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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF CARVER,

Respondent,

-against-

No. 139

STATE OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York 12207
September 16, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 139, Matter of Carver.

3 Counsel. Do you want any rebuttal time,
4 counsel?

5 MS. FIGUEREDO: Two minutes, please.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.
7 Go ahead.

8 MS. FIGUEREDO: May it please the court
9 Valerie Figueredo for the State Office of Temporary
10 and Disability Assistance. Carver was a recipient of
11 government aid, not a government employee. Because
12 his relationship with the City - - -

13 CHIEF JUDGE LIPPMAN: Counsel, but - - -
14 but what - - - what's the - - - the common sense
15 approach? Did he have a job, and was he living on
16 that money?

17 MS. FIGUEREDO: He did not have a job. He
18 was receiving public assistance, which was designed
19 to cover his basic needs.

20 CHIEF JUDGE LIPPMAN: But in practical
21 terms - - - I understand your technical arguments,
22 the economic reality test, right, that's in some of
23 these cases? What in practical terms is going on
24 with - - - with - - - this person is working a full
25 regular workload; he's receiving money that he's

1 dependent on. Why from a more pragmatic perspective
2 should he not be covered by minimum wage, Fair Labor
3 Standards Act, et cetera?

4 MS. FIGUEREDO: The work activity
5 requirement was merely another eligibility
6 requirement necessary for him to meet to satisfy to
7 receive his public assistance. He was receiving
8 assistance - - -

9 CHIEF JUDGE LIPPMAN: Does it - - - if it
10 looks and smells like a job, is it a job?

11 MS. FIGUEREDO: It is not a job here
12 because the purported employer, the City or HRA,
13 lacked the control necessary to establish an
14 employment relationship. Here all of the - - -

15 CHIEF JUDGE LIPPMAN: Who - - - who was in
16 control of - - - of him?

17 MS. FIGUEREDO: All of the requirements of
18 his work activities were dictated by the legislature.
19 They were set by statute.

20 CHIEF JUDGE LIPPMAN: Yeah. Yeah. But who
21 controlled his work?

22 MS. FIGUEREDO: The legislature. The
23 legislature dictated - - -

24 CHIEF JUDGE LIPPMAN: The legislature on a
25 daily basis controlled his work?

1 MS. FIGUEREDO: On a daily basis he was
2 supervised by - - - for instance, when he was at the
3 Staten Island Terminal it would have been the Staten
4 Island Ferry Service. But - - -

5 CHIEF JUDGE LIPPMAN: So that's - - -
6 that's my point to you. The legislature did not
7 control his work. He was, for all practical
8 purposes, an employee. And I understand your
9 argument and the legal arguments to be made about
10 whether he was technically an employee, but my
11 question to you is wasn't he, for all intents and
12 purposes, an employee?

13 MS. FIGUEREDO: He was - - - he was not an
14 employee because his purported employer, HRA, the
15 Staten Island Ferry, the City, whoever you want to
16 look to, did not exercise the control necessary to
17 establish an employment relationship.

18 CHIEF JUDGE LIPPMAN: What do you mean - -
19 - define control.

20 MS. FIGUEREDO: None of the contours of
21 that relationship were determined by the City or HRA.
22 For instance, his - - -

23 JUDGE RIVERA: Well, they don't decide that
24 he does janitorial work?

25 MS. FIGUEREDO: They place some - - -

1 JUDGE RIVERA: They don't decide that he's
2 going to salt the ferry area during the winter?

3 MS. FIGUEREDO: That alone is not
4 dispositive. Yes, they assign to him a work
5 activity. That work activity was designed for him to
6 develop the skills necessary to eventually gain
7 employment.

8 JUDGE RIVERA: But what - - - what skills
9 is he - - - did he develop - - -

10 MS. FIGUEREDO: There are many.

11 JUDGE RIVERA: - - - in those work
12 activities?

13 MS. FIGUEREDO: For instance, being
14 required to show up on time, timeliness, being
15 required to cooperate with coworkers, being required
16 to follow instructions of your supervisors. At a
17 minimum the - - -

18 JUDGE RIVERA: Those are generic. What
19 specific to that particular task, as you call it - -
20 -

21 MS. FIGUEREDO: Well, these are all in - -
22 -

23 JUDGE RIVERA: - - - that would - - - that
24 would mean he's not an employee, that he's getting
25 work training? What's - - - what's the training he's

1 getting in the job? What skills is he developing in
2 those jobs?

