HOT GOODS AND COLD CASH

HOT GOODS LAWS, THE JOINT EMPLOYMENT DOCTRINE AND RETAILER LIABILITY UNDER THE FAIR LABOR STANDARDS ACT OF 1938

Donna Karan, Marc Jacobs, Vera Wang, Prada. To most consumers of American culture, names like these likely conjure images of red carpets, celebrity-studded catwalks and fantasy weddings. The fashion industry has anointed itself the arbiter of all things glamorous, with the gushing approbation of the fawning media and the spending consumer. Magazines, television shows and even entire cable channels are devoted to covering clothing designers, their collections and the celebrities who wear them.[1] The fruits of the high-end fashion industry—the garments—are potent symbols of wealth, style and glamour. Decidedly unglamorous is the way in which workers toil in sweatshop conditions to produce these garments.

As tempting as it may be to pillory the rarefied denizens of *le monde de la haute couture* as epitomizing the dichotomy that exists in the fashion industry, the industry as a whole is guilty of this practice. Mid-level retailers like The Limited as well as low-end clothing lines like those of Jaclyn Smith and Kathie Lee Gifford, sold at K-Mart, have been embroiled in sweatshop scandals.[2] Sweatshops are rampant in the garment industry, with women of color and immigrant women the most easily exploited—and therefore preferred—labor market.[3] From the Triangle Shirtwaist Factory Fire to the illegal factories in today's Chinatown, the garment industry has a long history of exploiting workers, just as consumers have a long history of turning a blind eye to its methods. The law, too, works to shield those at the top of the fashion food chain—the retailers—while it targets contractors and manufacturers, arguably mere middlemen who must succumb to the terms of the more powerful retailer. The retailer is the arbiter of production—it designs the garments, contracts for and supplies requirements for their production. Why, then, does the FLSA contain an "innocent

[1] *The Style Network* is devoted almost exclusively to fashion-related programming.
[2] CNN.com, Four chains bought from sweatshops that exploit workers (Dec. 14, 1997), at http://64.233.179.104/search?q=cache:Egb8M_1s09MJ:www.cnn.com/US/9712/14/sweatshop.retailers/+Kathie+Lee+Gifford+sweatshop&hl=en.
[3] Laura Ho, Catherine Powell & Leti Volpp, (DIS)ASSEMBLING RIGHTS OF WOMEN WORKERS ALONG THE GLOBAL ASSEMBLY LINE: HUMAN RIGHTS AND THE GARMENT INDUSTRY, 31 Harv. C.R.-C.L. L. Rev. 383, 387-89.

purchaser" exemption that allows retailers to use the manufacturers they contract with as buffers to liability? Any inherent biases in our laws is not a topic to be addressed in this paper; rather the purpose here is to examine how existing legal frameworks can be used to carry out one of the policies behind the FLSA—protection for workers—through increasing retailer exposure to liability.

This paper will examine the "hot goods" clause of the Fair Labor Standards Act of 1938, which prohibits the sale of goods produced in violation of minimum wage and maximum hour laws and how it has been applied by the courts. It will include an analysis of the New York State "hot goods" provision and how it has been applied. Finally, this paper will discuss the development of the joint employment doctrine in the Second Circuit and how it may be expanded to hold retailers responsible for purchasing goods produced in violation of wage and hour laws.

THE "HOT GOODS" PROVISION OF THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act states that "[a]fter the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person to transport. . .ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title. . ."[4] Sections 206 and 207 of the FLSA set the minimum wage and maximum hours for certain employees, respectively.[5] The hot-goods provision includes two exemptions: one for transporters of hot goods and the so-called "innocent purchaser" exemption, which pertains to "purchaser[s] who acquired [the goods] in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter. . ." [6]

In articulating the policies behind the FLSA, Congress found "that the existence. . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. . . spread[s] and perpetuate[s] such labor conditions

[4] 29 U.S.C. § 215(a)(1).
[5] 29 U.S.C. §§ 206 and 207.
[6] 29 U.S.C. § 215(a)(1).

among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."[7] From this language one can glean that the well-being of workers is not an end of the FLSA, but rather a means to ensure the free flow of goods in the market economy and discourage unfair competition that may impede that flow. The purpose of the hot goods clause, then, is to prevent such goods from entering the stream of commerce.[8] This helps to ensure that manufacturers able to produce cheaper goods by engaging in unfair labor practices do not gain a competitive advantage over manufacturers who comply with labor laws.[9]

The FLSA is enforced by the Department of Labor, and only the Secretary of Labor may bring suits to enjoin the shipment or sale of hot goods. In the stratified garment industry, it is often difficult to ascertain whether production entities are complying with labor laws. The industry is structured so that the workers who make the garments are often far-removed from retailers and even manufacturers who contract for their labor.

