

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF YOGA VIDA NYC, INC.,

Appellant,

-against-

No. 130

COMMISSIONER OF LABOR,

Respondent.

20 Eagle Street
Albany, New York 12207
September 06, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

ELIZABETH A. HARLAN, ESQ.
ASTRACHAN GUNST THOMAS, P.C.
Attorneys for Appellant
217 East Redwood Street
Suite 2100
Baltimore, MD 21202

VALERIE FIGUEREDO, ESQ.
NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
Attorneys for Respondent
120 Broadway
New York, NY 10271

Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 130, Matter of Yoga Vida New York City v.
3 Commissioner of Labor.

4 MS. HARLAN: Your Honor, I'd like to
5 reserve three minutes for rebuttal.

6 CHIEF JUDGE DIFIORE: Yes, you may.

7 MS. HARLAN: Thank you.

8 May it please the court.

9 Elizabeth Harlan on behalf of the appellant,
10 Yoga Vida NYC, Inc.

11 The issue on this appeal is whether there is
12 substantial evidence in the record to support the
13 Unemployment Insurance Appeal Board's finding of an
14 employer/employee relationship in this case.

15 As this court is well aware, substantial
16 evidence means taking a look at the record as a whole, and
17 when that's done, the answer is that there is not
18 substantial evidence on the record. And this is true
19 whether the court applies the results produced, or means
20 used test on the one hand, or whether it applies the
21 overall control test on the other hand.

22 JUDGE FAHEY: So you think either that it
23 applies - - - you're correct whether we apply the
24 traditional test or the overall test. The overall
25 test, I thought the generally applied to

1 professionals, you know, lawyers, doctors, people
2 like that.

3 MS. HARLAN: Right. I absolutely agree
4 with you, Your Honor, and I would urge the court to
5 apply the results produced from means used test.

6 JUDGE FAHEY: So that - - - that's a
7 traditional test. So let's assume that we apply that
8 test then. Then we're really into what's substantial
9 evidence here, aren't we? Because - - -

10 MS. HARLAN: Right.

11 JUDGE FAHEY: - - - for us, the facts are
12 the facts, and we don't really get into that. So
13 substantial evidence, as I understand it here, is
14 less than a preponderance of the evidence, so that
15 means it would be less than it if we had a scale of
16 fifty percent, but it could still be substantial
17 evidence; that's the way I read Gramatan and those
18 cases.

19 MS. HARLAN: Um-hum.

20 JUDGE FAHEY: And I can see that there are
21 facts on both sides here; I think that that's a very
22 reasonable argument. A violation of substantial
23 evidence becomes much tougher though in that
24 circumstance, because there is proof that supports
25 the Commissioner of Labor here.

1 MS. HARLAN: Well, Your Honor, I would like
2 to just point out a few of the facts that the
3 Commissioner of Labor relied upon that - - - that we
4 believe are either incorrect or incorrectly
5 interpreted.

6 JUDGE FAHEY: So let me ask you this, and
7 this is a hard question in cases like this. Is there
8 anything you can argue here that doesn't imply - - -
9 it doesn't require us to reinterpret the facts for
10 the Department?

11 MS. HARLAN: Absolutely. Absolutely.
12 There's also a slew of facts that were not considered
13 at all. And under Gramatan, we should be - - - or
14 the court should be "reviewing the proof within the
15 whole record and find that it has to be of such
16 quality and quantity as to generate a conviction in
17 and persuade a fair and detached fact finder."

18 And so if you look at the record as a whole, and
19 consider the facts that I'll discuss in a moment about
20 what was just not considered at all by the Board or by the
21 Appellate Division. It's enough to shift the scale over,
22 to find these non-staff yoga instructors to be independent
23 contractors.

24 JUDGE FAHEY: You know, in Supreme Court,
25 the kind of the way I viewed these cases is I'd say,

1 should this question go to a jury. And if the
2 question went to a jury, then I'd say, well, they
3 decided that it's a factual question; it's not for me
4 to decide it. It seems to me that that's kind of the
5 position we're in right now.