3 MS. FIGUEREDO: The - - - the Work
4 Experience Program, again, is designed for people who
5 lack the basic soft skills necessary to enter the
6 workforce, skills such as - - -

7 JUDGE ABDUS-SALAAM: So it doesn't
8 necessarily mean training in the sense that we think
9 of training like on-the-job training or some other
10 type of training?

11 MS. FIGUEREDO: That - - - that is correct.
12 This is a hands-on ability to develop and demonstrate
13 the skills that employers look for in entry-level
14 jobs.

15 JUDGE RIVERA: He did that for five years.
16 Did he have those skills at the end of the five
17 years; did he have it midway; did he have it after
18 thirty days? How long did it take him to figure out
19 that I should be at my worksite on time?

20 MS. FIGUEREDO: Mr. Carver's situation in -
21 - - in an - - - in an initial - - - as an initial
22 matter was an anomaly. The - - - the Work Experience
23 Programs are meant to be temporary; they are not
24 meant to have lasted for as long as it did. The
25 recipients of public assistance who participate in

1 Work Experience are monitored by H - - - by the City
2 and HRA. They are assessed to ensure that they are
3 searching for jobs and gaining the skills they need
4 to - - -

5 JUDGE PIGOTT: Can - - - can you give us -
6 - -

7 MS. FIGUEREDO: - - - eventually
8 transition.

9 JUDGE PIGOTT: - - - a broader view of
10 that? When we - - - when you look at this one it's
11 as Judge Rivera's indicating, but are - - - are there
12 other jobs; are there other people; are - - - the - -
13 - is this - - - how big is this Work Experience
14 Program; what does it entail? I understand the idea
15 of experience as you've described, and I'm just
16 wondering if we're seeing the whole picture here.

17 MS. FIGUEREDO: So for - - - as an example,
18 in July of - - - as of July of 2015 there were 11,074
19 statewide Work Experience participants. The entire
20 public assistance program, which encompasses work
21 activities that are not just Work Experience, had
22 109,000 participants participating in some type of
23 work - - - work activity. And work activity, again,
24 is defined broadly to include things that we do not
25 dispute are employment such as unsubsidized

1 employment.

2 CHIEF JUDGE LIPPMAN: What kind of - - -
3 how many people were there when he was working? How
4 many people were there in the program during the
5 years that he was working? And was it all - - - was
6 it at all - - - was the contours of the program at
7 all changed due to things that happened in
8 Washington, legislation, or court cases?

9 MS. FIGUEREDO: So I don't - - - I don't
10 have the specific statistics for Work Experience
11 Participants back in the 90s. The Work Experience
12 Program is defined by statute and the Social Services
13 Law.

14 CHIEF JUDGE LIPPMAN: Did it change over
15 the years?

16 MS. FIGUEREDO: It did not change, because
17 after Congress enacted PRWORA, the Social Serv - - -
18 that was the last time, in '97, that the Social
19 Services Law would have been amended.

20 JUDGE PIGOTT: You didn't take out FICA or
21 tax - - - taxes or anything with respect to the money
22 that he was receiving?

23 MS. FIGUEREDO: That's correct. Because
24 such public assistance grants are exempt from things
25 in the - - -

1 JUDGE PIGOTT: Why did you take it out of
2 the 5,000 dollars that you took?

3 MS. FIGUEREDO: I'm sorry?

4 JUDGE ABDUS-SALAAM: His lottery winnings.

5 JUDGE PIGOTT: You - - - you took 5,000
6 dollars out of his lottery winnings, I take it, to
7 reimburse you for that money. Why did you tax it?
8 Why did you deduct taxes from his - - - from his
9 5,000 dollars - - -

10 MS. FIGUEREDO: So - - -

11 JUDGE PIGOTT: - - - before you took it?

12 MS. FIGUEREDO: Right. The IRS ex - - -
13 explicitly exempts public assistance grants from the
14 calculation of what is taxable income. It does not
15 exempt other types of windfall such as lottery
16 winnings.

