

**REDO - REVISED SECOND STAGE OF THE CHATGPT-4 APPEAL EXPERIMENT: Prediction of outcome of the appeal and possible dissent.**

**Ralph Losey, October 15, 2023.**

GPT put my picture in the record of all my prompts, plus I have added a short break line for clarity.

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Can you make a reasoned prediction of the outcome of this appeal and provide a full and detailed explanation of your reasoning and the facts and law relied upon.

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**Predictive Memorandum**

**Subject: Predicted Outcome of the Appeal in McKay v. Miami-Dade County**

**Introduction**

The appeal in McKay v. Miami-Dade County centers on the pivotal question of whether an individual participating in an unpaid internship program for personal, non-civic reasons qualifies as an "employee" under the Fair Labor Standards Act (FLSA). Given the arguments presented by both parties and the underlying court decision, this memorandum aims to make a reasoned prediction of the appeal's outcome.

**Predicted Outcome**

It is likely that the appellate court will affirm the lower court's decision in favor of Miami-Dade County.

**Reasoning**

**Regulatory Framework**

Both parties rely on different sections of the Code of Federal Regulations (CFR) to bolster their arguments. Ms. McKay leans on 29 C.F.R. § 553.101, which defines a volunteer as someone who performs services "for civic, charitable, or humanitarian reasons." Miami-Dade County, on the other hand, cites 29 C.F.R. § 553.104, which does not predicate volunteer status on civic-mindedness and is more specific to public agencies.

The lower court found that these regulations are in tension and opted for a more holistic approach, which is likely to be upheld on appeal. Courts often defer to a lower court's interpretation of regulatory ambiguity unless it is clearly erroneous.

**Primary Beneficiary Test**

The lower court's application of the "primary beneficiary test" is a strong point in Miami-Dade County's favor. This test, which originated from the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, has been adopted by multiple circuits and provides a flexible, multi-factor analysis

to determine who benefits more from the internship. Given that this test is becoming the prevailing standard, it is likely that the appellate court will find this approach persuasive.  
Economic Reality and Duration of Internship

The lower court found that the "economic reality" of Ms. McKay's relationship with the County indicated that she was the primary beneficiary. She gained valuable skills and networking opportunities, which is consistent with the purpose of an internship. The duration of the internship was also not found to be "grossly excessive," further supporting the volunteer classification.

#### Precedent and Policy Considerations

The lower court cited *Lucia Vlad-Berindan v. NYC Metro. Trans. Auth.*, which supports the application of the primary beneficiary test to public sector internships. This precedent, along with policy considerations about the potential disruption of public sector internship programs, will likely weigh in Miami-Dade County's favor.

#### Conclusion

Given the lower court's reasoned application of the primary beneficiary test, the existing legal precedents, and the policy implications of classifying such interns as employees, it is probable that the appellate court will affirm the lower court's decision. This prediction is based on a synthesis of the facts of the case, the arguments presented by both parties, and the relevant legal frameworks and precedents.

This memorandum is intended for legal analysis purposes and should be reviewed for accuracy and applicability to specific circumstances.

Best regards,

[Your Name] [Your Position]



As you know, this appeal would be determined by the Eleventh Circuit Court of Appeals three judge panel. Only two judges must join in an opinion for it to become binding law. A third judge may dissent and write their own separate dissenting opinion. Please speculate as to the likelihood of a dissent being filed by one of the three judges to an Opinion that affirms the District Court's opinion. State a numerical value of between 0% to 100% and provide a full explanation for your estimate. Further, as a separate additional memorandum, please assume that a dissent is filed, and speculate as to what you think the most likely grounds would be for the dissent. Please state the expected reasoning for the dissent in as detailed and complete manner as possible.

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#### Likelihood of a Dissenting Opinion

Numerical Estimate: 25%

Explanation:

The Eleventh Circuit Court of Appeals is known for its collegiality but also has a diverse set of judges with varying judicial philosophies. Given the complexity and the somewhat novel nature of the issue at hand—classification of unpaid interns under the FLSA—there is room for interpretive divergence. However, several factors reduce the likelihood of a dissent:

1. **Strong Precedent:** The "primary beneficiary test" is becoming a widely accepted standard for determining employment status under the FLSA. Its application to public sector internships is a logical extension, reducing the space for judicial disagreement.
2. **Regulatory Ambiguity:** The lower court's decision to move beyond the conflicting CFR sections to a more holistic approach is a judicial maneuver that's hard to fault, especially given the deference appellate courts often afford to lower courts in cases of regulatory ambiguity.
3. **Policy Implications:** The potential for disrupting public sector internship programs is a strong policy argument that could sway judges to concur with the lower court's opinion.
4. **Economic Reality:** The lower court's focus on the "economic reality" of the internship aligns well with the FLSA's purpose, making it a less likely point of contention.

Given these factors, while there is some room for disagreement, the likelihood of a dissenting opinion is estimated to be relatively low at 25%.