> The garment industry is a low-wage sector with notoriously high rates of noncompliance with minimum wage and overtime pay requirements, as well as with health and safety laws and other labor laws. Larger and more visible manufacturers (who supply finished apparel to retailers), or sometimes very large and visible retailers themselves, contract out garment production to a network of smaller, low visibility and often transient contractors. Enforcement is further impeded by the widespread reliance, among those low-wage, low-visibility workplaces at the bottom of the production chain, on undocumented immigrant labor, among whom fear of deportation exacerbates the usual fear of reprisals that silences many low-wage employees.[10]

[7] 29 U.S.C. § 202(a).
[8] Herman v. Fashion Headquarters, 992 F.Supp 677, 678 (1998).
[9] *Id*. at 678.
[10] Cynthia Estlund, REBUILDING THE LAW OF THE WORKPLACE IN AN ERA OF SELF-REGULATION, 105 Colum L. Rev. 319, 347-48

Both the multi-layered structure and reliance on immigrant labor serve to insulate those entities nearer the top of the contractual chain from labor violations. In an effort to close this gap Department of Labor turned to the . . .'hot-goods' provision of the FLSA."[11]

The Supreme Court has broadly construed the hot-goods provision of FLSA to comply with Congress' intent to exclude goods produced under "substandard labor conditions" from interstate commerce.[12] In *Citicorp Industrial Credit v. Brock*, the Court held that a secured creditor could be enjoined from selling goods it acquired from a debtor who produced the goods in violation of labor laws. The petitioner in that case argued that the two exemptions indicated Congress' intent to limit the application of the hot goods clause to "culpable parties, and therefore, 'innocent' secured creditors who were not aware of nor a party to any unfair labor practices involved in the making of the acquired goods should not be subject to the Act."[13] The court rejected this argument, first pointing out that the provision applies to "any person" rather than "any employer," and that "persons" under the FLSA include corporations.[14] The Court then pointed to Congress' inclusion of two exemptions, in which it expressly identified those parties it considered to be innocent, to conclude that its intent was to limit exemptions under the hot-goods provision to these two narrow categories and that all other persons, regardless of culpability, are subject to § 215(a)(1).[15] To bolster this reading of the statute, the Court looked to the House Report of the 1949 Amendment to the Act, which stated that a "purchaser who ships in commerce goods produced by another person who violated the wage-and-hour provisions of the act in the production of such goods, commits an unlawful act."[16] *Citicorp* is the only case where the Supreme Court has construed the FLSA hot-goods provision, and its strict liability reading of the statute is instructive as a valuable precedent for the purpose of expanding the joint employer doctrine to encompass retailers and other ultimate consumers under the FLSA hot goods clause.

[11] *Id*. at 349
[12] Citicorp Indus. Credit Corp. v. Brock, 483 U.S. 27, 31 (1987).
[13] *Id*. at 34.
[14] *Id*. at 34.
[15] *Id*. at 34.
[16] *Id*. at 35, n.7, quoting H.R.Rep. No. 267, 81st Cong., 1st Sess., 39 (1949).

Citicorp also contains reasoning concerning the underlying policies of the FLSA. The petitioner argued that because the primary purpose of FLSA was to improve working conditions for American workers, applying the hot-goods provision to creditors who are not responsible for labor violations does not further this policy.[17] The Court contradicted this interpretation, stating instead that improving working conditions was only one of the goals of FLSA, and another was to eliminate the element of unfair competition to which unfair labor practices contribute.[18] In its conclusion, the Court when discussing the goals served by its decision does not refer to working conditions, but writes instead:

> We hold that § 15(a)(1)'s broad prohibition on interstate shipment of "hot goods" applies to secured creditors who acquire the goods pursuant to a security agreement. This result is mandated by the plain language of the statute, and it furthers the goal of eliminating the competitive advantage enjoyed by goods produced under substandard labor conditions.[19]

This reasoning follows not only the language of the statute, but also reflects the philosophy of § 202(a), which, while stating as one of its goals the protection of workers, seems to subjugate workers' interests to the more important goal of promoting fair competition. This language is telling, and provides instruction for how to successfully appeal to courts using the hot-goods provision of FLSA. Highlighting how labor violations disadvantage the free flow of goods in interstate commerce or the competitive marketplace is an approach compatible with the legislative history and stated goals of the FLSA, and an excellent strategy in the effort to expand the reach of the hot-goods clause.

The Department of Labor uses a variety of remedies to enforce compliance with the FLSA's requirements. Under § 215(a)(1), the Secretary of Labor has the power to seek injunctions against entities seeking to ship, sell or receive goods produced in violation of FLSA. The Secretary may also seek payment of wages due under sections 206 and 207 of the FLSA to those employees whose labor, in violation of the Act, contributed to the production of the goods

[17] *Id*. at 36.
[18] *Id*. at 36.
[19] *Id.* at 39-40

at issue.[20] The hot-goods provision, however, is not the first step in holding employers accountable for workplace violations. When the Department of Labor, through the Wage and Hour Division which administers these laws, investigates allegations of labor violations, it may suggest changes in employment practices to bring the employer into compliance. At this stage, requests for payment of any back wages due to employees may be made, and the DOL may require the employer to enter into an agreement promising compliance with wage and hour laws and setting for the procedures for doing so.[21] An employer's willful and repeated refusal to comply with wage and hour laws may result in criminal prosecution and fines of up to $10,000 and civil penalties of up to $1,000 per violation.[22]

These procedures are problematic in that they may not provide manufacturers or subcontractors with enough incentive to cease their unfair labor practices. For example, if an employer is fined $1,000 for a wage and hour violation for one employee, but can save twice that amount in a month's, or week's or day's time by underpaying that employee, then the $1,000 fine is money well spent. A similar problem comes into play with memoranda of agreement to comply with labor laws. The employer may be contractually bound to abide by the agreement, but how likely is it that the DOL has the personnel and the resources to ensure compliance with the agreement at all times? Another problem is the transient character of many subcontractors in the garment industry. A company may have been subject to penalties and compliance agreements as Company X, but can then just stop doing business as Company X and start operating as Company Y, where the investigative process will have to start all over again.

