Next Shot Fired: We've Read Grubhub's 71-Page Appellate Response Brief So You Don't Have To

Insights
1.10.19

The next shot has been fired in the long-running misclassification dispute between plaintiff Raef Lawson and gig economy giant Grubhub, as the company filed its Answering Brief with the 9th Circuit Court of Appeals late last night. As regular readers of this blog know, Lawson and Grubhub squared off in the nation's first-ever gig economy misclassification trial in late 2017, leading to a victory for Grubhub in February 2018. Things took a turn for the worse in April 2018 when the California Supreme Court dropped a bombshell and changed the misclassification standard with its infamous *Dynamex* decision, which ushered in the notorious ABC test, and Lawson's attorneys quickly pounced and argued that he should now be declared the victor given the new standard. Lawson filed an appeal with the 9th Circuit Court of Appeals and filed his opening brief in November 2018. Now, it's Grubhub's turn.

Grubhub's 71-page Answering Brief presents three main arguments to the court:

1. **You can ignore *Dynamex*, the company says, because the standard only applies to cases arising under California's wage orders, and this present dispute revolves around an expense reimbursement claim.**
2. **Even if you think *Dynamex* should apply to such claims, you shouldn't apply it in this case because it would be unfair to hold us to this standard retroactively.**
3. **Even if you apply *Dynamex*'s ABC test retroactively, we should still win because we can satisfy the test.**

Let's take a look at each of these arguments in a little more depth:

1. ***Dynamex* Does Not Apply To Expense Reimbursement Claims**
   "*Dynamex* applies only to claims brought under IWC wage orders," the brief begins, and later points out that plaintiff's expense-reimbursement claim instead "arises under California Labor Code Section 2802." Grubhub cites to a 2018 9th Circuit case where the court agreed that *Dynamex* did not purport to replace the flexible *Borello* standard "in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California's labor protections." It then points out that a very recent California Court of Appeal case specifically declined to extend the ABC test beyond wage order claims; my colleague Ben Ebbink recently wrote a detailed blog post about the October decision in *Garcia v.*

Border Transp. Group that provides more depth on the matter. In other words, Gruhub hopes to sidestep *Dynamex* and the ABC test altogether.

2. ***Dynamex* Should Not Be Applied Retroactively**
   This line of argument is pivotal and more applicable to the many gig economy (and other) companies that had been operating for years under the impression that the correct standard to determine independent contractor status was established in the *Borello* case—which provided a flexible construct. On page one of the Answering Brief, Grubhub plainly states that Lawson "was properly classified under *Borello*—the only test that should apply to this case consistent with basic principles of fairness and due process." It characterizes the ABC test as "a new legal standard not announced until years after the parties ended their relationship, and months after trial concluded"—indeed, "a tectonic shift in California law, completely unforeseen by the parties and the courts." Grubhub relies on a 2004 state appellate case for the proposition that "courts [should] generally decline to apply a decision retroactively when a judicial decision changes a settled rule on which the parties below have relied." And, of course, it points out that it reasonably relied on the longstanding flexible *Borello* standard when contracting with Lawson, classifying him as a contractor, and litigating the case to trial. In fact, it points out, the trial court acknowledged that the company wrote its independent contractor agreement with *Borello* in mind, amply demonstrating its reasonable reliance. Because *Dynamex* radically altered the legal landscape by introducing a substantive change in established law—which the plaintiff himself contended over and over again in his opening brief—it would be unfair to hold the company to that standard in this particular case.

3. **Grubhub Should Win Under The ABC Test**This is the most challenging argument for Grubhub to win—but one that would also be of monumental significance to gig economy companies across California. The company confidently addresses each of the three prongs in *Dynamex*'s ABC test and explains why it should win each prong (which it would need to do in order to satisfy the new standard):

   - **Prong A: The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact.** This line of argument essentially repeats the merits of the same arguments that Grubhub used to win the trial under the *Borello* standard. For a more in-depth analysis of this reasoning, read my blog post recapping the blueprint the company established to gain the victory.
   - **Prong B: The worker performs work that is outside the usual course of the hiring entity's business.** This is the big one, the hardest one for gig companies to overcome. Grubhub cites to several cases from Massachusetts—a state that adopted a similar ABC test years ago—and contends that they establish a way of looking at Prong B that should work in its favor. In its view, a pivotal question is whether the service the individual is performing is "necessary" to the business of the employing unit or merely "incidental." And because Grubhub contends that its business operations demonstrate that it is not a delivery company but instead "an online take-out marketplace that connects restaurants to a broad audience of diners while

offering diners a single destination to browse dining options, the deliveries that Lawson made "were merely incidental to Grubhub's usual course of business." To support this claim, Grubub states that it is not, and never has been, directly dependent on delivery as a primary source of revenue. "On the contrary," it argues, "Grubhub profited only incidentally from deliveries that it facilitated (which were less lucrative than self-delivery or customer pickup orders), and delivery revenue constituted a small percentage of Grubhub's total revenue during the relevant time frame."

- **Prong C: The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.** Grubhub presents an interesting argument in an effort to win Prong C, offering an expansive way of looking at this legal test. Grubhub cites to a key Massachusetts case and asks the 9th Circuit to examine "whether the worker is capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend upon a single employer for the continuation of the services." Under this test, "where a worker has the right to offer his services to anyone wishing to so avail themselves, he will qualify as an independent contractor." Because Lawson was capable of—and in fact did—perform delivery services for numerous gig companies such as Uber, Lyft, Postmates, Caviar, TaskRabbit, Doordash, and others, he should satisfy Prong C.

Finally, Grubhub argues that, if the court is inclined to apply the *Dynamex* standard retroactively, it should have the opportunity to present further evidence and argument to the trial court on remand. After all, it says, "the ABC test turns on evidence that the parties had no occasion to investigate or develop when trying their case under Borello." So rather than take the loss at the 9th Circuit, Grubhub says that it should at least get a do-over at trial, and have another chance to conduct discovery, present new arguments, and create a new record for the fact-finder. The company's brief presents a long list of concepts that it would like to present in order to satisfy the *Dynamex* standard, none of which it claims were relevant to the *Borello* standard and were therefore ignored at trial. "Neither this court nor the district court can fairly consider plaintiff's claims under the ABC test without all the relevant evidence, and due process guarantees Grubhub the opportunity to develop and present that evidence for consideration," it concludes.

Next up: Lawson will have a chance to submit a reply brief. You can be sure we'll review it and summarize it for you once it is filed.

Related People

Richard R. Meneghello
Chief Content Officer
503.205.8044
Email