A *Black Swan* for Fox Entertainment Group: How to Avoid FLSA Violations When Dealing with Interns

Darrell M. Crosgrove
University of Toledo

Sonny S. Ariss
University of Toledo

Donald K. Wedding
University of Toledo

Kimberly Nigem
University of Toledo

Fred Post
University of Toledo

Unpaid internships have long been a part of the business world. Internships provide the intern with training and experience, while the employer may evaluate potential employees in a non-binding environment. Federal and State laws place strict requirements upon employers[1] *to assure that interns are not in fact employees entitled to be paid under the Fair Labor Standards Act. The recent* Black Swan *case involving Fox Searchlight Pictures, Inc., highlights these requirements.*

INTRODUCTION

The Fair Labor Standards Act (FLSA) was passed into law when President Franklin D. Roosevelt signed it on Saturday, June 25, 1938 (Grossman, 1978). The law, 29 USC Chapter 8, set the minimum wage an employee could be paid at $0.25 an hour, with a standard work week of 44 hours. The Department of Labor in supervising FLSA does permit unpaid internships, when the primary purpose of the internship is educational, and not for the purpose of enriching the company providing the internship with cheap/free labor (Wage and Hour Division, 2010). In 1947, the US Supreme Court ruled in Walling v. Portland Terminal Company, 330 U.S. 148 (1947) that the Defendant, railroad Portland Terminal Company, had an internship program fit into the exception to the FLSA because it consumed company resources and provided the railroad no enrichment, but rather enriched the interns with a skill they could then use to seek employment.

Despite very clear language of FLSA, and a steady series of FLSA violation lawsuits over the 66 years since Walling, companies still violate the law and use "interns" to do menial labor to enrich the

company. One of the most recent major cases was decided against the production company that produced the Academy Award winning film *Black Swan* in Glatt v. Fox Searchlight Pictures Inc., S.D.N.Y., No. 11-06784. In that case, once the parties agreed upon the facts to be litigated, the trial court found no need for litigation, but rather based upon the company's own admissions in the pleadings, deemed the "interns" were "employees", and certified a class action for all other such abused employees.

Fox Searchlight is not the only major company accused violating the FLSA by obtaining free employees under the guise of providing "internships". Indeed, as of this writing, the ProPublica website is tracking 18 similar lawsuits against such giants as NBC Universal, Inc., Warner Music Group, Inc., Atlantic Music Group, Inc., Conde Nast Publications, Inc., News Corp and Fox Entertainment Group, Elite Model Management, Inc., Hamilton College, Charles Rose and Charles Rose, Inc., and the Hearst Corporation (Suen, 2013). Some of these lawsuits involve hundreds of unpaid interns, and at least one, Warner/Atlantic, proposes a class of 1,000 interns.

The Searchlight/*Black Swan* case has sent shockwaves through the media. Some of the titles for articles covering the decision include, Forbes--Is The Unpaid Internship Dead? (Adams, 2013), Slate--The End of the Unpaid Internship (Seltzer, 2013), HRE Online--Intern or Trainee? Pay or No Pay? Ruling Raises Stakes (Frasch, 2013), The Atlantic Wire--The 'Black Swan' Intern Ruling Could Change Unpaid Internships Forever (Greenfield 2013).

THE *BLACK SWAN* CASE

The Glatt v. Fox Searchlight Pictures, Inc. litigation involved 4 lead plaintiffs (Glatt, Footman, Gratts, and Antalik) suing Fox Searchlight Pictures, Inc. ("Searchlight"), and Searchlight's parent company of Fox Entertainment Group ("FEG"), for their intern work on the motion picture *Black Swan*[2], and requesting class action certification for the other unpaid interns who worked for those firms[3]. FEG was the parent, with Searchlight being one of 800 subsidiaries FEG controls. Searchlight then entered into an individualized production agreement for the film, which is its standard business model for the films it produces. FEG gave Searchlight hiring and firing authority, but still retained final control over such decisions via two FEG employees that oversaw the FEG internship program.

The work performed by the interns involved long hours, and was often menial in nature. The duties covered such acts as making photocopies, emptying trash, taking lunch orders, performing errands, and other such tasks. It was not part of a college or other academic environment's curriculum, and was not set up with classes, lectures, or lesson plans. It was unpaid labor performed by entry level employees as a means of getting their "foot in the door" so they would be able to place it as a work experience on their resume to hopefully obtain future paid employment[4].

