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MATERIAL WITNESSES: THE EXPLOITATION OF GARMENT WORKERS IN AMERICA

CELIA J. ELDER
Assistant Director of Contract Implementation with the Association of Pennsylvania State College and University Faculties

ABSTRACT

The Fair Labor Standards Act (FLSA) was enacted in 1938 to eliminate low wages and long hours and child labor. The purposes behind the Act, however, are not being fulfilled in the U.S. garment industry due to inaction by the executive and legislative branches of the government. As a result, American clothing manufacturers have knowingly contracted their sewing work out to American contractors who regularly violate the FLSA. Although contractors are the actual violators of the Act, in reality, it is the manufacturers who control the production methods used by their contractors; therefore, the manufacturers should be considered either as the joint employers of those who work for the contractors, or as the employers of the contractors themselves, and thus, liable under the Act. As the courts have consistently recognized the goals of various types of social legislation and worked to enforce them in the past, it is time to ask the judiciary branch to apply and enforce the FLSA with regard to the practices within the garment industry.

A fair day's wages for a fair day's work: it is as just a demand as governed men ever made of governing. It is the everlasting right of man.

Thomas Carlyle (1795-1881)

With fingers weary and worn,
With eyelids heavy and red,
A woman sat in unwomanly rags
Plying her needle and thread—
Stitch! Stitch! Stitch!
In poverty, hunger, and dirt.

Thomas Hood (1799-1845)
The Song of the Shirt

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http://baywood.com

Until recently, most consumers in America were not aware of the origins of the clothes they bought—that is, where or by whom their clothes were manufactured. However, with the highly publicized loss of American jobs to overseas markets, including a large percentage of garment industry jobs, the news media, unions, and other interest groups have raised the American conscience to "look for the union label" and to "buy American." Unfortunately, however, the "Made in the USA" label often only provides camouflage for American clothing manufacturers who routinely and knowingly contract their sewing work out to American contractors who violate the Fair Labor Standards Act (FLSA) [1] by hiring child labor and paying their workers wages substantially below the minimum wage.

"The purpose of the FLSA is to 'eliminate low wages and long hours' and 'free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers' " [2]. Although these goals have been achieved in a large majority of this country's manufacturing sector, violations of the FLSA continue, and are especially rampant in the garment industry, where large manufacturers such as Liz Claiborne, Banana Republic, Guess, and Esprit (to name a few), in search of the widest possible profit margin, contract their sewing work out to the lowest bidding garment contractors. Although the manufacturers design and market their apparel, the actual production of garments occurs in the factory setting of the contractor. Contractors normally obtain work by bidding for each contract. This process allows the manufacturer to keep its expenses low by controlling how much the contractor makes for each contract. The practice of bidding work out to contractors and maintaining an independent contractor-type relationship has greatly benefited manufacturers. "By characterizing their relationship with contractors as independent, [manufacturers] have avoided legal responsibility for worker's compensation, unemployment insurance and fringe benefits" [3]. Meanwhile, the profit margin in the American garment industry remains one of the highest in the world. This high profit margin, however, is maintained at the expense of workers through a deliberate violation of American labor laws.

Garment contractors hire mostly women, a majority of whom are immigrants who are easily exploited, as they are unsure of their rights and are often limited in their use of the English language. The contractors used by the above-mentioned manufacturers have been shown to routinely impose exploitative labor policies upon their workers. Until very recently, neither the manufacturers nor the contractors have been more than minimally disciplined for their illegal acts. Contractors have also been shown to hire a large number of illegal aliens. "According to census statistics, the garment industry depends more on undocumented workers than any other industry" [4]. Although the Immigration Reform and Control Act (IRCA) of 1986 [5] imposes fines against employers who hire undocumented workers, these fines have done little to alleviate the problem, as "[i]mmigrant rights advocates believe that the IRCA [has] merely exacerbated a bad situation by driving garment workers underground" [6].

