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GrubHub Driver Wage Case Still En Route?

By Jon Steingart

A federal judge in California found that food ordering service GrubHub correctly classified a delivery driver as an independent contractor who isn't eligible for overtime and other employee rights. But that's not likely to be the last word.

Other gig economy giants like Uber and Postmates have faced similar lawsuits that settled or were dismissed. They can include eye-popping figures, like the $100 million Uber agreed to in a class action that a judge rejected as too small.

But this case was the first to reach trial and is seen as a bellwether. Former GrubHub delivery driver Raef Lawson said the online food ordering company should have classified him as an employee and owed him overtime pay and reimbursement for business expenses he'd be entitled to under state law if he had been correctly classified as an employee. The most important factor the judge's decision hinged on was GrubHub's limited right to control the details of how Lawson carried out his work.

Lawson lost, but there is time for him to file an appeal. A separate case pending before the California supreme court could change the test for worker status under state law, which could give Lawson another shot in the trial court.

"It's an extremely important recognition that in certain circumstances companies can succeed with creating independent contractor relationships," said attorney Richard Reibstein, who represents employers and senior management in labor and employment cases. But it's not a free pass, he told Bloomberg Law Feb. 8. Companies have to make sure they've structured, documented, and implemented such relationships right, said Reibstein, a partner at Locke Lord LLP in New York.

'Borello' Balancing Test on Way Out?

Magistrate Judge Jacqueline Scott Corley of the U.S. District Court for the Northern District of California considered the case under the "Borello" test for worker classification, adopted by the California Supreme Court in a 1989 in ruling on the *S. G. Borello & Sons, Inc. v. Dept. of Indus. Relations*. The test lists nearly a dozen factors to be

weighed to determine the economic reality of the relationship between a worker and a business: independent contractor or employee.

“While some factors weigh in favor of an employment relationship, Grubhub’s lack of all necessary control over Mr. Lawson’s work, including how he performed deliveries and even whether or for how long, along with other factors persuade the Court that the contractor classification was appropriate for Mr. Lawson during his brief tenure with Grubhub,” Corley said in a Feb. 8 ruling.

But Lawson’s lawyer, Shannon Liss-Riordan, notified Corley after the trial concluded in October—but before the judge had ruled—that the California Supreme Court appeared to be considering adopting a different test for worker classification under state law in another case.

The state justices were preparing to hear arguments in a similar case involving delivery drivers for courier service Dynamex. The state high court asked parties to weigh in via brief on whether the California law on classifying workers as employees or independent contractors should dump Bordello and instead use a test similar to one the New Jersey Supreme Court adopted in 2015.

ABCs of ContractorStatus in NJ—and Maybe Calif.?

New Jersey’s ABC test starts with the presumption that the worker is an employee. But if three conditions are met, the person can be considered and independent contractor. If A, B, or C isn’t present, the worker is considered an employee.

The state supreme court heard arguments in Dynamex Feb. 6 and can rule at any time. Courts typically take several months to decide a case after oral arguments.

It may adopt the ABC test, but that hasn't happened. "The judge has to make a decision on the current state of the law," Reibstein said. In Lawson's case, the Borello test was and still is the current state of the law.

"I believe we should have prevailed even under the Borello standard, so we will appeal the decision," Liss-Riordan told Bloomberg Law by email Feb. 8. She said she was surprised Corley decided the GrubHub case before knowing whether the supreme court would change the classification test.

The deadline for Liss-Riordan to file an appeal isn't for a few weeks, and there are procedural moves she could take that may effectively push it later.

"You can buy yourself additional time," Reibstein said. "Any capable lawyer who thinks that the law may change would probably do so."

Court Delivered Right Ruling, GrubHub Says

In the meanwhile, GrubHub welcomed the decision.

"We're extremely satisfied with today's ruling in Lawson v. Grubhub, which validates the freedom our delivery partners enjoy from deciding when, where and how frequently to perform deliveries," CEO Matt Maloney said in a statement emailed to Bloomberg Law Feb. 8. "We will continue to ensure that delivery partners can take advantage of the flexibility that they value from working with Grubhub."

The company declined to comment on potential impact of the Dynamex case.

Liss-Riordan and Thomas Fowler with Lichten & Liss-Riordan, P.C., in Boston and Matthew Carlson in the firm's San Francisco office represented Lawson.

Gibson, Dunn & Crutcher LLP attorneys Michele Maryott in Orange County, Calif., and Theane Evangelis and Theodore J. Boutrous Jr. in Los Angeles represented GrubHub.

The case is Lawson v. Grubhub, Inc., 2018 BL 44071, N.D. Cal., No. 3:15-cv-05128, findings of fact, conclusions of law 2/8/18.