Uber Driver Jumps Into Grubhub Battle: 3 Things You Need To Know

Insights
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The *Grubhub* misclassification battle, which has dominated gig economy headlines for the past year or so, has taken another interesting turn. An Uber driver has jumped into the fray, offering his opinion about why the 9th Circuit Court of Appeals should conclude that the Grubhub driver at issue was incorrectly classified as an independent contractor.

Regular readers of this blog are familiar with the *Grubhub* litigation. In sum, the nation's first gig economy misclassification case to reach a judicial merits determination led to a trial victory for Grubhub in February, where a federal judge in California concluded that driver Raef Lawson was correctly classified as a contractor. But just a few months later, the California Supreme Court issued a decision (the *Dynamex* case) that created a new misclassification test (the ABC test) making it very difficult for gig companies to classify their workers as contractors. Lawson filed an appeal with the 9th Circuit Court of Appeals, the centerpiece of which is that the new *Dynamex* test should be applied to his situation. About a week ago, in fact, Lawson filed his opening appeals brief with the 9th Circuit. His brief anticipates that Grubhub will defend the case by contending that *Dynamex* should not be applied retroactively, given that it is such a radical departure from the state of misclassification law under which all businesses operated for decades.

Enter Jeffrey Grant, an Uber driver from California. Grant filed an amicus brief (friend of the court) with the 9th Circuit on Friday afternoon, offering his opinion on why the court should apply the *Dynamex* case retroactively and rule in Lawson's favor. Grant acknowledges that he has a vested stake in the outcome of the *Grubhub* appeal; he has filed an arbitration demand against Uber alleging a misclassification violation, and therefore any victory for Lawson in the *Grubhub* case will be a victory for him as well. He argues that for the 9th Circuit not to apply He argues that for the 9th Circuit not to apply Dymanex retroactively "would dramatically interfere with how courts define and develop critical statutory protections for employees." Here are three key takeaways from Grant's 27-page amicus filing.

First Argument: ABC Test Is A Logical Extension Of California Law

Grant's first line of argument as to why *Dynamex* should be applied retroactively is that the test is a "logical extension of principles that have long been embedded in California law." Grant claims that the ABC test is simply a "clearer test" than the law that had previously existed, and it is just "one more link in a chain of decisions" that have come down from California courts.

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In this author's opinion, Grant's argument falls flat. The test that had been applied prior to *Dynamex*—the one the federal court used to hand Grubhub a victory at trial—was the balancing test known as the *Borello* standard. It was a flexible test involving an analysis of multiple factors, leading the court to apply a common sense determination after reviewing a whole series of circumstances. The ABC test, on the other hand, is a rigid and inflexible legal standard that presumes employment status and forces businesses to overcome three separate hurdles if it wants to classify a worker as a contractor. The two tests could not be more different, and Grant's amicus brief fails to reasonably demonstrate a link between the two. The brief points to a statute and an unrelated 2010 wage-and-hour case to justify the alleged link, but these hardly create a pathway between *Borello* and *Dynamex*.

Second Argument: Statutes Are Refined By Case Law All The Time

Grant's second argument: statutory interpretation dictates that courts refine legal standards and tests with regularity—in fact, this is the "very essence of the common law"—and Grubhub should have to deal with the consequences of such a refinement. Grant points to several other statutes that have been refined over time through court decisions. The Fair Labor Standards Act (FLSA), for example, has seen a key phrase ("suffer or permit") interpreted in various ways by courts over the years. The portion of the Equal Pay Act (EPA) determining what "other factors other than sex" could legitimately justify a pay disparity has seen various interpretations by judges. And Title VII has witnessed an evolution in terms of whether sexual orientation should be considered a protected category under the statute's "because of sex" definition. It stands to reason, he argues, that the California state law should be similarly evolving through court decisions—including the misclassification standard at issue here.

This argument, too, misses the mark. While it may be true that courts routinely extend new standards to govern existing statutory schemes, nowhere in this line of argument does Grant explain whether such extensions of the law are routinely applied retroactively. No one is arguing that the California Supreme Court did not have the authority to adopt the ABC test instead of the *Borello* test. Instead, the key issue is whether the new test should be read to apply to decisions that were made in reliance upon the old test at the time it was in effect.

Third Argument: Failing To Apply A New Judicial Test Retroactively Would Lead To A Slippery Slope

Grant's final argument: Grubhub's argument would have "no logical stopping point" if it is applied. As he argues, if the ABC test were not applied retroactively, "all judicial decisions announcing or refining a statutory standard and then applying that standard to the past conduct at issue" would be rendered unconstitutional. He predicts a parade of horribles that would result in such a scenario, where countless decisions by courts across the land—including the U.S. Supreme Court—would lead to due process violations. All litigants seeking backward-looking relief (such as "employees who discover wage violations after leaving a job") would lack the ability to recover, turning the common law system on its head.

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Once again, Grant's argument fails to persuade. Grubhub's position certainly will not be that all backward-looking relief is prohibited, and that all judicial determinations that refine or change a standard will be due process violations. Instead, Grubhub has already indicated that there are some very specific factors unique to this case and unique to this new legal standard that call for a due process review and a determination that retroactivity would be unwarranted. Rather than careening down a slippery slope, Grubhub will be asking the court for a careful review of this specific situation to conclude whether due process would be violated by the application of a completely new legal standard.

Conclusion

All eyes are on the *Grubhub* case, and it will not be surprising if additional amici file briefs offering their own opinions on the matter to help sway the 9th Circuit. When additional briefs are filed, we'll take a look at them and provide analysis as warranted.

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