The Legal Standards

In his Memorandum and Order grating summary judgment in Glatt, Judge Pauley III spells out six criteria which are to be examined to determine if a person is a legitimate intern, or is in fact an employee. These criteria are the exact same ones found in the DOL Fact Sheet #71 and mirror what was decided in Walling. Indeed, the *Black* Swan Court stated:

> "…the DOL factors have support in Walling. Because they were promulgated by the agency charged with administering the FLSA and are a reasonable application of it, they are entitled to deference." Page 22

In giving guidance as to whether one qualifies as an intern, the DOL Fact Sheet #71 states:

The following six criteria must be applied when making this determination:

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 operations may actually be impeded;
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." (Memorandum and Order, p.22-23)

The court addressed each of these individually in separate sections of its decision.

1. Training Similar to an Educational Environment

> "While classroom training is not a prerequisite, internships must provide something beyond on-the-job training that employees receive. "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." Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1028 (l0th Cir. 1993)" (Memorandum and Order, p.23)

The Court pointed out that one intern's only special training was minor material such as how to operate the company's photocopier or place watermarks on scripts, and that the other intern didn't seem to learn much of anything. However, the amount of material learned is not important, as some students simply do not absorb much in traditional settings, but rather that there be an actual attempt at training.

2. Whether the Internship Experience is for the Benefit of the Intern

Of this, the court noted, that simply having a listing for one's resume is not enough, as that is incidental to the work at hand. Further, this was a byproduct of their work, and not the primary purpose. The Company attorneys argued that the fact the interns received resume material made them the primary beneficiaries of the relationship, to which the Court merely responded that in weighing out the benefits, the companies received the primary benefits of the free labor over the secondary benefit of the resume material for the Plaintiffs.

3. Whether the Plaintiffs Displaced Regular Employees

The record indicated the interns: obtained documents for personnel files, picked up paychecks for coworkers, tracked and reconciled purchase orders and invoices, traveled to the set to get managers' signatures, drafting cover letters, organizing filing cabinets, making photocopies, and running errands, assembling office furniture, arranging travel plans, taking out trash, taking lunch orders, answering phones, watermarking scripts, and making deliveries. These were all duties which needed to be done, and one supervisor even stated:

> "[I]f Mr. Glatt had not performed this work, another member of my staff would have been required to work longer hours to perform it, or we would have needed a paid production assistant or another intern to do it." (Memorandum and Order, p.24)

The court also took note of the fact that when one intern went from 5 days of work per week to 3, *Black Swan* hired another part-time intern to pick up the slack.

4. Whether Searchlight Obtained an Immediate Advantage From Plaintiffs' Work

At this point in its decision, the Court noted that Searchlight did not dispute that it received benefit from the Plaintiff's work. The Court also notes that Searchlight never argued that training the interns halted or slowed down production, and despite the fact the work was entry level and menial, it "was essential" (Memorandum and Order, p.25). The Court then discussed two competing principles of labor

law—namely that it is possible to pay trainees less than minimum wage, but it is the hours of work, and not output, that matters for calculating pay:

> "The fact they were beginners is irrelevant. The FLSA recognizes this by authorizing the Secretary of Labor to issue certificates allowing "learners" and "apprentices" to be paid less than minimum wage. See 29 U.S.C. § 214(a). "An employee is entitled to compensation for the hours he or she actually worked, whether or not someone else could have performed the duties better or in less time." Donovan v. New Floridian Hotel. Inc., 676 F.2d 468,471 n.3 (11th Cir. 1982)." (Memorandum and Order, p.25)

There is nothing in the decision to indicate Searchlight obtained the required certificates from the Secretary of Labor to permit a sub-standard wage be paid. Without said certificate, the only question that remained under this section was how many hours were spent to the employer's benefit. Trainees or not, sub-standard work or not, the amount of hours spent working determines the amount of benefit—for compensation purposes—that the employer received.

5. Whether Plaintiffs Were Entitled to a Job at the End of Their Internships

The Court spent one sentence on this issue before moving on:

> "There is no evidence Glatt or Footman were entitled to jobs at the end of their internships or thought they would be." (Memorandum and Order, p.25)

The Court does not state if this is in favor of the plaintiffs, or Searchlight. To find further guidance on this issue, the Walling case is helpful. In that case, the "internship" was short—seven to eight days. No employees were displaced, and the Supreme Court noted in its decision that if anything, the program siphoned off company assets to run the training program. It may have produced long term results of permitting the railroad to better select employees, but in the short term the company received no benefit. Further, the trainees who completed the program with good marks were then placed on a roster for employment when needed, and were also paid $4.00 a day for their time spent in the training period, which was equal to 10 hours of work at the then required wage of $0.40 an hour (History of Changes, 1988).

Thus, the fact that the interns working on *Black Swan* had no expectation of employment indicates that this probably hurt the company's case. Interns come on board for training and to possibly become employed after being interns—not to be used as free employees and then not receive work upon successfully completing the internship program.