The garment industry employs 5.5 percent of all U.S. manufacturing workers. The Bureau of Labor Statistics estimates more than one million workers are employed in apparel and related industries [7]. "[A]lmost half of the contractors working for apparel manufacturers have minimum wage and overtime violations; over 7 percent use illegal child labor; more than 20 percent employ homeworkers illegally; and 90 percent have record-keeping violations involving hours worked and wages paid" [7]. Thus, it is apparent the garment industry has developed many layers of employment issues and problems that are interwoven and interdependent. Therefore, any solution must address all of these layers to be truly effective. To date, solutions to the garment industry's problems have been difficult and sometimes impossible to accomplish for a number of reasons, including the weak enforcement provisions of the FLSA, ineffective governmental response, the manufacturers' successful reliance on the common law theory of independent contracting, and flight of businesses to overseas markets where labor laws are minimal or nonexistent.

Another major difficulty that creates obstacles to compliance with the FLSA is the fact that the garment industry is so highly decentralized. "There are over 15,000 firms in the industry, and the top 4 firms in almost all product segments account for less than 25 percent of total shipments" [8]. This decentralized scheme is highly beneficial to garment manufacturers, as it makes organization of workers extremely difficult and is central to the manufacturers' ability to remain isolated from the appearance of worker control. It can be argued that manufacturers themselves purposefully maintain this decentralized structure through their management practices and payment structure so they may avoid the responsibilities of a traditional employment relationship and claim ignorance when contractors are caught violating the Act. In reality, however, the appearance of isolation from contractors and garment workers is largely superficial and the probability of removing the label of independent contractor from garment workers and contractors will be pursued later in this article. Thus, the factors listed above, coupled with the government's consistent unwillingness or inability to employ the requisite number of inspectors and investigators to ensure compliance, have permitted the garment industry to become a chronic violator of the FLSA. Recently, the federal government and some state governments have attempted to take action to deal with this wide-ranging problem.

THE GOVERNMENT'S REACTION

Inspections/Investigations

The government's activity regarding enforcement of the FLSA over the contractors has frequently taken the form of one-day hunts for child labor violations in which "virtually every federal wage and hour investigator in the country" [9] is sent out in search of such violations during a one- or two-day mission. Although such efforts are commendable, they are performed only on a limited basis and are

certainly not effective as a permanent form of enforcement. Unfortunately, there is a shortage of Labor Department inspectors and investigators (approximately 900 to cover the entire country [10]) due to funding cutbacks in labor law enforcement at both the state and federal levels [11].

As a result, there has been little continuity of inspections and investigations of complaints, as the man- and woman-power required to effectively enforce the FLSA is simply not available. In an interview on National Public Radio, Jeffrey Newman of the National Child Labor Committee stated: "The reality is that nobody's out looking at the federal level and today we have as many child labor violations as we did, probably more than at any time since the 1930s" [10]. Given the call for lower taxes and less "big government" continuously heard throughout the halls of Congress, state legislatures, and the media, the forecast for future increases in the number of investigators is dismal indeed. Clearly, what is needed is a call to arms from the unions, governmental agencies such as the Department of Labor, and especially the news media. When the American public is faced with visual images on its television sets of eight-year-old children sewing buttons on shirts in overcrowded, unsafe, sweatshop conditions, and paychecks that reflect a sixty-hour week at ninety cents an hour, the public will respond and force change on the manufacturers through legislative action. As long as this problem continues to be ignored, manufacturers will continue their exploitation of workers.

Education

In an announcement to the news media, former Secretary of Labor Lynn Martin announced a nationwide education and enforcement initiative to bring about compliance within the garment industry [7]. Martin stated in her address to the news media that the manufacturers and retailers would be the main focus of the initiative. "As part of the . . . initiative, the department sent out 3,300 letters to manufacturers explaining the FLSA. The letter advises the manufacturers what steps can be taken to ensure their contractors, subcontractors and jobbers operate in compliance with the law" [7]. Although this approach is a step in the right direction, the final decision on whether or not to ensure compliance with the law rests with the manufacturer, which appears to many in the labor movement as asking the fox to guard the henhouse. Although the Bush Administration's approach to the problem may have been well-meaning, it was incredibly naive at best. Manufacturers have shown that their legal counsels have a very clear understanding of the enforcement powers of the FLSA, as well as the common law concept of independent contracting. Manufacturers don't need an education. They have, however, proven that they need to be regulated.

