

Uber Drivers: Who Has the Right to Control?

The United States Court of Appeals for the Third Circuit, in *Razak v. Uber Techs., Inc.*, 2020 U.S. App. LEXIS 6674 (3rd Cir. March 3, 2020) (Greenaway, Jr., C.J.), reversed the grant of summary judgment for Uber Technologies (“Uber”) in its dispute with UberBLACK drivers, a putative class of Pennsylvania drivers utilizing Uber’s ride-sharing mobile phone application. While the question on appeal appeared to be limited, it has broad implications. At issue was whether UberBLACK drivers are employees or independent contractors within the meaning of the Fair Labor Standards Act (“FLSA”) 29 U.S.C. §§ 201-219 and similar Pennsylvania state laws.

Plaintiffs drivers each owned and operated independent transportation companies, which are essentially limousine services. The drivers entered into a software license ~~SL~~ and Online Services Agreement that permits UberBLACK drivers to utilize technology services which Uber provides to generate leads. The licensing outlines the relationship between the parties. It describes driver requirements, vehicle requirements, financial terms, and contains an arbitration clause for dispute resolution. There is also a Driver Addendum that must be signed by those driving the vehicles.

Uber holds a certificate of public convenience and is licensed by the Philadelphia Parking Authority to operate a limousine company. The plaintiffs claimed that they were employees and sued Uber for violations of minimum wage and overtime requirements under federal and state laws. The federal cause of action invoked the Fair Labor Standards Act ~~as a result of the “control” exercised by Uber~~. The plaintiffs claimed that they were “employees” under the FLSA because of the control exercised by Uber.

The Third Circuit utilized the test set forth in *Donovan v. DialAmerica Marketing, Inc.*, 757 F.3d 1376 (3rd Cir. 1985). for determining employment under the FLSA. ~~set forth in *Donovan v. DialAmerica Marketing, Inc.*, 757 F.3d 1376 (3rd Cir. 1985).~~ It is difficult to believe that ~~as recently as~~ since 1985, there has not been any ~~no~~ major case law development ~~on~~ regarding internet use which has raised ~~the~~ issues similar to those ~~current~~ involved in *Razak v. Uber Technologies* in 2020. However, although *DialAmerica* was decided thirty-five years ago and involved different technology, it does stand for the proposition that degree of control would be the gatekeeping test for employment status.

Applying *DialAmerica*, the District Court granted summary judgment to Uber, ruling that drivers for UberBLACK were independent contractors within the meaning of the FLSA and similar Pennsylvania laws. That finding was reversed by the Third Circuit, which found that genuine disputes of material fact existed. The parties contested whether Uber exercised control over the drivers, and the Circuit Court found that the degree of control

was not a factor that the District Court could legitimately determine absent further development of the record. Both parties argued that there were no genuine disputes regarding control, but the appellate court disagreed. The question of start or stop times, for example, would assist in determining the right to control plaintiff's work. "While Uber determines what drivers are paid and directs drivers where to drop off passengers, it lacks the right to control when drivers must drive. UberBLACK drivers exercise a high degree of control, as they can drive as little or as much as they desire, without losing their ability to drive for UberBLACK." *Razak v. Uber Technologies*, At slip opinion at 20.

The District Court ruled that there was no genuine dispute as to the opportunity for profit or loss depending upon managerial skill. The lower court had determined that this factor favored independent contractor status. However, the appellate court noted there were other factors that needed to be considered, such as the fact that Uber decides the fare, which driver receives a trip request, and whether to refund or cancel a passenger's fare. Uber also determines a driver's territory, which is subject to change without notice. Plaintiffs may drive for competitors, but Uber may attempt to frustrate those who try. The permanency as to the working relationship is another area of disputed fact which the appellate tribunal indicated must be determined by a fact finder at the lower court level.

Far from ducking this sensitive issue, the Third Circuit clearly understood the importance of a proper record. The Court remanded the case for resolution of the factual disputes, which it indicated would be accomplished either by resolving facts utilizing a jury or by virtue of a Rule 52 proceeding.