17 JUDGE FAHEY: Yeah, but that's not what
18 happened here, but what happened was it was - - -
19 there was a 10,000-dollar win. He got five, you got
20 five under - - - under your rubric except he paid all
21 the taxes on the ten. He paid 30 - - - 3,550 in
22 taxes, which would be the full tax amount, I believe,
23 on the ten. Left him with 1,450, and the State
24 didn't any pay taxes. There is an Ebenezer-Scrooge-
25 like quality to this case, you'd have to admit. Is -

1 - - when you don't even split the taxes. Was there
2 any discretion on the Agency's part or - - - or the -
3 - - or are they required to - - - to - - - to act
4 this way?

5 MS. FIGUEREDO: There is no discretion.
6 The program is - - -

7 JUDGE FAHEY: So you're - - - you're saying
8 that even though it's - - - it's seven years since
9 he's been on public assistance and you're taking half
10 the money and - - - and he's paying all the taxes you
11 don't have any discretion on that? How about on the
12 Attorney General's part; any discretion on this?

13 MS. FIGUEREDO: It's - - - it's a
14 legislative choice, and it's mandated by SLL 131-r.

15 JUDGE FAHEY: I see.

16 MS. FIGUEREDO: The Agency has the
17 authority to recover this - - - and he does not
18 dispute the - - -

19 JUDGE FAHEY: No, and that wasn't my
20 question. I know you have the authority. My
21 question was do you have the discretion in this kind
22 of unusual case not to do this?

23 MS. FIGUEREDO: Perhaps there may be the
24 discretion but it's clear that we have the authority
25 to do so.

1 JUDGE FAHEY: Well, those aren't the same
2 things. You know, sometimes because you can doesn't
3 mean you should.

4 JUDGE STEIN: What - - - what - - - what
5 ramifications would there be if we were to find that
6 the FLSA applies?

7 MS. FIGUEREDO: It's - - - it's not
8 possible to foresee the full consequences because
9 there are lots of benefits and liabilities that are
10 pegged to an employment relationship. But for
11 instance, some of those ramifications would be not
12 just the cost of the - - - the federal, state, and
13 local taxes that would be incurred on such public
14 assistance grants but also the costs - - -

15 JUDGE STEIN: Well - - - well, what - - -
16 what say - - - is there something that says that it
17 would then have to be deducted; that those taxes
18 would have to be deducted?

19 MS. FIGUEREDO: So I - - - IRS guidance is
20 very clear. It exempts public assistance grants but
21 if you are now considering them employees they would
22 be receiving a wage, and wages are not excluded from
23 taxable income. In addition, as City employees,
24 these public assistance recipients would now be
25 liable for their share of such costs as Social

1 Security, Medicare, and Unemployment Compensation
2 Insurance. They would also be required to pay such
3 things as union dues because City employees are union
4 members, and for instance, although public assistance
5 grants are exempt from garnishment by creditors,
6 wages are not, so they would now be subject to
7 garnishment.

8 JUDGE ABDUS-SALAAM: Counsel, what about
9 workers' compensation? Are they - - - are public-
10 assistance recipients who are working under the WEP
11 program, are they covered by workers' compensation?

12 MS. FIGUEREDO: The legislature provided
13 for them to be covered, but that is not alone
14 dispositive because there are var - - - there are
15 various instances. For example, volunteers are also
16 sometimes protected by workers' comp, and they are
17 not considered employees. Workers' comp is a benefit
18 for the - - - for the purported employer because it
19 protects them from lawsuits for - - - for injury.

20 CHIEF JUDGE LIPPMAN: Okay, counsel.
21 You'll - - - we'll - - - you'll have your rebuttal.
22 Let's - - - let's hear from your adversary.

23 MS. ANTOS: Good afternoon, and may it
24 please the court my name is Susan Antos from the
25 Empire Justice Center representing Walter Carver.

1 CHIEF JUDGE LIPPMAN: Counsel, let's - - -
2 let's talk from the - - - at least from my
3 perspective, from the more common sense aspects of
4 this that I talked about with your adversary. Was
5 this - - - how does - - - how does this person differ
6 for any other employee, or your - - - is your
7 argument that he doesn't?

