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3rd Circ. Revives UberBlack Drivers' Bid For Employee Status

By **Linda Chiem**

Law360 (March 3, 2020, 1:12 PM EST) -- The Third Circuit on Tuesday revived Philadelphia-based UberBlack drivers' class claims that Uber misclassified them as independent contractors to deny them proper minimum and overtime wages, clearing a path for the drivers to go to trial to prove whether they are, in fact, employees.

A three-judge panel of the federal appeals court said in a precedential ruling that a Pennsylvania district court prematurely determined outright that UberBlack drivers couldn't show they were employees under the Fair Labor Standards Act or Pennsylvania wage-and-hour laws, making them quintessential independent contractors.

The panel vacated U.S. District Judge Michael Baylson's **April 2018 decision** granting summary judgment to Uber Technologies Inc., saying there isn't yet a cut-and-dried answer to the question of whether UberBlack drivers are employees or independent contractors, so the dispute should be allowed to go to trial.

"DialAmerica teaches that where there are questions of fact that need resolution, these questions must go to a fact-finder," Circuit Judge Joseph A. Greenaway Jr. wrote for the panel, referring to the Third Circuit's 1985 case that set the standard for determining whether a worker is an employee under the FLSA. "This case presents such genuine disputes of material facts."

Judge Baylson found in 2018 that Uber had the edge in four of the six factors that the Third Circuit set in *Donovan v. DialAmerica*, pointing to the fact that the drivers were entitled to make their own hours, worked as much or as little as they wanted and largely invested in their own equipment.

But the Third Circuit said Tuesday that the two factors that are still open for debate must be resolved first — either by a jury or the district court through a Rule 52 proceeding — so it is much too early to issue a summary judgment ruling. Those two factors cover whether Uber exerted enough of a "right to control" its drivers and whether the drivers had "opportunity for profit or loss depending on his or her managerial skill."

The panel explained that "actual control of the manner of work is not essential," but rather, "it is the right to control which is determinative," and the parties are at odds on whether Uber exercised control over its drivers.

For example, Uber says drivers use the Uber app to "connect with riders using the UberBlack product" and are free to drive for other ride-hailing services even if they drive for Uber, according to the opinion. However, the drivers have argued that while they're logged into the Uber app, they cannot accept ride requests from rival companies. On top of that, Uber threatens to deactivate drivers, essentially barring them from ride requests, if they're "soliciting payment of fares outside the Uber system" or making "anonymous pickups," the drivers have said.

Uber also argues it has no control over the "schedule start or stop times" for drivers and does not "require them to work for a set number of hours," the opinion said. But the drivers have countered that Uber keeps a tight grip on the number of trip requests it makes available to drivers.

"Plaintiffs can drive for competitors, but Uber may attempt to frustrate those who try, and most of the factors that determine an UberBlack driver's Uber-profit, like advertising and price setting, are also controlled by Uber," the panel said. "Under the circumstances, we believe that a reasonable fact-finder could rule in favor of plaintiffs. Thus, summary judgment was inappropriate."

The plaintiffs, Ali Razak, Kenan Sabani and Khaldoun Cherdoud, drive for Uber's higher-end service UberBlack, which offers rides in luxury sedans or SUVs. Uber has maintained throughout the litigation that they're essentially entrepreneurs who are **in business for themselves**, provide a service materially and wholly different from the business that Uber operates in — which is the development and licensing of its smartphone-based ride-hailing app — and acted at all times in their own interest and for their own advantage while also deriving their revenue from multiple streams, according to court documents.

Those are the hallmarks of being an independent contractor, Uber has said, so the drivers don't qualify for employee status.

The ride-hailing giant said in a statement on Tuesday that the Third Circuit "did not rule that drivers using UberBlack in Philadelphia should be classified as employees."

"It merely found that there were fact issues that could not be decided in a summary judgment motion," an Uber spokesperson said in the statement. "We disagree with the Third Circuit's opinion and we are considering all options."

Meanwhile, attorneys for the drivers have hailed the decision as a major win, describing it as the first court of appeals decision to address the proper classification of gig-economy workers under the FLSA.

Travis Lenkner of Keller Lenkner LLC said Tuesday that under this ruling, "it is difficult to imagine how Uber and other gig companies can avoid trial on any of their workers' misclassification claims."

"We're grateful for the court's decision, and we look forward to the proceedings in the district court as well as the opportunity to use this ruling to advocate for our clients throughout the country," Lenkner said.

Chief Judge D. Brooks Smith and Circuit Judges Joseph A. Greenaway Jr. and David J. Porter sat on the Third Circuit panel.

The drivers are represented by Ashley Keller and Seth Meyer of Keller Lenkner LLC, and John K. Weston and Jeremy E. Abay of Sacks Weston Diamond LLC.

Uber and its Philadelphia subsidiary Gegen LLC are represented by Andrew M. Spurchise, Sophia Behnia, Paul C. Lantis, Robert W. Pritchard and Joshua C. Vaughn of Littler Mendelson PC.

The appellate case is *Ali Razak et al. v. Uber Technologies Inc. et al.*, case number 18-1944, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Braden Campbell, Dave Simpson and Cara Bayles. Editing by Jack Karp.

Update: This story has been updated to include more information from the opinion and comments from the parties.

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