NEW YORK COURT OF APPEALS ROUNDUP

COURT DECIDES GIG EMPLOYMENT ISSUE: '*VEGA V. POSTMATES*'

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In response to the COVID-19 pandemic, the Court of Appeals released a notice to the bar on April 6, 2020 stating that it will not hear oral argument during its April/May session and that the Clerk's Office will contact counsel to provide information regarding further consideration of their appeals. The court's building in Albany will not be open to the public until further notice, but the court will continue to consider previously filed pending matters and issue decisions.

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The Court of Appeals recently addressed an issue of increasing importance in today's gig economy. In *The Matter of the Claim of Luis A. Vega v. Postmates*, the court decided that an individual who served as a courier for the delivery service Postmates qualified as an "employee" and Postmates was therefore required to make contributions to the unemployment insurance fund for him and other similarly situated individuals. In a majority opinion authored by Chief Judge Janet DiFiore and joined by Judges Leslie Stein, Eugene Fahey and Paul Feinman, the court determined that substantial record evidence supported the determination of the Unemployment Insurance Appeals Board that the couriers were employees. Judge Jenny Rivera concurred in the result but wrote separately to encourage the adoption of a new standard for defining an employee, drawn from the Restatement of Employment Law. Judge Rowan Wilson authored a dissent, joined by Judge Michael Garcia, criticizing the court's historical precedent on categorizing "employees" as inconsistent and concluding that Mr. Vega is not an employee under the common-law multi-factor test.

Mr. Vega worked briefly for Postmates during one week in June 2015. Postmates is a delivery business that arranges to pick up goods from local restaurants and stores and deliver them quickly to customers who make requests through a smartphone application. After downloading the Postmates app, passing the criminal background check, and receiving orientation, Mr. Vega was authorized to work as a Postmates courier. Over the course of one week, he signed onto the app a dozen times to receive delivery requests. Mr. Vega had the capacity to accept, reject or ignore the delivery requests. He advised Postmates that he would make deliveries by walking, as opposed to bicycle or car. He did not have a pre-determined schedule or a supervisor. Mr. Vega accepted about 50% of the assignments offered to him. Postmates paid him 80% of the service fee charged to the customer, which fee could range from $0.99 to $9.99 per delivery. Postmates asserted that it received customer complaints on "a lot of" Mr. Vega's deliveries that the customers did not receive the items requested. Postmates terminated Mr. Vega's service by blocking him from the app. Mr. Vega subsequently filed for unemployment benefits.

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Over the course of four proceedings, the underlying tribunals reached contrary conclusions on whether Mr. Vega qualified as an employee. The Department of Labor found that Mr. Vega was an employee. After a hearing, an Administrative Law Judge reversed. On appeal, the Unemployment Insurance Appeals Board reversed again, holding that Mr. Vega and "any other on-demand couriers (delivery drivers) similarly situated" were employees because Postmates had sufficient control over their services. A majority of the Appellate Division, Third Department came out the other way, finding that there was not substantial evidence of "Postmates' control over the means by which these couriers perform their work." Two justices dissented, finding substantial evidence to support the Board's conclusion. The Commissioner of the Department of Labor appealed to the Court of Appeals pursuant to CPLR 5601(a).

A majority of the Court of Appeals reversed and upheld the Unemployment Insurance Appeals Board's finding that Mr. Vega was an employee. The majority opinion recognized that the Board's determination is beyond further review if it is "supported by substantial evidence on the record as a whole," noting that this is a "minimal standard," requiring "less than a preponderance of the evidence." The court thus may not "interpose [its] judgment to reach a contrary conclusion" so long as the evidence reasonably supports the Board's opinion.

The majority observed that the Labor Law defines "employment" broadly as "any service under any contract of employment for hire, express or implied, written, or oral." The Board and the courts have employed a multi-factored test to determine whether an individual serves as an employee or operates as an independent contractor (who is not entitled to unemployment benefits). The key factor has historically been whether the employer exercised control over the results produced by the worker or the means used to achieve those results.

