



4 Things You Need To Know About Grubhub Plaintiff's Reply Brief

Insights

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Regular readers of this blog know about the Grubhub gig economy misclassification litigation. The quick version: Grubhub squared off with a former driver, Raef Lawson, 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](#), and [Grubhub filed its Response in January](#).

Late Friday afternoon, Lawson filed his Reply brief. This should be the last substantive filing in the case before oral argument and what promises to be a blockbuster decision by the 9th Circuit Court of Appeals. As always, we've dug through the details and culled the five most important points from the briefing so that you don't have to read the 38-page brief yourself.

1. ***Dynamex* Should Apply Retroactively**

Lawson's attorneys really dig into this argument, feeling confident that such a ruling would not only hand them a victory in this case but also open the floodgates for them to be able to seek misclassification damages against just about every gig economy business in California. Their strongest argument: "every court to address the issue to date has applied *Dynamex* retroactively," citing three state court cases and a federal district court decision handed down in recent months to support their argument. They also attempt to cast aside Grubhub's argument about the ABC test ushered in by *Dynamex* being a "tectonic shift in California law, completely unforeseen by the parties and the courts." Nonsense, Lawson's attorneys say. They cite to a 2010 California Supreme Court case that seemed to put the flexible *Borello* standard on thin ice as evidence that any reasonable business operating in California should have anticipated such a radical shift.

2. ***Dynamex* Applies To Reimbursement Claims**

In response to Grubhub's argument that it should be able to sidestep the ABC test in this specific instance because Lawson's only claim against the company is for an expense reimbursement—and because *Dynamex*'s ABC test only applies to claims brought under California's wage orders—Lawson's attorneys contend that reimbursement claims can and are brought pursuant to

California's wage orders. This is a critical argument because it will ultimately determine the breadth and width of *Dynamex's* reach in future cases. Lawson's main policy argument in this regard is that the case should not be read so narrowly as to squeeze out such coverage because the underlying state statute has a "remedial purpose" and is "protective" legislation.

3. **Lawson Wins Under The ABC Test**

Lawson's attorneys rip into Grubhub's argument that he cannot satisfy Prong B of the ABC test: whether the worker performs work that is outside the usual course of the hiring entity's business. "There is no question that it cannot satisfy Prong B," they boldly state. They all but ignore Grubhub's argument that it should be treated like an "online take-out marketplace that connects restaurants to a broad audience of diners while offering diners a single destination to browse dining options" rather than a delivery service, citing to findings at the lower court that specifically concluded that "Grubhub is a food ordering and delivery business" and "is in the business of providing food delivery for certain restaurants." They also reject the contention that Grubhub can satisfy 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") simply because Lawson also worked for other food delivery platforms like Postmates and Caviar. They cite to an illustrative case from Massachusetts (the seeming birthplace of the ABC test) that rejected a similar argument.

4. **What's Next?**

This should be the last substantive legal filing in the case. Next up: oral argument. The court recently asked the parties for dates they are available to hold the oral argument in Portland during the months of June, July, and August. Given the fact that your author is based in Portland, there is a good chance that we will be able to present a summary of the arguments once they take place. Stay tuned.

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