Keller | Lenkner

May 2, 2019

VIA CM/ECF

Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Ali Razak, et al. v. Uber Technologies, Inc., et al.
Case No. 18-1944
Response to May 1, 2019 Letter

To Whom It May Concern:

On May 1, 2019, Appellees filed a letter purportedly pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, suggesting that they had learned of "a pertinent and significant authority" related to this matter. What Appellees cite, however, is an Opinion Letter from the Wage and Hour Division of the U.S. Department of Labor that is "based exclusively on the facts [] presented" by the party requesting the letter.

Such opinion letters, which are issued without notice-and-comment rulemaking, do not warrant any deference by this Court. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587–88 (2000). The Letter moreover is not persuasive and the agency has taken inconsistent positions on this very issue. *Cf.* U.S. Dep't of Labor, Wage and Hour Division, Administrator's Interpretation No. 2015-1 (July 15, 2015); *see Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 155 (3d Cir. 2004).

Importantly, the Opinion Letter has no bearing on the issue of whether the district court or a jury should make the findings of fact required to decide whether an individual is an employee or independent contractor. On that issue, it is clear that the trier of fact "must first make findings of the historical facts surrounding [the individual's] work and then use those findings to *make findings* as to the six factors." *Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567, 571 (10th Cir. 1994) (emphasis added). Findings of this second type—i.e., findings as to the six *Donovan* factors—"are plainly and simply based on inferences from facts and thus are questions of fact'" for the jury. *Id*. That rule is binding precedent in this Circuit. *See Donovan v. DialAmerica Mktg., Inc*., 757 F.2d 1376, 1382 (3d Cir. 1985) (holding that summary judgment was improper because the six factors as well as the ultimate question of "the extent to which [the workers] were dependent on DialAmerica" were questions for the factfinder). And that rule requires reversal in this case.

Sincerely,

/s/ Ashley Keller

Ashley Keller