

Meet Your SCBA Colleague — Barry Smolowitz

By Laura Lane

Barry Smolowitz, a general practitioner focusing on criminal, computer and education law, is a former New York City police officer. He moved forward in life at a different pace than most, entering college when he was 16 years old and becoming a trainee police officer when he was 17. That's about the time he first became interested in the law.

How did you end up becoming involved in the police department at 17? I was going to college and was living in Brooklyn. I was too young to drive so I had to take two trains and two buses to get there. I used to get home at 1 a.m. My father was a transit police officer and he told me about the police trainee exam. You could become a police officer on your 21st birthday. On a lark I took the exam and did extremely well. I left college and was appointed to the police department working the midnight to 8 tour as an assistant desk officer. Because I was a civilian I was inside. I started reading law books and that piqued my interest in the law in general.

But you didn't go back to college at this time, right? At 21 I went to the police academy, and back to college. A year later I made an arrest in Brownsville Bed Stuyvesant that went to trial. The attorney defending the person I arrested won. He came over to me and said, "What's a nice Jewish boy like you doing in the police department?" He said I was smart and should become a lawyer. I told him I had to finish college first. So, I did finish college, then went to graduate school and then law school all while I was a police officer. I went to school part time.

Then what happened. I got transferred to the legal department. In Manhattan they had a Legal Bureau back then, which had 150 people in it, most of which were police officers. One of my jobs was to give legal opinions to the police on the street.

You ended up being in the police department for 18 years. How did you end up leaving? I left because of an injury where I tore the ligaments in my knee after making an arrest. That was 2 1/2 years before I actually left. My plan had been to stay a police officer who was also an attorney and then go up through the ranks in the Police Department. When I retired I was 34 and wasn't even admitted to the bar yet.

You went to Touro. I was in the first full graduating class there. That's when I got involved in the Suffolk County Bar Association.

Why did you join? My first three cases were matrimonial and I didn't know what to do. I went back to Touro but there were no alumni to call. I was the alumni. Most of the teachers never practiced a day in their life. I decided to go to the SCBA and join and see if they could help me. They were nice and gave me names of people to call, which included Barry Warren, Harvey Besunder and Craig Purcell. They, and others, took me under their wing and asked for nothing in return.

How did you initially get involved at the SCBA? Before there were mandatory CLE's I volunteered at the Academy. I ran the programs, assisted in putting on lectures. I brought surveys into the Academy and did lectures on technology too.

You became the Academy Dean in 1997. Why did you get more involved? The bar was good to me. I met a lot of good people there. There are very few people that transcend from law enforcement to law at the bar. I'm a take charge type of individual. They weren't used to that at the SCBA and they appreciated it. It's about getting things done. That's how I got involved in technology there. They were shipping their computers down south to have them fixed. I helped them so they didn't have to do that anymore.

When did you first take an interest in technology? I started to get involved in technology when I was 5 years old. By age 10, I was repairing televisions and radios. Then when I was in high school I worked part time jobs as a television repairman. I am, and have been for years, an amateur radio operator. When in the Legal Bureau at the Police Department I got my first computer. Electronics for me is as natural as breathing.

Why would you recommend that attorneys, both new to the profession and the more experienced join the SCBA? There are a lot of reasons. If you are young in the practice the bar offers many opportunities to learn a lot early on. The bar has influence in the legal profession and gives a voice to instituting change. As a member you can be a part of this. You can also become a mentor to younger practitioners, and of course there is the opportunity for comradeship.

You have been an instructor at the Traffic and Parking Violations Agency in Suffolk since 2015. Why do you continue to be involved? I teach required courses to motorists considered to be problematic. I originally did this as a volunteer because the roads were so dangerous. I'm trying to make a difference.

You have received many awards. Which ones are you most proud of? I received the SCBA's President's Award and Director's Award twice. Those are important.

What do you like about being an attorney? My life has always been surrounded by situations where I give back or assist people. Being a lawyer is a service profession. When one does the job correctly we can have a major positive impact on people's lives. Everything we do in this country involves the law. I help people. That's why I became a lawyer. And that's why there are other things that I also do that helps people outside of the practice of law.

You've always had your own practice. Why? I left a job in policing and made a thoughtful decision. I didn't want to work in an office or a firm. I wanted to be my own boss, to decide how and when I would help somebody.

What kinds of challenges did you face? Initially it was how to establish and run a business. I always had a home office and never regretted it. It gives me a certain amount of freedom. I also wanted to give my clients a personal experience. I do not advertise. My clients come to me on referral. If you hire me you get me. And that's worked pretty well for me. I was one of the first practices in 1986 that was completely computerized. Channel 12 even came in to interview me.

Getting back to the SCBA, is there any other reason why membership is of value? We are dealing in a time where different generations expect different things. Millen-



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nials don't engage like baby boomers do. The SCBA brings individuals who have similar interests that allow you to examine and exercise a wide range of thoughts and beliefs to reach a common goal. You don't get that if you isolate. The SCBA also brings diversity among the different areas of law.

