No. 09-6128

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HILDA L. SOLIS,
Secretary of Labor,

Plaintiff-Appellant,

v.

LAURELBROOK SANITARIUM AND
SCHOOL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Tennessee

SECRETARY OF LABOR'S PETITION FOR REHEARING *EN BANC*

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Pursuant to Federal Rule of Appellate Procedure 35 and Sixth Circuit Rule 35, the Secretary of Labor ("Secretary") respectfully requests rehearing *en banc* of the decision issued in this case. On April 28, 2011, a panel of this Court (District Judge Murphy, Kennedy, Martin) issued an opinion in which it refused to accord Skidmore deference to the Department of Labor's ("Department") longstanding six-part test for assessing whether an individual is a trainee or an employee under the Fair Labor Standards Act ("FLSA" or "Act"), on the grounds that the test is not helpful in determining employee status in a training and educational setting, and is inconsistent with Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).[1] Rather, the

[1] After Portland Terminal, the Department's Wage and Hour Division ("WHD") identified six criteria to determine whether a trainee is an "employee" for purposes of the FLSA. See

panel employed a primary benefit test to distinguish between trainees and employees in learning or training environments. After purporting to balance the relative benefits of the work of the students of the Laurelbrook Sanitarium and School ("Laurelbrook") to the students and the institution, and utilizing the district court's findings of fact as well as facts that it found on its own, the panel concluded that the students' work inures to the benefit of the students and not the Sanitarium, and that the students are therefore trainees, not employees protected by the child labor provisions of the FLSA.

The panel's decision is incorrect and warrants *en banc* review because the case presents several questions of "exceptional importance," including the continued viability of the Secretary's generally-applicable training test under the FLSA, and the application of the FLSA's child labor provisions to vulnerable, young trainees and student-trainees. See Fed. R. App. P. 35(a)(2); 6th Cir. R. 35(c). Similarly, *en banc* review of the decision is warranted because it creates an inter-circuit split with the Fifth Circuit's opinion in Atkins v. General Motors Corp.,

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Employment Standards Admin., U.S. Dep't of Labor, *Employment Relationship Under the Fair Labor Standards Act*, WH Pub. 1297 (Rev. May 1980); Field Operations Handbook ("FOH") ¶10b11(b). These factors are:

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

WH Pub. 1297 at 4-5.

701 F.2d 1124, 1128 (5th Cir. 1983), and thereby presents a question of exceptional importance. See Fed. R. App. P. 35(b)(1)(B). *En banc* review is also warranted because the decision presents an intra-circuit conflict with Marshall v. Baptist Hospital, Inc., 668 F.2d 234 (6th Cir. 1981), rev'g on other grounds 473 F. Supp. 465 (M.D. Tenn. 1979), which considers three of the Secretary's six criteria to determine whether X-ray technicians participating in a hospital's training program are employees under the FLSA. See Fed. R. App. P. 35(a)(1) and (b)(1)(A); 6th Cir. R. 35(c). Therefore, there are compelling reasons for this Court to rehear the case *en banc*.

STATEMENT OF THE ISSUE

Whether a panel of this Court erred by adopting a primary benefit test instead of the Department's six-part test for determining whether an individual is a trainee or an employee under the FLSA, and concluding that the students enrolled in Laurelbrook's vocational training program received the primary benefit of their work, and thus are trainees outside the protections of the FLSA's child labor provisions.

ARGUMENT

1. This case presents two issues of exceptional public importance: (1) the need for consistent application of the Secretary's objective, six-part test to determine whether individuals are trainees or employees for purposes of the FLSA, which is utilized in many contexts outside of vocational schools; and (2) the application of the FLSA's child labor provisions to youth working in a training or vocational education program. See Fed. R. App. 35(a)(2); 6th Cir. R. 35(c).

