

*Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014) (holding plaintiffs were employees of FedEx as a matter of law under California’s “right to control” test, and denying FedEx’s cross-appeal for class decertification because the court did not rely on individualized evidence in reversal of summary judgment.)

Plaintiffs, approximately 2,300 full-time delivery drivers for FedEx Ground Package Systems, Inc. (“FedEx”), appealed a summary judgment granted by a Multidistrict Litigation Court in the District Court for the Northern District of Indiana (the “MDL Court”). The Plaintiffs had brought claims for employment expenses and unpaid wages based on a purported miscategorization as “independent contractors.” Plaintiffs moved for class certification and partial summary judgment establishing themselves as “employees” as a matter of law. The MDL Court certified the plaintiffs as a class, but denied most of the plaintiffs’ motions for summary judgment. Instead, the MDL Court granted the majority of FedEx’s cross-motions for summary judgment and held that plaintiffs were “independent contractors.”

On appeal, the parties agreed that California law controlled and that employment status was determined by application of the multi-factor common law test outlined in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989). The *Borello* test includes ten factors: (1) the right to control the manner and means of accomplishing the desired result; (2) the right to terminate at will; (3) the existence of a distinct occupation or business; (4) whether the work is performed under one of the party’s direction; (5) the skill required for the occupation; (6) the provision of tools and equipment; (7) the length of time in service to employer; (8) the method of payment; (9) whether the work is part of the principal’s regular business; and (10) each of the parties’ beliefs about the relationship. In accordance with *Borello*, the court placed primary importance on the “manner and means” factor in its determination that the delivery drivers were employees as a matter of law.

In its analysis of the “manner and means” factor, the court found that FedEx exercised substantial control over the manner in which drivers did their jobs. It indicated that FedEx controlled the appearance of delivery drivers through the uniform and hygiene requirements, as well as paint, logo, and dimensional specifications for delivery vehicles. The court also found that the managerial control over workloads and terminal loading requirements “define[d] and constrain[ed] the hours that FedEx’s drivers can work.” Additionally, FedEx directed how and when drivers delivered packages by specifying service areas and dictating customer service requirements.

FedEx argued against control of “manner and means” by highlight-

ing that it did not specify the exact route a driver should take or dictate a specific order for deliveries. It further argued that it only controlled drivers to the extent of obtaining its desired business results. The court rebuffed this argument, asserting that the “right to control” test does not require an *absolute* control, and that the detailed appearance and hygiene requirements, as well as the vehicle specifications, were not control measures aimed strictly at the result of timely delivery of packages. The court went on to highlight that FedEx required loading and unloading at FedEx terminals every working day, assigned specified service areas, had control over the packages assigned delivery, was responsible for obtaining clients, set the rates for the clients, and billed the clients. The drivers delivered only to FedEx’s customers and were paid by FedEx on a regular schedule.

FedEx tried to employ an “entrepreneurial-opportunities” test articulated by the D.C. Circuit, claiming that a driver’s ability to take on multiple routes and hire third-party helpers to reduce work hours were contrary to an employee status. The court rejected this argument as inconsistent with California law and noted that nothing in FedEx’s Operating Agreement prohibited FedEx from exercising a right of refusal if drivers requested to take additional routes or utilize third parties.

The court next considered the remaining *Borello* factors in brief, as none of the remaining factors heavily favored FedEx and only three favored them at all. The only aspects that supported characterization of the drivers as independent contractors were that FedEx did not have an unqualified right to terminate employment at will, that delivery drivers provided their own tools and equipment, and that the Operating Agreement between FedEx and the drivers characterized the relationship as “independent contractor.” Otherwise, the drivers’ work was “wholly integrated” into FedEx’s business operation, drivers performed the work under FedEx direction, the job required only minimum skill level, and the drivers were employed for lengthy, indefinite periods – all factors weighing in favor of an employee relationship.

Even in examining the evidence in a light most favorable to FedEx, the court still found that the most important factor, the control over the manner in which the drivers performed their work, weighed strongly in favor of an employee status for the drivers. Accordingly, the court held that the plaintiffs were employees as a matter of law, reversed the MDL Court’s grant of summary judgment, and remanded the case to the district court with instructions to enter summary judgment in favor of the plaintiffs as to the question of employee status.

On a conditional cross-appeal, FedEx argued that if their grant of summary judgment was reversed, the court should also reverse the class certification decision if the court relied on individualized evidence. The court rejected this argument because it did not rely on individualized evi-

dence to reach its decision on the employment status of the drivers. Consequently, FedEx's cross-appeal was ineffective.

*Jennifer L. Carty*

*NO Gas Pipeline v. F.E.R.C.*, 756 F.3d 764 (D.C. Cir. 2014) (holding that three petitions filed for review of the order made by the Federal Energy Regulatory Commission ("FERC") granting certificates of public convenience and necessity to construct natural gas facilities lacked jurisdiction in the United States Court of Appeals for the District of Columbia).

Three petitions for review of the order granted by FERC for certificates seeking construction of natural gas facilities were submitted to the Court of Appeals. The environmental groups NO Gas Pipeline, Sierra Club, and Food and Water Watch ("Environmental Groups") submitted two petitions. The other petition was submitted by the city of Jersey City ("Jersey City"). Under the Natural Gas Act ("NGA"), entities that wish to construct a natural gas facility must obtain a certificate of public convenience and necessity from FERC. FERC granted two certificates to natural gas pipeline company Spectra to expand existing natural gas pipelines. In the certificate process, FERC must prepare environmental impact statements pursuant to the National Environmental Policy Act ("NEPA"). The Environmental Groups alleged that FERC did not follow the proceedings laid out in NEPA when they granted the certificates approving construction of the pipelines.

The Environmental Group's complaint rested upon NEPA's requirement for all agencies to prepare environmental impact statements while processing applications. The Environmental Groups asserted that the level of radon present in natural gas was hazardous and would have a negative effect on indoor air quality. There was also a concern regarding the risk of cyber attacks to Spectra's control system. FERC issued an environmental impact statement, pursuant to NEPA, regarding the negligible hazard of radon presence in natural gas.

The court first examined whether the Environmental Groups had standing for their claims. To meet standing requirements under *Lujan*, a plaintiff must have suffered an injury in fact, that injury must be traceable to the challenged action of the defendant, and a favorable ruling must redress the injury.

Under the first element, the members must have suffered a concrete and particularized injury and it must be actual or imminent and not conjectural or hypothetical. The court reasoned that Environmental groups did not meet this element because they simply stated that they objected