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COURT OF APPEALS

STATE OF NEW YORK

COMMISSIONER OF LABOR,

Appellant,

-against-

NO. 13

MATTER OF VEGA (POSTMATES, INC.),

Respondent.

20 Eagle Street
Albany, New York
February 11, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is Matter of Vega.

3 Good afternoon, Counsel.

4 MR. SPADOLA: Good afternoon. May it please the
5 court, Joseph Spadola for the Commissioner of Labor. I'd
6 like to reserve two minutes for rebuttal, if I may?

7 CHIEF JUDGE DIFIORE: You may.

8 MR. SPADOLA: There's ample evidence in the
9 record to support the Board's determination that Postmates
10 exercised sufficient control over the delivery work of its
11 couriers, like Mr. Vega, to create an employment
12 relationship. Just like the on-demand delivery services at
13 issue in this court's Rivera decision - - -

14 JUDGE WILSON: Well, let me - - - let me ask you
15 this. When did Mr. Vega become an employee?

16 MR. SPADOLA: From the - - - from the moment he
17 became subject to Postmates - - -

18 JUDGE WILSON: When he downloaded the app?

19 MR. SPADOLA: Not when he downloaded the app,
20 when he began - - - when he actually rendered services on
21 behalf of Postmates.

22 JUDGE WILSON: So when he listed himself as
23 available? When he took his first assignment? When he
24 declined his first assignment? When - - - can you pinpoint
25 a time when he became an employee?



1 MR. SPADOLA: I don't think there is any argument
2 that he was an employee before he actually became - - - you
3 know, rendered delivery services. Until he actually
4 accepted an assignment and - - -

5 JUDGE FEINMAN: Could it be - - - in this
6 particular case, he had to go to the orientation and get
7 the - - - did he go and get the - - - the card?

8 MR. SPADOLA: That's - - - that's correct, yes.
9 He - - - so he had a training session where he was educated
10 on how to use the platform.

11 JUDGE FEINMAN: Does that make him - - - would
12 that answer Judge Wilson's question?

13 MR. SPADOLA: Yes, in part. I think that would
14 certainly be the first part of the employment relationship,
15 when he receives the training and receives an instrument
16 telling - - -

17 JUDGE WILSON: So my question is, is that enough?
18 I mean, "the first part", I don't know what that means.
19 When is the - - - you - - - you know the sequence of events
20 here.

21 MR. SPADOLA: Yes.

22 JUDGE WILSON: When is the point in time when he
23 switched from being not an employee to being an employee?

24 MR. SPADOLA: When he began actually delivering
25 items for Postmates.



1 JUDGE WILSON: So not when he got a request and
2 accepted it, and then said, you know what, I don't want
3 this. He has to have actually said I'll take this request;
4 I'm the courier, and then his first delivery. That makes
5 him an employee.

6 MR. SPADOLA: There may be an argument that an
7 employment relationship is created one way - - -

8 JUDGE WILSON: I want your argument.

9 MR. SPADOLA: But our argument is that based on
10 the actual performance of delivery services - - -

11 JUDGE WILSON: So the first time he made a
12 delivery, then he's an employee?

13 MR. SPADOLA: Correct, with respect to that de -
14 - - and by the way, this - - - this relationship is
15 intended to be open-ended. This is not a - - -

16 JUDGE FAHEY: I - - - I had thought that you
17 primarily - - - you were relying on a Rivera-type analysis,
18 similar to delivery persons, and so that - - - to go to the
19 judge's point, that delivery was a linchpin in employeewood
20 (sic). Is that - - - that's correct, is it?

21 MR. SPADOLA: That's correct.

22 JUDGE FAHEY: But - - - but I had thought the
23 courier argument was really that - - - that this is a simp
24 - - - this - - - that this is a straightforward substantial
25 evidence question.



1 MR. SPADOLA: Absolutely, yes. This is - - -
2 this is a substantial evidence question, and the court
3 nearly - - - merely needs to decides there was enough
4 evidence to support a rational finding of an employment
5 relationship.

6 JUDGE GARCIA: But it is substantial evidence in
7 the record, right? And we have, in a number of cases,
8 found that there wasn't substantial evidence for a finding
9 that you're asking us to make, not only in Yoga Vida, but
10 in Empire State, in Hertz, in Ted Is Back Corp., so it is a
11 real standard. It isn't some evidence; it isn't any
12 evidence. It's substantial evidence.