a. The determination whether a trainee or student-learner is an employee under the FLSA arises under many different factual scenarios, such as individuals participating in an employer-

sponsored job training program, students enrolled at a vocational school with on-site job training, and interns. A comprehensive test that fully takes into account all relevant indicia of an employment relationship therefore is necessary. The Department's six-part test was informed by and closely tracks the Supreme Court's 1947 decision in Portland Terminal that considered each of those factors, thus assessing the "totality of the circumstances." See, e.g., Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026-27 (10th Cir. 1993) ("[T]he six factors are meant as an assessment of the totality of the circumstances."); Archie v. Grand Cent. P'ship, Inc., 997 F. Supp. 504, 532-33 (S.D.N.Y. 1998) (Sotomayor, J.) (Department test considers the totality of the circumstances). In Portland Terminal, the Supreme Court discussed the type of the training offered by the railroad to individuals who wished to become railroad brakemen and noted that similar training might be obtained through a vocational school; that trainees did not displace any of the regular employees; that the trainees' work did not benefit the railroad's business because, in addition to their normal duties, the regular employees had to closely supervise the trainees; that trainees did not receive compensation during their training period other than a retroactive $4.00 per day allowance, contingent upon successful completion of the training; that the trainees were not guaranteed a job at the completion of the training; and, based on the "unchallenged findings," that the railroads did not receive an advantage from the trainees' work. 330 U.S. at 149-53.[2] Thus, the Department's test is a faithful application of the Supreme Court's decision in Portland Terminal. See Archie, 997 F. Supp. at 532-33 (Department test requires findings that are nearly identical to those considered in Portland Terminal);[3] see also Harris v. Vector

[2] Given all these factors, the Supreme Court concluded that the trainees were not employees within the meaning of the FLSA. Portland Terminal, 330 U.S. at 153.

[3] Noting that "[t]he Wage and Hour Test is . . . a reasonable application of the FLSA and *Portland Terminal* and [is] entitled to deference by this Court," the district court in Archie

Marketing Corp., 716 F. Supp. 2d 835, 840-43 (N.D. Cal. 2010) (noting that "the DOL test in some form applies" and referring to "the Portland Terminal/DOL analysis of trainees," court applied the six-factor test).

The Department's longstanding position is that all six criteria must apply before it will consider that a trainee is not an employee under the FLSA. See FOH ¶10b11(b); U.S. Dep't of Labor Opinion Letter ("Op. Ltr.") FLSA2006-12, 2006 WL 1094598 (Apr. 6, 2006); Op. Ltr. FLSA2002-8, 2002 WL 32406598 (Sept. 5, 2002); Op. Ltr., 1998 WL 1147717 (Aug. 11, 1998); Op. Ltr., 1986 WL 1171130 (Mar. 27, 1986); Op. Ltr., 1975 WL 40999 (Oct. 7, 1975). WHD also has stated that whether all six criteria are satisfied in a particular case will depend "upon all the facts and circumstances surrounding the activities of the trainee on the premises of the establishment at which the training is received." FOH ¶10b11(b); Op. Ltr., 1975 WL 40999 (Oct. 7, 1975). The Fifth Circuit has deferred to the Department's test. See Atkins, 701 F.2d at 1128; Donovan v. American Airlines, Inc., 686 F.2d 267, 273 n.7 (5th Cir. 1982) (applying WHD's six-factor test derived from its interpretation of Portland Terminal); cf. Parker Fire, 992 F.2d at 1027-28 (using six-factor test but concluding that the test does not require all six factors to be met; rather, the factors should be used to assess the totality of the circumstances); but see McLaughlin v. Ensley, 877 F.2d 1207, 1210 (4th Cir. 1989) (applies factors, such as the nature of the instruction involved, to determine the "relative degrees of benefit" at issue in the case, which it uses as the ultimate criterion to determine employment status).

