Litigators of the Week: A Gig Economy Bellwether Battle

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By Cogan Schneier
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Gibson, Dunn & Crutcher partners Michele Maryott and Theane Evangelis scored a win in a bellwether case that could have a lasting impact on how gig-economy workers are classified.

But Maryott and Evangelis said that for them, despite its importance to the labor and employment legal community at large, the case was about one thing: getting the best result for their client, food-delivery company GrubHub.

"Every trial is monumentally important to our clients," Maryott said. "So I just focused on what do we need to do to put on the best case we possibly can for GrubHub … the courtroom was packed almost every day, but we were just there to put on our case and convince the judge that we were right."

Former GrubHub driver Raef Lawson sued the company, alleging GrubHub misclassified him as an independent contractor instead of an employee entitled to minimum wage and other benefits. While other gig-economy giants like Uber have faced similar challenges, the GrubHub case is the first to reach a conclusion in federal court.

The case was the perfect fit for Maryott and Evangelis, both employment and class action law veterans who actually met in 2009 when they were working on *Wal-Mart Stores, Inc. v. Dukes*, which the Supreme Court decided in 2011.

Michele Maryott, left, and Theane Evangelis, right, of Gibson Dunn & Crutcher.

When it came to GrubHub, Evangelis said, the key was looking ahead and setting the stage. The case began as a class action in state court in California in 2015, and was soon removed to federal court in the Northern District of California. The Gibson team then filed a preemptive motion asking the judge to deny class certification.

The judge granted it a little more than a month later, agreeing that Lawson, who had opted out of GrubHub's arbitration agreement with a class action waiver, could

not represent a class of workers the majority of whom had signed the agreements.

"I think that really changed the playing field," Evangelis said. "The case went from being a class action to being a [Private Attorney General Act] case. In many ways, it really became about Mr. Lawson and his attempt to proceed on behalf of the state."

Next, the lawyers focused their efforts on Lawson's deposition. The key, Maryott explained, was making sure that everything he said could be brought out again at trial. The worker, they were sure, had gamed the GrubHub system so he could remain inactive for much of his shift. The company also exerted what they considered to be very little control over him, not dictating what he wore or how he made deliveries, and allowing him to work for other delivery services while also working for GrubHub.

"We wanted to make sure that we nailed him down on key points during the deposition, so that if they case did go to trial–and it was highly likely that would happen–it would be very hard for him to change his story," Maryott explained.

The tactic worked, and Maryott was able to use the deposition throughout a six-day trial to coax Lawson into telling the judge exactly how he approached his work for GrubHub.

Maryott said that throughout the trial, she would pull out the deposition and read it back to Lawson, directly contradicting what he said on the stand or filling in a fact that he claimed he no longer remembered.

'In many ways, he was our best witness," Evangelis said. "His experience showed that no one was controlling him, watching him, he had no boss, there was no one monitoring him in any way. He had complete independence and flexibility, and in his case, it allowed him to game the system, but it really got to the heart of the matter."

Still, it wasn't over until it was over. As U.S. Magistrate Judge Jacqueline Corley closed the trial, it appeared she might rule against GrubHub. She noted that Lawson's contract with the company allowed him to be terminated at will, an important factor in determining an employment relationship under California law.

Evangelis and Maryott said the judge's focus on the contract issue was actually encouraging.

"As I left, it felt like that had been a challenging argument for sure, but I think that just speaks to the rigor that [Corley] put into the process," Maryott said.

Corley's opinion in the case reflected that rigor too. In ruling for GrubHub Feb. 8, the judge outlined every factor in her decision that the company did not exert enough control over Lawson for him to be considered an employee.

Lawson's lawyer, Shannon Liss-Riordan, said last week she plans to appeal that ruling. When she does, Maryott and Evangelis said they'll be right back at it too.

Cogan Schneier is a Washington, D.C.-based litigation reporter covering D.C. courts, national litigation trends, the Justice Department and the federal judiciary. She is the author of Trump Watch, an email briefing that covers the Trump administration and its imprint on the law.