13 MR. SPADOLA: Correct.

14 JUDGE GARCIA: And what concerns me here is when
15 we look at degree of control, which is our standard, by the
16 employer, it becomes, in this case, delivery. Look at our
17 delivery cases. Or look at - - - it has to be this one.
18 So much of what you posit as control is dictated by the
19 nature of this business. So it seems to me, essentially,
20 what you're asking us to do is have a delivery-person rule,
21 because there is, particularly in the nature of this
22 business that we're talking about in this case, an
23 incredible amount of control that's exerted by the business
24 itself over this employee.

25 And to the extent that this employer has any



1 ability to control, there is none. You don't have a
2 noncompete; you don't have a uniform. You don't have any
3 of those traditional trappings of control we've looked to.
4 You have a business-oriented control - - - a business-
5 model-oriented control. Because if you're delivering food,
6 yes, when the person orders it, they're going to want it
7 within a certain amount of time, right.

8 Is that control by the employer?

9 MR. SPADOLA: There are many traditional forms of
10 control present here that - - - that apply not - - -

11 JUDGE GARCIA: Like what?

12 MR. SPADOLA: For example, the control of the
13 assignment process.

14 JUDGE GARCIA: But they put out assignments, you
15 could take it or you could leave it. How much less control
16 could you have?

17 MR. SPADOLA: The same was true in Rivera. All
18 of the elements of control that this court found in Rivera
19 - - -

20 JUDGE FAHEY: You know, but there - - - there
21 seems to be - - - because I think the judge brings an
22 interesting point up, but it's almost an existential
23 question. Is - - - is there a business without delivery
24 people? That's kind of the - - - the way I'm trying to
25 look at this. In other words, Postmates is - - - is not a



1 - - - is - - - is only in the business of delivery, so
2 therefore, the delivery people are the business. They
3 aren't something else.

4 MR. SPADOLA: Correct.

5 JUDGE FAHEY: They - - - they aren't a computer
6 firm. You can't go back to your office and work for
7 Postmates. You can only work for Postmates if you're
8 walking around delivering food. So the existential
9 question is, is when does this thing become a business and
10 when do these employees become an employees (sic), and it
11 goes back to really what Judge Wilson talked about at the
12 beginning. What's a linchpin here? And the linchpin is -
13 - - it seems that the - - - we would all agree that it's
14 delivery.

15 The judge's question - - - Judge Garcia's
16 question goes to how much is enough, which is anoyer - - -
17 another question and then we get into our standard, but a
18 legitimate question. But really, you know, there is - - -
19 Postmates isn't a business unless there's delivery people,
20 right?

21 MR. SPADOLA: Absolutely, and the only difference
22 between Postmates and a traditional deliv - - - delivery
23 business is that Postmates uses an app, instead of a
24 dispatcher, to - - -

25 JUDGE RIVERA: But look, isn't - - - isn't the



1 real question in the case, and in all of these cases, just
2 a bifurcated question? This - - - just one thing on the
3 table. Are they employees or they an independent
4 contractor? That's the whole gang.

5 MR. SPADOLA: Correct.

6 JUDGE RIVERA: That's it.

7 MR. SPADOLA: Yes.

8 JUDGE RIVERA: If they're not an independent
9 contractor, there's no basis to say they're not an
10 employee, because they're obviously getting paid for this
11 delivery service that they do only at the behest of
12 Postmates.

13 MR. SPADOLA: Correct. It is - - -

14 JUDGE RIVERA: So isn't the only question really
15 before us whether or not these are independent contractors?

16 MR. SPADOLA: Absolutely.

17 JUDGE RIVERA: Between that - - - between those
18 two choices?

19 MR. SPADOLA: That - - - that's correct. If
20 you're not an employee, you're an independent contractor -
21 - -

22 JUDGE RIVERA: Why - - - why - - - why - - -

23 MR. SPADOLA: - - - and vice versa.

24 JUDGE RIVERA: Why, in the opinion of - - - of -
25 - - of the Commissioner, why wasn't Mr. Vega an independent



1 contractor? What makes him different in terms of what he
2 did in his relationship with Postmates?

