



Summary Of Post-Trial Briefs Filed In Grubhub Misclassification Case

Insights

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The parties in the Grubhub misclassification case are back in court on Monday, October 30, delivering their final closing arguments to the judge. We've written about the trial extensively; if you need a refresher, you can do so [here](#), [here](#), [here](#), and [here](#). To sum it up, though: a former delivery driver for Grubhub (Raef Lawson) claims he was misclassified as an independent contractor, and seeks to advance his claims on behalf of a whole class full of other drivers. Raising the stakes dramatically is the fact that this could very well be the first independent contractor misclassification claim for the gig economy has reached a judicial merits determination. Although the ultimate decision by the judge will not necessarily make or break the gig economy as a whole, this is an important milestone.

After a six-day bench trial, which included testimony from 10 witnesses, the parties retreated to their neutral corners and wrote extensive post-trial briefs to argue their case to the judge. The plaintiff's brief was 83 pages long, while the defendant's brief stretched 116 pages (not to mention hundreds of pages of exhibits and testimony transcripts). The briefs frame the arguments at issue wonderfully, although the size of them may seem daunting. Never fear, however; we've done what you don't necessarily want to do: conduct a thorough reading of all 199 pages of briefing. Here's a summary of the high points.

Legal Standard At Issue

Both parties agree that the pivotal case setting the standards to examine is the 1989 California case of *Borello & Sons v. Department of Industrial Relations*. That case created a multi-factored, common law test for determining whether a relationship is an employee-employer relationship or an independent contractor arrangement. The principal question, as is common with most misclassification situations, is whether the company to whom the service is rendered "has the right to control the manner and means of accomplishing the result desired."

After that critical question has been examined, *Borello* instructs the courts to also look to a series of "secondary indicia" of the nature of the service relationship, and lists eight such factors.

Here is a summary of all the *Borello* factors, along with the arguments raised by each side in the legal briefs:

Right To Control

- Grubhub argues that the overwhelming number of facts should lead the court to conclude that it did not have the right to control the manner and means of the food delivery. The company said drivers choose whether and when they want to deliver food, where they want to accomplish the deliveries, what kind of vehicle (or bike) they use, and which routes to take to accomplish the delivery. They can also work with competitors if they so choose, delivering for any number of other gig companies (including food delivery companies), and have the option of hiring employees or subcontractors to carry out the work. Grubhub said it provides no training to the drivers (other than offering optional videos showing people how to use their app efficiently) and does not supervise their work. It pointed out that drivers have the right to negotiate their compensation if they choose. It said drivers have no requirement to wear a Grubhub uniform, and have the sole discretion on how they choose to interact with dining establishments and food consumers. Finally, the company points out that each party in the relationship has mutual termination rights under the contract.
- Lawson's attorneys disputed all of these factors and said that Grubhub levied necessary control over all of the drivers. Overall, the attorneys contended that Grubhub monitored their work closely in a number of ways, demonstrating the right to control. They argued that drivers were expected to accept all food delivery requests that came their way or would face negative consequences if they did not (such as lower pay scales and deprioritized access to blocks of time for scheduling purposes). In fact, the attorneys argued that drivers had limited flexibility in accepting schedules. They were expected to stay in certain geographic zones or received warnings from Grubhub employees. Moreover, the attorneys argued that drivers were encouraged to wear Grubhub-branded clothing and were forced to pass a background check before being accepted on the platform. Finally, the attorneys said that the contract's mutual termination provision was nothing more than an at-will arrangement, demonstrating that the relationship was employment-based.

Distinct Business

- Grubhub argued that Lawson ran a distinct business by delivering food for their service and for a number of other competitors. In this way, Grubhub seems to be contending that its drivers are each "solopreneurs," each developing their own business by stringing together a number of side gigs.
- Lawson's attorneys saw it differently. They said he was merely hustling to make ends meet, as if he had a series of low-paying jobs. Just because he was working for a number of companies did not mean he ran his own business, as there was no evidence demonstrating such (no employees, no incorporation, no business offices, etc.).

Lack of Supervision

- Grubhub pointed out that Lawson and the other drivers had no company supervisors from its end. As demonstrated above, he was free to carry out the delivery business as he saw fit. As long as the food got where it needed to get, he was able to get it there how he wanted.

- Lawson's attorneys pointed out evidence they believe supported the fact that Grubhub closely monitored his and other drivers' performance closely, watching their every move and redirecting them should they stray from expected performance standards.

Worker's Skill

- Grubhub contended that each driver – including Lawson – had the capacity to greatly influence their earnings and their success by using their own individual skill to accomplish the work better and more efficiently than other drivers. He might know better delivery routes, for example, or work at a more efficient pace than another driver.
- Lawson argued that he had no unique skill or special talent that led him to be able to perform; he simply delivered food. Even if he did a good job for a certain restaurant or customer, there was no guarantee that they would ever see him again if they placed a similar order.

Tools of the Trade

- Grubhub showed that Lawson and all other drivers used their own tools and equipment to carry out their mission: their cars or bikes. These were owned and maintained by drivers themselves, and they could influence how well the deliveries were conducted (for example, one might have a more reliable car than another).
- Lawson's attorneys tried to turn the tables on this issue by focusing on a more big-picture piece of equipment: the entire company infrastructure. They argued that the creation and maintenance of the app itself demonstrated that the company owned and controlled the most important tool of the trade.

Length of Time Services Performed

- Grubhub argued that Lawson (and other drivers) maintained a "fleeting and episodic" relationship with the company. They chose when to toggle on to indicate they were open to accept new assignments, and toggled off when they didn't. There was no pressure to accept any assignments or work a certain number of hours per week.
- Lawson said the relationship was actually "indefinite" in nature in that the initial contract agreed upon would automatically renew every certain number of days, binding the parties together for an undetermined period of time.

Method of Payment

- Grubhub pointed to evidence showing that drivers were paid in a way that was more project-based, incentivizing a higher number of deliveries.
- Lawson contended that the pay was akin to hourly pay, just like any other employee working in an unskilled labor field.

Core of Business

- Grubhub argued that food deliveries are not the core of its business, but that the company is an online take-out marketplace, marketing restaurants to a broad audience of consumers and offering a singular digital destination to browse for dining options. If the consumer chooses to place an order to have the food they have viewed online then delivered to their residence or place of business, that is a secondary function of the business and the app.
- Lawson and his counsel disputed this notion and said that Grubhub operates a food delivery service and that the drivers' work is at the core of what the company actually does. It rejected Grubhub's descriptions as "creative labeling for age-old employment concepts."

Understanding of Relationship

- Grubhub pointed out that Lawson agreed and acknowledged he was an independent contractor by agreeing to three separate contracts with the company, even after he initiated the lawsuit.
- Lawson's attorneys rejected the argument and said the agreement was an unconscionable contract of adhesion that could not bind the parties in that respect.

We'll continue to monitor the progress of the case and, if any fireworks ensue or the judge tips her hand in any way, will post a summary of the oral argument soon after it is completed. And of course, we're on standby to deliver news of the ultimate outcome of the case, so stay tuned.

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