Enforcement Using "Hot Goods" Provision

Under the "hot goods" provision of the Fair Labor Standards Act [1, § 215] it is unlawful for any person to "transport, offer for transportation, ship, deliver, or

sell in commerce . . . any goods in the production of which any employee was employed in violation" of the provisions of the act. The purpose of this prohibition, as outlined in *Ford v. Ely Group, Inc.* [12], is to exclude from interstate commerce goods produced under illegal labor conditions, as they would unfairly compete with goods produced by employers who comply with the law, thus forcing complying employers out of business. Investigators have recently "dusted off" this provision for use against companies that produce hot goods by obtaining court injunctions prohibiting transportation of such goods and permitting transportation only after they pay all back wages they are deemed to owe. "These new tactics represent a departure from past practices because the Labor Department plans to use the 'hot goods' provision against manufacturers whose subcontractors violate federal wage laws" [13]. To date, contractors under contract to manufacturers such as Banana Republic, Ralph Lauren, Macy's, Esprit, Joan Walters, Eber, and Sue-J were enjoined from transporting their goods back to the manufacturer until back wages were paid [14]. Enforcement using the "hot goods" provision has certainly been successful against the manufacturers to whom it has been applied. Unfortunately, the dilemma that afflicts the solution of increased inspections and investigations afflicts this solution as well. The search for violators is hampered by the shortage of state and federal labor inspectors and investigators. Governmental agencies must be provided with more funding and executive support to effectively address this problem.

MANAGEMENT'S SOLUTION

Voluntary Model Contracts

As a result of the increased media attention in recent years and closer government scrutiny, manufacturers have become somewhat more responsive to working toward alternative solutions to the problem of FLSA violations by their contractors. One result of this new "sensitivity" is the creation of a standard contract, or model agreement, in which manufacturers agree to work with their contractors to ensure compliance with the FLSA. The first model agreement was recently worked out between San Francisco area garment manufacturers and labor contractors. Parties who participated in negotiation of the agreement included the San Francisco Fashion Industries, Northern California Chinese Garment Contractors Association, the Chinese Bay Area Garment Contractors Association, the California Labor Commissioner, the International Ladies' Garment Workers Union and private attorneys. The model agreement includes provisions that, once the agreement is signed, will be in effect for a two-year period with automatic renewal for successive two-year terms. The model agreement is voluntary, and "requires that a separate schedule be filled out by the parties prior to the start of work. The schedule details the price to be paid to the contractor; expected completion dates; anticipated costs for repair and rework; expected costs for services such as

pressing, trimming, tagging, hanging, and delivery; and procedures for extending completion dates" [15]. The model agreement also provides a rescission clause that permits contractors who decide they made a bad deal with the manufacturer to back out of the contract within a specified period.

This form of self-policing works only when there is a good faith effort on the part of the manufacturers who sign the contract to truly enforce the FLSA with regard to their contractors. Union officials hold little hope for the success of the model agreement, as they believe it is "predicated upon the fictitious assertion that garment industry contractors are independent of the manufacturers whose garments they produce and that contractors are solely responsible for the terms and conditions of employment of the workers in their shops" [16]. Although the union is probably correct about the chance of success of the model agreement concept, it could also be argued that manufacturers are actually recognizing their responsibility for the terms and conditions of employment in their contractors' shops. Certainly, manufacturers are feeling the heat and attempting a "preemptive strike" in agreeing to become parties to such agreements. However, such model contracts might actually work against manufacturers by serving as evidence of control of the operation of the sweatshops from which they profit. This evidence may help lead advocates for garment workers to two possible judicial solutions that could finally put a stop to the exploitative practices which have become a major component of the garment industry.

JUDICIAL SOLUTIONS

Granting Contractors "Employee" Status

In the past, garment manufacturers have based their argument of nonliability "on the common law distinction between an employee and an independent contractor. Under the common law, a master cannot be held for the torts of an independent contractor who is not under his control" [3, p. 206]. Disputes regarding the status of workers as independent contractors or employees have raged for years in many sectors of labor, and through the mechanism of case law, the definition of an employee has been consistently expanded. A result of such case law is the development of a test that assists the finder of fact in determining the employment status of a worker or group of workers.

