To be Submitted by:
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No. APL 2018-00143
NYS Unemployment Insurance Appeal Board Nos. 588563, 588564
Third Department No. 525233

Court of Appeals

of the

State of New York

LUIS A. VEGA,

Respondent,

– against –

POSTMATES, INC.,

Respondent,

– and –

COMMISSIONER OF LABOR,

Appellant.

BRIEF FOR *AMICUS CURIAE* NEW YORK STATE AFL-CIO IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court of Appeals, counsel for proposed Amicus Curiae New York State AFL-CIO certifies that it is not a publicly held corporation, that it has no corporate parents, subsidiaries or affiliates, and no publicly held corporation owns ten percent (10%) or more of its stock.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The New York State AFL-CIO ("NYS AFL-CIO"), is a federation of approximately three thousand (3,000) labor organizations in the State of New York, representing approximately two million five hundred thousand (2.5 million) working men and women throughout New York State. The NYS AFL-CIO's purpose is to represent, through united action, the interests of working men and women with respect to significant labor issues that arise in the courts and legislatures. In the past, the NYS AFL-CIO has been a party to, or has been heard as *Amicus Curiae*, in numerous lawsuits before this Court, other courts of this State, and the courts of the United States, including lawsuits that impact terms and conditions of employment and worker health and safety.

The NYS AFL-CIO seeks to advance the interests of working men and women with respect to significant labor issues, including worker classification and unemployment insurance benefits, that arise in the courts and legislatures, such as the issues involved in this proceeding. The workers represented by the NYS AFL-CIO and its affiliates rely on the unemployment insurance benefits provided by New York's Labor Law. Additionally, the NYS AFL-CIO and its affiliates have been involved in efforts to ensure that workers in various industries are properly classified. Although different agencies employ different tests to determine whether workers are classified as employees or independent contractors, such classification

is determinative of whether workers are entitled to unemployment insurance benefits, workers compensation benefits, minimum wages, overtime compensation, anti-discrimination protections and other protections and benefits provided by New York State Law.

The NYS AFL-CIO recognizes the importance of unemployment insurance to working people that find themselves temporarily unemployed through no fault of their own. The NYS AFL-CIO supports the policy of the State of New York in enacting unemployment insurance benefits as set forth in N.Y. Labor Law §501. The NYS AFL-CIO has an interest in ensuring that workers performing services for companies that utilize online platforms and/or mobile applications to communicate, coordinate, direct, and supervise workers are properly classified under New York State Law.

PRELIMINARY STATEMENT

The NYS AFL-CIO, through its attorneys, Colleran, O'Hara and Mills L.L.P. submits this memorandum of law in support of the Appellant, Commissioner of Labor's ("Commissioner") appeal to reverse the decision and judgment of the Appellate Division, Third Department and to reinstate the determination of the Unemployment Insurance Board (the "Board") in the *Matter of Vega v. Postmates, Inc.*

In today's economy, many companies claim to be technology companies because they developed and utilize online platforms or mobile applications that are employed to communicate, coordinate, assign, direct, monitor and supervise their workforce, who perform services for customers. Postmates, Inc. ("Postmates") claims that it is a software company. (A. 12). These companies claim to create a marketplace where they connect consumers to workers who are willing to perform services. Postmates claims that it is a marketplace that connects requestors to "delivery experts." (A. 13). In doing so, these companies classify their workers as independent contractors and claim to have no obligation to provide unemployment insurance, workers compensation, minimum wages, overtime compensation, anti-discrimination protections and various other protections and benefits provided to employees under New York State Law.

Postmates claims that the workers who undergo a background check from Postmates, receive training from Postmates, receive assignments from Postmates' mobile application, are tracked by Postmates, are provided an estimated time to complete their assignment by Postmates, are paid by Postmates, and whose performance is reviewed by customers and monitored by Postmates are independent contractors. The Board correctly found that Postmates is not a technology company, but instead "is in the business of providing on-demand pick-up and delivery services to consumers who place orders from local restaurants or stores." (A. 128).

