3 Takeaways From Grubhub Plaintiff's Opening Appeals Brief

Insights
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The first-ever trial on the gig economy misclassification to reach a judicial merits determination has now turned into the first-ever appeal on gig economy misclassification. And late Friday evening, the plaintiff seeking to overturn the ruling filed his opening appeals brief with the 9th Circuit Court of Appeals. We've covered the *Lawson v. Grubhub* decision in detail over the past year; if you want to refresh your memory, feel free to catch up by reading any of our posts. In sum, a federal trial court ruled in February 2018 that Grubhub correctly classified plaintiff Raef Lawson as an independent contractor and rejected his misclassification claim, but then the California Supreme Court changed the game a few months later by adopting the strict ABC test for misclassification in the now infamous *Dynamex* case. How will the *Dynamex* decision impact the *GrubHub* appeal? We're not sure, but we know how the plaintiff feels about it. We digested the 61-page appeals brief and can give you the three most important takeaways from the filing.

1. **Delivery Driver Feels Confident That He's An Employee Under The ABC Test**

   The biggest takeaway, unsurprisingly, is that Lawson feels confident that the ABC test renders him an employee and not a contractor. "There could really be no question that Plaintiff was an employee under the *Dynamex* ABC test," his attorneys boldly state in the introduction section of the brief. They ask the 9th Circuit to reverse the lower court because of the "revised and extremely stringent ABC test."

   They first note that Grubhub cannot satisfy Prong B of the ABC test (whereby the worker must perform work that is outside the usual course of the hiring entity's business) because, as they argue, Lawson performed work within Grubhub's regular course of business. The attorneys cite 14 different cases from Massachusetts (the state from which California adopted this strict version of the ABC test) where courts have granted summary judgment in favor of workers by virtue of an application of Prong B in all sorts of industries. They then point out that the same should be followed here, because the lower court has already concluded that Grubhub is a food ordering and delivery business and that Lawson was most certainly a delivery driver. Anticipating that Grubhub would defend its position by claiming that is more of a platform for food ordering, Lawson's attorneys point out that under Prong B of the ABC test, as applied in Massachusetts, "an employer is not limited to having just one usual course of business." They conclude their argument by comparing Lawson to an exotic dancer at a strip club, noting that dancers who perform there are central to the strip club's business and therefore have been held to be

employers under the ABC test.

They then spend some time arguing that Grubhub cannot satisfy Prong C (whereby the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed). They argue that plaintiff was not running "Raef's Delivery Service" catering to his own customers, negotiating rates of pay, and deciding which jobs to accept from which customers. "Instead," they say, "he was working a low-paying job, albeit with relatively flexible scheduling to support himself while pursuing his acting career." They then point to all of the usual hallmarks of someone in an independently established vocation and note that none apply to Lawson's situation: incorporation, licensure, advertising, routine offerings to the public to perform the work, his own clientele, owning business cards, submitting invoices, maintaining a separate place of business, or having his own telephone listing.

They attorneys also include a line of argument about Grubhub not being able to satisfy Prong A (workers are free from control or direction when performing the work), but the battle lines will most definitely be drawn at Prongs B and C.

2. **The War Will Be Fought On Retroactivity And Application Of ABC Test**

Continuing with the battlefield analogy, it appears that this case could come down to retroactivity and whether the ABC test should be applied at all to Lawson's case due to the nature of what he is seeking to recover.

As for retroactivity, Lawson's attorneys anticipate that Grubhub will argue that the ABC test should not apply to this appeal, or to the case in general, because the *Dynamex* case did not get handed down until after the case had been decided—and, more importantly, because Grubhub established its business assuming that worker classification would be decided using a different test than the one adopted midstream by the California Supreme Court. Lawson's attorneys are having none of it. "The general rule that judicial decisions are given retroactive effect is basic in our legal tradition," they argue, citing to a California case from 1989. They also point to a legal standard confirming that new case law applies even to cases that happen to be pending on appeal when the new case gets handed down. They also note that a California Court of Appeal recently confirmed that *Dynamex* applies retroactively (my colleague Ben Ebbink blogged about this specific case a few weeks ago), and that another state court ruled that same way back in July (read about that decision here) and ask the 9th Circuit to concur and issue the same pronouncement.

When it comes to applicability of the ABC case to the case at hand, it's important to remember that Lawson's case is only seeking recovery of expense reimbursement claims. As we have noted earlier, the court did not let him pursue additional claims or class claims on behalf of other drivers. And while the *Dynamex* case is limited to Labor Code Claims covered by the California Wage Orders, Lawson's attorneys contend that Wage Order No. 9 (which requires businesses to

provide its workers with any tools or equipment necessary to perform the job) ensures that expense reimbursement claims are covered under the ABC test.

3. **Lawson Still Believes He Should Have Won Under The Old California Test**

   Even if the court concludes that *Dynamex* should not be applied retroactively, or that it should not be applied at all to claims for expense reimbursement, Lawson's attorneys put up a final fight by claiming that he should have been classified as an employee under the old California standard (known as the *Borello* standard) and that the lower court just got its decision plain wrong. Lawson's attorneys trot out the same line of argument they did earlier this year when they argued their case in chief at trial to the judge, and there is nothing in their briefing that we haven't discussed before. But it's worth noting that the 9th Circuit is notoriously worker-friendly, so it is quite possible that the court—if it got to this point—could very well come to a different conclusion than the lower federal court judge.

Grubhub has about a month to file its response brief, but that timing could be delayed by the holidays. Anticipate the next filing, in this case, to come down in late 2018 or early 2019; once the company has put forth their response, we'll read it all and summarize it for you, too.

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