Id. at 268.
122 Id.
123 Id. at 269.
124 Id.
125 Id.
126 Id.
127 Id.
128 See id. at 271–72 (the court analyzes Wirtz v. Wardlaw, 339 F.2d 785, 788 (4th Cir. 1964)).
129 Id. at 272.
130 Id. at 272.
could not otherwise obtain.” The fact that the trainees had to give up their jobs and move to Dallas for the training was considered an opportunity cost, which the court saw as “a [students] sacrifice to attend school. But [the sacrifices are made by] all who seek to learn a trade of profession.” Thus, through balancing the DOL’s factors and the primary benefits tests factors, the Fifth Circuit court was able to determine the trainees were not employees under the FLSA.

2. Tenth Circuit

The Tenth Circuit has also used the totality of the circumstances test when determining if an individual qualified as an employee under the FLSA. The Tenth Circuit used the flexible version of the DOL’s six-factor test to determine if participants in a firefighter academy were entitled to compensation under the FLSA. According to the Tenth circuit, all six factors were relevant but not a single factor was dispositive.

In Reich, trainees attended Parker Fire’s academy for classes, tours of the neighborhood, and simulations. In addition to the classes, the trainees also helped maintain fire trucks and other firehouse equipment. The Tenth Circuit court assessed the case under the totality of the circumstances test and looked at the economic reality of the relationship, using the DOL’s six-factors. The court noted that supporting the strict application of the DOL’s six-factors...
would be inconsistent with the *Walling* Supreme Court analysis because *Walling* does not support an all or nothing approach.\footnote{Id.}

The Tenth Circuit then weighed the DOL's six factors.\footnote{See id. at 1027.} First, the court determined that the curriculum taught at the academy was similar to the educational experience a trainee would receive at any firefighting academy.\footnote{Id. at 1027–28.} The court stated that “[a] training program that emphasizes the prospective employer’s particular policies is nonetheless comparable to vocational school if the program teaches skills that are fungible within the industry.”\footnote{Id. at 1028.} Second, the court also found that, while trainees were making “financial sacrifices,”\footnote{Id. (the court compared college students as making similar sacrifices).} the trainees benefited from the program because they were acquiring skills that were transferable within the industry and required to be career firefighters.\footnote{Id.} Third, the trainees did not displace any current employees of the department.\footnote{Id. at 1029.} Fourth, the trainees did not immediately benefit the employer and any benefit was “de minimis”.\footnote{Id. at 1028–29.} Fifth, the court looked at the fact that “those who successfully completed the course had every reasonable expectation of being hired.”\footnote{Id. at 1029.} And lastly, the trainees understood that they would not be receiving pay during their training.\footnote{Id.} After balancing the factors above, the court determined that five out of six factors favored that the trainees were not employees under the FLSA.\footnote{Id.} The Fifth Circuit, unlike the DOL, required that most factors be present, but it did not require that all factors are met because a “single factor cannot carry
the entire weight of an inquiry into the totality of the circumstances . . .

C. The Glatt Test

1. Origin of the Glatt Test in the Second Circuit

Recently, in Glatt v. Fox Searchlight Pictures, the Second Circuit addressed the question of when a trainee is an employee.\textsuperscript{152} There, three interns who worked in a movie production filed a class action claiming they should have been categorized as employees and entitled to back pay wages under the FLSA.\textsuperscript{153} The interns worked for nine months and were not compensated nor did they receive academic credit.\textsuperscript{154} The interns did menial office tasks, which included things like buying a pillow for the director of the film and bringing him tea.\textsuperscript{155}