The six-part test is the best means for determining whether an intern, trainee, or student-learner is an employee, and the Secretary has recently restated this position in a fact sheet

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looked at benefit, displacement and supervision, value of vocational program, advantage of individuals' work to the employer, and expectation of compensation in determining that employee status existed. 997 F. Supp. at 532-33.

discussing when an intern is an employee under the FLSA. See, e.g., Fact Sheet #71, Internship Programs Under the Fair Labor Standards Act (April 2010), available at www.dol.gov/whd/regs/compliance/whdfs71.htm. As the intern fact sheet points out, the Act's broad definition of "employee" necessitates that exceptions from employee status be narrowly construed. Id. The intern fact sheet gives specific examples, within the context of the six-part test, of situations that commonly arise in the intern setting, and which can help to distinguish interns from employees. Id. Thus, the fact sheet notes that in order to determine whether the internship is truly an extension of the individual's educational experience or whether an organization is receiving the primary benefit of the intern's work, the organization should observe, inter alia, whether the intern is performing the routine work of the business on a regular basis; whether the business is dependent on the work of the intern; and whether the interns are performing productive work. If any of these factors are present, the fact sheet concludes, "the fact that [the interns] may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime benefits because the employer benefits from the interns' work." Id. Likewise, in order to determine whether the interns displace regular employees, the organization should consider "whether it would have hired additional employees or required existing staff to work additional hours had the interns not performed the work." Id. And, a program that gives interns the same level of supervision as the rest of the workforce suggests an employment relationship rather than an education or training environment. Id. These examples are derived from the fundamental six-factor test.

The Laurelbrook panel's decision to focus exclusively on primary benefit omits important objective factors and thus invites greater subjectivity in the analysis. Although the Laurelbrook

panel stated that the educational value of the vocational program and displacement of regular employees could be "relevant considerations that can guide [the primary benefit] inquiry," 2011 WL 1584356, at *11, subsuming these two prongs of the test within the primary benefit inquiry does not provide for a thorough, independent assessment of all relevant criteria. This approach also fails to take into account in any manner three factors in the Department's test, factors that the Supreme Court considered in Portland Terminal -- whether the employer derives no immediate advantage, even on occasion having its operations impeded by the trainees or students; whether trainees are paid for their efforts; and whether trainees are entitled to a job after the training. See Portland Terminal, 330 U.S. at 150.

The Laurelbrook panel, applying its primary benefit test to the facts of this case as found by the district court, concluded that the benefit to the institution from the students' work, such as revenues from the wood pallet sales and contributions toward the Sanitarium's licensing, was "offset" by certain factors such as the time expended on supervision and the "tangible and intangible benefits" to the students that it determined to be "[o]n the other side of the ledger," such as hands-on training that allowed the students to be competitive in various vocations, and a well-rounded education provided to the students in an environment consistent with their religious beliefs. 2011 WL 1584356, at *12-13. The panel's subjective weighing of selected factors is inconsistent with application of the long-established six-part test. In fact, proper application of the Department's six-part test to the facts of this case makes clear that the students are employees because Laurelbrook's vocational training is not similar to a recognized vocational program as it focuses primarily on menial tasks that do not require meaningful training and lacks proper supervision, rotation, progressive training, and safety instruction; the benefit of the training inures to Laurelbrook rather than to the students because the students perform productive work

for the school and Sanitarium, such as shoveling coal, picking up garbage, and performing housekeeping and kitchen work; Laurelbrook students displace regular employees; Laurelbrook students, because they work independently, do not impede Laurelbrook's operations but instead provide a significant benefit; Laurelbrook students frequently return to Laurelbrook after they graduate to work for the organization; and Laurelbrook students, because they receive scholarships that are in direct proportion to the hours worked, receive "wages" for purposes of the FLSA. Therefore, the faithful application of all six Portland Terminal factors to the facts of this case establishes unequivocally that the Laurelbrook students are employees for purposes of the FLSA.

The facts of this case stand in stark contrast with those of Portland Terminal, where the trainees were deemed not to be employees. In Portland Terminal, railroad trainees did not displace paid workers. See 330 U.S. at 149-50. They also did not engage in menial work requiring little significant training but, rather, learned first through observation and then through practice to perform specific brakemen procedures. Id. Nor did the railroad workers perform productive work for the company; indeed, the Court specifically noted that the railroad received "no immediate advantage from any work done by the trainees." Id. at 153 (internal quotation marks omitted). These factual differences clearly show why the students of Laurelbrook are not genuine trainees.