6 MS. HARLAN: That it's a factual question.
7 It is - - - it can be considered as a matter of law
8 when the facts are clear enough - - -

9 JUDGE FAHEY: Um-hum.

10 MS. HARLAN: - - - to - - - to meet the
11 burdens, but - - - and I believe, or we believe it is
12 - - - it is clear enough in this case.

13 JUDGE FAHEY: Go ahead. Go ahead.

14 MS. HARLAN: So the - - - the - - - I guess
15 I'll focus on the factors that were not considered.
16 The first one, which we think is the largest, is that
17 the non-staff instructors are free to work elsewhere.
18 They're free to work for competitors, direct
19 competitors. They are free to tell their students
20 who are in the yoga class, tomorrow I'm going to be
21 teaching down the street at this other yoga studio;
22 you can come to my class there.

23 JUDGE FAHEY: Well, how is it different
24 then someone who works in a part-time job at 7-
25 Eleven, then they get another part-time job at

1 McDonald's?

2 MS. HARLAN: Because these - - - I think it
3 has to do with what these individuals do. They are
4 building and - - - they're entrepreneurs. They are
5 building a business for themselves, and they want a
6 following to go from place to place.

7 JUDGE PIGOTT: Is there any testimony from
8 those type of instructors in this case?

9 MS. HARLAN: There's no testimony on the
10 record from the instructors; there is - - - there are
11 websites and there are business cards that show - - -

12 JUDGE PIGOTT: No, but it was enlightening
13 to me. I think there were two letters from whoever
14 was running Yoga Vida, but the one in direct response
15 to the - - - to the Commissioner I thought was
16 nowhere near as enlightening as the second one after
17 - - - after the ruling went against him. Because it
18 seems to me that kind of what the point you're making
19 now was not as clear. That it's the instructors who
20 don't want to be employed.

21 I mean, they, you know, they want a space,
22 but, you know, maybe they don't want to work other
23 than Saturday's, or maybe, you know - - - and they
24 have - - - they have the following; the gym doesn't,
25 the space doesn't have the following, right?

1 MS. HARLAN: Right. Exactly, the
2 instructors have the following. I believe that
3 Michael Patton did give a - - - provide testimony to
4 that effect to the administrative law judge. It's -
5 - - you're correct, it does not appear in his initial
6 letter in answering the Department.

7 JUDGE RIVERA: Well - - - well, these
8 students are people who go to Yoga Vida, correct?

9 MS. HARLAN: Among other places.

10 JUDGE RIVERA: Yoga Vida has to permit them
11 on the space, do they not? So they're not really
12 students in the way you're suggesting "clients" of
13 the instructor. Because if Yoga Vida won't let them
14 in the door, that student is not going to be in front
15 of that instructor, correct?

16 MS. HARLAN: You're correct, Your Honor.
17 They are not clients, but they are - - - they are
18 people who want to take the class of this individual
19 instructor. And the website will say who the
20 instructors are.

21 JUDGE RIVERA: But it's not like in - - -
22 what you're sort of suggesting, I think, is that
23 these instructors have this business going, and they
24 have a following of students, and the students just
25 go wherever the instructor finds - - - finds a space.

1 But that's not - - - that's not this
2 record. These are people who go to Yoga Vida - - -

3 MS. HARLAN: Well, the record - - -

4 JUDGE RIVERA: - - - for yoga classes.

5 MS. HARLAN: The record reflects that the
6 judge - - - sorry, I apologize - - - that the
7 instructors do teach at multiple locations.

8 JUDGE RIVERA: Um-hum.

9 MS. HARLAN: And that they are - - - and
10 that they do choose to do that.

11 JUDGE RIVERA: Um-hum.

12 MS. HARLAN: It's important to note that
13 there are instructors at Yoga Vida who are employees.
14 Approximately seventy-five percent of them are
15 employees; twenty-five are these independent
16 contractors who've chosen not to be employees, and
17 instead to be free to teach at the United Nations,
18 and to teach at companies, and to teach at Yoga Vida,
19 and to teach at, you know, other yoga studios all
20 kind of at the same time.