The Second Circuit declined to use the DOL’s test because it was too rigid to be consistent with Second Circuit court precedent.\textsuperscript{156} The court stated: “the proper question is whether the intern or the employer is the primary beneficiary of the relationship.”\textsuperscript{157} Thus, the court chose to adopt a primary benefits test similar to those of the Fourth and Sixth Circuits.\textsuperscript{158} However, it delineated a list of nonexhaustive considerations to be used to determine if an individual is an employee under the FLSA.\textsuperscript{159}

\begin{itemize}
  \item \textsuperscript{151} Id. at 1029.
  \item \textsuperscript{152} See 811 F.3d 528, 536–37 (2d Cir. 2015).
  \item \textsuperscript{153} Id. at 530.
  \item \textsuperscript{154} Id. at 532–33.
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} See Glatt v. Fox Searchlight Pictures Inc., 811 F.3d 528, 536 (2d Cir. 2015) (citing Velez v. Sanches, 693 F.3d 308, 326 (2d Cir. 2012).
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} See discussion in Section II.A.
  \item \textsuperscript{159} See Glatt, 811 F.3d at 536–37.
\end{itemize}
The court noted that primary benefits tests had three important features: (1) the tests focused on the interns and their work, (2) it gave the court the flexibility to examine the economic realities between the parties, and (3) the test acknowledged that interns’ relationships with their employers were analyzed in a different context than the typical employer-employee relationship.\(^{160}\) Thus, the non-exhaustive seven-factors to aid district courts in determining an employment status under the FLSA were:

1. The extent to which the intern and the 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.\(^{161}\)

5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.

\(^{160}\) See id. at 536.

\(^{161}\) The court did not mention what the academic calendar in this case was. As each educational institution can have different academic calendars, Academic Calendar, OXFORD LIVING DICTIONARY (2017), https://en.oxforddictionaries.com/definition/academic_calendar (last accessed Dec. 1, 2017).
(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 when the internship concludes.162

The seven factors were considerations, but no single factor was dispositive.163 The court stated that this test required “weighing and balancing all of the circumstances,” where no element was “dispositive.”164 The Second Circuit also noted that besides the seven factors, the courts were free to consider any relevant evidence they determined would be of aid when making a decision.165 The court believed that this approach was the most consistent with Portland Terminal166 because the approach focused on “the relationship between the internship and the intern’s formal education.”167

2. Adaptation of the Glatt Test by the Eleventh Circuit

In Schumann v. Collier Anesthesia, the Eleventh Circuit adopted the Second Circuit’s Glatt test to determine if an intern was an employee under the FLSA.168 In Shumann, twenty-five former nurse anesthetists were required to participate in 550 clinical cases in order to graduate.169 The nurses alleged that they were employees under the FLSA and were entitled to compensation because Collier Anesthesia

162 Glatt, 811 F.3d at 536–37.
163 Id. at 537.
164 Id.
165 Id.
167 Glatt, 811 F.3d at 537.
168 803 F.3d 1199, 1203 (11th Cir. 2015).
169 Id.
benefited from their work by employing fewer registered nurses.170 In addition, the students were required to work longer hours than those required by their curriculum, and their services were billed by the college.171 The district court granted summary judgment for the defendants, finding that the student were not employees under the FLSA.172

On appeal, the Eleventh Circuit found that the Second Circuit’s Glatt test was the appropriate modern-day adaptation of the Supreme Court’s factors in Walling173. The Second Circuit’s approach effectively determined who was the “primary beneficiary” in an internship.174 The court noted that “the best way to [determine the primary beneficiary was] to focus on the benefits to the student while still considering whether the manner in which the employer implement[ed] the internship program [took] unfair advantage of or [was] abusive towards the student.”175

Furthermore, the court added additional guidance on how the factors should be applied to the facts of the case, such as that employers must have a legitimate reason for scheduling training when school is not in session.176 In addition, the Eleventh Circuit stated that court “should consider whether the duration of the internship is grossly excessive in comparison to the beneficial learning. The court vacated the summary judgment for defendants and remanded to the district court consistent with the opinion on the use of the Glatt test.

170 Id. at 1204.
171 Id.
172 Id.
173 Id. at 1212.
174 Id. at 1203.
175 Id. at 1211.
176 Id. at 1213.
III. HOLLINS V. REGENCY CORP.