8 MS. ANTOS: My argument is that he does
9 not. He was paid, and he - - -

10 CHIEF JUDGE LIPPMAN: But he's not hired
11 the way a normal employee is, right?

12 MS. ANTOS: He had to fill out a public
13 assistance application; he was subject to
14 fingerprinting and drug testing. If he did not show
15 up at his worksite - - -

16 JUDGE PIGOTT: But you're saying that
17 everyone who is on public assistance who - - - who is
18 required to go to work - - - and apparently,
19 according to counsel, is a lot of people, should have
20 wag - - - taxes deducted, should have FICA deducted,
21 should have all of this deducted from their - - -
22 from their benefit at the time that they perform the
23 work?

24 MS. ANTOS: No, I'm actually not saying
25 that, and, Your Honor, one of the things that we

1 talked about in our brief is that before 1997, it was
2 the policy of the State of New York to give credit
3 for workfare when people had recoveries. New York
4 has always had a variety of statutes. Before 131-r
5 there - - -

6 JUDGE PIGOTT: I'm sorry. I had lost when
7 you said - - -

8 MS. ANTOS: Okay.

9 JUDGE PIGOTT: - - - gave credit for
10 workfare - - -

11 MS. ANTOS: I'm sorry. Public assistance
12 is a - - -

13 JUDGE PIGOTT: - - - when - - - when they -
14 - - when they were - - - wait a minute.

15 MS. ANTOS: I'm sorry.

16 JUDGE PIGOTT: I - - - you don't know my
17 question. You said "credit for workfare" when there
18 were recoveries. I take it credit for workfare, you
19 mean the amount of money they received?

20 MS. ANTOS: Yes.

21 JUDGE PIGOTT: And there was a credit to
22 whom?

23 MS. ANTOS: It was a credit to them.

24 JUDGE PIGOTT: To the - - - to the person
25 for recoveries they receive, meaning recoveries of

1 what?

2 MS. ANTOS: So in the case of Walker v.
3 Shang, for example, in their - - -

4 JUDGE PIGOTT: No, just spell it out for
5 me. I - - - I - - - I don't recall that case.

6 MS. ANTOS: I'm going to explain his facts.

7 JUDGE PIGOTT: I don't recall that case.
8 I'm just saying - - -

9 MS. ANTOS: Oh.

10 JUDGE PIGOTT: - - - recoveries like a
11 personal injury recovery?

12 MS. ANTOS: Could be personal injury, could
13 be recovery of a mortgage, could be an inheritance.

14 JUDGE PIGOTT: Okay.

15 MS. ANTOS: Anything that the State of New
16 York is entitled to seize to pay themselves back for
17 public assistance.

18 CHIEF JUDGE LIPPMAN: Counsel, was - - -
19 were other employees not hired because this
20 particular person or others were working in these
21 jobs? Did they - - - did they actually replace, for
22 all practical purposes, other - - -

23 MS. ANTOS: There's a lot of scholarship
24 that suggests that's true, because the number of
25 unionized employees declined during the period that

1 the number of Work Experience participants increased.
2 They were actually halved in New York City.

3 JUDGE PIGOTT: I think that's true, but I -
4 - - I want to go back to - - - it - - - it just seems
5 to me - - - I - - - I don't blame your client, by the
6 way. If I got - - - if I won 10,000 dollars and I
7 got a check for 1,500, I'd be pretty upset. And I -
8 - - and as Judge Fahey was indicating, too, I mean
9 the way the taxes got decided on this - - - but he
10 didn't complain when he got his first check and say,
11 hey, wait a minute, and I - - - I worked, you know,
12 seventy hours for those two weeks and I'm getting 175
13 bucks? This is - - - this is - - - this is way below
14 what I should be getting paid.