The hot goods clause provides an attractive means through which to ensure compliance with labor laws for three primary reasons. First, it directly targets the bottom line. If goods are unable to be sold, no one makes money. Second, it holds purchasers further up the food chain

[20] Lopez v. Silverman, 14 F.Supp.2d 405, 410 (S.D.N.Y. 1998); *See also* Chao, v. Fashion Etoile, 2002 WL 31947202 (C.D.Cal 2002).
[21] U.S. Department of Labor, *Employment Law Guide*, at http://dol.gov/compliance/guide/minwage.htm#CompAssist
[22] *Id.*

strictly liable for goods produced in violation of wage and hour laws unless that purchaser can produce a written assurance from the producer to the contrary. Third, the impact on the bottom line and the strict liability serve as incentives for the top links in the chain to exert pressure to comply with workplace laws on those below.

NEW YORK LAW

The apparel industry, like other global enterprises in the twentieth century, has shifted much of its production from the West to developing countries around the world, especially Asia, attracted by the plethora of cheap labor in those areas.[23] In the United States, New York City and Los Angeles have remained epicenters of garment production due to the constant influx of cheap immigrant labor in those cities. As a result, New York and California have developed laws to combat the worker exploitation that permeates the industry. In New York, under Article 12A of the State Labor Law, garment and accessories manufacturers and contractors are required to register with the Department of Labor each year by January 15[24]. The law mandates that apparel companies only do business with registered firms.[25] The Apparel Industry Task Force, under the aegis of the New York State Department of Labor, investigates over 1,000 garment sector firms annually, and reports wage and hour law violations, as well as unsafe working conditions to the appropriate authorities.[26]

These laws are useful in monitoring the compliance of legitimate garment manufacturers and contractors, but how does the state keep track of the many underground operations that employ undocumented immigrants and do not register with the state? This is where New York State's hot-goods law can be a useful tool to ensure compliance with labor laws. The government has limited resources, and cannot stay abreast of illegal employment operations

[23] Ho, Powell & Volpp, *supra* note 3, at 389-90.
[24] New York State Dep't. of Labor, at http://www.labor.state.ny.us/workerProtection/LaborStandards/workprot/garment.asp
[25] *Id*.
[26] Office of the New York State Attorney General, Press Release (July 19, 1999), at http://www.oag.state.ny.us/press/1999/jul/jul19a_99.html

throughout New York City. The hot-goods law provides incentive for the industry to regulate itself. Liability based on an objective test, along with the inability to sell such goods, may combine to deliver enough of a financial hit to the retailers and large manufacturers to encourage them to not only demand compliance with labor laws from the firms with whom they contract, but to monitor those firms' compliance themselves.

New York's hot-goods law differs from that of the FLSA in that it does not impose strict liability for dealing in hot goods, limits liability to manufacturers, contractors and retailers rather than "any person,"and it specifically targets retailers. The law states that, "any manufacturer or contractor in the apparel industry who ships, delivers or sells any apparel or sections of apparel; who *knew or should have known* that such goods were produced in violation of article six or nineteen of this chapter, shall be deemed to have violated this article."[27] (Emphasis added).

New York rejected strict liability for apparel manufacturers and contractors dealing in hot goods, but included the objective "should have known" standard for such entities. This higher standard may serve as an obstacle to liability for labor violations, but objective evidence should be readily available to meet this requirement. Simple mathematics may be the most direct means of proving objective knowledge; books can be audited and labor contract prices compared with garments produced to figure the average working hours needed to complete the terms of the contract. It should be relatively simple to meet this higher standard of proof, if accurate financial records are kept (which could be a big "if").

The section of the law that deals with retailers states that, "[a]ny retailer who sells any apparel or sections of apparel, *who knew or should have known* that such goods were produced in violation of article six or nineteen of this chapter, shall be deemed to have violated this article. Except that no violation of this article shall be deemed to have occurred if the retailer acquired the apparel or sections of apparel without notice from the commissioner of any violations of article six or nineteen of this chapter and with the written or electronically transmitted assurance

[27] McKinney's Labor Law § 345(10)(a)

of such manufacturer or contractor, given before or after production, whether as part of the retailer's vendor approval process, purchase contract requirements, electronically transmitted purchase order acknowledgments or invoices, or otherwise, that such goods would be, or were, produced in compliance with this article or, generally, all applicable laws. . . "[28] (Emphasis added).

New York's retailer clause is a step toward closing the gap between the exploited worker and the ultimate consumer. Again, New York imposes an objective test that can be met with an audit of financial records and agreements among the parties, assuming those records are truthful and accurate. The New York retailer exemption differs from that of the FLSA. While FLSA only requires that a purchaser relied, in good faith, on a written assurance from a producer that the goods purchased were produced in compliance with wage and hour laws.[29] New York's exemption requires that the retailer receive written assurance of compliance from whomever the goods were procured, but also requires that the retailer not have received any notice from the State Labor Commissioner that the garments had been produced in violation of state labor laws. The former requirement seems easily circumvented by boilerplate contractual clauses written to conform with the language of the statute, which lists such documents as purchase agreements and order acknowledgment forms as acceptable means of compliance. The second depends on the efficiency of the commissioner to (1), identify hot goods and (2) transmit that information to retailers.