21 That's - - - and that's - - - they are not
22 downtrodden individuals; they're - - - they are
23 entrepreneurs building their own business, and their
24 websites do reflect this.

25 JUDGE ABDUS-SALAAM: Does - - - do we or

1 did the Commissioner or the ALJ consider that Yoga
2 Vida is in the business of giving yoga classes? Is -
3 - -

4 MS. HARLAN: Yes.

5 JUDGE ABDUS-SALAAM: Is that - - - so
6 that's their business. And so wouldn't that have
7 something to do with whether these folks are
8 considered independent contractors or not?

9 MS. HARLAN: I agree it does have something
10 to do with it, but to make that the end-all be-all
11 factor would destroy the ability to have independent
12 contractors in certain industries as a matter of
13 course, and that wouldn't be beneficial.

14 JUDGE FAHEY: Well, you see the policy
15 implications though - - -

16 MS. HARLAN: There's a - - -

17 JUDGE FAHEY: - - - of the question.

18 MS. HARLAN: There are policy implications
19 on the flip side. I'm sure we'll hear from the
20 Commissioner of Labor about the policy on the one
21 hand, but on the other hand, there are a lot of
22 people who benefit from being able to be independent
23 contractors and go from place to place.

24 There are industries like dentistry and,
25 you know, gardening, and yoga, and places - - -

1 people that do benefit from being able to, to - - -
2 while they do with the core work of the business,
3 they want to do this in an independent contractor
4 capacity.

5 JUDGE RIVERA: What's - - - what's the
6 benefit?

7 MS. HARLAN: The benefit to them is that -
8 - -

9 JUDGE RIVERA: Of the freedom, I get your
10 point there, freedom - - - but financially, what's
11 the benefit?

12 MS. HARLAN: Well, they can - - - they can
13 grow their business, they can make more money going
14 to more places than they could working in - - -

15 JUDGE RIVERA: Because they work more
16 hours, or what - - - what's the - - -

17 MS. HARLAN: More hours, more diversity,
18 they could be a dancer, they could be an actor, they
19 can choose to do - - - sort of, design their life the
20 way they want to.

21 If you look at the websites - - - if you look at
22 the Yoga Vida website, you'll see that there are a number
23 of these individuals who have blogs, who are - - - they
24 are creative individuals, and - - - and - - -

25 JUDGE RIVERA: Isn't any of this dependent

1 on the expertise of the Commissioner, with respect to
2 what the market looks like, and what trends there are
3 in labor; is that anything that needs to be
4 considered in this case?

5 The deference in that way, not just on the
6 substantial evidence standard, but deference to the
7 Commissioner with respect to the way the Commissioner
8 views the market and these labor trends and
9 employment trends?

10 MS. HARLAN: Well, Your Honor, I would say
11 that the facts of this case, if these individuals are
12 considered to be employees, it will shut down a lot
13 of - - - it will potentially cause individuals to
14 lose their jobs; that's the flipside of the argument.

15 Because they - - - this yoga studio cannot
16 afford to employ this many people, and they are - - -
17 they have their core employees, and then they have
18 these individuals who come in to teach two weeks or
19 teacher one - - - one workshop, and they won't be
20 able to employ them, so those people won't have a job
21 anymore. So it's - - - I don't think it's a
22 one-sided "independent contractors are always bad"
23 type of argument.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MS. HARLAN: Thank you.

1 CHIEF JUDGE DIFIORE: Counsel.

2 MS. FIGUEREDO: May it please the court.

3 Valerie Figueredo for the Commissioner of Labor.

4 The Board properly concluded that Yoga Vida's
5 non-staff instructors were employees of Yoga Vida for
6 payment of unemployment insurance contributions.

7 The Board's determination was based on its
8 finding that Yoga Vida - - -

9 JUDGE RIVERA: Could a yoga instructor ever
10 be an independent contractor?

11 MS. FIGUEREDO: In the context of a school
12 that provides yoga instruction to that school's
13 clients, we believe that it would be highly unlikely
14 for the yoga instructor that furthers that core
15 function to ever be an independent contractor.