Postmates is not a technology company; it is a delivery company. It does not profit from selling technology; it profits from orders placed on its platform that are delivered by its workers. (A. 39-40). It does not create a "marketplace." Its workers have no method of bidding for work or negotiating their costs. Its customers have no way selecting which individual will deliver their goods and cannot opt to pay more or less for a faster or slower delivery. As the Board properly determined, these workers are employees and they are entitled to unemployment insurance benefits.

New York State's Unemployment Insurance Law was initially adopted approximately eighty-four years ago. See New York State Department of Labor, A History of UI Legislation in the United States and NYS 1935-2014, July 2014 at p. III-2 *available at* https://labor.ny.gov/stats/PDFs/History_UI_Legislation.pdf. Section 501 of New York's Labor Law is entitled "Public policy of state" and it provides:

> As a guide to the interpretation and application of this article, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden, which now so often falls with crushing force upon the unemployed worker and his family. After searching examination of the effects of widespread unemployment within the state, the joint legislative committee on unemployment appointed pursuant to a joint resolution adopted April ninth, nineteen hundred thirty-one, reported to the legislature that "the problem of unemployment can better be met by the so-called compulsory unemployment insurance plan than it is now handled by the barren actualities of poor relief assistance backed by

> compulsory contribution through taxation. Once the facts are apprehended this conclusion is precipitated with the certainty of a chemical reaction." Taking into account the report of its own committee, together with facts tending to support it which are matters of common knowledge, the legislature therefore declares that in its considered judgment the public good and the well-being of the wage earners of this state require the enactment of this measure for the compulsory setting aside of financial reserves for the benefit of persons unemployed through no fault of their own.

N.Y. Labor Law §501. While the nature of employment and the manner by which people perform work and earn a living has changed tremendously since 1935, the impact of involuntary unemployment on workers and their families have not. The benefit of unemployment insurance does as much to protect workers and their families from the "crushing force" of unemployment today as it did over eighty years ago.

The Board properly saw through Postmates' façade of a software company and the innovativeness of its mobile application. The evidence demonstrates that Postmates exercised, or reserved the right to exercise, sufficient supervision, direction or control over the services of the claimant and similar individuals who performed delivery services for the company. The decision of the Appellate Division, Third Department must be reversed, and the decision of the Board must be reinstated.

STATEMENT OF THE CASE

1. The Hearing before the Administrative Law Judge.

On or Around August 28, 2015, the New York State Department of Labor notified Postmates of its initial determination that the Claimant, Mr. Vega, was an employee of Postmates. (A. 118-119). On November 20, 2015 a hearing was held before Administrative Law Judge Wendy Pichardo. (A. 1). At this hearing, Mr. Hugo Durand, Postmates' regional manager for the East Coast, testified on behalf of Postmates. (A. 3). Mr. Durand testified on multiple occasions that Postmates is a software company, a technology platform, a marketplace that connects requestors with delivery experts. (A.12, 13, 16, 20, 51). However, Mr. Durand also testified that Postmates could not technically operate without having delivery professionals. (A. 69).

While Postmates claims that it sets up a marketplace between requestors and delivery providers, Postmates itself sets the fees for delivery. (A. 39-40). There is no negotiation, bargaining, bidding or haggling between the customer and the worker. Postmates sets the fee charged to the customer based solely on the distance between the location where the order is to be picked up by the worker and the location where the delivery is dropped off to the customer. (A. 71-72). Similarly, the workers do not get to negotiate their rate of compensation. Postmates sets the rate and compensates the worker at eighty percent (80%) of the customer's delivery fee.

(A. 42-43). Postmates does not charge the worker for using the platform. Workers are generally paid approximately four days after completing deliveries. (A. 42-43).