3 MR. SPADOLA: He was subject to the same forms of
4 control exercised unilaterally by Postmates that
5 traditional delivery businesses have exercised, including
6 control over the fees, the commissions, the assignment
7 process, the timing of deliveries. There is far more
8 control over the timing here than in - - -

9 JUDGE RIVERA: Well, that could be true with an
10 independent contractor. So I think you got to go a little
11 bit more.

12 MR. SPADOLA: It - - - it can be true, but the -
13 - - here, timing is essential to delivery - - -

14 JUDGE RIVERA: Okay.

15 MR. SPADOLA: - - - because when you're under a
16 twenty-minute estimated delivery time and you're being
17 tracked by the customer, you don't have much freedom with
18 respect to your delivery or not.

19 JUDGE RIVERA: True, true, but you could - - -
20 you could make that same argument about an independent
21 contractor. Isn't really the difference that, with all due
22 respect to Mr. Vega and those similarly situated, they are
23 not really wielding as if they were their own
24 businesspeople, as if they have a business of their own,
25 that they are promoting through this relationship with



1 Postmates, and that's why they're an employee, not an
2 independent tra - - - contractor?

3 MR. SPADOLA: That - - - that's correct, and
4 that's one of the factors that the restatement cites with
5 respect to the control analysis.

6 JUDGE FEINMAN: So that brings me to this whole
7 sort of fixation on the word "control" and, you know, if we
8 go back to the Morton case in the '40s, I mean control is a
9 factor, but it's certainly not the sole factor, and - - -
10 and really never has been, although I know that that's what
11 a lot of the cases talk about.

12 MR. SPADOLA: That's correct. The common law
13 test of agency is what - - -

14 JUDGE FEINMAN: It's what - - - I think that's
15 what Judge Rivera's question getting at. What are the - -
16 - some of these other things that suggest that he is an
17 employee rather than an independent contractor?

18 MR. SPADOLA: What Judge Rivera mentioned is
19 certainly pertinent: the fact that he was not engaged in
20 an independent delivery business and was not holding
21 himself out as independent from Postmates. He was simply
22 performing labor for Postmates' business model.

23 JUDGE WILSON: Well, let's take Judge Garcia's
24 and Judge Fahey's questions, put them together and look at
25 them a little bit differently. In the Commissioner's view,



1 what is the minimum number of things, and - - - and what
2 are they, that Postmates would have to do to turn Mr. Vega
3 into an independent contractor?

4 MR. SPADOLA: They would have to allow the
5 courier to independently negotiate the fee charged to the
6 customer, to independ - - -

7 JUDGE WILSON: Would that be enough?

8 MR. SPADOLA: It could be, but you know, there
9 are - - -

10 JUDGE WILSON: Still take a percentage of it, as
11 long as they let the courier negotiate the price.

12 MR. SPADOLA: That would certainly be a factor in
13 favor of independent contractor status.

14 JUDGE WILSON: Okay.

15 MR. SPADOLA: And even - - - and further, if they
16 allowed them to set the timing. That would be a tremendous
17 factor.

18 JUDGE WILSON: I'm trying to ask something a
19 little different, which is, can you identify some one thing
20 or some combination of things that you say are the minimum
21 necessary to move him over?

22 MR. SPADOLA: This court said in the Matter of
23 Morton, there is no mathematical formula. This is a very
24 fact-intensive question. It's like deciding was someone
25 negligent. That is fact intensive and - - - and it



1 requires considering the context. What it means for a
2 brain surgeon to be negligent - - -

3 JUDGE WILSON: But here you have the facts, and
4 here you have the context. And I'm asking you to change
5 one or more of them and tell me where the result would be
6 different.

7 MR. SPADOLA: The result would be different if
8 couriers could decide their own fees, their own timing,
9 their own method of assignment. So if they - - - so if you
10 look at the test TaskRabbit case - - -

11 JUDGE WILSON: So you need all those three
12 things.

13 MR. SPADOLA: Those three things, I think, would
14 give you an independent contractor status. And - - - and
15 if you look at the TaskRabbit case - - -

16 JUDGE FEINMAN: How about who gets the payment?
17 Here, the payment is going to Postmates directly. And then
18 they pass it along days later.