The model and controlling case that provides the currently accepted test for employee status is *Donovan v. Sureway Cleaners* [17]. In this case, the court held that "agents" who operated retail outlets of Sureway Cleaners laundry and dry-cleaning business were "employees" for purposes of the Fair Labor Standards Act, and set out a six-point test to determine employee status. The first element, control, focuses on what the purported employee actually does in the course of business, as opposed to the powers and abilities he is alleged to have. Thus, the court's argument and its decision regarding control is based, not on singular

elements of power that the purported employer states the employee has, but instead looks to the "circumstances of the whole activity" and the "economic reality" of the situation at hand. The court recognized a defining quality of employee control, citing *Usery v. Pilgrim Equipment Co., Inc.* [18], in which the court stated that "[c]ontrol is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity" [18, at 1313].

In a companion case that applied the elements of the *Sureway* employee status test, the court in *Donovan v. DialAmerica Marketing, Inc.* further refined the definition and significance of the control factor in determining employee status [19]. Citing *Goldberg v. Whitaker House Cooperative* [20], the court stated that merely looking to physical control over workers is not, in itself, sufficient to determine control, and even though the workers in question could choose their own hours of work and were subject to little direct supervision, the most compelling fact that led to the conclusion that the workers were employees was that they were "regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates . . . " including the fact that "management fixes the piece rates at which they work . . . " [19, at 1384].

The second and third factors illustrated in the *Sureway* test are related to whether the purported employee has made a capital investment in the business and is, therefore, at risk of a loss or opportunity for profit. The court in *Sureway* stated that, in addition to the consideration of whether there is a capital investment, control over the factors that determine profit is also an important consideration. The court stated that there are at least three factors that determine profit: "advertising, price setting, location, etc." [19, at 1371] and held that Sureway did control those factors, so even though the agents were responsible for bad checks, theft losses, and the disposal of abandoned clothing, Sureway was acting in the role of an employer, as these were burdens that were placed on the agents by Sureway.

The fourth factor in the *Sureway* test requires the finder of fact to determine whether highly developed skills, such as business acumen and managerial abilities, are required to run the agent's end of the business. The court observed that outside of a five-day training session provided by Sureway, "all major aspects of the business open to initiative—advertising, price setting, power to choose cleaning plants and thereby get the best price—are controlled by Sureway" [19, at 1372] and outside of the minimal skills provided in the five-day training session, the agents had no skills as required under the test.

The fifth factor in the test looks to the permanency of the working relationship. The court observed that, as independent contractors tend to move from job to job, employees are dependent on the employer for continued employment. Additionally, the employee usually tends to work for the same employer for an extended period of time.

The sixth and final factor of the *Sureway* test considers whether the services rendered by the agents were an integral part of Sureway's operation. This factor requires the finder of fact to determine if the work being performed by the purported employee is essential to the operation of the business.

Application of the *Sureway* test to contractors employed by garment industry manufacturers illustrates that, given the increasingly broad definition of "employee" that has arisen over the years through the courts' interpretation of common and case law, and the fact that the FLSA is, in fact, social legislation, contractors may be considered the employee of the manufacturers.

In integrating the first element of the *Sureway* test, control, into the garment industry model, it is clear that manufacturers do have significant control over the manner, means, and cost of production. This control is manifested primarily in the method used by manufacturers to determine how long it should take to produce a garment and how much they will pay for the contract. "Generally, manufacturers calculate the contract price on the basis of the time it takes their sample-makers (seamstresses generally hired to sew sample garments to be displayed in showrooms for retailers' and buyers' inspection) to produce the garment under 'accepted industry conditions'. However, such estimates inaccurately reflect the actual production process" [3, p. 206]. Under normal industry conditions, considerations such as the garment workers' skill level, the surrounding working conditions, tools, equipment, and other variables affect the time it takes to produce a garment, and the time-motion studies manufacturers employ do not take such variables into consideration. The manufacturer also provides the contractors with the fabric, materials, and pattern to sew the garments they are contracted to produce. In comparison to the facts and holding in *DialAmerica*, it is fairly clear that the practices of the garment manufacturers more closely resemble an employer's practices in terms of the control that they exercise over their contractors.

Looking to the second and third elements of the *Sureway* test, which are based on whether the purported employee makes a capital investment in the business and if s/he is at risk of a loss or has an opportunity for profit, the first part of the test as applied to contractors is typically going to be in favor of the contractor being an independent contractor, as most contractors rent or buy the facility and sewing equipment to be used. However, upon closer inspection, the primary factors that determine profit, as set out in *Sureway*, such as advertising, price setting, and location, are normally within the control of the manufacturer and not the contractor. Certainly, contractors do not market the garments they produce, nor do they have any control over how the manufacturer finally determines the pricing structure of the garments produced. This is under the manufacturers' control.

