OAJ Employment Law Section Article January 2015

"Volunteer" Sues For-Profit Marathon Promoter Alleging FLSA Violation and Fraud

By: Merisa K. Bowers, Esq., Columbus, Ohio

A law professor has sued a marathon promoter for fraud and Fair Labor Standards Act violations alleging that the company is not permitted to use volunteer labor to staff its races. Companies like Competitor Race Group, Inc. ("CGI") rely heavily on volunteers to staff its participator events; but are such companies misleading prospective do-gooders to volunteer by appearing to be charitable while turning big profits?

Themed runs and obstacle course events have become increasingly popular over the last few years. From "Color Runs" to "Warrior Dashes," these events, which tour the country, are not put on by community organizations or non-profits. Rather, they are organized by for-profit event promoters. One of these corporations, Competitor Group, Inc., runs the "Rock 'n' Roll Marathon and Half Marathon" series, which takes place in cities across the U.S. and Europe. For-profit race and athletic event organizers are big business. According to *Sports Business Daily*, CGI was purchased by private-equity firm Calera Capital for almost $250 Million in 2012. At $100 and up per race entry, corporate sponsorships, and 28 Rock 'n' Roll events planned for 2015, each race generates significant revenue for CGI.

Enter Yvette Liebesman, a law professor at St. Louis University. Liebesman volunteered as a bike escort for the St. Louis Rock 'n' Roll Marathon and Half-Marathon event in October 2012. Her duties included arriving at the starting line an hour before the start, then riding her bike along the route with a leading female half-marathoner. She assisted with ensuring the safety of the runner during the race and was expected to provide her own bicycle, cell phone and hands-free (Bluetooth) device. Liebsman was not compensated or employed by CGI.

In September 2014, Liebesman, represented by Simmons Hanly Conroy, filed a Complaint in the U.S. District Court for the Eastern District of Missouri (4:14-cv-01653). She alleges that Defendant CGI violated the Fair Labor Standards Act and state wage laws, and claims unjust enrichment and fraud. Specifically, Liebesman alleges that CGI misrepresented that the Rock 'n' Roll Marathon series has a charitable purpose "by enlisting legitimate charities in a scheme to recruit a volunteer labor force" and that she and other volunteers had no way of knowing that "their role was to increase Defendant's profit margins… ." Liebesman alleges that she volunteered believing the race was charitable, and implies that she would not have given away her services to enrich a for-profit race. Therefore, she claims, she did not knowingly volunteer and should be paid for her labor. Liebesman details the costs and obligations of becoming an "official charity" of the race, which include guaranteeing a minimum number of participants. For the 2015 series, such charities include well-recognized non-profits such as the ASPCA, Feed the Children, and St. Jude's Children's Research Hospital.

Liebesman further argues that a for-profit corporation may only utilize volunteer labor in limited circumstances, which are not applicable to the Rock 'n' Roll series. She alleges facts that suggest that the Rock 'n' Roll Marathon series relies on a substantial volunteer labor force and that such labor is integral to the operation of the events. She alleges that there are approximately 1000 volunteers per race and that

CGI has a position "Coordinator, Volunteer Services" because volunteer labor is so heavily relied upon. One fact anticipated to come out through discovery is that paid workers and volunteers performed the same tasks.

CGI, represented by Cooley LLP, recently filed its Motion to Dismiss Liebesman's Complaint. CGI argues that the Rock 'n' Roll Marathon events are not subject to FLSA and that the fraud claim is not alleged with the required particularity of Fed. R. Civ. Proc. 9(b). In support of its argument that the events are not subject to FLSA, CGI argues that the Rock 'n' Roll Marathon events are exempt from FLSA because (a) they are amusement or recreational; (b) each event in each city is a separate "establishment"; and (c) the events operate for less than seven months in any given year. To meet the exemption, CGI must meet all three components. Defendant cites *Chen v. Major League Baseball,* 6 F. Supp.3d 499 (S.D.N.Y. 2014) and *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590 (11th Cir. 1995) to support its position that such sporting events are exempt from FLSA. Much of the case law cited by Defendant revolves around unpaid labor at baseball events, which have tended to favor defendants. CGI argues that legislative history and federal regulations dating to the 1960s establishes that such sporting events were clearly anticipated to be exempt from the FLSA. However, there is no existing case law on participatory sporting events such as marathons or triathlons (versus spectator events).

Even if the Court declines to find that sporting events are exempt from FLSA, CGI claims for-profit businesses may use volunteer labor and Liebesman and others are volunteers under a "common sense understanding." CGI cites *Cleveland v. City of Elmendorf*, 388 F.3d 522 (5th Cir. 2004) and *Rodriguez v. Twp. of Holiday Lakes,* 866 F.Supp. 1012 (S.D. Tex. 1994)). CGI argues that the factors to be considered should be whether the person was economically reliant on the work, the relationship between the person and the entity, and the person's expectation of compensation. This shifts the analysis to looking at how the volunteer perceived the labor, instead of whether the labor was integral to the project or relied on by the employer.

Substantively, the Court will have these questions to address going forward:

- Is CGI's Rock 'n' Roll Marathon series subject to FLSA and state wage laws?
- Did CGI's Rock 'n' Roll Marathon series' appearance of charitable purpose fraudulently induce Liebesman and others similarly situated to provide volunteer labor?
- And ultimately, if subject to FLSA and state laws, has CGI violated labor laws or are volunteers permissible?

The parties have stipulated that Plaintiff may either amend her complaint or file her opposition to the Defendant's Motion to Dismiss. Defendant has also requested an oral hearing on the Motion. It is expected that the Court could rule on the Motion to Dismiss as soon as late February or March 2015.

Neither side has yet briefed the issue of collective or class certification. According to blogger and employment attorney Kelly Burns Gallagher of McCarter & English LLP in Hartford, CT, the FLSA allows a "collective" action, which requires prospective members to affirmatively "opt in" to the collective. Under state laws, the "class" action would automatically include race volunteers as class members, unless they affirmatively opt out. "When you bring both a collective and a class action in the same lawsuit (which is what Ms. Liebesman did here) it's called a hybrid action. Courts often struggle

with what to do with a hybrid action because of the conflict between how collective actions and class actions work."[1]

Does every volunteer feel that they were taken advantage of? From just a scan of comments on blogs regarding this issue, opinions are mixed. One commenter remarked: "I [volunteer] because I love running and the running community," not necessarily to benefit a charity. Another says, "I'm volunteering to support the other runners." With the increase in use of social media and digital evidence, it's feasible that comments such as these could thwart certification of the collective or class action. However, according to Ms. Gallagher, the bigger hurdle for conditional class certification will be demonstrating that putative class members are sufficiently "similarly situated." Without a class of plaintiffs, this case alone won't likely make much impact, but the litigation will likely be used as a roadmap for subsequent similar claims.

[1] K. B. Gallagher. (2014 Oct. 28). Liebesman v. Competitor Group – What Happens Next? [Web log post]. Retrieved from http://www.somerandomthursday.com/liebesman-v-competitor-group-what-happens-next/.
See also K.B. Gallagher. (2014 Dec 17) Liebesman v. Competitor Group –Handicapping the Motion to Dismiss [Web log post]. Retrieved http://www.somerandomthursday.com/liebesman-v-competitor-group-handicapping-the-motion-to-dismiss/.