6. Whether Searchlight and the Plaintiffs Understood They Were Not Entitled to Wages

All parties understood and agreed to this, with their contract excluding wages or any expectation of wages. However, in addressing this, the Court stated:

> "But this factor adds little, because the FLSA does not allow employees to waive their entitlement to wages. "[T]he purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees wi1ling to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act." Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 299, 301 (1985)." (Memorandum and Order, p.25)

The Court then went on to discuss prior decisions that also state a secondary purpose of disallowing wage waivers via contract is to protect the overall competitive marketplace. If one company could gain a competitive advantage by using its power to force employees to take lower wages, other companies would

be pressured into following suit. The FLSA is either forced upon all, or it ceases to be relevant, as the market reverts to a scenario where employers pay the minimum they can achieve.

If the parties cannot wave wages, then Criteria #6 cannot be used to validate an otherwise illegal agreement to waive wages. Therefore, if Criteria #6 is to have any practical use, the only logical use of it is to take someone who is otherwise a legitimate intern and qualify them as an employee. In short, this test can only qualify an intern as an employee if an otherwise legitimate intern has an agreement to receive compensation—thus making them legally an employee despite all other criteria indicating they are genuine interns. Neither party can opt out of paying/receiving the statutory minimum wage, but parties can opt into such[5].

The Decision, Fallout, and Unwarranted Surprise

The Judge ruled, "considering the totality of the circumstances," that:

1. Glatt and Footman had demonstrated sufficient evidence to grant them a favorable Summary Judgment ruling without needing a trial, because no elements required to make a decision were in dispute.
2. Gratt's claim was denied as it had been filed after the Statute of Limitations had expired.
3. Antalik's request for class action certification for all similarly situated unpaid interns was granted. (At this point, Antalik had not requested Summary Judgment, but only class action certification.)

At the time of this writing, the case is still pending. How many interns will be owed exactly how much in back wages, and possible punitive damages, remains unknown. What is known is that the *Black Swan* case has caused many companies to be aware that their intern programs may need to be revamped.

However, what is most surprising about the *Black Swan* case is that it surprised anyone. The legal standard has been spelled out in the FLSA Statute since 1938. The Criteria found in the DOL Fact Sheet #71 have existed in DOL opinions since at least 1967 (Memorandum and Order, p.30-31). It is true that fact Sheet #71 was a new document in April 2010 (Opinion and Order p.30), but it merely summarized what had been the law of the land since at least the 1947 Walling decision. The record in this case clearly indicated that FEG was aware of the potential liability prior to the publication of Fact Sheet #71. As the court noted:

> "An internal memo in August 2008 states that, "[s]tarting with the Fall 2010 internship program ... Fox will only provide paid internships unless a manager can comply with the six criteria provided by the DOL. Ultimately, FEG eliminated unpaid internships altogether because of "the new regulation[6] on [unpaid] interns." (Memorandum and Order, p.31)

FEG was aware it was probably violating the FLSA in August of 2008, and decided it would take the steps to be in compliance by Fall of 2010.

Black Swan began production on November 2009, a year after the memo noting FEG was violating the FLSA, and a year before FEG planned to be in compliance with the FLSA.

THE FUTURE OF UNPAID INTERNSHIPS

The *Black Swan* litigation does not mark the death of unpaid internships. Rather, it marks a wake-up call to 'internship programs' which have been little more than 'slave labor programs' that have been in violation of the FLSA since 1938. True unpaid internships—for educational or vocational purposes, are still very much alive and well. A company wishing to take advantage of the opportunities afforded to it by offering internships should follow these guidelines:

1. **Try to recruit interns from a college, university, or trade school.** Great deference is made to programs which are approved by a degree-granting institution, especially when the intern is receiving college credit. Often educational institutions will recommend that students perform an

internship, or will at least afford them an independent study to perform an internship. While this alone will not allow misuse of interns as unpaid employees, it will help to show that the internship was for a bona fide educational purpose.