16 JUDGE RIVERA: So that's what makes a
17 difference, that this is a yoga studio and nothing
18 else.

19 MS. FIGUEREDO: It is - - - the fact that
20 this is a yoga studio, and Patton testified that
21 providing yoga instruction is an integral function,
22 it's the sole basis for the school's revenue in a
23 compelling - - -

24 JUDGE RIVERA: So if it was, let's say, a -
25 - - a gymnasium that had weights, has other classes,

1 yoga is one of those classes that they offer, would
2 those yoga instructors then be independent
3 contractors as opposed to employees?

4 MS. FIGUEREDO: Certainly where the gym
5 exercises the level of control that Patton exercised
6 here, you would find that they would be employees.
7 The rea - - -

8 JUDGE PIGOTT: But they can work for - - -
9 they can work for competitors, right?

10 MS. FIGUEREDO: The non-staff and the staff
11 instructors can - - -

12 JUDGE PIGOTT: No, no, no. The ones that -
13 - - the ones that we're talking about; the ones that
14 they say are independent contractors, and you say are
15 employees, up until the time you make that
16 determination, they can work for a competitor of Yoga
17 Vida.

18 MS. FIGUEREDO: Yes.

19 JUDGE PIGOTT: Right?

20 MS. FIGUEREDO: The non-staff instructors
21 can work - - -

22 JUDGE PIGOTT: And yet, you're saying,
23 well, you're still an employee even though you can
24 work for an opponent - - - a competitor.

25 MS. FIGUEREDO: There is - - - there are

1 certainly lots of industries where you have people
2 entering to multiple employment relationships.

3 We cite one example in our brief where you have
4 the lawyer who's an employee of the law firm, and then
5 also an employee of the university where he might teach as
6 an adjunct professor.

7 JUDGE PIGOTT: They're not competitors.
8 You can't - - - you can't come to my law firm and
9 work for - - - for let's say - - - let's say a
10 plaintiff's law firm who is suing somebody who's
11 insured by State Farm, and then go, you know, on
12 their weekends and work for State Farm's law firm.

13 MS. FIGUEREDO: Sure. That - - - that may
14 be an ethical problem. In this con - - -

15 JUDGE PIGOTT: It's not an ethical problem;
16 I mean, it is, but it's a problem that no one is
17 going to counter. And - - - and what my
18 understanding of this is that you have people, as
19 your opponent is pointing out, who, for a variety of
20 reasons, only want to work certain times, I don't
21 know if they're actors or, you know, whatever else
22 they're doing, but they can do this, they can do it
23 the evenings, they can do it on the weekends, and
24 they want to be able to do that.

25 And if - - - and if one gym can provide

1 Saturday's and another one can provide Sundays, they
2 want to do both of those.

3 You're saying they can't do that; that they are
4 an employee of Yoga Vida, that they - - - that - - -
5 that's it, and they can't work for a competitor.

6 MS. FIGUEREDO: We're not saying that they
7 can't work for competitor. Certainly you can enter
8 into multiple employment relationships, even with a
9 competitor where the employer permits you to do that.

10 The flexibility of the fact that you can
11 work for multiple competing businesses is just
12 dictated in that - - - in the confines of that
13 relationship. It's not required; it's not something
14 that we're saying is part of the rule.

15 What we're saying here is that where you
16 have a gym or where you have a business whose
17 function is to instruct students, such as in this
18 case yoga, but another context such as music
19 instruction or gym - - -

20 JUDGE PIGOTT: No, but if - - - if a person
21 is working at Yoga Vida and then working for a
22 competitor, who is paying the unemployment insurance,
23 and who is paying, you know, all of the - - -

24 MS. FIGUEREDO: Right.

25 JUDGE PIGOTT: - - - things that you say.

1 All three of them - - -

2 MS. FIGUEREDO: Yes. So - - -

3 JUDGE FIGOTT: - - - If there's three, all
4 five of them if there are five?

5 MS. FIGUEREDO: Yeah, that - - - that is
6 correct. The threshold for payment of unemployment
7 insurance contributions by the employer is low; it's
8 set by the legislature at 300 dollars in a calendar
9 quarter. So once the employer pays 300 dollars in
10 wages, he is required - - - or it's required to make
11 those contributions.