A. Case Background

Recently the Seventh Circuit was tasked with determining which test it would apply to the facts of Hollins v. Regency Corp.177 In January 2011, Venitia Hollins enrolled as a full-time cosmetology student at Regency.178 Regency operated a state licensed and accredited cosmetology school.179 Regency’s stated educational goals were “to prepare students to pass the required state cosmetology exams and teach them the entry-level skills needed to work in a professional salon.”180

Regency was governed by state regulations and the National Accrediting Commission of Career Arts & Sciences.181 Indiana and Illinois state regulations required that Regency’s curriculum include at least 1,500 hours of “clock time” and cosmetology-related subjects, such as chemical treatment of hair, hair styling, shop management and nail technology.182 The regulations also required that the cosmetology student received instruction in proper sanitation techniques.183 The instruction of the cosmetology topics needed to take the form of both classroom and practical learning methods.184

Thus, Regency divided its curriculum into three periods: (1) workshop phase, (2) rehearsal phase, and (3) performance phase.185 Regency provides 320 hours of introductory education on various

177 867 F.3d 830, 830 (7th Cir. 2015).
178 Hollins v. Regency Corp., 144 F. Supp. 3d 990 (N.D. Ill. 2015), aff’d, 867 F.3d 830 (7th Cir. 2017).
179 Id. at 991.
180 Id. at 991.
181 Id.
182 Id.
183 Id. at 992.
184 Id.
185 Id.
cosmetology subjects. In order for students to move from the workshop phase to the rehearsal phase, they must pass various written and performance-based tests. After they pass the workshop phase, students are rotated in between the rehearsal and the performance base phase. For the performance phase, students participated on the “performance floor.” The performance floor is designed to replicate a modern salon, indistinguishable from a fully licensed commercial salon. Here, customers are charged a fee for student-provided services, at rates lower than those of licensed cosmetologist.

Venitia Hollins, alleged that since she spent time on the performance floor serving customers and doing administrative and cleaning duties, she was entitled to wages under the FLSA. Hollins claimed janitorial and administrative activities were not part of the cosmetology curriculum and did not amount to the experience she needed for her certification; therefore, she was entitled to compensation. The Seventh Circuit, using the Second Circuit’s Glatt primary beneficiary test and the totality of the circumstances test together (referenced here as the “economic reality test”), determined that Venitia Hollins was not an employee under the FLSA. The Seventh Circuit agreed with the district court when it determined that “[t]he economic reality of the relationship between Regency and its students is that the students were engaged in their statutorily-mandated curriculum to become a licensed cosmetologist while [the students] were working on the performance floor.”

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186 Id.
187 Id. at 993.
188 Id. at 992.
189 Id.
190 Id.
191 Id. at 993.
192 Id.
193 Id.
194 Hollins v. Regency Corp., 867 F.3d 830, 830 (7th Cir. 2015).
195 Hollins, 144 F. Supp. at 1007.
that “[this] require[d] us to [] examine[d] the ‘economic reality’ of the working relationship.”

B. Court Analysis

Previously, in Vanskike v. Peters, the Seventh Circuit “had instructed district courts to assess the [‘] economic reality[‘] of the relationship between the proffered employee and his alleged employer.” However, in Hollins the district court revisited the topic, and the Seventh Circuit affirmed its decisions. Thus, after the district court discussed Walling v. Portland Terminal, it determined that a flexible approach to the factors was consistent with the teachings of Walling, and it rejected the DOL’s Fact Sheet#71. Thus, the court found that a mixture of the Glatt factors, the “primary beneficiary” test and “the totality of the circumstances,” shed significant light on the economic reality of the relationship shared by Hollins and the school, Regency. The court also noted that no factor is determinative, and everything should be considered using the totality of the circumstances.

Applying the Glatt factors, the court first determined if Hollins had an expectation of compensation when she was on the performance floor. The court stated that Hollins conceded she understood there would be no compensation for her time spent on the floor or she would get guaranteed employment.