2. **Provide education and training.** The more the focus of the internship program is on creating specialized skills, and less on "productivity", the less likely a company is to run afoul of being deemed "an employer". Requiring "homework" and "lesson plans" which do not increase the company bottom line help demonstrate that this is a genuine internship.
3. **The interns should augment, and not replace, paid staff.** Having an intern make a photocopy or two is probably OK, but making them stand at the copier and make copies for 45 minutes is not a wise thing to do. However, having an intern learn the ropes of a desktop publishing program while under the loose supervision of an employee in the graphics arts department should be permissible. Again, the "totality of the circumstances" is what the courts look at, and the more something aligns with paid staff providing an education, the more likely it is to be a genuine internship.
4. **Be looking for possible employees.** An internship program is expected to possibly be a training and/or proving ground for possible future employees. The law recognizes that companies have a vested interest in both discovering and cultivating a skilled workforce, and that society benefits when internships provide both of these.
5. **The Internship should not run longer than is needed for training and evaluation.** While not part of DOL Fact Sheet #71, the Supreme Court in Walling did make note of the fact the railroad apprentice program was short, being only 7-8 days. That does not mean that an internship must be short, but that it should not be longer than required for training purposes. Most college semesters run for roughly 16 weeks, and if an internship program can fill 16 weeks, that is how long it should run. Conversely, if the internship program is really an 8 week program that cannot be made to run for 16 without stretching too far, it should only be an 8 week program.
6. **Provide an honorarium or stipend to cover legitimate expenses.** There is nothing wrong with offering some flat rate amount to cover the intern's expenses of transportation, parking, etc., etc… And while not specifically mentioned in the Black Sawn case, it reads that FEG/Searchlight treated the interns like unappreciated slaves. Providing an honorarium in a legitimate internship program will not merely garner good will, it will also attract a higher caliber of interns competing for the position(s), and should there be legal questions down the road, could help a judge or jury decide that the company was taking steps to not abuse its position in running the internship program.

CONCLUSION

The *Black Swan* case was hardly the result of changes in unpaid internship laws. Rather, it represents a very public wake-up call for a change which occurred with the introduction of the Fair Labor Standards Act and as interpreted by the Walling decision. FEG/Searchlight was even aware of the fact it was violating the law and opted to take two years to stop violating it. Companies that wish to utilize intern programs will look at the decision in the *Black Sawn* case, in the Walling decision, and in the DOL Fact Sheet #71 to craft programs which both comply with the law, and provide valuable training to legitimate interns.

ENDNOTES

1. Unless otherwise noted, all facts surrounding this litigation are pulled directly from the Memorandum and Order issued by Federal District Court Judge Pauley III on June 11, 2013.
2. There were several legal issues and various Federal and state laws being litigated in this case, with the plaintiffs winning some, and losing some. For the purposes of this paper, the only issues and laws that will

be focused on involve the “intern v. employee” test as spelled out by Federal District Court Judge Pauley III.

3. The record indicates that Searchlight liked the work Glatt did on *Black Swan* enough to offer him a position on the *Black Swan* post-production work. However, this offer was for him to work on that as an unpaid intern again, which he accepted.
4. A concept which in truth, when examined, makes one wonder why it needs mentioning at all.
5. The phrase “new regulation” here is Judge Pauley III quoting a FEG memo. In truth, there has been nothing “new” in terms of the Six Criteria listed in Fact Sheet #71 since the 1947 Walling case.

REFERENCES

Adams, S. (2013). Is The Unpaid Internship Dead? *Forbes*, June 14, 2013 @ 11:47AM, http://www.forbes.com/sites/susanadams/2013/06/14/is-the-unpaid-internship-dead/

Frasch, K. (2013). Intern or Trainee? Pay or No Pay? Ruling Raises Stakes. *Human Resource Executive Online*, July 15, 2013 http://blog.hreonline.com/2013/07/15/intern-or-trainee-pay-or-no-pay-ruling-raises-stakes/

Greenfield, R. (2013), The 'Black Swan' Intern Ruling Could Change Unpaid Internships Forever. *The Atlantic Wire* Jun 12, 2013 http://www.theatlanticwire.com/national/2013/06/black-swan-intern-ruling/66168/

Grossman, J. (1978). Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage. http://www.dol.gov/oasam/programs/history/flsa1938.htm, originally published in *Monthly Labor Review* of June 1978.

History of Changes to the Minimum Wage Law, Adapted from Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act, 1988 Report to the Congress under Section 4(d)(1) of the FLSA. http://www.dol.gov/whd/minwage/coverage.htm

Seltzer, C. (2013). The End of the Unpaid Internship, *Slate*. Tuesday, June 18, 2013, at 10:54 AM, http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/black_swan_interns_case_internships_should_be_paid.html

Suen, S. (2013) Tracking Internship Lawsuits. *ProPublica*, Updated July 3, 2013 (first published June 25, 2013), http://projects.propublica.org/graphics/intern-suits on July 22, 2103.

Wage and Hour Division (WHD) (April 2010) Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act, http://www.dol.gov/whd/regs/compliance/whdfs71.htm

STATUTES

Fair Labor Standards Act (FLSA) 29 USC Chapter 8
Employment under special certificates 29 U.S.C. § 214(a)

CASES

Donovan v. New Floridian Hotel. Inc., 676 F.2d 468,471 n.3 (11th Cir. 1982)
Glatt v. Fox Searchlight Pictures Inc., S.D.N.Y., No. 11-06784, (Memorandum and Order dated: 6/11/13)
Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1028 (l0th Cir. 1993)
Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 299, 301 (1985)
Walling v. Portland Terminal Company, 330 U.S. 148 (1947)