15 He was there from '93 to 2000, as I
16 understand it never complained, and - - - and - - -
17 about any of this. I mean he got the benefit, which
18 the State gives him, tax-free, if I remember it
19 right, and in exchange says if you're an able-bodied
20 person - - - if you're not an able-bodied person, you
21 don't have to work, but if - - - if you can benefit
22 from a Work Experience Program, however it is - - -
23 this one happened to be what it was - - - you got to
24 do that. And no one is saying it's a wage; no one's
25 saying that - - - that you got to pay all of this

1 stuff. And - - - and then fair or unfair, the idea
2 they'll use half your winnings on - - - on a lottery
3 ticket, that does not turn it into a - - - into a
4 wage; does it?

5 MS. ANTOS: Yes, and here's why. The hours
6 of work he was assigned was taken by taking the size
7 of his public assistance grant plus the value of his
8 food stamps and divided by the minimum wage. So he
9 felt - - - in fact, he always felt he was employed.

10 JUDGE PIGOTT: He did that, you're saying.
11 Is that - - - that's not what the Social Security - -
12 -

13 MS. ANTOS: No, no. The - - - not only did
14 the City of New York do it, the state computer system
15 - - - if you look at the affidavit in the record that
16 - - - that is appended to 07-ADM-08 and 08-ADM-07, it
17 says the state computer - - -

18 JUDGE ABDUS-SALAAM: So, counsel, if - - -
19 if the minimum wage were not a part of the equation,
20 we wouldn't be talking about FLSA; is that - - - is
21 that basically what you're saying?

22 MS. ANTOS: The - - - the minimum wage is
23 part of the equation because the statute requires
24 that's how workfare be assigned. So the minimum wage
25 has to be part of the equation here be - - -

1 JUDGE RIVERA: Well, this is what he's - -
2 - he's - - - he's - - - I - - - I thought the essence
3 of your argument was by holding the 50 - - - the
4 5,000, excuse me, that he got in winnings that his
5 hourly wages were then reduced, and that was your
6 argument. Did I misunderstand the argument?

7 MS. ANTOS: It's slightly different. So
8 the - - - the argument is is that when he was on
9 public assistance and working - - -

10 JUDGE RIVERA: Um-hum.

11 MS. ANTOS: - - - because he worked at the
12 rate of his grant divided by the minimum wage - - -

13 JUDGE RIVERA: Right.

14 MS. ANTOS: - - - he worked off his grant,
15 because public assistance is a debt. So he was even,
16 fair and square with the State of New York. He did
17 not owe them anything.

18 JUDGE RIVERA: The State got his labor, and
19 he got the money?

20 MS. ANTOS: Right.

21 JUDGE ABDUS-SALAAM: But even - - - even if
22 the regulations or the statute says this - - - your -
23 - - this is not something you're working off; these
24 are public assistance benefits that you're entitled
25 to, but we want to - - - I thought the - - - the

1 purpose of the program was not to have people work
2 off the grants but to give them work experience or
3 sometimes training, depending upon how you define
4 that, so that they would be able to get off of public
5 assistance permanently, not that they were actually
6 working off the grant.

7 MS. ANTOS: The Fair Labor Standards Act
8 says that - - - that labels, so if the State calls it
9 a training program or learning work skills, aren't
10 dispositive in determining whether or not someone is
11 employee. You have to look at the economic
12 realities. And as you pointed out, he got workers'
13 comp; he got a wage, he - - - his work was controlled
14 by the City and the State of New York.

15 JUDGE STEIN: If he's an employee does he -
16 - - does he have to pay union dues and does he have
17 to have taxes withheld from his pay now? Is that - -
18 -

19 MS. ANTOS: No. I don't believe - - -

20 JUDGE STEIN: Why not?

21 MS. ANTOS: I don't believe so, because
22 when it was the policy of the State of New York
23 before 1997, and it was that policy for decades,
24 taxes were not withheld. That IRS guidance applies
25 when you're in a workfare program.

1 JUDGE RIVERA: Well, he wasn't a union
2 member.

3 MS. ANTOS: No, he was not.

4 JUDGE RIVERA: And - - - and you're only
5 going to pay taxes on whatever amount would have been
6 taxable anyway.

7 MS. ANTOS: That's correct.

8 JUDGE RIVERA: So it's not even clear that
9 he would have had to pay any taxes. But can you
10 answer the - - - you were about to answer my other -
11 - - my - - -

12 MS. ANTOS: Okay.

13 JUDGE RIVERA: - - - prior question, which
14 was my - - - what I thought was your argument, and
15 you said the argument is slightly different. So
16 what's - - - what's that difference in the argument?