The fourth *Sureway* factor, which asks the finder of fact to determine whether running the agent's end of the business requires highly developed skills, very clearly demonstrates the employer/employee relationship that exists between contractors and manufacturers. "Most contractors in the major garment centers are

monolingual immigrants who were formerly garment workers themselves" [3, p. 199]. Thus, many of these individuals enter into garment contracting with little to no managerial skills or education. As contractors have very limited bargaining power, their decision-making powers are limited by what the manufacturers will pay them for their work. Thus, contractors are permitted to exercise very little initiative in the business, leaving most of the important business decisions and control to the manufacturers.

In terms of the permanency of the working relationship, the fifth element of the *Sureway* test, it appears that, although there are a number of contractors who do perform on a per-contract basis, the limited number of contractors in some garment manufacturing regions do result in manufacturers using the same contractors on a regular basis. However, the main determinant of whether a manufacturer will hire a contractor is the contractor's bid for the work. The lowest bid wins. "[C]ompetitive pressure from imports has forced subcontractors—which provide most of the work for the nation's well-known ladies' apparel makers—to fight among themselves over what U.S. business remains, pushing more companies to operate on the margin" [11]. As a result, there are probably few permanent working relationships between contractors and manufacturers. This is probably the weakest element in the line of analysis toward granting contractors employee status. However, although these indicia may not be as compelling as some of the other evidence of an employer/employee relationship, "[t]he presence or absence of any individual factor is not dispositive of whether the economic realities indicate the existence of an employee/employer relationship. Such a determination depends upon 'the circumstances of the whole activity' " [21].

Finally, the question of whether the contractor is performing an integral part of the manufacturer's operation may certainly be answered in the affirmative. The contractor is the outside producer of the manufacturer's garments. If the contractor did not act in this capacity, the manufacturer would be required to perform the same function internally or find a different arrangement to accomplish the same essential activity.

As we can see, there is an abundance of evidence that the relationship between manufacturers and contractors is, in reality, one of employer and employee and not an independent contractor relationship at all. In deciding whether contractors are employees for purposes of the FLSA, courts should bear in mind the remedial nature of the FLSA and the fact that judicial interpretation of social legislation has enjoyed a long and consistent history of being read in the context of the evil it was written to address. "The terms 'independent contractor', 'employer', and 'employee' are not to be construed in their common law senses when used in federal social welfare legislation" [22]. "Rather, their meaning is to be determined in light of the purposes of the legislation in which they were used" [23].

If courts do confer employee status on contractors, the question remains: how will this help the average garment worker? First, application of the FLSA to

contractors will provide a level of relief to a group of small businesspeople who are extremely vulnerable to the demands of manufacturers. Competition is high in the garment contracting business, as contractors must undercut each others' bids to get work. As there is an overabundance of contractors on the market, manufacturers are able to determine the price they pay and to keep their profit margins extremely low. The result is that contractors, immigrants themselves—many of whom have worked as garment workers—whose businesses are extremely undercapitalized, live on the edge of bankruptcy. If they go out of business, their workers have no place to turn to receive the wages owed them. It is not uncommon for contractors to hold workers' wages until they are paid by the manufacturer. It is also quite common for manufacturers to refuse to pay contractors "because the apparel is purportedly either improperly sewn or not delivered in time" [3, p. 204]. Recognition of contractors as employees would have a certain "trickle-down" effect, as their inclusion under the FLSA would ensure them dependable pay periods and at least a minimum wage from the manufacturers. In turn, contractors would be able to pay their workers on a dependable basis as well.

Thus, manufacturers should be held to the standard established by the Fair Labor Standards Act and be compelled by the courts to treat contractors as employees, fully providing for the manner and means of operation, paying minimum wages, benefits, and complying in all other ways with the act. The social and economic benefits of such a determination are apparent. The garment industry would become more centralized and easier to monitor and regulate. The frenzy of competition and undercutting currently existing between contractors would be eradicated and replaced by a system that would recognize their contribution to the industry and ensure the equitable payment of garment workers. The fact is that the purpose of the Fair Labor Standards Act is "to 'eliminate low wages and long hours' and 'free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers" [2]. The government and the courts should not lose sight of these high standards and important goals for the benefit of corporations. To ignore the plight of the garment worker is to move one more step backward into the trap of social Darwinism and the terrible world of the sweatshop.