The Laurelbrook panel's heavy reliance on "intangible benefits" is so amorphous and open-ended that it can easily be utilized to place more student learners, trainees, and interns, who would otherwise qualify as employees, outside the Act's protections. The Laurelbrook panel stated that "[t]he overall value of broad educational benefits should not be discounted simply because they are intangible," and found "significant value" in the "intangible" benefits that the

students received from their participation in the training program, such as "responsibility and the dignity of manual labor"; "the importance of working hard and seeing a task through to completion"; "respect for the elderly and infirm"; "a strong work ethic [and] leadership skills." 2011 WL 1584356, at *13.[4] It is thus reasonable to expect that students, interns, and other trainees, who all arguably receive these kinds of "intangible" benefits from their exposure to the learning environment, will necessarily have a more difficult time establishing that they are employees under the FLSA. Under the Department's test, intangible benefits are accounted for in a framework that considers other crucial factors to employee status.

Moreover, permitting the Laurelbrook primary benefit test to play the decisive role in determining employee status will likely have the most detrimental effect on disadvantaged individuals who have the greatest need for training and the Act's protections. In Archie, for example, the district court readily acknowledged that homeless individuals derived a great benefit from their participation in a job training program. However, after assessing the other factors in the six-part test, which showed that the participants did not receive training similar to that given in a vocational training program, were performing productive work, displaced regular employees, did not work under meaningful supervision, and expected compensation for their work, the district court concluded that the individuals were employees. 997 F. Supp. at 533. Application of the Laurelbrook panel's primary benefit test to the facts in Archie could well result in the participants being deemed trainees, even when they performed productive work for the company.

[4] The Laurelbrook panel also cited with approval other court decisions that in its estimation have held such intangible benefits to "tip the scale of primary benefit in the students' favor even when the school receives tangible benefits from the students' activities." 2011 WL 1584356, at *13 (citations omitted).

b. Misclassification of employees as trainees is of paramount importance in the child labor context. Laurelbrook students worked at a minimum four-hour shifts, six days a week, performing repetitive, manual, and oftentimes dangerous tasks that contained little educational value. Despite this, the Laurelbrook panel concluded that the students derived the primary benefit of the educational training, based largely on intangible benefits regarding responsibility, the dignity of work, and being taught in an environment consistent with their religious beliefs. The Laurelbrook panel's decision thus leaves the door open for children of any age who are working in hazardous jobs, for long hours and under little supervision, to be deemed "trainees" outside of the FLSA's protections, even if the youth are performing productive work and are not receiving the benefit of a bona fide vocational education program.

It is important to note that application of the child labor laws to the facts of this case, and in particular the injunctive relief sought by the Secretary preventing further violations of the child labor laws, would not preclude Laurelbrook from conducting bona fide vocational training. In such a vocational training program, exposure to hazardous equipment necessarily would be incidental to the training, performed only intermittently, and conducted under the direct and close supervision of a qualified and experienced adult. On the other hand, if the youth were deemed to be employees under the Act, there are specific student learner and apprenticeship exemptions for certain of the hazardous occupation orders, which apply to 16-18 year olds in nonagricultural employment and 14-16 year olds in agricultural employment if certain conditions and safeguards are met, as well as a Work Experience and Career Exploration student exemption from some of the hours of work rules that apply to youth in nonagricultural employment under the age of 16. See 29 C.F.R. 570.36, 570.50, 570.72.

c. Even if, contrary to the Secretary's argument, the full Court were to view a primary benefit test as appropriate, the panel here erred in concluding that the youth in this case are trainees under that truncated test. Clearly, for the reasons the Secretary has already articulated, Laurelbrook receives far more benefit than the minors from their performance of day-to-day custodial and other production tasks for the school and its sanitarium. Most such tasks have little educational or long-term vocational value, which is critical to trainee status. Given the students' performance of menial tasks that do not require any significant training, and a concomitant absence of appropriate supervision, rotation, progressive training, and safety instruction, it cannot be fairly concluded that the youth are the primary beneficiaries of the tasks that they perform. Rather, it is Laurelbrook that derives such benefit by virtue of the students' contribution to its maintenance, receipt of significant payments, and licensing. Indeed, even if the panel correctly concluded that the students receive "intangible" benefits from their participation in the vocational program, those benefits are insufficient to overcome the very tangible benefits that Laurelbrook derives from the students' work.