19 MR. SPADOLA: Correct. So when I says "fees", I
20 mean control over the whole financial aspect of the
21 business. They have to be the ones who assume the risk of
22 loss. That's part of being in business, that if the
23 customer doesn't pay, it's your customer, so you bear that
24 loss. They also have to - - -

25 JUDGE GARCIA: All true of all independent



1 contract - - - those three things you just named, in every
2 case that we've found that it wasn't an - - - an employee,
3 it was an independent, they had the equivalent of those
4 three things? I mean, that is so, again, dependent of the
5 business model you're looking at.

6 I mean, in this case, you can say that would be
7 required, because under a model where you're delivering
8 food, that's never going to happen, right? You never going
9 to have people call up and say, okay, you called this
10 restaurant; let's do two hours. You know, that's just not
11 realistic here.

12 So I think what you're saying is the business
13 delivery services will in fact mandate your status. It
14 will answer Judge Rivera's question. Is it an independent
15 contractor? Is it employee? Well, it's a delivery
16 service, so you're an employee.

17 MR. SPADOLA: Well, some delivery services don't
18 - - - don't have immediate delivery like Postmates does.
19 The Rivera cases, you had delivery that happen to have - -
20 - that had to happen within twenty-four hours. That's - -
21 -

22 JUDGE GARCIA: You also had some mandatory
23 assignments in that case - - - those cases, I remember, and
24 you also had them filling out things on company letterhead
25 that - - - bills of lading, or some type of receipts on



1 company letterhead. The facts in Rivera were very
2 different than here.

3 MR. SPADOLA: There - - - there were no mandatory
4 assignments in Rivera. The - - - the - - - each of those
5 couriers could accept or reject assignments at their
6 discretion. They could call into this dispatcher - - -

7 JUDGE RIVERA: But - - - but there is something.
8 I - - - I - - - if I'm understanding Judge Garcia
9 correctly, I think there is something to the point that he
10 is trying to get at, and it may something of what I was
11 trying to get at, which is there may very well be, and
12 maybe this is the case - - - I'm not saying it is - - -
13 there may very well be a business model that simply does
14 not afford for a relationship with workers that - - - that
15 one could say these are independent businesspeople. The -
16 - - the business model itself is not situated for a
17 relationship with an independent contractor. As I say,
18 maybe it's this; maybe it's not. But that very well could
19 be the case in the labor force.

20 And of course, you are free to look at those
21 facts and determine that that's the case in this particular
22 - - - with this particular employer, with this particular
23 model. They could have come up with a different model.
24 They didn't. The consequences, from your view, and you
25 think there's substantial evidence, is that then these



1 drivers are employees, not independent contractors.

2 MR. SPADOLA: Absolutely. And I think that's
3 what the restatement captures when it discusses the skill
4 required. When you have a job that is just, essentially,
5 labor, raw labor, that's being input into a pre-existing
6 model, that's almost always done by an employee, not an
7 independent contractor. Because the notion that someone
8 who's just taking a package from point A to point B is an
9 independent entrepreneur is really just a fiction. These
10 are - - -

11 CHIEF JUDGE DIFIORE: Thank you, Counsel. Thank
12 you.

13 Counsel?

14 MR. COOPER: May it please the court, David
15 Cooper on behalf of Postmates. For over eighty years, this
16 court has said that the test for whether a person is an
17 employee or an independent contractor is whether there is
18 control over the results and the means by - - -

19 JUDGE FAHEY: Well, let - - - let - - - let me
20 ask you this, Mr. Cooper - - -

21 JUDGE RIVERA: Sorry.

22 JUDGE FAHEY: - - - as you've been listening to
23 the discussion here, you've noticed that there's been a lot
24 of discussion about the various factors that go into
25 weighing whether or not someone's an employee or an



1 independent contractor. And while it has public - - - pub
2 - - - broad public policy implications, it seems that we're
3 in the land of facts here, not in the land of law, where we
4 talk about which factors apply and which ones don't. You
5 would agree with that?

6 MR. COOPER: Yes.

7 JUDGE FAHEY: Okay, so - - - so if that - - - if
8 that's the case, then really, aren't we talking about
9 what's substantial evidence for the Board to make the
10 determination that they made, and whether or not they had
11 sufficient substantial evidence to make that determination,
12 and was the standard applied correctly by the Appellate
13 Division?

14 MR. COOPER: That is, but I think a critical
15 point here is there's only deference under the substantial
16 evidence standard to findings that the Board actually made.
17 And here the Commissioner relies extensively, really
18 principally, on facts that the Board did not find.