Creating a Standard of Joint Employment between Manufacturers and Contractors

Although there may be sufficient evidence to prove that manufacturers, in many cases, control the wages, hours, and conditions of employment of contractors, obtaining employee status for contractors may not be the most effective means to obtain fair wages and labor practices for garment workers. Certainly, gaining employee status for contractors would ensure them a dependable and consistent wage on which they could, in turn, base their employees' wages. However, to effectively reach the employees of the contractors, advocates could advance the

argument that manufacturers and contractors act as the joint employers of garment workers. In *Moldonado v. Lucca*, the argument of joint employment was raised and won in the context of migrant farmer workers who worked for both the farm labor contractor and the farm owner [24]. In regulations enacted to implement the FLSA, the Department of Labor specifically endorsed the doctrine of joint employment. Under 29 CFR § 791.2, a determination of joint employment "depends upon all the facts in the particular case," and the rule of thumb is whether an employee's work for one employer is "completely disassociated from his or her work for another" [24, at 487]. Additionally, 29 CFR states that

> [a] joint employment relationship is generally deemed to exist (1) where one employer is acting directly or indirectly in the other's interest in relation to the employee and (2) where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer [§ 791.2(b)(2)(3)].

In *Hodgson v. Griffin and Brand of McAllen, Inc.* the definition of a joint employment relationship was further refined [25]. Applying the Supreme Court's creation of the economic reality test in the landmark case of *Bartels v. Birmingham* [26], the court in *Hodgson* looked to five factors in its interpretation of the test to determine whether an employment relationship existed between migrant farm workers, contractors, and farm owners. The economic reality test incorporated a number of the *Sureway* factors in its analysis. In *Hodgson*, the court looked to

> (1) whether the employment took place on the alleged employer's premises; (2) how much control the alleged employer exerted over the workers; (3) whether the alleged employer had the power to hire and fire the workers or to modify their employment conditions; (4) whether the workers performed a 'specialty job' within the line of production; and (5) whether the worker could refuse to work for the alleged employer or choose to work for others [25, at 237-238].

In making its determination that the farm workers were employees of the contractors and the farm owners, the court found that 1) the farm owners actually leased the lands on which the employees worked; 2) the farm owners designed, implemented, and ultimately controlled the picking process and the system of payment to the workers; 3) the farm workers were free to continue to work for the owners even after the contractor had been fired; and that picking blueberries qualified as a "specialty job" within the process of taking berries from field to market because it is an integral element of agricultural production [25, at 238].

Application of the facts and circumstances surrounding the employment of garment workers to the economic reality test of *Hodgson* is similar to that of comparing the garment workers' employment relationship to the *Sureway*

independent contractor test. First, although it is clear garment manufacturers do not become involved in the financing of garment factories, their payment and pricing policies certainly affect the ability of contractors to stay in business and to pay their workers.

As was clear in applying the *Sureway* test to the contractors' employment relationship with manufacturers, the second element of the economic reality test, which relates to control of the employees, continues to be one of the most persuasive. Manuracturers control the pay scales and working conditions of garment workers, through systems developed by the manufacturers, by encouraging contract bidding wars between garment contractors, calculating contract prices based on time studies in near perfect working conditions determined by the manufacturers, and by requiring contractors to work with the fabric, materials, and patterns the manufacturers supply.

The third element of the economic reality test, which looks to direct interaction between the manufacturer and the worker, would be difficult to apply to garment workers. Manufacturers have (smartly) distanced themselves from any appearance of such direct interaction with garment workers. Therefore, it is unlikely that it would be possible to find any manufacturer informing garment workers that they would be able to continue working for the manufacturer if that manufacturer fired a particular contractor. Certainly, there is an element of permanency in the circumstances of garment workers' employment, if not in the circumstances of their employment relationships. When contractors lose a particular bid, the garment workers are usually free to move on to another sweatshop to find work. However, garment workers should not be penalized for being employed in an industry that has been purposefully manipulated to keep both garment contractors and garment workers from obtaining secure working relationships. This situation ties in with the fifth element of the economic reality test—whether the worker can refuse to work for the employer or choose to work for others. Typically, garment workers may work for whomever they choose. But the economic reality of a legal or illegal immigrant with little English-speaking ability and few employment contacts outside of their immediate neighborhood makes it unlikely that work from one sweatshop to the next will be any better or more lucrative. As a result, garment workers have few real choices or opportunities in employment.