2. *En banc* review of the Laurelbrook decision is also warranted because the panel's conclusion that the Department's six-part trainee test is not entitled to deference is in conflict with the Fifth Circuit's opinion in Atkins, 701 F.2d at 1128. This inter-circuit split presents a question of "exceptional importance." See Fed. R. App. 35(a)(2) and (b)(1)(B). Atkins addresses whether participants in a training program that was conducted under the auspices of a training institute but was specifically designed to teach individuals how to work on a General Motors ("G.M.") assembly line were G.M. employees under the FLSA. The court relied on the Department's six-part test in its analysis of this issue, stating that the test, which helps to apply

the broad statutory definition of "employee" in the training context, was entitled to "substantial deference." Id. at 1127-28 (citing American Airlines, 686 F.2d at 267).

The Laurelbrook panel acknowledged that the Fifth Circuit "approv[ed]" the Department's six-part test in Atkins, but suggested that this endorsement was tempered by the Atkins court's focus on the test's fourth criterion, which looks at whether the employer derives an advantage from the individuals' work. Laurelbrook, 2011 WL 1584356, at *10 (citing Atkins, 701 F.2d at 1128). However, there is no question that the Fifth Circuit deferred to the Department's test, stating that it is entitled to "substantial deference." Atkins, 701 F.2d 1128. The fact that the "appeal turn[ed]" on the fourth criterion in that particular case does not diminish the court's deference to the entire test. Id. Thus, there is a clear inter-circuit conflict warranting *en banc* review.

3. The panel's conclusion that the determination of employee status in an educational or training context turns on an evaluation of the primary beneficiary of the relationship, rather than an examination of all six factors in the Department's longstanding trainee test, also warrants *en banc* review because the decision presents an intra-circuit conflict with a previous Sixth Circuit decision, Baptist Hospital, 668 F.2d 234. *See* Fed. R. App. P. 35(a)(1) and (b)(1)(A); 6th Cir. R. 35(c). This Court in Baptist Hospital utilized at least three of the six Portland Terminal criteria to determine that x-ray technicians participating in a hospital's training program were employees under the FLSA.[5] Baptist Hospital addresses an x-ray technician program where students were

[5] Although neither the district court nor this Court explicitly adopted the Department's six-part test or viewed Portland Terminal as the source of the three factors examined in the case -- validity of the educational program, displacement of regular employees, and primary benefit -- it may be fairly inferred that the courts drew these factors from the Department's test because they are identical to the factors used in that test, and because the test was before both courts and was specifically discussed in those parts of the decisions addressing whether the hospital could invoke the good faith defense under the Portal-to-Portal Act, 29 U.S.C. 259 (providing that an

assigned to the hospital for on-the-job clinical training, which was intended to provide trainees with the opportunity to observe x-ray technologists in the performance of specific procedures, and eventually to perform the procedures themselves under the direct supervision of the technologists. See 473 F. Supp. at 472. In practice, many of the procedures were easy to learn and a number of x-ray rooms were staffed solely by trainees. Id. The trainees were regularly reassigned to rooms where they were most needed; new trainees were sometimes taught by more experienced trainees; and trainees spent much of their time doing clerical work and other routine hospital chores rather than learning. Id. at 472-73. In reviewing the district court's conclusion that the students were employees rather than trainees, this Court specifically considered and credited the district court's three, distinct conclusions: that the clinical training students displaced regular employees; that the training was deficient because it lacked close supervision;[6] and that the hospital received the direct and substantial benefit of the trainees' work. 668 F.2d at 236. This Court concluded that it "[did] not believe that the District Court applied an erroneous test of liability under the FLSA." Id.