Mr. Durand testified that Postmates would tell its workers how and where to perform. Postmates would instruct the worker of where to pick up items for delivery and the address where those items were to be delivered. (A. 64). Postmates would also provide the worker with an estimate as to how long the delivery should take. (A. 66). This estimate is calculated based on the average time it has taken to complete previous requests. (A. 67). This estimated time for delivery would also be provided to the customer. (A. 66). While Postmates claimed that workers were not penalized in anyway if they failed to make the delivery in a timely manner, Mr. Durand also testified that customers had the ability to rate workers poorly and provide feedback regarding their experience. (A. 66-67, 82-83; A. 32, A. 36, A. 50). Postmates would terminate its relationship with a worker by prohibiting the worker from logging into the mobile application based on feedback received from customers. (A. 36).

Postmates placed advertisements online to solicit workers. (A. 63-64). When an individual wished to perform delivery services for Postmates, they would provide Postmates with personal information sufficient to allow Postmates to conduct a background check. (A. 37). Additionally, these individuals were invited to a session to receive training on how to utilize Postmates' software. (A. 37). Once these

individuals began performing delivery services, Postmates provided them with a PEX card. (A. 52). Postmates would load the PEX card with a sufficient funds to allow the worker to pay for the order that they were picking up for the customer. (A. 52-55). Postmates will notify the customer regarding which worker will be delivering the order and will provide a customer with a photo of the delivery provider. (A. 47-48). Delivery providers are not allowed to subcontract out orders they accept to other individuals and they are not allowed to swap or substitute. (A. 49, 73).

2. The Unemployment Insurance Board Issues its Findings and Opinion.

On or around October 29, 2016 the Board issued its findings and opinion. (A. 127- 132). The Board reviewed the record and testimony in the proceeding below and found that "Postmates is in the business of providing on-demand pickup and delivery services to consumers who place orders from local restaurants and stores." (A. 128). The Board noted that Postmates advertised online seeking couriers; conducted criminal background checks; provided couriers with PEX cards; conducted orientations educating workers on how to use the app.; tracked whether workers accepted, declined, or ignored requests; provided workers with information to make deliveries; calculated estimated time of delivery; set the delivery fee based on distance; charged the customer; paid the delivery provider within four to seven days; monitored poor ratings, complaints, and negative feedback. (A. 128-129).

The Board determined that the record contained credible evidence establishing that the employer "exercised, or reserved the right to exercise, sufficient supervision, direction or control over the services of the claimant." (A. 129). The Board ruled that "[u]nder the totality of the circumstances, the claimant and any other on-demand couriers (delivery drivers) similarly situated were employed as employees in covered employment for purposes on unemployment insurance." (A. 130).

3. The Third Department Substitutes its Judgment for the Board's and Reverses the Board's Determination.

The Third Department did not dispute the factual findings of the Board. In fact, the Third Department acknowledged that there was proof of control in the record. However, the Third Department minimized the impact these facts had on the work performed by the delivery providers and Postmates' operations. Instead, the Third Department substituted its own judgment for that of the Board; placing more weight on the facts that the mobile application allowed for scheduling flexibility, the ability of workers to accept or ignore requests, and the workers ability to choose their own route for delivery. *Matter of Vega v. Postmates Inc.*, 162 A.D.3d 1337, 1338-1340 (3rd Dept. 2018).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD's DETERMINATION THAT COURIERS LIKE MR. VEGA WERE EMPLOYEES OF POSTMATES.

The NYS AFL-CIO adopts, supports, and fully incorporates the Arguments set forth in the brief of the Appellant Commissioner of Labor as if they were fully set forth herein. As set forth above, the Board relied on a multitude of factors in the record to determine that Postmates exercised or reserved the right to exercise sufficient control, supervision and direction over the services provided by the Claimant.

Today's workplace is not the same as it was when New York's Labor Law first addressed the concept of unemployment insurance in 1935. Workers do not all report to one central location. Technology has changed the way companies communicate with their workers. It has also changed the way companies exercise control, supervision, and direction over the workforce. Postmates does not need a supervisor to give direction to workers to pick up orders at one location and drop them off at another location. The mobile application provides that direction.