At first glance, the New York retailer exemption is more limiting than the FLSA's innocent purchaser exemption because it has two requirements instead of just one. Upon closer inspection, however, those requirements seem so easily met as to be no more than the legislature's symbolic concessions to labor interests.

The third section of New York's hot goods law grants jurisdiction to the Supreme Court and gives the Attorney General the power to "restrain the shipping, delivery, sale or purchase by

[28] McKinney's Labor Law § 345(10)(b).
[29] 29 U.S.C. § 215(a)(1).

any manufacturer, contractor or retailer of apparel [was] . . . upon a showing that such apparel . . . during the previous one hundred and eighty days, produced in violation of article six or nineteen of this chapter or sold in violation of paragraph (a) or (b) of this subdivision."[30] This section of the hot goods law seems to refute the prior sections' requirement that manufacturers or retailers knew or should have known that the goods being purchased were produced in violation of labor laws. This contradiction was construed in the only decision to address the New York hot goods law, *Spitzer v. 14 West Garment Factory Corp*., which is discussed below.

The FLSA and New York State laws are similar in that actions under the FLSA hot goods law may only be initiated by the Secretary of Labor, and only the Attorney General law may initiate actions under the New York Law. The absence of individual causes of action forces sole dependence on the government to ferret out and prosecute labor violations and serves as an additional buffer to bringing practices in the apparel industry to light. Workers may of course report violations to the appropriate enforcement agencies, but the undocumented status of many workers precludes them from asserting their rights against their employers.

This was not the case in 1999, when a group of mostly Chinese, immigrant garment workers reported the non-payment of wages to the Department of Labor Apparel Industry Task Force (AITF).[31] The AITF sent investigators to the employer's facilities and notified the Attorney General's office of the violations, and the Attorney General brought suit against the employer.[32] This case was *Spitzer v. 14 West Garment Factory Corp.*[33], and it was the first to be brought under the New York hot-goods law, which was passed in 1996.[34]

Acting on the workers' accusation that their employer, Ding & Mag, a garment subcontractor, underpaid 23 workers engaged in piece work production of various clothing items,

[30] McKinney's Labor Law § 345(10)(c).
[31] Office of the New York State Attorney General, *Press Release* (July 19, 1999), at http://www.oag.state.ny.us/press/1999/jul/jul19a_99.html
[32] *Id.*
[33] 182 Misc.2d 146 (June 28, 1999).
[34] [34] Office of the New York State Attorney General, *Press Release* (July 19, 1999), at http://www.oag.state.ny.us/press/1999/jul/jul19a_99.html.

AITF launched an investigation. Upon its completion the AITF alleged that the workers should have received $18,500 in wages for work they performed between October 1, 1998 and January 15, 1999.[35] The Attorney General then sought an injunction against 14 West Garment Factory Corporation, barring the shipping, delivery, sale or purchase of these garments until the workers received payment for back wages.[36]

In its motion to dismiss the Attorney General's petition for the injunction, Respondent 14 West relied on § 345(10)(a) to argue that it should not be held liable under the statute because it had no knowledge at the time of contracting that the goods had been produced in violation of labor laws.[37] It also argued that it should be eligible for the retailer exemption under § 345(10)(b) because "the fact that the legislature provided an express exemption. . . to retailers who obtain apparel in good faith means that a similar standard should be read into the provisions concerning contractors and manufacturers."[38] The court rejected these arguments, first by construing the plain language of § 345(10)(c) to impose strict liability on manufacturers who traffic in illegally produced goods.[39] The court then read § 345(10)(b) narrowly to limit the exemption to the express language of the statute, which refers only to retailers.[40] 14 West did not contend that it was a retailer rather than a manufacturer, so the court deemed it ineligible for this exemption.[41] Based on these holdings and a rejection of Respondent's argument that the injunction constituted an unconstitutional taking, the court granted the injunction against 14 West.[42]

The court in *14 West* makes clear that only retailers are eligible for the exemption of § 345(10)(b), stating in its reasoning that "[e]xemptions for a retailer acting in good faith and in compliance with the law makes sense because they have little, if anything at all, to do with the

[35] 14 West, 182 Misc.2d. at 148.
[36] *Id*. at 148
[37] *Id*. at 149
[38] *Id*. at 150
[39] *Id.* at 151
[40] *Id*. at 151
[41] *Id*. at 151.
[42] *Id*. at 153.

workers who construct the garments. However, relieving the contractors or manufacturers of liability does not make sense."[43] This rationale leaves open two questions. First, is it realistic to assume that retailers, though they may be removed from the actual production of garments, are not the ultimate arbiters of the process? Second, the language of § 345(10)(c), which the court construed as imposing strict liability on manufacturers, includes retailers as well. Though the court made clear that only retailers can escape strict liability through the exemption of § 345(10)(b), it did not address how to reconcile the language of § 345(10)(c) with the "knew or should have known" requirements of §§ 345(10)(a) and (b). Subject to the temporal requirement in § 345(10)(c), the holdings in 14 West indicate that the strict liability imposed in this clause trumps the knowledge requirements of the previous two sections.