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196 Id. at 993.
198 Hollins, 144 F. Supp. at 994.
199 Hollins, 867 F.3d at 837.
201 Hollins, 144 F. Supp. at 997.
202 Id. at 998.
203 Id.
204 Id. at 993.
205 Id. at 998.
similarities between the clinical/internship experience and that of classwork.\textsuperscript{206} If the work done in the unpaid position provided a learning experience similar to that be given in a formal-educational environment, the students were likely not employees.\textsuperscript{207} Here, the court said Hollins was practicing her cosmetology techniques on the performance floor, which were things she also did in the classroom.\textsuperscript{208} The court concluded that that fact supported the notion that Hollins was not an employee.\textsuperscript{209}

Another factor the court looked at was whether Hollins received educational credit. The court noted that a student receiving academic credit is a strong indicator that the individual is not an employee under the FLSA.\textsuperscript{210} In this instance, Hollins was receiving academic credit by working the performance floor.\textsuperscript{211} Hollins was obtaining the 1,500 hours required of practical instruction before taking the license exam, and there is no basis to infer Regency would offer salon services to the public absent the requirement of the practical instruction requirement hours.\textsuperscript{212} The court also considered if the work was tied to the academic calendar,\textsuperscript{213} and if the length of the internship was limited to a period that provide[d] the student with beneficial learning.\textsuperscript{214} Here the court noted that although Hollins had to work on Saturdays, when school is not in session, it furthered her educational goals and provided a more fulfilling experience.\textsuperscript{215} The court declared the school had a legitimate reason for requiring students to attend work on Saturdays.\textsuperscript{216} Saturdays were the busiest days, and they provided

\begin{footnotes}
\item[206] Id. at 999.
\item[207] Id.
\item[208] Id.
\item[209] Id.
\item[210] Id. at 1000.
\item[211] Id.
\item[212] Id.
\item[213] The court did not explain Regency’s academic calendar.
\item[214] Hollins, 144 F.Supp.3d at 1001–02.
\item[215] Id. at 1001.
\item[216] Id.
\end{footnotes}
students with a greater supply of customers and a variety of experience.\textsuperscript{217} In addition, the time the students were required to work was limited to only the 1,500 hours required for the state certification exam.\textsuperscript{218}

The court also considered if the students’ work complemented, rather than displaced, the work of paid employees stating that “[i]f the students’ activities displace the trainer’s regular full-time employees, then the economic realities might indicate the existence of an employee-employer relationship.”\textsuperscript{219} Here, Hollins did not allege employees of Regency were displaced because Regency did not have paid cosmetologists.\textsuperscript{220} In fact, if Regency was not a school, there would be no Regency performance floor.\textsuperscript{221} Hollins also claimed that because Regency fees to the public were lower, the students were displacing licensed cosmetologists.\textsuperscript{222} However, the court noted that if it were to agree with Hollins, any clinical program in which students perform services might displace people operating in the same market.\textsuperscript{223} The court stated that Hollins argument is too “broad [a] swat,” and would effectively eliminate all student clinical services.\textsuperscript{224} Thus, looking at the evidence the court found that the cosmetology students were the primary beneficiaries of the program.\textsuperscript{225}

After the court considered all the factors, based on the totality of the circumstances, it found the economic reality of Hollins was that she was a student and was not an employee under the FLSA.\textsuperscript{226} Thus, Hollins was not entitled to compensation.\textsuperscript{227}

\begin{footnotesize}
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\footnote{217} Id.
\footnote{218} Id. at 1002.
\footnote{219} Id.
\footnote{220} Id.
\footnote{221} Id. at 1002–03.
\footnote{222} Id. at 993.
\footnote{223} Id. at 1004.
\footnote{224} Id.
\footnote{225} Id.
\footnote{226} See id. at 1007.
\footnote{227} Id.
\end{footnotes}
\end{footnotesize}
C. The Seventh Circuit’s Hesitation

The Seventh Circuit stated that “[t]he district court was rightly skeptical about the utility of this plethora of [f]actors.”228 And although the court ultimately found that Hollins was not an employee under the FLSA, the court declined to articulate a specific definitive test to determine whether an individual is an employee or an unpaid trainee.229 The Seventh Circuit could not make “a one-size-fits-all decision” about programs that include practical training or internships.230 Thus, the court explicitly stated that the decision in Hollins should not be read to mean that all internships/trainings involving practical skills are appropriate under the FLSA.231 Rather, evaluating such circumstances is on a case-by-case basis.232 Thus, even after Hollins, the Seventh Circuit has not established a clear-cut test to determine an employment relationship between unpaid interns/trainees and employers.233 Instead, the court has allowed flexibility depending on the relationship at issue, leaving unpaid interns and employers with many questions.234