19 Now, we cited case law in our brief that you
20 cannot go beyond the Board's grounds for its decision, the
21 Trump-Equitable case. In reply, they said well, Trump-
22 Equitable deals with different legal bases, not a different
23 factual basis. And I want to call this court's attention
24 to a few cases where this court has explicitly said that a
25 different factual basis cannot be provided as a grounds for



1 an agency decision.

2 First, this court has said, "Review is limited to
3 a consideration of the statement of the factual basis for
4 the determination by the agency." That's Montauk
5 Improvement, 41 N.Y.2d at 914. This court said the same in
6 Barry v. O'Co - - -

7 JUDGE RIVERA: Okay, with the - - - with the
8 facts in the record, as - - - as you've already set them
9 out in your brief, what you say are the only facts that we
10 can work or the record that's available, what made Mr.
11 Vega, and others similarly situated, entrepreneurs in your
12 mind - - - in this business model for your client?

13 MR. COOPER: So what made - - - what - - - so
14 first I think we would object to the idea that they have -
15 - - that entrepreneurship is the test. So no more than the
16 yoga instructors in Yoga Vi - - - Vida were entrepreneurs.
17 Or - - -

18 JUDGE RIVERA: Oh, but I think it - - - it - - -
19 I - - - I joined the dissent in that case, but I think that
20 case is suggesting that those individuals were much - - -
21 were much more involved in an entrepreneurial type of
22 relationship with the employer at the time. So, again,
23 what's - - - what's that independent businessperson in your
24 business model?

25 MR. COOPER: So it's an independent



1 businessperson because they can, and frankly often do, work
2 for more than one company at a time delivering more than
3 one thing at a time.

4 JUDGE RIVERA: But that just means someone can't
5 make enough money to only work for your client.

6 MR. COOPER: No, it doesn't - - - it means more
7 than that. Because typically, an employee would have - - -

8 JUDGE RIVERA: And an independent contractor can
9 have, of course, lots of clients, but - - -

10 MR. COOPER: Yes.

11 JUDGE RIVERA: - - - but people can work part
12 time for several employers and still be employees.

13 MR. COOPER: They can work part time for several
14 employers and be employees, but typically, an employee - -
15 - if you look just sort of generally at what employee
16 means, it typically does not mean that you can show up
17 whenever you want or not, whenever you want, take an
18 assignment or not take an assignment, work for competitors
19 or not.

20 JUDGE STEIN: Well, that's - - - that's not the
21 linchpin, is it? Because if it was then - - - then what
22 does Rivera say?

23 MR. COOPER: So, you're right, that is not the
24 only linchpin. I - - - and I think that an additional
25 factor here that is critical is that there was no control



1 over the timing of deliveries or any requirement to take
2 any particular assignment.

3 JUDGE STEIN: But I - - - to me - - -

4 JUDGE RIVERA: But isn't that - - -

5 JUDGE STEIN: - - - part of the problem here is,
6 is that we're - - - we're looking at a different business
7 model. It used to be that employees went to a brick-and-
8 mortar place, and there were supervisors, and so on and so
9 forth. That's not the business model anymore.

10 Now the business model is, is this is all done
11 through an app, right. So how - - - aren't - - - aren't
12 they, in effect, ex - - - isn't the app, in effect,
13 exercising the same kind of control, for example, over the
14 timing by - - - by saying, you know, we're going to let the
15 customer know when you left, and we're going to let the
16 customer track you, and we're going to let the customer
17 rate you, and if we don't like what you're doing, we're
18 going - - - we're going to let you go.

19 So isn't that control, just in a more modern way?

20 MR. COOPER: No, and I think there's sort of two
21 aspects to the answer. The first is just that the Board
22 did not find that they'd exercised control over timing, and
23 the record absolutely refutes it. And I call this court's
24 attention to pages 66 to 67 of the appendix, the unrefuted
25 testimony. "We give them an estimate based on what the



1 customer received, but if they don't follow, they're not
2 penalized in any way." Pages 82 to 83 of the appendix,
3 "Are they required to meet the time frame?" "No." "Are
4 they penalized?"

5 JUDGE STEIN: That - - - that's - - - that's what
6 the - - - that's what the - - - the Postmates - - - the
7 representation - - - representative testified to. But I'm
8 referring to other evidence in the record, which would
9 suggest otherwise.