### **Hypothetical Dissenting Memorandum**

Subject: Grounds for Dissent in McKay v. Miami-Dade County

Introduction

Assuming a dissenting opinion is filed in the case, this memorandum speculates on the most likely grounds for such a dissent.

Grounds for Dissent

1. **Regulatory Interpretation:** A dissenting judge might argue that the lower court erred in its interpretation of 29 C.F.R. § 553.101 and § 553.104. The judge could assert that these regulations are not in tension but rather serve different purposes and should both be applied.
2. **Narrow Application of the Primary Beneficiary Test:** The dissent could argue that the primary beneficiary test, while useful, should not be applied in a manner that essentially nullifies the regulatory definitions set forth by the Department of Labor.
3. **Public Policy and Legislative Intent:** The dissent might emphasize that the FLSA was designed to protect workers and that extending its protections to unpaid interns aligns with this legislative intent.
4. **Economic Coercion:** The dissent could argue that the "economic reality" test fails to account for the economic pressures that lead individuals to accept unpaid internships, effectively coercing them into free labor.
5. **Judicial Precedent:** The dissent might cite cases where courts have been more willing to classify unpaid workers as employees under the FLSA, arguing for a more expansive interpretation.

Conclusion

The dissent would likely be rooted in a different interpretation of the relevant regulations, a more circumscribed view of the primary beneficiary test, and a focus on the FLSA's original intent to protect workers. It would serve as a call for a more expansive interpretation of employment under the FLSA, one that takes into account both regulatory language and broader economic realities.

This memorandum is speculative and intended for legal analysis purposes. It should be reviewed for accuracy and applicability to specific circumstances.

Best regards,

[Your Name] [Your Position]

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Please assume that the 11th Circuit panel assigned to hear this appeal is composed of Circuit Judge JORDAN, Circuit Judge JILL PRYOR, and Chief Circuit Judge TJOFLAT. With this assumption, please provide a revised memorandum that speculates as to the likelihood of a dissent being filed by one of the three judges to an Opinion that affirms the District Court's opinion. State a numerical value of between 0% to 100% and provide a full explanation for your estimate.

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### **Revised Likelihood of a Dissenting Opinion with Specific Panel Composition**

Numerical Estimate: 40%

Explanation:

Given the specific composition of the panel—Circuit Judge JORDAN, Circuit Judge JILL PRYOR, and Chief Circuit Judge TJOFLAT—the likelihood of a dissenting opinion may be higher than initially estimated. Here's why:

1. **Judicial Philosophies:** Judge TJOFLAT is one of the most senior judges on the Eleventh Circuit and is generally considered conservative. Judge JORDAN, while also conservative, has shown a willingness to diverge from conservative orthodoxy in certain cases. Judge JILL PRYOR is considered more liberal and has written dissents in the past on labor and employment issues.
2. **Regulatory Interpretation:** Judge JILL PRYOR, in particular, might be more inclined to adhere strictly to Department of Labor regulations and could dissent if she believes the majority is straying too far from regulatory text.
3. **Public Policy Concerns:** Judge JILL PRYOR has shown sensitivity to worker rights and might be concerned about the broader implications of denying FLSA protections to unpaid interns.

4. **Collegiality vs. Principle:** While the Eleventh Circuit is known for its collegiality, the presence of judges with different judicial philosophies and priorities increases the likelihood of a dissent.
5. **Case Complexity:** The issue at hand is not straightforward and involves reconciling conflicting regulations and policy goals. Such complexity often increases the likelihood of divergent opinions.

Given these factors, the likelihood of a dissenting opinion could be around 40%. Judge JILL PRYOR would be the most likely to dissent, given her judicial philosophy and past rulings on labor issues.

This memorandum is speculative and intended for legal analysis purposes. It should be reviewed for accuracy and applicability to specific circumstances.

Best regards,

[Your Name] [Your Position]

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Given this assumption as to the judges involved, please provide a revised memorandum, where again it is assumed that a dissent is filed, and speculate as to what you think the most likely grounds would be for the dissent. Please state the expected reasoning for the dissent in as detailed and complete manner as possible.

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### **Revised Memorandum on the Likelihood of a Dissenting Opinion with Specific Panel Composition**

Subject: Speculative Grounds for a Dissenting Opinion in FLSA Internship Case Before the 11th Circuit Panel Composed of Circuit Judge JORDAN, Circuit Judge JILL PRYOR, and Chief Circuit Judge TJOFLAT

Introduction:

This memorandum aims to speculate on the most likely grounds for a dissenting opinion, assuming that one is filed by one of the judges on the Eleventh Circuit panel hearing the appeal in the FLSA internship case. The panel is composed of Circuit Judge JORDAN, Circuit Judge JILL PRYOR, and Chief Circuit Judge TJOFLAT.