228 Hollins v. Regency Corp., 867 F.3d 830, 835 (7th Cir. 2017).
229 Id. at 837.
230 Id.
231 Id.
232 Id.
234 Id.
IV. THE UNPAID INTERNS’ EXPOSURE TO DANGER DUE TO LACK OF TITLE VII PROTECTION

A. Brief Title VII Background

Usually, if an intern is found not to be an employee under the FLSA, they also are not a qualified employee under Title VII.235 Congress created Title VII of the Civil Rights Act of 1964 for two main purposes: (1) to eliminate discrimination in the workplace, which has been fostered in the U.S for many years; and (2) to compensate the victims of workplace discrimination.236 With Title VII Congress sought to create equal employment opportunities for individuals, regardless of race, sex, color, religion, or national origin (“protected categories”).237 Title VII made it illegal for an employer to make hiring, firing, compensation, or conditions of employment decisions based on these protected categories.238

In addition, Title VII is not limited to discrimination that leads to tangible or economic impact.239 The Supreme Court determined that Title VII “strikes at the entire spectrum of disparate treatment of men and women . . . [including when they must] work in a discriminatorily hostile or abusive environment.”240 Thus, the Court extended Title VII and made the creation and perpetuation of discrimination in a work environment an actionable harm.241 The Supreme Court intended to decrease workplaces that are “so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.”242 Thus, Title VII makes an employer

238 See id.
242 Id.
directly liable for an employee’s unlawful discriminatory harassment and vicariously liable when the harasser is the victim’s supervisor. 243

Nevertheless, although Title VII is meant to protect employees from work environments that are hostile or discriminatory, it leaves unpaid interns without employment related federal protection. 244 Congress circularly defined “employee” under Title VII to mean, “an individual employed by an employer.” 245 This is a similar definition used to define “employee” under the FLSA. 246 Thus, if unpaid interns are found not to be employees under the FLSA it is likely that the courts will also find that students were not employees under Title VII. 247 As a result, unpaid interns are not shielded by Title VII’s protection of discrimination and hostile work environment based on sex, race, color, national origin, and religion. 248 This lack of protection has led to interns having to face challenges in the workplace, like sexual harassment, without any way to seek legal relief, such as that faced by the intern the case discussed below. 249


A lack of Title VII protection for interns was evident in the federal New York case Wang v. Phoenix Satellite Television, US, Inc. 250 Lihuan Wang was a broadcast journalism master’s degree student for Syracuse University. 251 Wang obtained an unpaid internship at

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244 See id.
246 29 U.S.C § 203(g).
247 See Wang, 976 F. Supp. 2d at 529 (using a similar test as FLSA cases to determine if she was an employee).
248 See id.
249 See id.
250 See id.
251 Id.
Phoenix Media Group, a Hong Kong-based media conglomerate that produces television news geared towards Chinese-language audiences.252

During her internship, Wang began to receive unwanted sexual attention from a supervisor, Mr. Zhengzhu Liu.253 The attention included making sexual comments, trying to forcefully kiss her, and asking her to go to his hotel room.254 Previous to this incident, Wang and Liu talked about a permanent position and the company’s help to obtain a work visa.255 However, after the hotel incident, Liu told Wang that the company would not be able to sponsor her.256 Thus, Wang sought protection under the New York States Human Rights Law257 and the New York City Human Rights law258 alleging that she was unlawfully subjected to a hostile work environment due to Mr. Liu's sexual advances. She further alleged that Phoenix discriminated against her based-on gender because Mr. Liu linked future employment opportunities based on her agreement to his sexual demands and withdrew the opportunity once Wang rejected Mr. Liu’s advancements.259