17 MS. ANTOS: Okay, so I think we were at the
18 point where I was saying that he was fair and square
19 - - -

20 JUDGE RIVERA: I'm saying the 5,000
21 diminished what his hourly wage was.

22 MS. ANTOS: Okay, and so then - - -

23 JUDGE RIVERA: I thought that was the
24 argument.

25 MS. ANTOS: Okay, so then he got the 5,000

1 dollars. He thought that he had paid his debt to the
2 State of New York by working it off.

3 JUDGE RIVERA: And there's no outstanding
4 debt?

5 MS. ANTOS: And there was no outstanding
6 debt. So when the 5,000 dollars was provided to him
7 - - - or actually it was 10 and the State took 5 - -
8 - the State took it back. And under the Fair Labor
9 Standards Act an employer cannot take back wages that
10 it pays. So what they did - - - what the State has
11 done has taken back wages saying that his work has no
12 value, no value at all.

13 JUDGE PIGOTT: Well, wait - - - wait - - -
14 wait. You can't say that. I mean if they're wages
15 then we've got 100,000 - - - I don't know, however
16 many people, that have not been paid a fair wage in
17 the state going back many, many, many years.

18 MS. ANTOS: No, no, that's not true. So -
19 - -

20 JUDGE PIGOTT: Because you said it was a
21 wage. If it's a wage it seems to me that everybody
22 that's in the WEP program, and in any other program
23 similar to that, we owe them a lot of money, the
24 State of New York does, because it - - - they were -
25 - - they were either paying the minimum wage but not

1 making the appropriate deductions or it's not a wage,
2 it's a - - - it's a benefit that can be offset by
3 things like the lottery.

4 MS. ANTOS: Two - - - two points about
5 that. First of all, as - - - as I've pointed out,
6 for decades the State of New York happily did not
7 take taxes out of workfare when it considered it
8 "paid off" for purposes of assessing debt. So before
9 1997 if I was in workfare and I came into an
10 inheritance the State would not move to take my
11 inheritance because they considered it paid off; they
12 did not take taxes.

13 The - - - and the - - - and the second
14 point is that the only people that this is going to
15 apply to - - - this isn't going to apply to every
16 single workfare recipient. It's only going to apply
17 to workfare recipients like Mr. Carver who, after
18 they've worked off their grant, have come into some
19 money - - -

20 JUDGE PIGOTT: No. If you call it a wage,
21 it's a wage. I mean if - - - if it's a wage, it's a
22 wage, and that means deductions. I - - - I agree
23 with you if it's a benefit and you want to say having
24 received the benefit and having - - - having worked
25 the equivalent of what the benefit is maybe there

1 shouldn't be an offset. But I think the minute you -
2 - - we - - - if we were to say that's a wage I think
3 you - - - you - - - you kick in the entire Tax Code.

4 MS. ANTOS: I think - - -

5 JUDGE FAHEY: Is there a difference between
6 saying it's a wage and saying someone's an employee?

7 MS. ANTOS: Yes.

8 JUDGE FAHEY: What's the difference?

9 MS. ANTOS: Well, for purposes of the stair
10 - - - Fair Labor Standards Act the - - - the
11 definition of employee is very expansive, and the
12 definition of what's taxable income under the
13 Internal Revenue Code is very, very different. So
14 you find cases in the Fair Labor - - - under the Fair
15 Labor Standards Act than, in fact, say people who
16 might otherwise be volunteers or employees or people
17 who do piecework or who are prisoners are employees.

18 CHIEF JUDGE LIPPMAN: What's the - - -
19 what's your best legal precedent for your position?

20 MS. ANTOS: I believe the City of New York,
21 the Second Circuit case which, although it was a
22 Title VII case, has the same definition of employee
23 as the Fair Labor Standards Act. It's a case that
24 would be of immense guidance when looking through
25 this - - -

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Let -
2 - -

3 JUDGE RIVERA: Let - - - if I may ask - - -

4 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
5 Rivera.

6 JUDGE RIVERA: Why - - - why isn't Brukhman
7 v. Giuliani dispositive? Didn't we say there that
8 public assistance recipients are not employees?