Most Likely Judge to Dissent:

Given the composition of the panel and the nature of the case, Circuit Judge JILL PRYOR is the most likely to file a dissenting opinion, should one be filed.

Probable Grounds for Dissent:

1. **Regulatory Interpretation:** Judge JILL PRYOR could argue that the majority's interpretation of 29 C.F.R. §§ 553.101 and 553.104 is inconsistent with the Department

of Labor's intent. She might assert that the regulations were designed to protect workers and that the majority's interpretation undermines this purpose.

2. **Public Policy and Worker Rights:** Judge PRYOR could emphasize that the FLSA was enacted to protect workers from exploitation. She might argue that the majority's ruling could open the door for employers to exploit unpaid interns, thereby undermining the FLSA's core purpose.
3. **Judicial Precedent:** The dissent could point out that the majority's reliance on the "primary beneficiary test" is inappropriate for public sector internships, citing that this test was primarily developed for private sector cases. She might argue for a different standard or test that better aligns with the public sector context.
4. **Economic Reality Test:** Judge PRYOR could argue for the application of the "economic reality" test, emphasizing that the intern provided services that benefited the employer and that the intern was, in economic reality, more similar to an employee than a volunteer.
5. **Case Law:** The dissent might cite other circuit or district court decisions that have taken a different approach in similar cases, arguing that the majority's opinion is out of step with a broader judicial consensus.
6. **Constitutional or Statutory Concerns:** While less likely, the dissent could raise concerns about federalism or the separation of powers, arguing that the court's interpretation infringes upon states' rights to regulate labor within their jurisdictions.

Conclusion:

Should a dissenting opinion be filed, it is most likely to come from Circuit Judge JILL PRYOR and would probably focus on regulatory interpretation, worker rights, and the appropriateness of the legal tests applied by the majority. The dissent could serve as a clarion call for a more worker-centric interpretation of the FLSA and related regulations.

This memorandum is speculative and intended for legal analysis purposes. It should be reviewed for accuracy and applicability to specific circumstances.

Best regards,

[Your Name] [Your Position]



Assume that the dissent is by Judge Jordan, speculate as to what you think the most likely grounds would be for his dissent. Please state the expected reasoning for the dissent in as detailed and complete manner as possible.

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**Memorandum on Speculative Grounds for a Dissenting Opinion by Circuit Judge JORDAN in FLSA Internship Case**

Subject: Speculative Grounds for a Dissenting Opinion by Circuit Judge JORDAN in the Eleventh Circuit Panel Hearing the FLSA Internship Case

Introduction:

This memorandum aims to speculate on the most likely grounds for a dissenting opinion by Circuit Judge JORDAN, assuming that he files a dissent in the Eleventh Circuit panel hearing the appeal in the FLSA internship case.

Probable Grounds for Dissent:

1. **Statutory Interpretation:** Judge JORDAN could argue that the majority's interpretation of the Fair Labor Standards Act (FLSA) is too narrow and does not adequately protect workers, which is the primary aim of the statute. He might assert that the statute should be read in a manner that provides the broadest protections to workers, including interns.
2. **Regulatory Ambiguity:** Judge JORDAN might point out that the regulations at issue—29 C.F.R. §§ 553.101 and 553.104—are ambiguous and that the court should defer to the Department of Labor's interpretations of its own regulations, which tend to be more worker-friendly.
3. **Judicial Precedent:** The dissent could argue that the majority's reliance on the "primary beneficiary test" is misplaced. Judge JORDAN might suggest that this test is not universally accepted and that the court should consider alternative tests that have been applied in other circuits or recommend that the Eleventh Circuit establish its own test.
4. **Economic Reality and Public Policy:** Judge JORDAN could emphasize that the "economic reality" of the situation is that the intern provided valuable services to the employer and should be compensated for her work. He might argue that failing to do so would set a dangerous precedent that could be exploited by other employers, thereby undermining the FLSA's core purpose of protecting workers.
5. **Constitutional Concerns:** While less likely, Judge JORDAN could raise constitutional issues, such as due process or equal protection, arguing that the majority's interpretation creates an unfair or unequal system that disadvantages certain classes of workers.
6. **Detailed Scrutiny of Facts:** Judge JORDAN might delve into the factual record more deeply than the majority, pointing out specific instances where the intern's work went beyond educational training and constituted work that benefited the employer, thereby warranting compensation.

Conclusion:

If Circuit Judge JORDAN were to file a dissenting opinion, it would likely focus on a broader interpretation of the FLSA and related regulations, a critique of the majority's reliance on the "primary beneficiary test," and an emphasis on the "economic reality" of the intern's work. The dissent could serve as a counterpoint to the majority's more employer-friendly interpretation and could be cited in future cases or legislative efforts to amend the FLSA.

This memorandum is speculative and intended for legal analysis purposes. It should be reviewed for accuracy and applicability to specific circumstances.

Best regards,

[Your Name] [Your Position]