While the legislature has addressed the problem of sweatshops and sought to redress them in New York state laws targeting the garment industry, there is a paucity of case law testing the statute. *14 West* represents a victory for workers in the struggle against manufacturers and contractors by imposing strict liability for dealing in illegally produced goods under the hot goods law. Conversely, the case indicates that policy continues to favor the idea of the "innocent purchaser" in the case of retailers. On its face the rationale that the onus to ensure compliance with labor laws should not be on retailers because they are removed by one or more layers from the actual production of the garments makes sense. But given the long traditions of worker exploitation and abuse in this industry, it seems disingenuous for modern doctrine to espouse the narrative articulated by the *14 West* court. The identification of the retailer in New York's hot goods law as a potentially culpable party in the mistreatment of workers in the garment industry is a step in the right direction. The law still needs to incorporate a method of linking the retailer to labor practices much further down the garment production ladder—practices it may encourage either blatantly or implicitly—to ensure that this powerful segment of the industry is held

[43] *Id.* at 151.

responsible for the conditions of its workers. The developing joint employment doctrine may be the best way to accomplish this link.

THE JOINT EMPLOYMENT DOCTRINE

The Department of Labor's Wage and Hour Division has promulgated regulations allowing for joint employment under the FLSA because nothing in the Act prohibits an employment relationship of this type.[44] The regulation does not clearly define the joint employment relationship, but instead states that "whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case."[45] The regulation refers to specific situations characteristic of joint employment, such as when the employee does work that simultaneously benefits more than one employer, and where there is an arrangement to share the employee's services; where one employer is acting in the interest of the other employer with regard to the employee; or where the employers are not "completely disassociated" and share control of the employee.[46] If a joint employment relationship is deemed to exist, the regulation requires that "all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek."[47]

Armed with this limited guidance from the Department of Labor, the courts have been charged with carving out a test to determine whether a joint employment relationship exists in a certain situation. The Circuits have cobbled together various "economic reality" tests consisting of myriad factors derived from tests used to determine both joint employment and independent contractor relationships, but have not reached a consensus as to which factors to apply.[48] The

[44] 29 C.F.R. § 791.2(a).
[45] 29 C.F.R. § 791.2(a).
[46] 29 C.F.R. § 791.2(b)(1),(2) and (3).
[47] 29 C.F.R. § 791.29(a).
[48] *See generally* Zheng v. Liberty Apparel Co., 335 F.3d 61 (2d. Cir. 2003); Zhao v. Bebe Stores, Inc., 247 F.Supp.2d 1154 (C.D. Cal. 2003); Chen v. Street Beat Sportswear, Inc., 364 F.Supp.2d 269 (E.D.N.Y. 2005).

framework within which to apply factors is "a full inquiry into the true economic reality of the employment relationship based on a particularized inquiry into the facts of each case."[49] A hallmark of this inquiry is the employee's level of dependence on the employer; rather than being an individual factor, it is this question that analysis of each factor endeavors to answer.[50] This section will focus on the development of the joint employment doctrine in the Second Circuit, as much of the case law involving this issue has evolved there.

In looking to define joint employment under the FLSA, the courts first turn to the definitions contained therein. The FLSA defines "employee" as "any individual employed by an employer."[51] The statute defines "employ" more broadly than any other federal law, as "to suffer or permit" to work.[52] It is under this broad definition that the joint employment doctrine has developed.

In the 1947 case *Rutherford Food Corporation v. McComb*,[53] the Supreme Court looked at the "circumstances of the whole activity" and applied six factors to hold that a slaughterhouse was a joint employer of boners, the services of whom it had arranged through a subcontractor.[54] Those six factors were: (1) the operation constituted a "specialty job on the production line;" (2) the responsibility under the boning contracts passed from one boner to another without material changes; (3) the premises and equipment of the slaughterhouse were used for the work; (4) the boners "had no business organization that could or did shift as a unit from one slaughterhouse to another;" (5) the manager of the slaughterhouse kept "close touch" on the boners; and (6) the work resembled piecework more than an "enterprise that depended for success upon the initiative, judgment or foresight" of the boners.[55] Significantly, the *Rutherford* Court found that the slaughterhouse was the boners' joint employer when the relationship

[49] Carter v. Dutchess Community College, 735 F.2d 8, 13-14 (2d Cir. 1984).
[50] Lopez v. Silverman, 14 F.Supp.2d 405, 414 (S.D.N.Y. 1998).
[51] 29 U.S.C. § 203(e)(1).
[52] 29 U.S.C. § 203(g).
[53] 331 U.S. 722 (1947).
[54] *Id*. at 724-25, 730.
[55] *Id.* at 730.

between the boners and their direct supervisor—the contractor—exhibited all the characteristics traditionally used to define employer-employee relationship. The contractor, rather than the slaughterhouse, hired and fired the boners, set their hours and paid them for their work.[56]

Subsequent cases looked to *Rutherford*'s articulation of factors as a guideline to determine whether a joint employment relationship existed. The test being applied in the Second Circuit today has evolved from several cases, primarily *Rutherford*, *Carter v. Dutchess Community College*,[57] *Brock v. Superior Care, Inc*.[58] and *Lopez v. Silverman*,[59] as discussed in *Zheng v. Liberty Apparel Company Inc*.[60]