9 MS. ANTOS: You said that, but you said
10 that in a very limited context, and there are four
11 points that I think will - - - are - - - are helpful
12 in looking at this. First of all, you said that the
13 WEP recipients were not employees, and I'm quoting
14 here, "within the intendment of the New York State
15 Constitution." You also said that the employers were
16 not contractors or subcontractors within the meaning
17 of the New York State Constitution. You also said
18 that the relief that the plaintiff sought in
19 Brukhman, which was that they would get to work fewer
20 hours in the workfare program, was not a remedy that
21 the Constitution was intended to address. And
22 finally, and again I'm quoting here, you said
23 "notably, we decide nothing more than is before us."
24 So I - - - I believe that case is very, very narrow.

25 CHIEF JUDGE LIPPMAN: Okay, and that case

1 did not use the economic reality test?

2 MS. ANTOS: It did not. It did not.

3 JUDGE ABDUS-SALAAM: But - - - but the case
4 that did use the economic reality test, the case in
5 the Tenth Circuit - - -

6 MS. ANTOS: Yes.

7 JUDGE ABDUS-SALAAM: - - - the Johns case -
8 - -

9 MS. ANTOS: Yes.

10 JUDGE ABDUS-SALAAM: - - - said that WEP
11 recipients or WEP participants are not employees, so
12 how do you distinguish Johns from this case?

13 MS. ANTOS: There are several reasons, the
14 most important of which is that Johns was decided in
15 1995, and that was before the United States
16 Department of Labor issued its guidance stating that
17 workfare recipients are in fact subject to the Fair
18 Labor Standards Act protections. It was also four
19 years before the Department of Health and Human
20 Services promulgated its regulation stating that TANF
21 recipients, temporary assistance recipients, the
22 federal funding for the welfare program, were
23 protected by the Fair Labor Standards Act.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MS. ANTOS: Also, the - - -

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
2 you.

3 MS. ANTOS: Thank you.

4 CHIEF JUDGE LIPPMAN: Appreciate it.

5 Counsel, rebuttal.

6 MS. FIGUEREDO: I just want to address
7 three points raised by Ms. Antos. First, she relies
8 on the prior state policy to credit public assistance
9 recipients for the work they completed as part of a
10 work activity. As an initial matter, the State's
11 prior policy does not determine the economic reality
12 of the relationship. But as a - - - as a second
13 matter, the fact that the State considered the debt
14 "paid off" as she - - - as she described it does not
15 mean that it considered it a wage or that an
16 employment relationship had - - - had been created.

17 JUDGE PIGOTT: But could we do that here
18 then? I mean the - - - by that reasoning he's saying
19 it was "paid off" even though - - - you know, and not
20 by a wage but, you know, I put in time, you know, I -
21 - - I put in more than 177 dollars' worth of time
22 every two weeks, so they shouldn't be taking my 5,000
23 dollars.

24 MS. FIGUEREDO: Considering it paid off
25 still does not determ - - - does not establish an

1 employment relationship because that's - - -

2 JUDGE PIGOTT: No. I'm just saying - - -
3 you were saying before without a - - - without a
4 relationship, you did not do what you're - - - what
5 you've done now, which is apparently, accor - - -
6 according to Santos, since 1997. Have you changed
7 your policy such that it - - - it now is a different
8 policy and you can take this money?

9 MS. FIGUEREDO: Now SSL - - - under SSL
10 131-r, we try to recover the lawful debt that is owed
11 to the State. If the court were to find that Mr.
12 Carver worked off his debt or somehow repaid it
13 already, that still only provides a limited ruling in
14 his favor but does not speak to the broader Work
15 Experience Program statewide.

16 JUDGE PIGOTT: Right. If he - - - if he
17 had worked a week and hit the lottery would you be
18 after him for half?

19 MS. FIGUEREDO: It - - - as long as it's in
20 - - - as long as it's within the ten-year-lookback
21 period, OTA has the ability to recover for the public
22 assistance lawfully paid.