Ultimately, the district court for the Southern District of New York dismissed Wangs’ case, claiming that Wang was an unpaid intern and not an employee under employment discrimination statutes.260 Thus, Wang was not entitled to

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252 Id.
253 Id. at 530.
254 Id.
255 Id.
256 Id.
257 N.Y. Exec. Law §290 (McKinney 2013).
260 Although Wang only sued under state law claims the district court compared the language of Title VII to determine if an unpaid intern could be offered protection under the statutes. See Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527, 537 (S.D.N.Y. 2013) (the court concluded that Title VII did not
protection under Title VII or any of New York’s employment protecting statutes.261

V. A Universal Clear Standard

To create a more effective test and protection for interns, the courts should narrow the number of tests they currently apply and choose a single clear standard.262 A clear standard would provide employers a clear legal standard when creating their internship program. Also, interns would know their rights and make decisions with a better understanding of what is required of them and the implications of being an intern. Thus, the courts should only look at two factors: (1) are all the tasks assigned to the intern associated in furtherance of their educational or career goals and is the intern aware of how it will further their goals; and (2) does the intern replace any of employer’s employees.

The first factor centers on whether the students are primarily benefiting from the relationship. This requirement was clearly established by Walling who stated that trainees were not employees because trainees are working to serve their own interest.263 Furthermore, while the courts look at the “totality of the circumstances” to determine who benefits, the real focus should be on protect interns and neither did New York’s equivalent statutes, leaving Wang without a cause of action).

whether the tasks the intern are doing give them the skills that would make him successful in their future career. Thus, although in Hollins, the court interpreted the benefit analysis correctly it erred in deciding that it should be a flexible approach. The court focused on the development of the intern’s skills based on their career of choice. However, it did not look at if all the tasks were meant to meet their educational and career goals or if the students were aware what skills each task was helping them develop. If Hollins had been labeled as a trainee, but only observed and took care of menial tasks, like cleaning, it would have been reasonable to consider her an employee because she would not have been practicing skills she expected would make her successful cosmetologist. In addition, the court’s emphasis in Hollins was on the fact that most of the student’s time was spent providing services to clients and not conducting menial tasks. If cosmetology schools treated students as in the example I referenced above, the students would not be providing any cosmetology services thus weakening the court’s analysis that students are trainees in cosmetology schools.

The second factor to consider is if the employer’s intention of having an internship program is to displace the employers’ regular full-time employees, whom they would be required by the FLSA to provide greater benefits. Walling noted that trainees were not supposed to “expedite the company business.” This can be determined by considering the amount of help, supervision, and internship that the employer receives. Thus, the Seventh Circuit ruled incorrectly that the students were not displacing employees. In Hollins, the trainees were doing what a licensed cosmetologist would do and where taking away the business and employment from them. The school should have hired licensed cosmetologist and paired them with a trainee, a

265 See id.
266 See id.
267 See Walling, 330 U.S. at 152.
268 See Hollins, 144 F.Supp.3d at 991.
269 See id.
type of mentorship program. This would ensure the trainee was under constant supervision and receiving feedback on their performance. In addition, they would not have displaced employment opportunities with Regency from licensed cosmetologist. Regency would not be making money from the intern’s work. Rather, the money would come from the licensed cosmetologist supervision and training.

CONCLUSION

In recent years, there has been a bubble of litigation dealing with unpaid interns’ relationship with employers and the implications of not being labeled as “employees.” These issues include wage and hour, discrimination, and hostile work environments. Thus, courts have had to juggle with different tests to determine what individuals are employees and what individuals are unpaid interns. However, there is not any universal test or clear guidance as to what employers should do and what unpaid interns should expect. Legislators have started to see these issues and have tried to address them.\textsuperscript{270} Nevertheless, the best solution would be a clear two-question universal test focused on who primary benefits from the relationship. Therefore, when they ask: “Mirror, mirror on the wall are they interns and not employees at all?” The mirror can reflect clear guidance to the expectations of their relationship.\textsuperscript{271}


\textsuperscript{271} Note that the test would be evaluating an interns’ employment relationship with the employer not evaluating the employers’ internship program as a whole.