The Laurelbrook panel stated that Baptist Hospital "suggested" that the key to determining employment status in an educational context was "identifying the primary beneficiary of the relationship," and that this outcome was consistent with the Supreme Court's decision in Portland Terminal. 2011 WL 1584356, at *8. Characterizing this Court's decision in

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employer will not be subject to liability if it has relied in good faith on any written administrative regulation, order, or interpretation of the agency). See Baptist Hosp., 668 F.2d at 237-38; Baptist Hosp., 473 F. Supp. 465, 477-78. Although this Court agreed with the district court findings of fact and "test of liability under the FLSA," it ultimately concluded that the hospital had a valid Portal Act defense based on a specific discussion in the FOH of x-ray technicians. Baptist Hosp., 668 F.2d at 237-38.

[6] This Court also noted that the training was deficient because of the "absence of records, absence of a complete rotation system, inadequate orientation, and performance of functions of only peripheral value to the program." Baptist Hospital, 668 F.2d at 236.

Baptist Hospital as merely "approv[ing] the district court's decision regarding employee status without discussion," the Laurelbrook panel looked closely at the district court's decision, and viewed it as actually applying only two factors in its analysis -- the validity of the educational program and primary benefit -- despite the fact that the district court mentioned other factors, such as displacement, as being relevant. Id. (citing Baptist Hospital, 473 F. Supp. at 468, 468 n.4). The Laurelbrook panel concluded that the district court's decision "turned on the court's finding that the hospital received the primary benefit of the training program," and that its "consideration of both employee displacement and educational validity was made in furtherance of the ultimate determination of primary benefit." Id. at *9 (citing Baptist Hospital, 473 F. Supp. at 476-77).

The Laurelbrook panel's analysis overlooks several critical points. The Baptist Hospital district court's "Facts and Conclusions" section is divided into discrete headings addressing in turn: "1. The Program"; "2. Displacement of Regular Employees"; "3. Educational Validity of the Program"; and "4. Primary Benefit." 473 F. Supp. at 469-77. These sequentially numbered sections are best read as giving each of the three factors cited equal weight, particularly given the district court's concluding statement that its finding of employee status was based "[i]n view of the circumstances of the whole activity as set out in the foregoing findings." Id. at 477. The district court's clear identification of three separate factors directly contradicts the Laurelbrook panel's contention that the district court utilized in its analysis only two of those factors, validity of the educational program and primary benefit, and that the ultimate determination was based on primary benefit. See Laurelbrook, 2011 WL 1584356, at *8. Moreover, contrary to the Laurelbrook panel's assertion, this Court in Baptist Hospital, although not discussing each factor in detail, gave separate emphasis to the district court's findings on displacement, educational

validity, and primary benefit. Baptist Hospital, 668 F.2d at 236. This Court, after referencing the district court's discussion of displacement, stated that "[t]he District Court next concluded that the training of the students at Baptist was deficient because of the lack of close supervision," and goes on to state, "[f]inally, the [district] court concluded that the hospital was the primary beneficiary of the relationship." Id. (emphases added). Thus, the Laurelbrook panel's conclusion that this Court's decision in Baptist Hospital "turns" on the primary benefit factor incorrectly characterizes the basis for the legal determination.[7] Therefore, the Laurelbrook decision is in conflict with Baptist Hospital.

CONCLUSION

For the foregoing reasons, this Court should grant the Secretary's Petition for Rehearing *En Banc*.

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[7] The Tenth Circuit has read the district court's decision in Baptist Hospital as relying upon the Department's six-part test, rather than primary benefit, in considering employment status. See Parker Fire, 992 F.2d at 1026 (citing Baptist Hospital, 473 F. Supp. at 478).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Maria Van Buren
Maria Van Buren
Senior Attorney