23 CHIEF JUDGE LIPPMAN: What - - - what cases
24 - - - what's your best legal precedent that supports
25 your position?

1 MS. FIGUEREDO: Our best legal precedent -
2 - - precedent is there's two, there's Brukhman v.
3 Giuliani; although that case did not concern the FSLA
4 it addresses some principles that are applicable to
5 employment status generally. The court there already
6 examined HRA's Work Experience Program and concluded
7 that the participants there are not paid a wage and
8 are not any employee - - -

9 CHIEF JUDGE LIPPMAN: No - - - no economic
10 reality test there?

11 MS. FIGUEREDO: There is no economic
12 reality because the purported employer did not exert
13 the type of control necessary to establish an
14 employment relationship.

15 CHIEF JUDGE LIPPMAN: Okay. What's your
16 other case?

17 MS. FIGUEREDO: The second one is Johns v.
18 Stewart. That case, again, was a similar - - -

19 CHIEF JUDGE LIPPMAN: What about what your
20 adversary says that it's before these guidelines came
21 out?

22 MS. FIGUEREDO: The DOL guid - - - guidance
23 is not dispositive; it speaks broadly to welfare
24 recipients. And as we know, there are work
25 activities in - - - to which welfare recipients may

1 be assigned for which there is an employment
2 relationship, such as unsubsidized or subsidized
3 employment. So the fact that D - - - the DOL
4 guidance says that there may be an employment
5 relationship could be speaking to just those types of
6 work activities.

7 JUDGE RIVERA: Oh, so does the case then
8 turn on that other dispute between you and your
9 adversary about how many hours were work and how many
10 hours of training, how many hours of skills
11 development? Is that - - - and is this really
12 something that we - - - that should be decided on the
13 case-by-case fact interests in terms of determination
14 about what the individual did with respect to each of
15 these, as they allege, employer?

16 MS. FIGUEREDO: Court - - - federal courts
17 determining whether there is an employment
18 relationship do apply a case-by-case analysis. They
19 examine the economic reality of that specific
20 relationship. Here Mr. Carver - - - all of the
21 elements of control were outside of the City or HRA's
22 control and they were essentially - - -

23 JUDGE RIVERA: So the - - - but your
24 position is that's true for all of them? So - - - so
25 you just undermined the first part of your answer to

1 me. Your - - - as I read it, unless I've
2 misunderstood your position, that is the government's
3 position throughout - - -

4 MS. FIGUEREDO: It is.

5 JUDGE RIVERA: - - - that they don't have
6 any control. These are state-mandated. They - - -
7 they do not in any way make any decisions about the
8 work on the ground.

9 MS. FIGUEREDO: That is correct. It's - -
10 -

11 JUDGE RIVERA: Then what - - - what does
12 the facts matter then under that analysis is my - - -
13 I started out asking you are these cases that really
14 have to be determined on a case-by-case determination
15 based on the nature of the actual work, whether part
16 of it is training, part of it is some other kinds of
17 skills development.

18 MS. FIGUEREDO: The facts here only
19 reemphasize the nature of the program and establish
20 that the control - - - the elements of the economic
21 reality were outside of the City or the HRA's
22 control. They - - -

23 CHIEF JUDGE LIPPMAN: Counsel, what's - - -
24 what's the - - - the import? If we decide for your
25 adversary who does this affect?

1 MS. FIGUEREDO: The court could - - - could
2 decide one of two ways. If it rules simply on the -
3 - - on the facts of Mr. Carver's case it could
4 conclude that just for him as a - - - he would have
5 been considered an employee of HRA or the City. It
6 could also conclude more broadly that all Work
7 Experience participants are employees. It should not
8 do that here because Mr. Carver's factual allegations
9 are anomalous. It is not the case that Work
10 Experience participants spend thirty-five hours a
11 week in a Work Experience Program.

12 CHIEF JUDGE LIPPMAN: So he is an unusual
13 case in your mind?

14 MS. FIGUEREDO: He is the unusual case.

15 CHIEF JUDGE LIPPMAN: Okay. Thanks,
16 counsel.

17 Thank you both. Appreciate it.

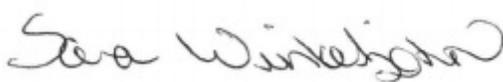
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Carver v. State of New York, No. 139 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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