Finally, with respect to the question of whether garment workers perform a "specialty job" integral to the line of production in the garment industry, it is helpful to consider what would happen if there were no garment workers as we know them today. Manufacturers would be forced to find another means of piecing their clothing together for sale. The alternative would be an "in-house" manufacturing process in which garment workers would be employed in garment manufacturing factories supplied by the manufacturer. The contractors would be replaced by foremen or supervisors, and the result would be an industrial model similar to any factory setting that exists in America today. Clearly, therefore, garment

workers are integral, and probably *the* most important element in clothing manufacturing as we know it. However, they are the least valued and the lowest paid.

CONCLUSION

As recently as 1990, the courts recognized the principal purpose behind the Fair Labor Standards Act and incorporated it into decisions. In *Watson v. Graves*, the court, using the economic reality test, decided that prison inmates hired to work for outside employers via a contract between the private employer and the prison were employees of the private employer and subject to the Fair Labor Standards Act [27]. In its examination of the facts and circumstances of that case, the court concluded that "we must also look to the substantive realities of the relationship, not to mere forms or labels ascribed to the laborer by those who would avoid coverage" [27, at 1554]. Given the apparent inability or unwillingness of the executive and legislative branches of the federal government to deal firmly with garment manufacturers, perhaps it is time to look to the courts to apply the social legislation of the Fair Labor Standards Act to the garment industry. After all, it is the courts that have consistently recognized the goals of various types of social legislation and worked to enforce them. It was the Supreme Court in *Rutherford Food Corp. v. McComb* [28] that stated "[w]here the work done, in its essence, follows the usual path of an employee, putting an 'independent contractor' label does not take the worker from the protection of the Act" [28, at 729]. Thus, the judicial system has recognized the role of the Fair Labor Standards Act as a form of protection of workers against employers who would create structures to isolate themselves from the responsibilities expected of them in return for the privilege and license of making a profit in this country. It is the conclusion of this article that, in the absence of legislative and executive support, only through strong advocacy within the judicial system will garment workers gain the power to receive what most American workers take for granted: an honest day's pay for an honest day's work.

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Celia J. Elder is the Assistant Director of Contract Implementation with the Association of Pennsylvania State College and University Faculties (APSCUF) in Harrisburg, Pennsylvania, which represents the faculty of the fourteen State System Universities in Pennsylvania. She is a 1995 graduate of Widener University School of Law, and has a Master's Degree in Industrial and Labor Relations from Indiana University of Pennsylvania. Prior to her matriculation at IUP, Ms. Elder served in the U.S. Air Force.

ENDNOTES

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18. 527 F.2d. 1308, 1312 (5th Cir.), *cert. denied*, 429 U.S. 826, 97 S.Ct. 82, 50 L.Ed.2d. 89 (1976).
19. 757 F.2d. 1376, 27 Wage & Hour Cas. (BNA), *cert. denied*, 474 U.S. 919, 106 S.Ct. 246, 88 L.Ed.2d 255 (U.S.N.J., 1985).
20. 366 U.S. 28, at 32-33, 81 S.Ct. 933, at 936, 6 L.Ed.2d. 100 (1961).
21. *Haywood v. Barnes*, 109 FRD 568 (E.D.N.C. 1986), quoting *Rutherford Food Coop. v. McComb* at 730, 67 S.Ct. at 1477.
22. *NLRB v. Hearst*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944).
23. *Mednick v. Albert Enterprises, Inc.*, 508 F.2d. 297, 299 (5th Cir. 1975).
24. 629 F.2d 483 (1986).
25. 471 F.2d 235 (5th Cir.), *reh'g denied*, 472 F.2d 1405, *cert. denied*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973).
26. 332 U.S. 126, 130, 67 S.Ct. 1547, 1550, 91 L.Ed. 1947 (1947), ("In the application of social legislation employees are those who *as a matter of economic reality* are dependent upon the business to which they render service.")
27. 909 F.2d 1549, 59 USLW 2200, 29 Wage & Hour Cas. (BNA) 1601 (5th Cir., 1990).
28. 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947).