The court concluded that there was substantial evidence to support the Board's determination that Mr. Vega was an employee, including that: (1) Postmates could not operate without the couriers; (2) Postmates controls the assignment of delivery requests to the couriers; (3) Postmates informs the couriers where the requested goods are to be delivered only after they accept the request; (4) couriers cannot be selected by a customer and build their own following; (5) Postmates is responsible for finding a replacement if a courier cannot complete the job; (6) Postmates tracks the couriers from the pick-up spot to the delivery location; (7) Postmates unilaterally fixes the delivery fee and the couriers' compensation, and the couriers have no ability to negotiate; (8) Postmates bears the loss if its customers do not pay; (9) couriers cannot determine how much money they will make in advance of accepting an assignment because the fee is distance-based, and the distance is not known to them in advance; (10) Postmates provides couriers with the equivalent of pre-funded debit cards to pay for customers' items when necessary; and (11) Postmates handles all customer complaints and bears liability to the customer for lost, incorrect or damaged goods. While couriers can set their own schedule, the court determined that "Postmates dominates the significant aspects of its couriers' work by dictating to which customers they can deliver, where to deliver the requested items, effectively limiting the time for delivery and controlling all aspects of pricing and payment."

The majority distinguished the court's decision in *Matter of Yoga Vida NYC*, 28 N.Y.3d 103 (2016), in which the court reversed the Board's determination that non-staff yoga instructors were employees. In that case, the Court of Appeals found that the Board's ruling was not supported by substantial evidence because the yoga instructors provided unique services, were free to create their own customer following, could invite students to attend their classes at competing studios, chose their method of payment, and could make more money depending on how many students attended per class. The *Vega* majority distinguished these yoga instructors as "independent contractors who were in business for themselves. The same cannot be said for the couriers here."

In her concurring opinion, Judge Rivera agreed with the majority's conclusion that Mr. Vega was an employee, but would eschew the common law multi-factor test as outdated and difficult to apply to "electronically mediated work arrangements." Judge Rivera favors the Restatement of Employment Law approach, which

focuses more on the individual's entrepreneurial control over his or her services and the extent to which the employer "effectively prevents" such individual control. Relying on this test, Judge Rivera states that entrepreneurial control can be demonstrated regarding important business decisions, such as whether and when to serve other customers, the purchase and use of equipment, and the hiring and assignment of assistants, whereas employees can largely only increase their compensation by working harder or more skillfully on their employer's behalf. Judge Rivera concludes that Mr. Vega was not able to build a customer base or act as an entrepreneur in the course of delivering to Postmates customers. He could only increase his pay by performing more deliveries on Postmates' behalf.

Judge Wilson wrote a lengthy dissent criticizing the court's historical approach to the multi-factored employee test as not providing decisional clarity to the Board, employers and workers. He views the deferential standard of review for Board decisions and the various factors to be considered in the employee test as constructing a paradigm where the court must affirm the Board whenever there is some evidence that the Board relied on some of the factors in the test. He reviewed prior decisions, pointing out what he observes to be discrepancies in their reasoning and reliance on different factors (e.g., commission-based compensation or professional services) to justify the outcome. Ultimately, the dissent concludes that "Mr. Vega's six-day adventure as a courier" does not qualify him as an employee and finds it procedurally inappropriate to rule on a broader group of similarly-situated couriers.

The court's decision finding that Postmates couriers qualify as employees could have far-reaching impact in our modern economy. As the United States adjusts to having a substantial sector of Americans work from home due to the coronavirus, one could predict a growing number of arrangements will evolve in which individuals continue to perform work for companies remotely. How the Board and the courts respond to these dynamic working conditions, including the use of gig workers in app-enabled industries, will impact the state's unemployment insurance fund as well as hiring and firing decisions. As both the majority and dissenting opinions state, if there is to be a new standard reflecting public policy decisions about who should qualify as an employee, that proposal must come from the Legislature. Until then, the common-law multi-factor test will govern.