10 MR. COOPER: The - - - to be clear, there is
11 none. And I know they suggest that there is. This is - -
12 - their cites on page 4 of their reply brief, where they
13 say, well, look they take into account customer reviews;
14 therefore, we could sort of intuit that if those reviews
15 were based on bad timing, they might be fired for that
16 reason.

17 But if you look at each of those appendix cites,
18 cited at page 4 of their reply brief, all of them say that
19 customer reviews suggesting fraud, not just customer
20 reviews generally, let alone customer reviews as to timing,
21 would be a basis for taking someone off of the app. So
22 there is actually no evidence in the record at all in
23 opposition to what Postmates testified to, and even more
24 importantly, no finding of the Board suggesting that the
25 app exercises any kind of control.



1 Now, if for a future case, they want to try to
2 develop that evidence, they can. And if the Board wants to
3 make a finding, then it can, and maybe we'd be back before
4 this court with a very different record. But on the record
5 we have here, on the Board's findings we have here, there
6 is no evidence whatsoever that the app is exercising that
7 kind of control.

8 And to sort of take a step back to sort of the
9 more general aspect of the question of, well, are - - -
10 aren't we exercising control through the app, the app is
11 just a matching system. The app is a mechanism for people
12 who want things to deli - - - be delivered, to find people
13 who are willing to make those deliveries. That's all it
14 is. It - - -

15 JUDGE WILSON: Well, it's a pricing system as
16 well. It's a matching and pricing system.

17 MR. COOPER: True, but to be clear, it's a - - -

18 JUDGE FAHEY: Sure, it's also a marketing system.
19 No one does anything who's under forty years old without
20 going to an app today, so it - - - even I use them. So I -
21 - - it's - - - it's - - - it's just hard for me to believe
22 that - - - that you can narrowly characterize it, that - -
23 - it's the primary method of communication for a society of
24 300 million people.

25 MR. COOPER: It - - - it - - -



1 JUDGE STEIN: Well, what does it say - - - it
2 just - - - it - - - it keeps striking me that in this one
3 particular case, we had - - - the original determination on
4 the application for unemployment insurance said that Mr.
5 Vega was an employee. Then the ALJ said, no, he wasn't.
6 Then the Board said yes, he was. And then the Appellate
7 Division said, no, he wasn't. What are we doing here? Are
8 - - - are - - - are we just weighing these - - - are we
9 each just weighing the factors and if so, doesn't that
10 suggest that there are factors on both sides, and that
11 ultimately, that we defer to the Board? Because - - -

12 MR. COOPER: No.

13 JUDGE STEIN: I'm sorry; go ahead.

14 MR. COOPER: No, no, it's true that there has
15 been a back-and-forth in the decisions, but there is case
16 law specifically addressing this kind of situation. It - -
17 - it - - - it's not as though this is the first case
18 dealing with a courier or a delivery provider, right.
19 There are many, many such cases. And there's a clear line
20 in the case law where if you allow the delivery person
21 total discretion over if, when, and how they perform
22 deliveries, the how meaning you're not setting time
23 constraints, you're not saying what route they have to
24 take, those people - - -

25 JUDGE STEIN: In Rivera.



1 JUDGE FEINMAN: So you would agree that we should
2 look at the cases that are similar professionally?

3 MR. COOPER: Well, I think it's - - - I think - -
4 -

5 JUDGE FEINMAN: Career courier cases?

6 MR. COOPER: I think it's helpful to do so, but I
7 certainly don't think this court should be limited to those
8 cases. And more generally, if you look outside of the
9 courier context, you look at Yoga Vida or Hertz or Empire
10 State, all of these cases, it's the question of, are you
11 controlling how they are doing their job.

12 Here, the task at hand is to deliver something
13 from point A to point B. Postmates does not tell people
14 how to do that, when to do that, the means by which the - -
15 - whether you take a car or walk or take a bike, whether or
16 not to stop and do another delivery in between. It does
17 none of those things. So to get at one of the questions
18 that was asked by this - - -

19 JUDGE RIVERA: But it - - - but in part - - -
20 let's assume for one moment that description is wholly
21 accurate. I'm not persuaded, but I'll just go with it for
22 one moment. But in part, this sort of - - - and getting
23 back to something Judge Garcia was saying before, in part,
24 for purposes of your business model, it doesn't matter to
25 you. It doesn't matter to you. But that doesn't mean that



1 the individual is not an employee, is not employed by you
2 as opposed to their own businessperson who's working in an
3 entrepreneurial setting?