UPDATE

The need to strengthen the enforcement provisions of the Fair Labor Standards Act and to hold apparel manufacturers and retailers responsible for the workplace abuses and labor law violations committed by the sweatshops with which they contract has never been more evident than it was in the summer of 1995. It was August 3, 1995, when Federal agents raided a dirty, sweltering, and crowded sweatshop in El Monte, California, where seventy-two illegal Thai immigrants

were being forced to work for wages as low as fifty cents an hour, for up to twenty-two hours a day[1]. These workers, whose passage was paid for by the sweatshop owners and operators (Thai and Laotian nationals themselves) were usually bused from the airport directly to the sweatshop to begin working off their debt—a debt they would never pay off. Some of them had been working at the sweatshop for more than seven years when the Federal raid took place[2]. The operators of the sweatshop were indicted in early September on charges of recruiting the workers from Thailand and harboring them as slave laborers[3].

The garment manufacturers who contracted with the sweatshop have been fined $35,000 each by the California Labor Department. They include F40 California Inc., Balmara Inc., New Boys Inc., A & M Casuals, U.S. Boys, Voltage Inc., Jonquil Inc., and BUM International[4]. Additionally, Labor Secretary Robert Reich has announced that the U.S. Labor Department is seeking $5 million in back wages from these manufacturers[5]. Among the apparel retailers who received goods made at El Monte are Macy's, Neiman Marcus, Hecht's, Filene's, Rich's, Montgomery Ward & Company, and The Limited Inc. State authorities have also subpoenaed records from Mervyn's, as they suspect that the "retailer may have obtained goods directly from the sweatshop"[6]. Several retailers have attempted to perform public relations damage control, denying knowledge of the sweatshop's activities. Neiman Marcus issued a statement claiming that it has "clearly communicated to all vendors that it will not do business with any manufacturer that exploits its workers"[7]. Montgomery Ward & Company announced its intention to remove all New Boys Inc. merchandise from its shelves[8] and to file suit against the Los Angeles garment manufacturer "for supplying goods in violation of the company's policy not to employ slave, prison or child labor"[9].

Secretary Reich invited the retailers who received the sweatshop's goods to a meeting in Washington in September 1995, to discuss ways to prevent goods made by slave labor from being sold in their establishments, stating, "It is time for major retailers and brand-name manufacturers to assert some control and responsibility . . ."[10]. There has also been a movement requesting that the Labor Department publish a list of retailers that continue to sell clothing made in sweatshops[11]. But even as official statements are issued and gestures are made, there is no guarantee that the practice will not continue, or that governmental agencies will be more vigilant. As Steven Nutter, West Coast Director of the Union of Needle Trades Industrial and Textile Employees stated, "no one has any level of confidence that there aren't similar shops out there"[12]. As the media turns away to pursue other issues of consequence, industry practices will most likely return to the status quo, where legal and illegal immigrants toil in filth and misery for the benefit of American manufacturers and retailers, who claim ignorance when faced with the ugly truth of their industry, yet continue to reap its benefits. Personal responsibility is said to be the axiom of this Republican-led Congress. If that is true, then it is time for the new Congressional leadership to enact legislation

which will require manufacturers and retailers to practice personal responsibility by policing the garment suppliers with whom they contract and to stop profiting from the suffering of others.

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[1]*New York Times,* August 15, 1995, V144, pA14(L), C6.
[2]*New York Times,* August 4, 1995, V144, pA1(L), C5.
[3]*New York Times,* September 7, 1995, V144, pA28(L), C3.
[4]*New York Times,* August 16, 1995, V144, pA22(L), C3.
[5]*Id.*
[6]*Id.*
[7]*Id.*
[8]*Supra,* note 1.
[9]*Id.*
[10]*Id.*
[11]*Working Assets Newsletter*, November 17, 1995, p1.
[12]*New York Times,* August 12, 1995, V144, pA6(L), C1.

Direct reprint requests to:

Celia J. Elder
c/o APSCUF
319 N. Front Street
P.O. Box 11995
Harrisburg, PA 17108