LOS ANGELES
Daily Journal
www.dailyjournal.com

VOL. 127 NO. 61 MONDAY, MARCH 31, 2014

Interns at heightened risk of harassment

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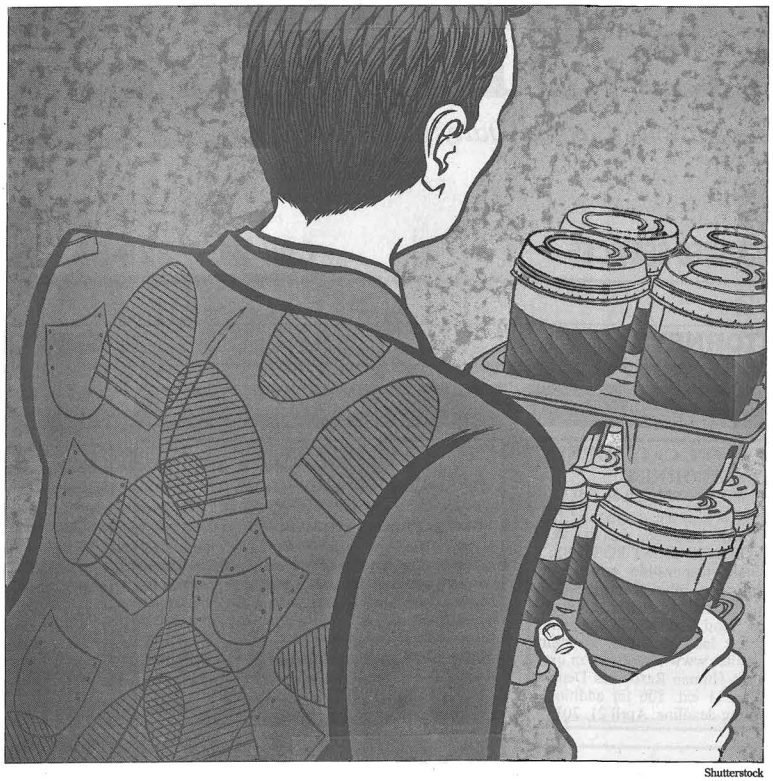

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Assume that an individual shows up every day to work, performs side-by-side with company employees, takes direction from his or her supervisor, receives performance evaluations, and even makes presentations to his or her managers. Assume further that the individual is a young person, has relatively little job experience, and desperately wants to do whatever he or she can to impress his or her supervisors. These individuals — with little work experience, no leverage in the employee-employer relationship, and an unabating desire to please "the boss" — are likely at the greatest risk of being taken advantage of by their employer. It seems axiomatic that these individuals should be afforded protection under the law.

Surprisingly, numerous courts have ruled that Title VII's prohibitions on sexual harassment do not apply to unpaid interns. See, e.g., *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997); *Wang v. Phoenix Satellite Television US Inc.*, 2013 WL 5502803 (S.D.N.Y. Oct. 3, 2013) (discussing protections against sexual harassment in the context of New York State and New York City Human Rights Laws). To reach this counter-intuitive conclusion, courts generally find that they need to look no further than the definition of "employee."

Must "Employees" Be Compensated?

In *O'Conner*, for example, a female student worked as an unpaid intern at Rockland Psychiatric Center in order to complete the work-study component of her undergraduate degree. Soon after beginning her internship, one of her supervisors began making inappropriate sexual remarks at O'Conner's expense. O'Conner wound up leaving Rockland to complete her internship elsewhere. Shortly thereafter, she filed a complaint of sexual harassment in violation of Title VII, 42 U.S.C. Sections 2000e et seq., against Rockland.

The district court granted Rockland's motion for summary judgment finding that Title VII's protections only applied to "employees," and that unpaid interns do not constitute "employees" under the common-law. O'Conner appealed and the 2nd U.S. Circuit Court of Appeals affirmed. The Court of Appeals began by noting the futility of relying on Title VII's definition of an "employee": "The definition of the term 'employee' provided in Title VII is circular: the Act states only that an 'employee' is an 'individual employed by an employer.'"