4 MR. COOPER: So I - - - I think that's - - -

5 JUDGE RIVERA: It is pretty straightforward,
6 right? Get the burrito or don't. This is - - - this is
7 not sort of complex, what's going on here, right.

8 MR. COOPER: Well - - -

9 JUDGE RIVERA: When we talk about delivery
10 service. I being one of the few people who doesn't use an
11 app. I still think it's a simple process. Either I'm
12 going to walk and get it, or someone else is going to go
13 and get it.

14 MR. COOPER: So whether or not it's simple, I
15 think the - - - the clear question is, did they exercise
16 control, and - - - I see my time is up, but if - - - if I
17 could finish. The point is that you can exercise control
18 over delivery providers. You can set time constraints on
19 them. You can say that they must take certain assignments.
20 You can say they have to ser - - - work a number of days.
21 They can't work for competitors. It's not as though you
22 can't imagine a situation in which there were greater
23 control. But on the other hand - - -

24 JUDGE RIVERA: All - - - all - - - all I was
25 saying is you could do all of those things. But the fact



1 that you may not have done any of those things, because of
2 your business model, doesn't mean that they're not
3 employees, given the nature of the work and how they - - -
4 excuse the pun here - - - deliver for you on what you need
5 them to do.

6 MR. COOPER: What I would say is that the nature
7 of the work, deliver - - - delivering an item - - - is the
8 same in an app or not in an app, and this court's cases - -
9 - and, you know, a dozen cases from the Appellate Division
10 are - - - understand the fact that many of those delivery
11 people are independent contractors, and the only basis - -
12 - this is page 15 of their reply brief - - - they have for
13 distinguishing those many, many cases is that those cases
14 supposedly involved no control over timing, and our case
15 supposedly does. That is the line in the sand that they
16 draw. But their problem is that that is not the line that
17 the Board drew, because the Board - - -

18 JUDGE RIVERA: But - - - but - - -

19 MR. COOPER: - - - found no such control.

20 JUDGE RIVERA: You know, an entrepreneur has some
21 way to seek out or firmly establish their client base. And
22 that's not what's going on here. You're not that
23 independent contractor's client.

24 MR. COOPER: So - - -

25 JUDGE RIVERA: Or your client is not their



1 client; excuse me.

2 MR. COOPER: And - - - and what I would say is
3 that an ability to establish a client base, if that were
4 the test, that would be a revolution in the law of who is
5 an employee. And if the legislature wants to make that the
6 - - - the test, and of course, the legislature is actively
7 considering these issues in - - -

8 JUDGE RIVERA: Well, the revolution in the law
9 may be the argument that even though one sets up a business
10 model that forecloses the ability to have someone be an
11 independent contractor as your - - - as the person who
12 works for you, nevertheless you want to continue to make
13 that argument. That might be the revolution in the law.

14 And your time did run out. So it wasn't a
15 question.

16 MR. COOPER: Fair enough. So I'd just like to
17 say that we - - - we'd ask this court affirm, or at the
18 very least, vacate so that the Board's decision can be
19 reconciled with the inconsistent decision of the Workers'
20 Compensation Board.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel.
22 Counsel?

23 MR. SPADOLA: With respect to the Board's factual
24 findings, the Board found all of the key facts that
25 demonstrate overwhelming control of the timing. The Board



1 specifically stated that Postmates deliveries are "normally
2 fulfilled in an hour", "customers could track the progress
3 of their request on a map", "Postmates monitored poor
4 ratings received on the platform, and it terminated its
5 relationship with couriers for, among other reasons,
6 negative consumer feedback."

7 The line that Mr. Cooper is trying to draw right
8 now between fraudulent activity and negative customer
9 feedback was not reflected in the record. They, in fact,
10 terminate couriers who receive negative customer feedback
11 regardless of the nature of that feedback, and if they - -
12 - and if the ca - - - if it's not the case, they could have
13 presented evidence suggesting that they don't terminate
14 couriers who, say, routinely show up late for their
15 deliveries. All that amounts to control over timing.