In *Liberty*, garment workers sought damages from a manufacturer, who had procured their services through a contractor.[61] The Second Circuit vacated the district court's decision granting summary judgment to the Defendant after applying the *Dutchess* test, which was originally used in the Ninth Circuit,[62] and consisted of the following four factors: (1) whether the putative employer had the right to hire and fire employees, (2) whether it supervised and controlled employee work schedules or conditions of employment, (3) whether it determined the rate and method of payment, and (4) whether it maintained employment records.[63] The court then briefly considered the 5-factor Superior Care test, which looked at: (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) thee degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.[64] The court

[56] *Id*. at 726, 730
[57] 735 F.2d 8 (2d Cir. 1984).
[58] 840 F.2d 1054 (2d Cir. 1988).
[59] 14 F.Supp.2d 405 (S.D.N.Y. 1998).
[60] 355 F.3d 61 (2d Cir. 2003).
[61] *Id*. at 64.
[62] *Id*. at 67. The test came from Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983).
[63] Liberty, 335 F.3d. at 67.
[64] *Id*. at 67.

rejected the former as not necessarily determinative of whether a joint employment relationship exists, and the latter for being more representative of independent contractor status.[65]

Rather than adopt either of these tests, the court looked to the 1998 district court case *Lopez v. Silverman*, which, after a lengthy discussion of the myriad joint employment tests being applied throughout the Circuits, synthesized *Rutherford* with the 4-factor *Dutchess* and the 5-factor *Superior Care* tests to create a 7-factor test applicable to garment industry manufacturers in the joint employment context.[66] Those factors were: (1) the extent to which the workers perform a discrete line-job forming an integral part of the putative joint employer's integrated process of production or overall business objective; (2) whether the putative joint employer's premises and equipment were used for the work; (3) the extent of the employees' work for the putative joint employer; (4) the permanence or duration of the working relationship between the workers and the putative joint employer; (5) the degree of control exercised by the putative joint employer over the workers; (6) whether responsibility under the contract with the putative joint employer passed "without material changes" from one group of potential joint employees to another; and (7) whether the workers had a "business organization" that could or did shift as a unit from one putative joint employer to another.[67] The test used in *Silverman* was an attempt by the district judge to fashion an "economic reality" test that would more accurately assess whether workers "are employed solely by one employer, or jointly by another as well."[68]

The *Liberty* court declined to apply the factors used in *Silverman*, but seemed to adopt that court's approach in its effort to create a test that would truly reflect economic reality in the joint employment context, while staying true to the broad language of the FLSA.[69] It articulated this test as an assessment to be "based on the circumstances of the whole activity viewed in light of economic reality," and invited the district court on remand to add any factors in addition to

[65] *Id*. at 68.
[66] *See* Silverman, 14 F.Supp.2d 405.
[67] *Id*. at 419-20.
[68] *Id*. at 415.
[69] Liberty, 355 F.3d at 69

those articulated in *Liberty* it deemed relevant.[70] The court then selected for this task the six factors first applied in *Rutherford:* "(1) whether Liberty's premises and equipment were used for the plaintiffs' work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants."[71] The court then elaborated on the last four factors, which it deemed less straightforward than the first two. For factor three, it directed that industry custom and historical practice should be taken into consideration.[72] It held that the fourth factor weighs in favor of joint employment when employees are tied to one entity such as the slaughterhouse in *Rutherford* rather than to a direct supervisor.[73] In assessing factor five, the court held that close supervision only weighs in favor of joint employment to the extent that it "demonstrates effective control of the terms and conditions" of the employees' work.[74] The court wrote that the sixth factor should only weigh in favor of finding joint employment if the employee worked predominantly or exclusively for the joint employer, such that the employer dictated the workers' pay and work schedules.[75]

The *Rutherford*/*Liberty* test is the present state of the law in the Second Circuit and has since been applied by the Eastern District of New York in *Chen v. Street Beat Sportswear, Inc*.[76] The *Street Beat* plaintiffs brought suit against both contractor and manufacturer under the joint employment doctrine, alleging wage violations under both the FLSA and New York State Labor

[70] *Id*. at 71, quoting Rutherford, 331 U.S. at 730 and Goldberg v. Whitaker House Co-op, Inc. 366 U.S. 28, 33.
[71] *Id*. at 72.
[72] *Id*. at 73.
[73] *Id*. at 74.
[74] *Id*. at 75.
[75] *Id*. at 75.
[76] 364 F.Supp.2d 269 (E.D.N.Y. 2005).

Laws.[77] After considering the *Rutherford/Liberty* factors with the *Liberty* gloss, the court found that material issues of fact existed as to whether Street Beat was the Plaintiffs' joint employer, precluding summary judgment.[78]

The evidenced showed that the manufacturer defendant, Street Beat.Sportswear, Inc., hired as many as twenty contractors to produce its garments—awarding the contracts based on cost (usually giving the contract to the lowest bidder) and the contractors' specialty in the garment assembling process.[79] The contractors used their own premises and equipment, but Street Beat supplied all materials except thread needed to construct the garments, as well as instructions for their assembly.[80] Street Beat employees had "unfettered access" to the contractors' premises, with one of its employees spending "100%" of her time at the various contractors' factories.[81]

The court ruled that the first factor—whether the workers used Street Beat's premises and equipment--weighed against a finding of joint employment and did not raise an issue of material fact concerning the question. The manufacturer's access to the contractors' premises, coupled with one plaintiff's testimony that he had worked at Street Beat's factory on two occasions, was not sufficient to show functional control over the plaintiffs.[82] Nor did the court find this factor satisfied by the supply of materials and garment assembly instructions by Street Beat to the contractors.[83]