12 If you are seeking benefits once you are
13 unemployed, it is your prior employer's in a four - -
14 - in a four-quarter period, in the preceding four-
15 quarters, that would be required to pay out or from
16 whose funds those employment - - - unemployment
17 benefits would be paid.

18 JUDGE GARCIA: Counsel, I'd like to go back
19 to this integral to the core business argument. And
20 that's something that the Appellate Division
21 mentioned, and they cite this Appellate Division
22 case. You have a substantial point in your brief on
23 - - - we've never held that, right?

24 MS. FIGUEREDO: Right.

25 JUDGE GARCIA: So how much is it your core

1 argument that we need to find that? I mean, it seems
2 like if we do that, that kinds of swallows up the
3 rest of the test, right? Because you would say, hey,
4 this is integral to the core business of a yoga
5 studio, they have to be employees. And we've never
6 done that.

7 MS. FIGUEREDO: It's correct that the court
8 has never specifically held that the integral
9 function is one of the elements. It is elements
10 that, as we cite in our brief at pages 28 to 29,
11 various courts have considered, we think it is a
12 compelling indicator of employment.

13 You certainly are not going to be - - -
14 it's unlikely that business will seek control over
15 its core functions to an independent contractor,
16 because as we explained in the brief, it is upon that
17 core function upon which the business relies. So
18 it's certainly a compelling, if not, determinative
19 factor of employment.

20 Here, you don't have to decide. You don't have
21 to just look at the core function because we know that
22 Yoga Vida exercises meaningful control over other elements
23 of its relationship with its instructors. So your - - -

24 JUDGE PIGOTT: But Ms. Harlan makes a
25 point, I guess, that there is a three quarters of

1 them are employees, and a quarter of them are not.

2 MS. FIGUEREDO: The testimony we have is
3 from 2011. At that time, Patton testified that
4 twenty-five percent of its instructors are
5 independent contractors. They were offering
6 approximately 95 to 90 - - -

7 JUDGE PIGOTT: But - - - so the answer is
8 yes.

9 MS. FIGUEREDO: Yes.

10 JUDGE PIGOTT: My - - - my - - - because I
11 was going to - - - follow-up question was, did - - -
12 did the one quarter, did they complain, are they
13 upset about this?

14 MS. FIGUEREDO: We do have - - - it's not
15 in the record, there are - - -

16 JUDGE PIGOTT: Well, in the record, I found
17 no one complaining. And in fact, I thought the
18 testimony was that they want to be free to advertise,
19 to do, as Ms. Harlan was saying, to blog, to solicit,
20 to do what they do, in terms of what they determine
21 is yoga, and they don't want to be an employee.

22 MS. FIGUEREDO: There's no evidence in the
23 record about what the individual supposed independent
24 contractors want; the only testimony we have is from
25 Patton. What we have in the record are printouts

1 from websites and business cards showing that these
2 independent contractors had outside businesses.

3 It is not - - - it does not prevent them from
4 having - - - you can be in an employment relationship with
5 Yoga Vida and nonetheless run your own yoga business on
6 the side.

7 JUDGE PIGOTT: I know. But my point was no
8 one is complaining.

9 MS. FIGUEREDO: We - - - we - - - no one is
10 complaining in this particular context because this
11 arose out of Yoga Vida's registration for un - - -
12 through the Department of Labor. We do know - - -
13 it's not in the record, but we do know that there are
14 yoga teachers in the industry seeking unemployment
15 benefits.

16 CHIEF JUDGE DIFIORE: To Ms. Harlan's point
17 about Yoga Vida being in a position to perhaps want
18 to have a few independent contractors, what would the
19 structure have to be in order for Yoga Vida to do
20 that?

21 MS. FIGUEREDO: You could certainly imagine
22 a situation where Patton did not monitor the quality
23 of the instruction. So for instance, we know here
24 that Patton - - - Yoga Vida itself is the one that
25 takes the student's complaints, and Yoga Vida is then

1 - - - then investigates those complaints. So you
2 could see a scenario where Yoga Vida doesn't accept
3 complaints; it's given directly to the instructor.