16 JUDGE GARCIA: Counsel, I - - - I - - - going
17 back to Judge Rivera's points, my point isn't that the
18 model that you've chosen - - - they've chosen - - - makes
19 this an employee. My point is you apply the same test - -
20 - this is an app; it's not a street corner where you have a
21 messenger waiting on - - - on Restaurant Row, which you
22 might have had in the past. It's an app. And that's the
23 model that's been set up in the delivery business.

24 But why wouldn't we apply the same factors we
25 apply in every case, which is, did they work at their own



1 convenience, were they free to engage in other employment,
2 did they receive fringe benefits, were they on the payroll,
3 and were they on a fixed schedule, which is Bynog and a
4 number of other cases, to these facts, and look at what the
5 employer, in the model they set up, controlled? Because I
6 don't see - - - I mean, they're on the payroll in a way,
7 but it's not a regular payday. I don't see which one of
8 those factors weighs in - - - in your favor.

9 MR. SPADOLA: You have to look at the nature of
10 the job to determine what control means for it. If - - -
11 if - - - if my job consists in doing A, B, and C, you have
12 to look at control over A, B, and C. If my - - -

13 JUDGE STEIN: Have we ever limited the facts to
14 Bynog?

15 MR. SPADOLA: No, and in Bynog, the court made
16 clear that it was a nonexhaustive list, saying - - -

17 JUDGE STEIN: And - - - and was Bynog an Article
18 78 proceeding; do you recall?

19 MR. SPADOLA: It - - - it was not. It was a - - -
20 - an action - - - I believe it was a plenary action under
21 the Labor Law to recover - - -

22 JUDGE GARCIA: So what's different in the test
23 that you want? What other factors would you put in here?

24 MR. SPADOLA: The factors cited in the
25 restatement, which is also a nonexhaustive list. These - - -



1 - some factors apply to all industries, to - - - to Your
 2 Honor's point. There are certain factors that apply to all
 3 industries, and then there are factors that are specific to
 4 an industry. If you want to know how much the employer is
 5 controlling a specific aspect of the job, you have to know
 6 what exactly that job consists in. And for delivery,
 7 timing and fees are everything. You want to know how much
 8 does it cost and when does it arrive, when you order a
 9 delivery.

10 With yoga instruction, by contrast, you want to
 11 know what time does the class start and how much does it
 12 cost, but that tells you nothing about the content of the
 13 yoga instruction. You want to know how - - - what's the
 14 yoga instructor's experience, what sequence of poses do
 15 they do, what is the style that they're expert in. There's
 16 a whole world of discretion that yoga instructors have that
 17 delivery drivers don't.

18 So when you've controlled the timing and the
 19 fees, you've left virtually no discretion to - - -

20 CHIEF JUDGE DIFIORE: Thank you.

21 JUDGE GARCIA: Well, you've left the route,
 22 right. You've left how do you get there. You've left do
 23 you want to do this or not, right. You got to go to
 24 Brooklyn. You could take a subway, you could take a car,
 25 you could take a bus, or you don't have to go at all.



1 MR. SPADOLA: Well, quickly on that point, they
2 restrain - - - they constrain the mode of transportation.
3 They make you say in advance whether you're going to use a
4 car or a bike - - -

5 JUDGE GARCIA: But it's your choice. You can
6 tell them, right?

7 MR. SPADOLA: But you're committed to that for
8 all deliveries. And then with - - -

9 JUDGE RIVERA: But even - - - but even so, they -
10 - - they - - - they really don't inform the job. This job
11 is to get that burrito to that address, right?

12 MR. SPADOLA: That's - - - that's correct, but
13 that's - - - you know, that doesn't lend itself to control.
14 This court has said certain things don't - - - you - - -
15 there is no - - -

16 JUDGE RIVERA: That is my point.

17 MR. SPADOLA: There is no job, where you - - -
18 where - - - where someone will actually say you have to
19 take Second Avenue instead of Third Avenue. In - - - in
20 transportation, whether you're an employee or an
21 independent contractor, that simply doesn't lend itself to
22 control. And Postmates comes as close as humanly possible
23 by tracking its couriers and giving estimated delivery
24 times.

25 CHIEF JUDGE DIFIORE: Thank you, Counsel.



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MR. SPADOLA: Thank you, Your Honors.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Vega (Postmates, Inc. - Commissioner of Labor), No. 13 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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