The Court of Appeals noted that disputes about statutory protections for "employees" usually arise when determining whether an independent contractor may claim the protections of Title VII. It recited the traditional factors in determining whether an employee relationship exists: right to control, location of work, duration of the relationship, benefits afforded, etc. (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)). The Court of Appeals concluded, however, that it need not even analyze these factors. Rather, where, as in the case of an unpaid intern, "no financial benefit is obtained by the purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist because ... *'compensation ... is an essential condition to the existence of an employer-employee relationship.*" (emphasis added). Because O'Conner received no "direct or indirect economic remuneration" from Rockland, the court found that she was not an employee within the meaning of Title VII.

The 9th Circuit

There is some indication that such an exacting standard is not the rule in California and in the 9th U.S. Circuit Court of Appeals. Indeed, as the 9th Circuit stated, "The lack of remuneration [is] not dispositive," and "the fact that a person is not paid a salary does not necessarily foreclose the possibility that the person is an "employee" for purposes of federal statutes, including Title VII." *Waisgerber v. City of Los Angeles*, 406 F. App'x 150, 152 (9th Cir. 2010).

If, indeed, salary is not dispositive of the question of whether an individual is an "employee" for the purposes of Title VII (at least in the 9th Circuit), the question then becomes under what circumstances an unpaid intern may avail himself of Title VII protections. Without offering much in the way of guidance, the Court of Appeals provided that the intern must identify "*some* form of compensation, although it can be

'substantial benefits' rather than a paycheck," to be eligible for protection under Title VII.

What's a Substantial Benefit?

The nature of this "substantial benefit" is not entirely clear, but it seems as though courts require the intern to gain something more than the general experience of working for the employer. A court may find a "substantial benefit" (and, therefore, coverage under Title VII) in cases in which the employer provides insurance, tax exemptions, medical benefits, or scholarships. See *Pietras v. Bd. of Fire Comm'rs of the Farmingville Fire Dist.*, 180 F.3d 468, 471-73 (2d Cir.1999); *Haavistola v. Cmty. Fire Co. of Rising Sun Inc.*, 6 F.3d 211, 221-22 (4th Cir.1993).

A more interesting question — and one more relevant to interns — is the question of whether course credit will satisfy the 9th Circuit's "substantial benefit" required for coverage. It will be interesting to see whether this benefit — one that is routinely offered to unpaid interns — will satisfy the "substantial benefit" requirement in the 9th Circuit.

The FLSA

Most "employers" of unpaid interns are aware of the dangers of putting people to work without paying them. From class actions to Fair Labor Standards Act (FLSA) violations, employers walk a tight line when dealing with unpaid interns. Ironically, it is the very fact that these interns are unpaid that may prevent them from being protected under Title VII. Put another way, should an intern be unpaid, he may have a cause of action under the FLSA but lack protections Title VII; however, the moment that intern receives even the most de minimis compensation (that meets federal minimum wage laws), employers no longer need to be concerned with the FLSA but must contend with exposure to liability under Title VII.

The problem is that unpaid internships simply do not "fit" well under our current conception of employment. As the job markets in business, film, and even the law continue to tighten, the importance and ubiquity of such unpaid internships will continue to increase. The law should protect those that are the most vulnerable. Those interns who go to work every day with no experience, no leverage, and no significant remuneration can make a strong case for being just that.

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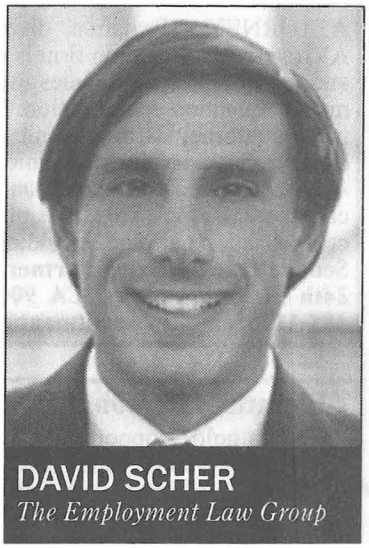

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