

MVP: Gibson Dunn's Jason C. Schwartz

By Kevin Stawicki

Law360 (November 19, 2019, 3:19 PM EST) -- Gibson Dunn & Crutcher LLP's Jason C. Schwartz secured a win for a Sprint contractor in a case over sales workers' classification, led the team tasked by Wynn Resorts to probe alleged sexual misconduct by then-CEO Steve Wynn and represents Amazon in an ongoing job ad bias case, earning him a place among Law360's 2019 Employment MVPs.

HIS BIGGEST ACCOMPLISHMENT THIS YEAR:

Schwartz developed the legal strategy in a case over whether a Sprint contractor and its subcontractor owed overtime pay to workers who signed up low-income customers for free cellphones through a federal program.

The case turned on whether the workers were overtime-exempt under the Fair Labor Standards Act's so-called outside sales exemption. The Second Circuit determined in April that even though the workers were poorly paid and had little freedom in their work, such conditions are incidental to the outside sales exemption test.

"At the beginning you might look at the case and say this looks like a traditional independent contractor case," Schwartz said. "But we wanted to look at it in a different way. We looked at the case under the outside sales exemption, which is not something you see a lot of case law on."

Making the argument that the workers were engaged in outside sales activity was central to victory in the case, Schwartz said. While the workers said they weren't engaged in a "sale" because the subsidized phone service could only be acquired by a virtual voucher, Schwartz said the argument, while creative, couldn't withstand the facts.

"We went out to see what happens on the street when you run through a conversation with somebody trying to sell them on this cellphone program. How does that work, who do you work with on the street," he said. "The exchange had all of the characteristics of an outside sale."



MVP

Jason C. Schwartz
Gibson Dunn

WHY HE'S AN EMPLOYMENT ATTORNEY:

While delving into the nuts and bolts of a business is stimulating and partly responsible for his interest in employment law, Schwartz said people's stories have made staying in the practice area worthwhile.

"If I didn't have to put three kids through school, I'd pay for the entertainment value of most of the stuff I work on," he said.

One of those stories that kept him coming back for more involved a business suit and a hot Arizona day. Schwartz had been investigating a trucker's allegation that his employer's expectations for how quickly he had to complete his route made it unsafe for him to perform the job.

Schwartz had one of his colleagues take the route in a tractor-trailer similar to the one at issue in the case to better understand the claims.

"He calls me and says 'should I wear a suit?'" Schwartz said. "I thought, well, it's in Arizona, I'm pretty sure the cab of the truck is not air-conditioned. So maybe not. But it was a debate!"

That conversation underscored just how critical getting the facts are, even if it means dropping the suit, he said.

"Whenever I have a new client, the first thing I want to do is to show up to your place of business as if you just hired me to work there," he said. "What would my job be like?"

HIS PROUDEST MOMENT OF THE YEAR:

Schwartz said investigating alleged sexual misbehavior by casino magnate Steve Wynn was particularly rewarding, as it presented a unique challenge.

After Gibson Dunn was retained in 2018 by a special committee of Wynn Resorts' board of directors to investigate the conduct, Schwartz said convincing employees that he wasn't on the side of management but rather a neutral advocate was central to the success of the project.

"You have to overcome that natural reluctance and suspicion that you're here for management to say, well, we're here because the company wants to find out what happened and to have a better workplace," he said. "That's a conversation that takes building trust. It's often multiple conversations before you can get to that place."

OTHER NOTABLE CASES HE'S WORKING ON:

Schwartz is representing Amazon.com Inc. in a closely watched suit accusing it of illegally blocking a proposed nationwide class of older workers from seeing Facebook job ads.

The Communications Workers of America and a group of workers accused the company and other major employers of placing job ads on Facebook that were illegally hidden from older workers.

In addition to seeking their own class of millions of Facebook users, the plaintiffs originally sought to pursue a defendant class of hundreds of employers. But a federal judge in April determined the defendant class allegations weren't viable.

"You rarely see where a class is trying to certify not only a class of plaintiffs but an unwilling class of defendants," he said, adding that at its core, the case is about an attempt to expand the reach of anti-

discrimination law in social media.

"This is the first time any court is confronting these issues," he said.

The case is still pending in California federal court.

HIS ADVICE FOR JUNIOR ATTORNEYS:

"Treat every client like they're the only client you will ever have," Schwartz said. "Make them feel like you own the issue and you will help them get through to the other side of it."

— As told to Kevin Stawicki

Law360's MVPs are attorneys who have distinguished themselves from their peers over the past year through high-stakes litigation, record-breaking deals and complex global matters. A team of Law360 editors selected the 2019 MVP winners after reviewing nearly 900 submissions.