Among your other responsibilities you are the official photographer for the SCBA. Do you enjoy it? I have been an amateur photographer since I was 13. I saw in the early days the way photographs were being shot and knew we could do better. I started doing it on a lark. Then one thing led to another. People seem to enjoy the photos that I take. I enjoy it and get a kick out of it.

You have been on Grievance for 12 years. Why? At the SCBA I was on the Ethics Committee and then became the chair. I was on the bar's Grievance Committee and became its chair. I left it because I was assigned to the 10th Judicial District Grievance Committee. Even back in law school I always thought that lawyers hold a special place in public trust. Lawyers should be beyond reproach. I find that 90 percent of everything that comes in is dismissed or disposed of without discipline. The percentage of lawyers doing bad things is extremely low but unfortunately there are some that are doing very bad things. I'm still policing. But I'm doing it differently than when I was a police officer. I'm policing the profession with my participation in the Grievance Committee.

Note: Laura Lane, an award-winning journalist, is the Editor-in-Chief of The Suffolk Lawyer. She has written for the New York Law Journal, Newsday and is the senior editor for three North Shore publications at Herald Community Newspapers in Nassau County.

EMPLOYMENT COVID-19 CIVIL RIGHTS

Delivery Drivers – Essential and Entitled to Unemployment Benefits

By Cory Morris

New Yorkers in 2020 can rejoice "that workers for [at least one food delivery] app are considered employees for purposes of unemployment benefits."¹ While most courthouses are closed, (many matters deemed non-essential due to COVID-19²), the courier, fast-food chains and the salesclerk that stocks the toilet paper are believed to be more essential than access to justice for a great deal of litigants.

Gig workers, working second or third jobs and perhaps unable to secure benefits

through more traditional employment, are on the frontline of the COVID19 pandemic and deserving of some recognition. Touted by the New York Attorney General in her March 26, 2020 Press Release, "During Coronavirus Pandemic, Decision Will Allow Drivers to Collect Unemployment Benefits," this New York Court of Appeals decision addresses but falls woefully short of fixing another pandemic problem just waiting to rear its ugly head — benefits for gig workers.



CORY MORRIS

There's an App for that

The newly minted New York Court of Appeals decision *In the Matter of the Claim of Luis A. Vega v. Postmates Inc.* upholds the award of unemployment benefits to a Postmates' courier, or what has become known as a gig worker, Luis A. Vega.

When you visit <https://postmates.com/>, the advertisement reads: "Food, drinks, groceries, and more available for delivery and pickup." If one were so inclined to click on

<https://careers.postmates.com/>, it currently recites that "[w]e're here to build the future, not just to maintain the status quo. For our people, Postmates is a way of life and a part of pop culture" and beckons those seeking a career with Postmates to "[b]e a part of a company that facilitates \$6.6 billion in economic activity across all sales, courier earnings, and merchant growth." While it sounds like a partnership, Postmates' couriers are classified as independent contractors. However, as Postmates argued before the New York Court of

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Employment COVID-19 Civil Rights (Continued from page 5)

Appeals, “Postmates food delivery drivers are not the company’s employees because the service simply connects couriers to customers.”³

Postmates, like many other application based services, argued that the computer/phone application is just “a matching system...a mechanism for people who want things to be delivered to find people who are willing to make those deliveries.” While the decision addresses the case of Luis A. Vega, “Postmates and other platform companies, like Uber and Lyft, face mounting legal and legislative challenges to a core aspect of their business model: the classification of drivers connected to customers as self-employed entrepreneurs, rather than employees.” Indeed, like outsourcing labor to sweatshops outside of the United States, that recurrent business model relies on avoiding paying employee benefits and taxes.

States and other municipal entities are pushing back against the free ride that these entrepreneurial exponents have obtained so far: a glut of workers essential to their business without having to pay those pesky perks otherwise mandated by law. Indeed, “[a] similar battle between Uber and regulators in New Jersey spotlights the possible financial implications [which resulted in] a \$650 million bill for unpaid employment and temporary disability taxes, finding that the company has been misclassifying workers as independent contractors.” It is likely that reasonable regulation would, among other things, have avoided the need for New York Court of Appeals to hear *In the Matter of the Claim of Luis A. Vega v. Postmates Inc.*

2020: Redefining employee-employer relations

Postmates’ couriers are entitled to unemployment benefits. “New York’s Court of Appeals has reinstated a 2015 decision determining that couriers for on-demand delivery app Postmates should be classified as employees, making them eligible for unemployment insurance at a time when the U.S. is seeing re-

cord job losses due to the coronavirus pandemic.”⁴ Although it is hard to imagine a lack of work for these persons during the shelter-in-place orders currently in place throughout the world, such “delivery app[s]” require a certain level of quality control mostly guided by user ratings.