4 You could have a potential - - - a potential
5 scenario where the instructor itself - - - himself or
6 herself sets the class fee and collects the payment, so
7 provides the administrative responsibilities that Yoga
8 Vida was taking on.

9 Here, we know that it's Yoga Vida who sets the
10 fee, and Yoga Vida collects that from the students. You
11 could potentially see a scenario where Yoga Vida just
12 rents out a space and collects a flat fee from the
13 instructor; we don't have that here.

14 JUDGE RIVERA: So these are Yoga Vida
15 students or Yoga Vida clients.

16 MS. FIGUEREDO: That's correct, and we - -
17 -

18 JUDGE RIVERA: These are not individuals
19 who are students of that particular instructor; is
20 that what you're trying to say? I mean, it is
21 possible that - - - she's argued that someone follows
22 that instructor knowing, oh, they're going to be at
23 Yoga Vida Monday at 8 a.m.; I want to do that class.

24 MS. FIGUEREDO: It is - - - it is possible,
25 but what we have here is Patton's testimony

1 explaining that it was Yoga Vida, for instance, who
2 provides a substitute when the instructor cannot
3 teach. And why does Yoga Vida do that? Because it
4 is a Yoga Vida's interest to not have the class
5 canceled, because it is Yoga Vida's business and
6 brand that they're trying to protect.

7 It was Yoga Vida who monitored the quality of
8 those instructors and set the fee for the classes.

9 JUDGE RIVERA: And - - - and if I'm one of
10 these Yoga Vida non-staff instructors, and I have
11 Monday at 8 a.m., I can't tell Yoga Vida, I have two
12 students who are coming and those are my students; I
13 don't want anyone you want in here coming into my
14 room.

15 MS. FIGUEREDO: That's - - - that's - - -
16 that's correct. Patton testi - - - Patton - - -
17 Patton was not asked that hypothetical in the
18 testimony, but it is clear that the way they
19 advertise for classes, which is by posting the weekly
20 schedule on Yoga Vida's website is to try to attract
21 people who are looking to go to Yoga Vida and not
22 necessarily a particular instructor.

23 JUDGE RIVERA: Um-hum.

24 JUDGE ABDUS-SALAAM: Counsel, how is this
25 different from the building industry, for example?

1 You have a lot of independent contractors, you have
2 plumbers, and carpenters, but the, you know, the
3 basic idea is to build something. And those are
4 independent contractors. Why is this different than
5 that?

6 MS. FIGUEREDO: Putting aside the fair play
7 act which I - - - which creates a presumption of
8 employment for certain - - - in the construction
9 industry for certain types of individuals. Here,
10 this is different, because in the construction
11 industry when you're bringing in a plumber, that's
12 your classic independent instruct - - - independent
13 contractor situation, where they're providing their
14 specialized expertise to deal with a particular
15 problem.

16 Here, you have a business whose sole
17 function is to provide yoga instruction, and they are
18 trying to delegate that sole function to people they
19 claim are independent contractors, without ceding the
20 necessary control to really give those people true
21 independence.

22 If there are no further questions, we believe
23 the Board's determination should be affirmed.

24 Thank you.

25 CHIEF JUDGE DIFIORE: Thank you.

1 Ms. Harlan.

2 MS. HARLAN: I'd like to clarify that Yoga
3 Vida, in addition to yoga instruction, also trains
4 teachers to become yoga instructors, and they also
5 lead trips that take retreats and take students on
6 retreats. So yoga is not their sole form - - -
7 source of income.

8 Also, Mr. Patton does not monitor the quality of
9 the classes. He doesn't sit in classes and watch the
10 instruction; he doesn't tell the yoga instructors how to
11 instruct a class.

12 JUDGE RIVERA: Yes, but if I'm one of the
13 non-staff yoga instructors, and I have a student who
14 is, as you are - - - follows me and looks for my
15 classes, Yoga Vida could choose not to let them take
16 the class, correct? Because they make the choice
17 about who walks into their studio and stays, correct?