On the question of whether the plaintiffs constituted a business unit that could or did shift from one employer to another, the court found that a material issues of fact existed. The defendants argued that the contractors worked for various garment manufacturers, rather than

[77] *Id*. at 273.
[78] *Id*. at 289.
[79] *Id*. at 273-74.
[80] *Id*. at 280.
[81] *Id*. at 280, 286
[82] *Id*. at 280.
[83] *Id.* at 284.

just Street Beat.[84] The court noted that normally evidence of this nature would weigh against joint employment, but it apparently found credible the plaintiffs' contention that, contrarily, the contractors were almost entirely dependent on Street Beat for work. [85]

With regard to the third *Rutherford/Liberty* factor, the court found that the workers performed a discrete job that was integral to Street Beat's process of production, which weighed in favor of joint employment. It looked to the *Liberty* court's description of a spectrum, with piecework performed on the manufacturer's premises, requiring minimal training and constituting an "essential step" in the production process weighing in favor of joint employment at one end of the spectrum; on the other end, weighing against joint employment, skilled work not performed on a predictable schedule.[86] The court characterized the plaintiff's work as analogous to that on the former end of the spectrum, but did not require that the work be done on Street Beat's premises.[87] In determining this, the court considered the outsourcing of labor in the context of another of the Liberty court's elaborations regarding this third factor—the custom and historical practices of the garment industry.[88] The plaintiffs submitted expert testimony detailing the history of dubious labor practices in the garment industry to support the contention that such practices were intentional, and used to increase profits by exploiting workers and circumventing labor laws.[89] The defendants argued that such practices were merely an attempt to remain competitive.[90] Despite a lengthy discussion of this evidence, the court did not consider it in determining that the third *Rutherford/Liberty* factor weighed in favor of joint employment, relying on the unskilled nature of the plaintiffs' piecework instead.[91]

The court found that the fourth factor—whether responsibility under the contracts could pass from one subcontractor to another without material changes—weighed in favor of joint

[84] *Id*. At 281.
[85] *Id.*
[86] *Id*. at 282.
[87] *Id.*
[88] *Id.* at 282-83.
[89] *Id*. at 283.
[90] *Id.*
[91] *Id*. at 285.

employment.[92] It held that the workers showed they were tied to Street Beat, rather than just the contractors, because supervision of the manual labor they performed and the simple product they produced could easily pass from subcontractor to subcontractor.[93]

The court next considered whether Street Beat supervised the plaintiffs to the extent that it controlled the terms and conditions of their employment, and found a material issue of fact to exist. Pursuant to *Liberty*, the court refused to count any evidence regarding Street Beat's quality control over the plaintiffs' work as control over the terms and conditions of their employment, as such supervision is consistent with a legitimate subcontracting agreement.[94] Instead, the court deemed Street Beat's requirements regarding turnaround time for production of garments to be the strongest evidence in favor of finding a joint employment relationship regarding this factor.[95] It found that this indirect control over the number of hours the plaintiffs worked was sufficient to preclude summary judgment for the defendants on this factor.

Finally, the court considered whether the plaintiffs worked exclusively or predominantly for Street Beat. A court will find a joint employment relationship exists when the plaintiffs perform "all or nearly all" of their work for the putative joint employer.[96] The plaintiffs estimated that 95% of the work performed in a given year was for Street Beat, while Street Beat contended that less than 25% of its total subcontracting was with the plaintiff's employers.[97] The court found that a material issue of fact was in dispute, and refused to grant summary judgment with regard to this factor.

Street Beat is the only case to have applied the *Rutherford/Liberty* factors as set forth in *Liberty*, and provides guidance on how the joint employment doctrine may be used to ensnare retailers. From the *Street Beat* court's discussion, it can be gleaned that supplying materials and patterns does not satisfy the first factor when the work does not take place on the manufacturer's

[92] *Id*. at 285.
[93] *Id.* at 285-86.
[94] *Id.* at 286.
[95] *Id*. at 287.
[96] *Id*. at 288, quoting Liberty, 355 F.3d at 75.
[97] *Id.* at 289.

premises, even when the manufacturer has unlimited access to the workers' place of employment. It seems unlikely that production work would be done on a retailer's premises, so the best way to link retailers to the premises would be financially. Lawyers should look to see whether retailers directly or indirectly, through significant economic support via production contracts, contribute to the manufacturer's or contractor's ability to lease or maintain the premises.

The *Liberty* court found the second factor--whether workers shift as a unit from one putative joint employer to another--relevant to the joint employment inquiry because "a subcontractor that seeks business from a variety of contractors is less likely to be part of a subterfuge arrangement than a subcontractor that serves a single client."[98] Given the nature of the garment industry, it might be time to debunk this assumption. The *Street Beat* court did not consider this underlying rationale, but focused instead on the factual dispute between the parties as to whether the Street Beat was the primary employer, or only one of several, saying that the latter would weigh against a joint employment relationship. To ascertain whether workers are tied to manufacturers or retailers rather than subcontractors, emphasis should be placed not only on how many manufactures the contractor works for, but also whether working for one dictates the contractor's ability to work for others. Any extrinsic market factors bearing on a specific relationship should be also be used to demonstrate workers' ties to a single manufacturer or retailer.