Postmates does not need to give direction to workers regarding the best route to take or the best mode of transportation; it provides workers with an expected time of delivery. Workers know that customers also receive the expected delivery time. Instead of customers calling a worker's boss and complaining about a late delivery, customers submit their feedback through the application. Postmates monitors the feedback on the application. Postmates can terminate workers by locking them out

of the application based on negative customer feedback, among other things. This is all clearly outlined in the testimony of Mr. Durand.

Postmates couriers are not able to generate business based on any unique personal qualities. Postmates operation is not even remotely similar to the yoga instructors in *Yoga Vida*, the salespeople in *Ted is Back*, or the insurance agent in *Scott v. Mass Mutual Life Ins. See Matter of Yoga Vida NYC, Inc. (Comm'r of Labor)*, 28 N.Y. 3d 1013 (2016); *Matter of Ted is Back Corp. (Comm'r of Labor)*, 64 N.Y.2d 725 (1984); *Scott v. Mass Mutual Life Ins. Co.*, 86 N.Y.2d 429 (1995). Postmates customers do not have the ability to request or schedule specific couriers to handle their deliveries through Postmates' mobile application. Providing fast and friendly delivery services does not provide Postmates' workers the opportunity to gain repeat customers. Postmates couriers do not have the ability to generate additional revenue due to their unique personalities, people skills, or powers of persuasion. They cannot attain referrals or new clients by word of mouth and reputation. Instead, they are at the mercy of Postmates's mobile application and its proprietary algorithm. They are given the opportunity to work based purely on their proximity to the customer placing the order or the restaurant from where the order is placed.

The Board recognized the circumstances under which workers perform services for Postmates and the reality of the workplace despite Postmates efforts to

position itself as a software company that creates a marketplace for delivery providers and customers to exchange services. The Board recognized that Postmates does exercise control and direction over the method of providing services and the results, even though such control, direction, and supervision was exercised through Postmates' mobile application.

II. THE MULTI-FACTOR COMMON LAW TEST EMPLOYED BY THE BOARD MUST BE ALLOWED TO ADDRESS THE CHANGING NATURE OF WORK.

In order to determine whether an employee-employer relationship exists, the Board must determine whether the alleged employer "exercises control over the results produced or the means used to achieve the results." *Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d 516, 521 (1985)(quoting *Matter of 12 Cornelia St.*, 56 N.Y.2d 895, 897 (1982). In making this determination, the Board applies a multi-factor common law test where no single factor is determinative. *Matter of Concourse Ophthalmology Assoc. P.C.*, 60 N.Y. 2d 734, 736 (1983); *See also, Matter of David L. Wells*, 87 A.D.2d 960 (3d Dept. 1982)(noting "no single factor alone is conclusive and each case must be decided by its own peculiar facts." (citing *Matter of Bull*, 71 A.D.2d 769, 769-70 (3rd Dept. 1979)).

The "peculiar facts" of the underlying appeal is the manner by which Postmates controls, supervises, and directs its workforce.

The "platform economy", the "gig economy," and "on-demand workers" are all terms that have been used to describe companies that match customers with workers through online platforms or mobile applications. *See* Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 Harv. L. & Pol'y Rev. 479 (2016); Cornell University Worker Institute, *On-Demand Platform Workers in New York State: The Challenges for Public Policy* (2019) *available at* https://archive.ilr.cornell.edu/sites/default/files/OnDemandReport.Reduced.pdf. The growth of the gig economy has been widely reported. Abdullahi Muhammed, *4 Reasons Why the Gig Economy Will only Keep Growing in Numbers*, FORBES (June 28, 2018) *available at* https://www.forbes.com/sites/abdullahimuhammed/2018/06/28/4-reasons-why-the-gig-economy-will-only-keep-growing-in-numbers/#1d670cb711eb; Neil Irwin, *Maybe We're Not All Going to Be Gig Economy Workers After All*, The New York Times (September 15, 2019) *available at* https://www.nytimes.com/2019/09/15/upshot/gig-economy-limits-labor-market-uber-california.html; Noam Scheiber, *Growth in the 'Gig Economy' Fuels Work Force Anxieties*, The New York Times (July 12, 2015) *available at* https://www.nytimes.com/2015/07/13/business/rising-economic-insecurity-tied-to-decades-long-trend-in-employment-practices.html. The current legal framework to

must be allowed to account for the peculiarity of how these companies exercise control over its workers in the gig economy.[1]