These formidable frontline favorites among those vulnerable, stuck at home or confined to their couch are run by gig workers. “Typically, gig workers are classified as independent contractors, which means they are ineligible for unemployment benefits or healthcare.” The legal fiction coupled with the side hustle slogan was that these “gig workers” were able to make their own hours while driving for a “delivery app.” From food and booze to people and papers, courier services are not new to New York while the idea that one could remove the independent contractor label was a novel idea.

*The Matter of Luis A. Vega*⁵ upholds the decision of the Unemployment Insurance Appeals Board by substantial evidence, finding that “Postmates exercised control over its couriers sufficient to render them employees rather than independent contractors operating their own businesses.”⁶ Of course, the legal fiction that allowed this system to operate was that the level of control was “incidental” and that these gig workers “were free to create their own customer following.”⁷ The stark reality, however, “is to get the delivery done and get paid by Postmates. There is no value in an independent relationship with any one customer since it will not lead to economically beneficial future business.”⁸ Citing the United States Census Bureau and the United States Bureau of Labor Statistics, Judge Rivera concurred in the result but admonished the gig worker exception.

Judge Jenny Rivera explained the history of New York’s Unemployment Law and made clear that “[a]lthough the legislature has not defined the term ‘employee,’ it has designated certain workers as such...and authorized the Commissioner of Labor to determine eli-

gibility for unemployment insurance benefits for all other workers.”⁹ Judge Rivera’s concurrence thoroughly explains how the result in is accord with agency law, employment law and the establishment of an employer-employee relationship.

While concurring in the result, Judge Jenny Rivera “reach[ed] that conclusion [considering] the extent to which an employer prevents worker entrepreneurialism and the worker’s exercise of entrepreneurial control over important business decisions.”¹⁰ Judge Rowan D. Wilson, dissenting, focused on the failure of the legislature to act in this new era of technology.

“A world where work looks much different”

Judge Wilson, dissenting, brings clarity to the staggering statistics cited by Judge Rivera in addressing what appears to be the new reality. If Judge Rivera described the proverbial elephant in the room, Judge Rowan D. Wilson hoisted it out and set up a spotlight — we need legislation to address the gig worker economy.

The year is 2020. We live in the 21st Century. While couriers, curbside delivery and dating have an “app for that” our New York Legislature needs to create legislation and assist the courts. Judge Rowan D. Wilson bemoans this in his dissent: “[w]hether, to what degree, and on what basis we wish to provide unemployment benefits to Postmates couriers generally, or to other workers in the gig economy, is a policy question best left to the Legislature.”¹¹

As the demand for these “essential” services have skyrocketed, we bear witness to the unionization and growing advocacy of the gig workers who make these applications function and who are starting to demand accountability and benefits. Rideshare Drivers United has been striking¹² while www.gigworkersrising.org touts that “Uber and Lyft drivers need a fair share.” While California has witnessed the passage of legislation entitling these workers to benefits and allowing “millions of new

workers [the] right to join labor unions,” New York has remained stagnant although the imprimatur of injustice remains.

Note: Named a SuperLawyer, Cory Morris is admitted to practice in NY, EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CASAC-T. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

1. NYS Attorney General, March 26, 2020 Press Release, *Attorney General James Scores Major Win for ‘Gig’ Workers with Victory in Postmates Case*, NYS Attorney General (last access on March 30, 2020), available at: <https://on.ny.gov/2vVpAjE>.

2. AO/78/20, *Administrative Order of The Chief Administrative Judge of The Courts: Essential Proceedings*, dated March 22, 2020, available at: <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>.

3. Karl Hardy, *Postmates Fights Driver’s Employee Status in New York Court*, Bloomberg Law (February 11, 2020), <https://bit.ly/3avm6Uf>.

4. Jay Peters, *Postmates couriers are eligible for unemployment benefits*, rules New York appeals court, The Verge (March 27, 2020), <https://bit.ly/3dH5JQn>.

5. *In the Matter of the Claim of Luis A. Vega v. Postmates Inc.*, No. 13 (New York Court of Appeals, March 26, 2020), available at: <https://www.nycourts.gov/ctapps/Decisions/2020/Mar20/130-pn20-Decision.pdf> (“Postmates”).

6. *Id.* at P. 6.

7. (citing *Matter of Yoga Vida NYC, Inc.*, 28 N.Y.3d 1013, 64 N.E.3d 276, 41 N.Y.S.3d 456 (2016)).

8. *Postmates*, *supra* (J. Rivera, concurring in result), P. 16.

9. *Id.* at P. 6 (citations omitted).

10. *Id.* at P. 8.

11. *Postmates*, *supra* (J. Wilson, dissenting), P. 23.

12. Lauren Kaori Gurley, *Gig Workers Are Forming the World’s First Food Delivery App Unions*, VICE (October 9, 2019), <https://bit.ly/2wPeCg1>; Alexia Fernández Campbell, *Gig workers’ win in California is a victory for workers everywhere*, Vox (September 11, 2019), <https://bit.ly/39qS4ja>.