When arguing the third factor, worker advocates should stress the unskilled nature of the work and simplicity of the product. One fact to look for would be whether the retailer has a hand in designing or overseeing the garment production process. If it does, that process should be examined for features unique to that particular retailer to satisfy the requirement that the workers perform "essential steps" in the assembly process. Attention should also be focused on the *Liberty* court's inclusion of industry custom and historical practice as they pertain to the

[98] Liberty, 355 F.3d at 72.

performance of integral line-jobs. More attempts should be made to force courts to acknowledge the garment industry's long history of exploitation of workers and to recognize that industry practices were developed to circumvent labor laws. Arguments regarding the integral and discrete nature of garment industry line-jobs should be scrutinized to distinguish reality from the accepted narrative. The *Street Beat* court's decision to decline to adopt a requirement that such jobs be performed on the putative joint employers premises, as they were in *Rutherford*, is a step toward acceptance of a more accurate picture of the garment industry's structure and practices.

The fourth *Rutherford/Liberty* factor--whether responsibility under the contracts can pass from one subcontractor to another without material changes—can be distinguished from the second factor because it focuses on the role of the subcontractor, rather than that of the worker. Like the third factor, the simplicity of the work should be emphasized when arguing in favor of joint employment. The simpler the work, the less likely the subcontractor's supervisory role is unique or integral to the operation. The *Street Beat* court found both the transient nature of the plaintiffs' work—how it could shift from between subcontractors while still working on Street Beat's garments—and the replaceability of workers to weigh in favor of a joint employment relationship. Both of these inquiries speak to the interchangeability of subcontractors, and will be persuasive elements when arguing that workers are tied to a manufacturer (or retailer) rather than a subcontractor.

With regard to the fifth factor, or whether the putative joint employer supervised the contractor's employees such that it set the terms and conditions of their employment, *Street Beat* offers hope for expanding the doctrine to include retailers. Though the court followed *Liberty* and rejected quality control of products as an element of controlling terms and conditions, it considered setting the turnaround time for production as setting workers' hours. This has a potentially tremendous "trickle-up" effect, and is a great stride in recognizing the reality that those who set the terms for the first link in the chain, indirectly set the terms for the rest of the links in the chain. The *Street Beat* court, in recognizing this fact, injected a modern dialogue into

the joint employment doctrine, which should be extremely useful in pushing courts to recognize both the control retailers have over the industry as a whole and their culpability for its practices.

Finally, in considering whether workers do all or nearly all of their work for a single entity, courts have found that 75% is sufficient to favor joint employment.[99] Worker advocates should seek to lower this standard to "most" of the work, which would be a more realistic reflection of the control an entity has over workers and of workers' economic dependence on that entity. Lowering this standard would also subject more manufactures and retailers to liability through the joint employment doctrine.

As discussed in the first section of this paper, all arguments concerning labor violations—be they under hot goods laws or under the joint employment doctrine, should incorporate the stated policies of the FLSA—to maintain the integrity of commerce and ensure fair competition by protecting workers from employers who would circumvent labor laws to gain an edge in the marketplace. Both the FLSA's language and case law make clear that our legal system is often more persuaded by economic arguments than emotional ones. Recognizing what moves the system within which we work is essential to forcing it to change. The development of the joint employment doctrine in the Second Circuit, culminating in *Street Beat*, illustrates how small changes in existing standards can herald great strides down the road. For example, the *Liberty* court's inclusion of history and industry custom as part of the joint employment analysis opened the door to a more contextual, and hence realistic, assessment of particular industries. The *Street Beat* court used that piece of the analysis to reject a requirement for on-premises production with regard to discrete, line-job work in the joint employment doctrine. It is small steps like these that provide encouragement to those who seek to expand the joint employment doctrine, and it is small steps that practitioners should continue to prod courts into making.

[99] Street Beat, 364 F. Supp at 289, referring to Silverman, *supra* note 50, at 420.

CONCLUSION

Using the joint employment doctrine in conjunction with the hot goods laws will reduce the likelihood that retailers and large manufacturers will be able to shield themselves through the "innocent purchaser" exemption of the FLSA or the retailer exemption of New York Labor Law. Though both the FLSA and New York impose strict liability for dealing in hot goods, the barriers to using these laws to help workers are many. First, many workers are afraid to assert their workplace rights because of their immigration status; second, hot goods claims can only be brought by the government, and the government may not have the resources to devote to finding labor violations in the garment industry. Compounding this problem is that, for the same reason many garment workers fear confronting their employers, they are reluctant to turn to the government, which has the power to deport them. Finally, it is too easy for powerful entities to satisfy the exemptions under the hot goods laws. Any retailer or manufacturer who selects contractors through a competitive process has the power to require those contractors to sign boilerplate contracts with language promising that the goods will be made in compliance with labor laws. As joint employers, retailers will not be able to escape their culpability in contributing to the garment industry's continued evasion of labor laws and exploitation of workers.

The law can be a powerful tool in protecting workers and holding corporations to the social compact. It is up to worker advocates to educate the courts about the realities of the garment industry, and update the antiquated narrative that allows powerful retailers and manufacturers to distance themselves from the workers at the bottom of the food chain. Finally, it is up to the public to let the garment industry know that such practices will no longer be tolerated. The individual consumer, who has the power to NOT purchase clothing made in sweatshops, or NOT read magazines that glorify an exploitative and corrupt industry, may be the most powerful tool of all.