The Board properly determined that Postmates is in the business of providing on demand delivery services to customers. (A. 128). Despite Postmates efforts to claim it is a software company or a technology company, it essentially uses its mobile application to fulfill customers' orders. This is a critical determination that the Board must be allowed to make based on the evidence in the record. A customer places and order and Postmates uses its platform's algorithm to identify those workers closest to the request. (A. 128). The platform identifies several workers

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[1] Some commentators have called into question whether the multifactor common law test is an appropriate test to determine whether workers in the gig economy are employees or independent contractors. *See* Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 Harv. L. & Pol'y Rev. 479 (2016). Others have called into question the utility of the multi-factor common law test in broader terms. *See Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*, 4 Cal. 5th 903, 954-959 (Cal. 2018). The "ABC Test" has been proposed, and in some cases adopted, as a better method of determining whether an employee-employer relationship exists. Cornell University Worker Institute, *On-Demand Platform Workers in New York State: the Challenges for Public Policy* (2019) pp. 44-46 *available at* https://archive.ilr.cornell.edu/sites/default/files/OnDemandReport.Reduced.pdf.; *See also Dynamex Operations West, Inc.*, at 957-967. The ABC Test presumes a worker is an employee unless the hiring entity can establish all three of the following criteria:

A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of work and in fact;

B) the worker performs work that is outside the usual course of the hiring entity's business; and

C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

See also Dynamex Operations West, Inc., at 957-967.

who can fulfill the order. *Id.* One a worker accepts the request, Postmates provides the worker with the order details, estimated delivery time, and transfers the cost of the order onto the workers PEX card. When the request is completed the worker notes the completion in an entry on Postmates platform. (A. 128-129). Postmates does not provide other services. It only allows customers to request deliveries from local stores and restaurants.

Postmates' mobile application directs the workers where to go, what to pick up, and where to bring it. This is control over the means, methods and results of the service provided by the worker. The fact that this instruction comes from Postmates platform as opposed to a human being is indicative of the changing nature of work. It does not however, mean that Postmates exercises no control over the worker. Postmates mobile application also sets an estimated delivery time and notifies the worker and the customer of the time. This is no different than a supervisor instructing an employee as to when a task should be completed. Workers must note completed deliveries in the application and customers can provide feedback or issue complaints. These complaints are then reviewed by Postmates, which can choose to block the worker's access to the platform based upon its judgment of the workers performance and the nature of the customer complaint.

Postmates cannot say that it does not exercise control, direction, or supervision of its workers simply because that control, direction, and supervision

comes directly from Postmates platform, through a mobile application, and to the worker. The Board reviewed a multitude of factors that were present in the record. (A. 129). It considered the realities of Postmates operation. (A. 128). The Board then determined that "[u]nder the totality of the circumstances, the claimant and any other on-demand couriers (delivery drivers) similarly situated were employed as employees in covered employment for purposes on unemployment insurance." (A. 130). This is a determination that the Board must be allowed to make in the face of a changing economy fueled by technological advancement.

CONCLUSION

For all of the foregoing reasons, and for all the reasons set forth in the Brief of Appellant Commissioner of Labor, the Third Department's judgment should be reversed, and the Board's determination reinstated.

Dated: November 21, 2019
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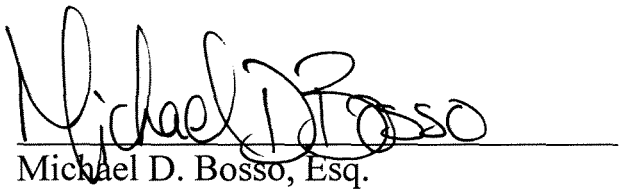

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