18 MS. HARLAN: That's correct. Yes.

19 I'd like to clarify the issue about the
20 substitutes. Yoga Vida asks the independent contractor to
21 find their own substitute, and that is, in fact, a sign of
22 freedom, not a sign of control. And it's - - - they - - -
23 they find their own substitute, they don't have to tell -
24 - - they tell - - - the only reason that they tell Yoga
25 Vida is so that the website can be correct.

1 JUDGE RIVERA: If they don't find an
2 instructor, what happens; the class is canceled?

3 MS. HARLAN: That's a good question. My
4 understanding of the record is that if it's right
5 before class - - -

6 JUDGE RIVERA: Um-hum.

7 MS. HARLAN: - - - like thirty minutes
8 before class, that's when the staff will come in and
9 teach the class. Otherwise, my understanding is the
10 class would be canceled. And that testimony is at A-
11 132 in the record.

12 JUDGE RIVERA: And could a non-staff
13 instructor persuade a staff instructor to be the
14 substitute, or does it have to be someone else?

15 MS. HARLAN: It could be a staff
16 instructor; I'm sure that would be fine.

17 With respect to the - - - the - - - I think - -
18 - I think the court has already discussed this, but this -
19 - - this core - - -

20 JUDGE RIVERA: So let me just ask - - -

21 MS. HARLAN: Sure.

22 JUDGE RIVERA: - - - so the substitute,
23 when they come in - - -

24 MS. HARLAN: Yes.

25 JUDGE RIVERA: - - - need not teach in the

1 same way that the non-staff teaches, right?

2 MS. HARLAN: That's right. They would - -
3 -

4 JUDGE RIVERA: So then a non-staff could be
5 - - - whatever, I'll make one up, Bikram, but that's
6 not what the substitute's going to teach.

7 MS. HARLAN: Well, Your Honor, I think - -
8 -

9 JUDGE RIVERA: Is that correct?

10 MS. HARLAN: I think that the substitute
11 needs to teach the class the students are expecting
12 to receive, whatever type of class - - -

13 JUDGE RIVERA: So if it was listed - - - so
14 then Yoga Vida chooses the type of yoga that gets
15 taught at a particular hour?

16 MS. HARLAN: No. The instructor chooses
17 what they're going to teach. There is a discussion
18 at the beginning of the relationship for the - - -
19 where the instructor says, I teach this and that, I
20 need approximately this much time to teach my class.

21 JUDGE RIVERA: So Yoga Vida doesn't say,
22 well, you know what, I want a few instructors who are
23 doing Bikram; I'll hire you.

24 MS. HARLAN: Though that may be the case,
25 as long as they really do Bikram.

1 JUDGE RIVERA: Okay.

2 CHIEF JUDGE DIFIORE: Your opponent makes a
3 compelling argument on the core function issue; do
4 you care to - - -

5 MS. HARLAN: I would like - - -

6 CHIEF JUDGE DIFIORE: - - - assess further?

7 MS. HARLAN: - - - to speak to that. The
8 core function argument has never - - - as the court
9 says, has never been adopted by this court. It seems
10 to have been taken out of the federal standard, the
11 FLSA Standard, without the other factors being
12 brought in at the same time to sort of balance it
13 out, and if it's adopted by the court, it would
14 largely swallow up the analysis.

15 JUDGE RIVERA: Is your position that the -
16 - - the approach they've taken is a single-factor
17 test?

18 MS. HARLAN: I don't think they're - - -
19 they're saying it's a single-factor test, but they're
20 saying it's a very important factor.

21 JUDGE RIVERA: So in - - - but in the
22 federal approach, it's a multi-factor test.

23 MS. HARLAN: It's a multifactor test,
24 absolutely.

25 JUDGE RIVERA: And that seems to have

1 worked, right?

2 MS. HARLAN: In federal setting, but it
3 hasn't been applied by this court.

4 I think my time is up.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MS. HARLAN: Thank you.

7 (Court is adjourned)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Yoga Vida NYC, Inc. v. Commissioner of Labor, No. 130 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: September 7, 2016